

**IN THE HIGH COURT AT CALCUTTA**  
**Civil Appellate Jurisdiction**  
**Original Side**

Present:

**The Hon'ble Justice Debangsu Basak**

And

**The Hon'ble Justice Md. Shabbar Rashidi**

**APO 18 of 2024**

**With**

**WPO 2635 of 1998**

**IA NO.: GA 1 of 2024**

**GA 2 of 2024**

**GA 4 of 2025**

**Pradeep Kundalia & Anr.**

**Vs.**

**Mr. Vaishali Manek & Ors.**

**With**

**APO 20 of 2024**

**IA NO.: GA 2 of 2024**

**M/s M. Walters & Co.**

**Vs.**

**Mr. Vaishali Manek & Ors.**

For Appellants

: Mr. Surojit Nath Mitra, Sr. Adv.  
Mr. Arindam Banerjee, Sr. Adv.  
Mr. Deepnath Raychowdhury, Adv.  
Ms. Arpita Saha, Adv.  
Ms. Kumkum Mukherjee, Adv.

For Respondents

: Mr. Saptangshu Basu, Sr. Adv.  
Ms. Vijaya Bhatia, Adv.  
Mr. Kaushik Dey, Adv.  
Mr. Ganesh Prasad Shaw, Adv.  
Mr. Harish Thirani, Adv.  
Mr. Barin Banerjee, Adv.

For Proforma Respondent : Mr. Ranjan Bachhawat, Sr. Adv.  
 Mr. Rishad Medora, Adv.  
 Mr. Meghajit Mukherjee, Adv.  
 Ms. Brinda Sengupta, Adv.  
 Mr. Satyaki Mukherjee, Adv.  
 Ms. Srijeeta Gupta, Adv.  
 Ms. Sonia Das, Adv.

For KMC : Mr. Alok Kumar Ghosh, Adv.  
 Ms. Sima Chakraborty, Adv.  
 Mr. Fazlul Haque, Adv.

Hearing Concluded on : January 30, 2025  
 Judgment on : February 27, 2025

**DEBANGSU BASAK, J.:-**

1. An appeal and the applications connected thereto have been heard analogously as they involve the same premises and raise similar issues.
2. Appellants have assailed the judgment and order dated January 30, 2024 passed by the learned Single Judge in WPO 2635 of 1998. By the impugned judgment and order, learned Single Judge has held that the construction existing at a defined area of the building was authorised and directed demolition thereof.
3. Learned Senior Advocate appearing for the appellants has contended that, learned Single Judge misunderstood the situs and extent of the alleged unauthorised construction. He has contended that, the learned Single Judge proceeded on the basis that, open space on the ground floor of the building was converted into a

commercial space. He has pointed out that, the original sanctioned building plan dated May 18, 1987 treated the ground floor where, the alleged unauthorised construction was complained to take place, as a car parking space. He has pointed out that, the conversion sought for and sanctioned on March 5, 2001 lies within the building line. He has referred to both the original sanctioned plan dated May 18, 1987 as also the sanctioned building plan on conversion dated March 5, 2001 in this regard.

**4.** Referring to the original sanctioned building plan dated May 18, 1987, learned Senior Advocate appearing for the appellants has contended that, the same demonstrates that the building was walled up from the sides at the ground floor level leaving appropriate ramps for entry and exit of the vehicles. The ground floor of the building has never been meant to be kept open.

**5.** Learned Senior Advocate appearing for the appellants has pointed out that, the appellants filed GA No. 2 of 2024 being an application under order 41 to 27 of the Code Of Civil Procedure, 1908 to demonstrate that a number of commercial businesses are run from different flats of the same premises including some belonging to few of the writ petitioners themselves.

**6.** Learned Senior Advocate appearing for the appellants has contended that, the finding of the learned Single Judge that, flat

owners had an indefeasible right in the common areas of the building including the converted portion, was incorrect. He has pointed out that, in the original building sanction plan dated May 18, 1987, there were 54 car parking spaces out of which 42 car parking spaces were required in terms of the prevalent rules. Appellants had 12 car parking spaces in excess in the building. Appellant No. 1 did not sell any of the 12 designated car parking spaces which were excess to any flat owners. Those 12 designated car parking spaces had continued to remain in the hands of the appellant No. 1 and did not devolve upon any of the flat owners including the writ petitioners. He has referred to the title deed executed in favour of the flat owners in this regard.

7. Learned Senior Advocate appearing for the Appellants has relied upon **2017 Volume 3 Calcutta High Court Notes 547 (Premjit Guha Thakurta & Ors. vs. Kolkata Municipal Corporation & Ors.)** for the proposition that, car parking space provided in an integrated building is not an easement right or appurtenant to each flat. Car parking spaces cannot be common or commonly enjoyed by each flat owner of the integrated building.

8. Learned Senior Advocate appearing for the appellants has contended that, the writ petitioners have no right or interest in the converted portion. He has contended that, Section 416 of the

Kolkata Municipal Corporation Act, 1980 permit conversion. He has contended that, such provisions do not require any of the writ petitioners to be heard with regard to the proposed conversion. In any event, an order of conversion is an appealable order under Section 416 (6) of the Act of 1980. The writ petitioners have not challenged the order of conversion before the appropriate forum.

**9.** Learned Senior Advocate appearing for the appellants has contended that, learned Single Judge erred in holding that the applicant for conversion did not have the requisite locus to apply for the change of user. He has referred to Section 416 of the Act of 1980 and contended that, Section 416 of the Act of 1980 uses the word “person” as opposed to “owner”. In any event, the applicant for conversion, namely Maitry Resources Private Limited (hereinafter referred to as MR for the sake of convenience) was recorded in the assessment register of Kolkata Municipal Corporation (hereinafter referred to as KMC) since the first quarter of 1996-1997. The housing society has also been collecting maintenance charges from MR in respect of the disputed portion since at least October 1996. Accordingly, MR had sufficient footprint in the disputed portion to maintain an application for conversion on March 12, 1999.

**10.** Learned Senior Advocate appearing for the appellants has contended that, although the writ petitioners were aware of the presence of MR at the building, they deliberately suppressed such material fact and did not array MR as a respondent in the writ petition which was filed on November 30, 1998.

**11.** Learned Senior Advocate appearing for the appellants has contended that, the interim order dated December 3, 1998 passed in the writ petition did not stand in the way of MR in applying for conversion of the disputed portion. According to him, the order of injunction was only on the appellant No. 1 and not on MR. Moreover, MR was deliberately kept out of the array of parties in the writ petition. Furthermore, application for conversion had been made on March 12, 1998 when MR was not a party to the writ petition. He has pointed out that, the MR was added as a party respondent in the writ petition on January 22, 2001 and the order of injunction was made applicable on MR on such date. He has pointed out that the learned Single Judge found the application for change of use had been filed in December 1998.

**12.** Learned Senior Advocate appearing for the appellants has contended that, there was no breach of the order dated December 3, 1998. The steel structures and the steel shutters found at the disputed portion had been present prior to the time of the filing of

the writ petition itself. Therefore, according to him, there no change in the nature or character of the premises had been made till such time the interim order was in force, that is, December 3, 2002 when, the writ petition was dismissed. He has pointed out that, learned Single Judge specifically found that there was no express prohibition on KMC from processing the application for conversion and disposing of the same in accordance with law.

**13.** Relying upon ***2005 Volume 4 Calcutta High Court Notes 487 (Shree Vardaan Improvement Pvt. Ltd. vs. Puspa Devi Agarwal & Ors.)***, learned Senior Advocate appearing for the appellants has contended that, injunction cannot be passed to restrain statutory authorities from exercising their statutory functions.

**14.** Learned Senior Advocate appearing for the appellants has contended that, Section 416 of the Act of 1980 allows KMC to permit conversion. He has pointed out that, the learned Single Judge erred in holding that excess sanctioned covered car parking space cannot be converted as the same will render Section 416 of the Act of 1980 otiose. He has contended that, the conversion was not in respect of any mandatory open space. According to him, Section 424 of the Act of 1980 has no manner of application in the present case.

**15.** Learned Senior Advocate appearing for the appellants has contended that, learned Single Judge has proceeded on the basis of survives and conjectures on the alleged failure of KMC to produce records pertaining to the proceedings of conversion. According to him, presumption of regularity attaches to the acts of KMC. He has pointed out that, original records were produced by KMC pursuant to an order dated January 17, 2003 which was kept in the safe custody of the Registrar, Original Side and directed to be released on a specified date. He has also referred to the affidavit of KMC affirmed on January 20, 2005 where photocopies of the original building plan dated May 18, 1997, the revised plan dated March 5, 2001 and the application for change of use with calculation sheets and typed copies of the noting dealing with the application for change of use along with the photocopy of the original note sheet were produced.

**16.** Learned advocate appearing for KMC has contended that, initially the writ petition was dismissed. The order of dismissal of the writ petition has been upheld on appeal. However, Hon'ble Supreme Court has remanded the writ petition for fresh hearing after framing some issues which are required to be considered.

**17.** Learned advocate appearing for the KMC has contended that, fresh hearing of the writ petition was restricted to the

questions raised in the order of remand of the Hon'ble Supreme Court. He has contended that, report submitted by the KMC is relevant to the issues raised subsequent to the order of remand.

**18.** Referring to the report of KMC, learned advocate appearing for KMC has contended that, a small portion of the ground floor of the building was about to be changed as a car showroom. The category of the building as a residential one has not been changed due to change of sanctioned use of car parking on the ground floor of the building as car showroom. The open spaces of the building on all 4 sides are still lying open subsequent to the sanction for conversion.

**19.** Learned advocate for KMC has contended that, the learned Single Judge proceeded to decide the case on completely erroneous basis that mandatory open space around the building sanctioned for open car parking spaces was allowed to be converted into a commercial space. Quite to the contrary, a portion of the covered car parking space in the ground floor of the building had been permitted to be converted into commercial space. The application for conversion had been considered strictly in terms of Section 416 of the Act of 1980.

**20.** Learned advocate appearing for KMC has contended that, the interim order dated December 3, 1998 was not a prohibition

upon KMC to consider an application under Section 416 of the Act of 1980. According to him, grant of sanction does not amount to making any change in the nature and character of the premises particularly when, the nature and character of the premises residential character has not been changed at all by the grant of sanction for conversion of a minor portion of the building. That apart, he has contended that, the restraint order was against the respondent No. 5 who ought not to have proceeded with any work in terms of the sanction.

**21.** Learned advocate appearing for KMC has contended that, it is not necessary that the person submitting the proposal for change of use under Section 416 of the Act of 1980 has to acquire title over the area to be permitted for change of the sanctioned use. According to him, the right to obtain sanctioned use change may be granted irrespective of acquiring title. According to him, the rights of the flat owners are limited to the extent of the terms and conditions as enumerated in the conveyance deed. The areas not common to use for all the flat owners may not be an area of dispute to be raised at the instance of the flat owners. According to him, flat owners cannot claim any right to participate at the hearing of an application under Section 416 of the Act of 1980.

**22.** Learned Advocate Appearing for KMC has relied upon **2003 Volume 2 Calcutta Law Times (HC) 588 (Smt. Rinkoo Mitra vs. State of West Bengal & Ors.)** in support of his contentions.

**23.** Learned Senior Advocate appearing for the respondents has contended that, the respondent No. 6 in the writ petition applied for conversion under Section 416 of the Act of 1980 after the order of injunction was passed as against him. In this regard, he has referred to order dated January 22, 2001 passed in WPO 2365 of 1998. He has submitted that, such application was filed subsequent to the order of injunction as will appear from the note on the body of such application.

**24.** Learned Senior Advocate appearing for the respondents has relied upon **2008 Volume 14 Supreme Court Cases 561 (Patel Rajnikant Dhulabhai and Another vs. Patel Chandrakant Dhulabhai and Others)** and **2013 Volume 14 Supreme Court Cases 689 (Jehal Tanti and Others vs. Nageshwar Singh)** in support of such contention.

**25.** Learned Senior Advocate appearing for the respondents has referred to the second schedule to the registered deed of conveyance existing in favour of a flat owner. He has contended that, undivided one half of one car parking space on the ground floor of the premises was sold to his client. He has pointed out

that, the original sanctioned plan contained 54 slots of parking. 23 of the 54 slots of parking were at the basement, 12 were in the open space out of which 4 were in the open front space and 8 were in the back space and the rest 19 car parking spaces were earmarked in the covered area on the ground floor.

**26.** Learned Senior Advocate appearing for the respondent has drawn the attention of the Court to the order dated July 11, 2001 passed in the writ petition. He has pointed out that, KMC authorities were directed to submit report in compliance with the earlier order dated March 17, 1999. He has also pointed out that KMC authorities were directed to produce relevant records regarding the sanctioned plan being B.S Plan No. 27 (B. VIII) dated May 18, 1987 accorded by the DG Building on March 5, 2001 in respect of the concerned premises.

**27.** Learned Senior Advocate appearing for the respondents has contended that, by the subsequent permission for conversion, KMC authorities permitted conversion of the covered car parking spaces at the ground floor which is not permissible. He has submitted that, such conversion infringed upon the right of the flat owners to the common spaces between the car parking spaces.

**28.** Learned Senior Advocate appearing for the respondents has submitted that, the original sanction was granted on May 18,

1987. At that relevant point of time, the building rules of 1950 were prevalent. He has referred to Rule 4, 5 and 22 (2) of the Rules of 1950.

**29.** Learned Senior Advocate appearing for the respondents has relied upon ***All India Report 1974 Supreme Court 2177 (K. Ramadas Shenoy vs. Chief Officers, Town Municipal Council, Udipi and Others)*** and ***2005 Volume 3 Calcutta Law Time 67 (Basana Dutta & Ors. Vs. State of West Bengal & Ors.)*** for the proposition that, the respondents were entitled to a hearing prior to an order under Section 416 of the Act of 1980 being passed by the KMC authorities.

**30.** Learned Senior Advocate appearing for the proforma respondent has submitted that, his client is the present owner of the disputed portion of the concerned premises. He has sought to assail the impugned judgment and order since the same affects the right title and interest of his client in respect of the disputed premises.

**31.** Learned Senior Advocate appearing for the proforma respondent has referred to the writ petition and contended that, the basis of the claim of the writ petitioners was the conversion of the car parking space. He has contended that the scope of the writ petition was limited to the right based on ownership of the car

parking spaces involved. He has referred to the impugned order and contended that the impugned judgment and order proceeds on the basis that the disputed area is within the mandatory open space. He has pointed out that, learned Single Judge erred in arriving at such finding. He has also contended that, the finding of the learned Single Judge that the KMC authorities failed to produce the sanctioned plan or that, the application of the respondent No. 6 of the writ petition as an agreement holder was non est, are erroneous.

**32.** Learned Senior Advocate appearing for the proforma respondent has referred to the provisions of Section 416 of the Act of 1980. He has contended that, no appeal under Section 416 (4) was preferred by any of the parties. Moreover, the case of ownership had been abandoned by the writ petitioners themselves.

**33.** Learned Senior Advocate appearing for the proforma respondent has contended that, the finding of the learned Single Judge that mandatory open space was converted was erroneous. The disputed area is not within the mandatory side spaces of the building. The disputed area was within the covered area. Therefore, the direction contained in the impugned judgment and order for demolition of the disputed portion is unworkable.

**34.** Learned Senior Advocate appearing for the proforma respondent has contended that, his client is a bona fide purchaser for value without notice of the alleged misdeeds in relation to the Act of 1980. He has pointed out that, when his client purchased the disputed area, there was no interim order in force. The proforma respondent had deliberately not been impleaded as a party respondent to the writ petition despite the writ petitioner being aware of the right, title and interest of the proforma respondent therein.

**35.** Learned Senior Advocate appearing for the proforma respondent has contended that, his client had preferred an independent appeal which was disposed of by an order dated September 2, 2024 by directing addition of his client as a proforma respondent in the pending appeal. He has pointed out that, a Special Leave Petition is pending against the order dated September 2, 2024.

**36.** Relying upon **2017 Volume 3 Calcutta High Court Notes 547 (Premjit Guha Thakurta & Ors. vs. Kolkata Municipal Corporation & Ors.)** learned Senior Advocate appearing for the proforma respondent has contended that, the car parking space covered in an integrated building is not an easement right nor appertaining to each flat.

**37.** Some flat owners of premises No. 13/3, Ballygunge Circular Road, Kolkata-700019 filed a writ petition being WPO 2625 of 1998 complaining of unauthorized construction at such premises.

**38.** KMC had sanctioned a building plan in respect of such premises on May 18, 1987, KMC for construction of a ground plus partly 5 and partly 8 storied building meant exclusively for residential purposes.

**39.** In such writ petition, learned Single Judge had passed an interim order dated December 3, 1998. Such interim order had restrained the respondent No. 5 in the writ petition being the appellant No. 1 before us from making any change in the nature and character of the premises in question. Learned Single Judge by an order dated March 17, 1999 had called upon KMC authorities to carry out inspection of the building upon notice to the writ petitioners and the respondent No. 5 therein. Report had been submitted before the learned Single Judge. Before the learned Single Judge, the writ petitioners had contended that, no notice of inspection was served upon the writ petitioner in terms of the order dated March 17, 1999.

**40.** By an order dated January 22, 2001, learned Single Judge had added MR as respondent No. 6 in the writ petition and made

the subsisting order of injunction dated December 3, 1998 applicable to them.

**41.** MR claiming to be holder of an agreement to purchase a unit at the said premises along with car parking spaces, applied for change of use of a portion of such premises with the KMC. Such application of MR is undated. However, there are endorsements of KMC authorities on such application. The first of such endorsement is dated February 19, 2001. KMC had allowed the application for conversion of car parking spaces, within the building, on the ground floor of the premises covered by an order dated March 5, 2001.

**42.** For the sake of convenience such portion of the premises concerned which was allowed to be converted is hereinafter referred to as the “disputed portion”.

**43.** By the order dated March 5, 2001 KMC authorities had allowed the disputed portion of the premises to be used as an air-conditioned car showroom measuring about 177.288 square metres.

**44.** By an order dated July 11, 2001, the learned Single Judge had directed MR to produce the agreement of purchase and sale deed in his favour. MR had failed to do so.

- 45.** By an order dated December 3, 2002, learned Single Judge had dismissed the writ petition on the ground of availability of alternative remedy. Appeal preferred against the order of dismissal dated December 3, 2002 had been dismissed on January 28, 2003.
- 46.** Special Leave Petition filed against the order dated January 28, 2003 had been disposed of by setting aside the order of the Division Bench dated January 28, 2003 and remanding the writ petition for fresh hearing after noticing some of the issues which arose for consideration in the writ petition.
- 47.** Relevant portion of the order of remand of the Hon'ble Supreme Court dated February 25, 2005 is 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.”*

**48.** Hearing of the writ petition subsequent to the order of remand has resulted in the impugned judgment and order before us.

**49.** Some of the issues which had arisen for consideration in the writ petition had been tabulated by the Supreme Court in the order of remand. The issues that have fallen for consideration are as follows:-

*(i) 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?*

*(ii) Whether an application under section 416 of the Act of 1980 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?*

*(iii) 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?*

*(iv) Whether a building essentially residential in character, could be permitted under the local law to be used for commercial purposes?*

*(v) Whether the change of use was in defiance of the interim orders of the Court?*

*(vi) To what relief or reliefs are the parties entitled to?*

**50.** Building at premises No. 13/3, Ballygunge Circular Road, Kolkata-700019 had been construed on the basis of the sanctioned plan dated May 18, 1987. Such sanctioned plan has a basement car parking as well as car parking on the ground floor of the building.

**51.** The number of car parking shown in the sanctioned plan dated May 18, 1987 had exceeded the number of flats that were sanctioned and constructed in terms of such building. Building had therefore, excess car parking spaces after sale of the flats along with one car parking space to each of the flat owners.

**52.** In the writ petition filed by the writ petitioner, alleging illegal and unauthorised construction, an order dated December 3, 1998 had been passed by the learned Single Judge restraining the appellant No. 1 from making any change in the nature and character of the premises in question. MR had been added as a party respondent in such writ petition and by an order dated January 22, 2001, the interim order dated December 3, 1998 was made applicable to them.

**53.** Both the orders dated December 3, 1998 and January 22, 2001 had been passed in the writ petition in which, Kolkata Municipal Corporation Authorities were party respondent. It is not the claim of KMC and cannot be so, that they were not aware of the order dated December 3, 2001 when it had granted the sanction for conversion on March 5, 2001.

**54.** Application of MR on which, the sanction for conversion had been granted by the KMC on March 5, 2001 is undated. The first endorsement of KMC authorities on such an undated application is February 19, 2001. On February 19, 2001 there subsisted an order of injunction dated December 3, 1998 as made applicable to MR by the order dated January 22, 2001.

**55.** The undated application of MR is for conversion of the disputed portion of the concerned premises which comprised of car parking spaces in the original sanction plan to one of air-conditioned car showroom. The application by itself has sought to change the nature and character of at least a portion of the concerned premises. Car parking spaces have been sought to be converted for commercial use.

**56.** In our view the application for conversion could not have been made by MR simply on the ground of subsistence of the order of injunction dated December 3, 1998. Even if one is to allow a

degree of latitude to MR since they were not parties to the writ petition, originally, then also they were made parties to the writ petition on January 22, 2001 and the order of injunction dated December 3, 1998 had been made applicable to them by the learned Single Judge on such date. Therefore, they could not have proceeded with their undated application for conversion, assuming or not admitting that, they were entitled to do so and that their application was made prior to the order dated January 22, 2001, on the strength of an agreement to purchase, before any authority far to speak before the KMC authorities, subsequent to January 22, 2001.

**57.** In our view KMC authorities were bound by the order dated December 3, 1998 and January 22, 2001 passed by the learned Single Judge. KMC authorities had acted in breach of subsisting orders of injunction in considering and allowing an application for conversion which resulted in the change of the nature and character of the disputed portion of the premises in question. The subsisting orders of injunction were in respect of the entirety of the concerned premises which included the disputed portion.

**58.** Admittedly, KMC authorities did not hear any of the flat owners while considering the undated application of MR for

conversion of the car parking spaces in the ground floor and allowing the same.

**59.** 19 car parking spaces have been allowed to be converted by KMC by the subsequent sanction dated March 5, 2001. 19 car parking spaces were sanctioned by the original sanction dated May 18, 1987 had obviously common passages to enter into and exit such 19 car parking spaces.

**60.** *Premjit Guha Thakurta & Ors. (supra)* has held that, individual car parking space is allotted to an individual flat owner and that such individual car parking space cannot be construed as a common area of all the flat owners. It has however not held that, the passage leading up to the individual car parking space is not the common passage.

**61.** Our attention has been drawn to a sample deed of conveyance in respect of a flat sold in the premises in question. There are a number of schedules in the deed of conveyance. Such schedules tabulate the properties that stood transferred to and vested with the purchase of the flat. We are concerned with the 3<sup>rd</sup> schedule clause 3 thereof which is as follows:-

“THE THRID SCHEDULED ABOVE PREFERRED TO

.....

3. Common passage, driveways, common areas, expecting specified car parking space.”

**62.** All common passages in the premises in question, therefore had stood vested with an individual owner of a flat at the concerned premises by virtue of the deed of conveyance executed by the builders and owners of the concerned premises in favour of such individual flat owner.

**63.** 19 car parking spaces which had been allowed to be converted by the KMC on March 5, 2001, obviously have common passages leading up to such individual car parking spaces. Although, by reason of the ratio laid down in ***Premjit Guha Thakurta & Ors. (supra)*** existing flat owners may not have exclusive right in respect of any of the 19 designated car parking spaces in the original sanction plan dated May 18, 1987, nonetheless, the common passage leading up to those 19 designated car parking spaces stood vested to all the flat owners of the concerned premises. In absence of their consent such common passage could not have been allowed to be converted by KMC.

**64.** Application for conversion had been made by MR authority as an agreement holder. Right to the property of which MR had held the agreement was yet to devolve completely on it at the time of its application for conversion. The application was not supported by the person or entity through which MR was claiming right in respect of the disputed portion, in the sense that such

transferor was not before KMC stating that it had no objection to the conversion.

**65.** Moreover as has been noted above, the common passages for the 19 car parking spaces comprised in the disputed portion stood vested with the individual flat owners when KMC received the application, considered and allowed it.

**66.** It was therefore incumbent on KMC to hear the individual flat owners apart from the transferor from whom MR was claiming right in respect of the disputed portion prior to processing the application for conversion, in the facts and circumstances of the present case. We hasten to add that, mitigative finding against the conversion is in addition to the other grounds noted herein.

**67.** KMC had acted in breach of principles of natural justice in considering and deciding the undated application for conversion which was allowed by them on March 5, 2001 without affording a reasonable opportunity of hearing to the individual flat owners of the concerned premises in whom the right in respect of the common passages to the car parking spaces stood vested.

**68.** ***K. Ramadas Shenoy (supra)*** has held that, an illegal construction materially affects the right to an enjoyment of the property of the persons residing in the residential area. It has also held that, Municipal authorities owe a duty and obligation under

the statute to see that the residential area is not spoiled by unauthorized construction.

**69. *Basana Dutta & Ors. (supra)*** has held that, where an application is made for revision of a building plan, all formalities for revision and/or the change of the original plan are required to be followed. It has also noticed that, the entirety of the premises concerned had been sold to individual persons and therefore, the original builder cannot hold himself out as to the owner and apply for conversion without the consent of the other owners.

**70.** In a contempt proceedings, Supreme Court in ***Patel Rajnikant Dhulabhai and Another (supra)*** has held that, creation of any third party interest during the subsistence of an interim order, should not be accepted.

**71.** In ***Jehal Tanti and Others (supra)***, Supreme Court has held that, execution of a sale deed during the currency of temporary injunction restraining alienation is a nullity.

**72. *Shree Vardaan Improvement Pvt. Ltd. (supra)*** has decided a first appeal directed against the interim order of injunction passed in a suit for permanent injunction. There, the application for construction of a capsule lift in the premises by a lessee has been found not to breach any right of the sub-lessees of the premises.

**73.** Section 416(1) of the Act of 1980 prohibits any person from changing the user of a premises without prior permission of KMC. Any person used in such sub-section would include a person other than an owner also. However such sub-section does not authorise KMC to allow change of user made by a person other than the owner without hearing the owner of the property concerned.

**74.** In the facts of the present case, change of user was allowed subsequent to the filing of the writ petition and during the subsistence of order of injunction passed therein. Writ Court can take into account such conduct of the parties to grant appropriate relief notwithstanding the existence of statutory alternative remedy of appeal under Section 416(6) of the Act of 1980.

**75.** In view of the discussions above, the first four issues are answered by holding that the application for conversion was not maintainable as it was not made by all the owners of the disputed portion and could not have been permitted without hearing all the owners in respect thereof.

**76.** The fifth issue is answered by holding that both MR and KMC had acted in breach of subsisting orders of injunction in making, considering and allowing the application for conversion.

**77.** The last issue is answered by directing KMC to restore the disputed portion to the position as obtaining in terms of the original sanction, within four weeks from date.

**78.** APO 18 of 2024 and APO 20 of 2024 along with all connected applications therein are disposed of without any order as to costs.

**[DEBANGSU BASAK, J.]**

**79.** I agree.

**[MD. SHABBAR RASHIDI, J.]**

**Later:-**

Learned advocate appearing for the added respondent seeks stay of the judgment and order.

Since our judgment and order require the KMC authorities to restore the position of the disputed portion, as that of the original sanction, within a period of four weeks from date, we do not find any necessity to grant stay.

Prayer for stay is, therefore, refused.

**[DEBANGSU BASAK, J.]**

I agree.

**[MD. SHABBAR RASHIDI, J.]**