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ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT/36/2026
IA NO: GA/1/2026
ASHOK KUMAR JAIN AND ANR
VS
THE MUNICIPAL COMMISSIONER, KOLKATA
MUNICIPAL CORPORATION AND ORS

APOT/46/2026
RAJAT GARDEN RESIDENTS ASSOCIATION AND ORS.
VS
THE MUNICIPAL COMMISSIONER, THE KOLKATA
MUNICIPAL CORPORATION AND ORS.

BEFORE:
The HON'BLE JUSTICE SHAMPA SARKAR
The HON'BLE JUSTICE AJAY KUMAR GUPTA
Date: 25th March, 2026.

Appearance:

Mr. Arindam Banerjee, Sr. Adv.
Ms. Anamika Bari, Adv. ...for appellants in item no.1 and
Respondent nos.3 & 4 in item no.2.

Mr. Ankit Agarwala, Adv.
Ms. Alotriya Mukherjee, Adv.
Ms. Arpita Paul Biswas, Adv. ...for respondent nos.3-5 in item no.1 and
Appellants in item no.2..

Mr. Gopal Chandra Das, Adv. ...for KMC.

The Court: APOT/36/2026 and APOT/46/2026 both arise out of the same interim order passed by the learned single Judge in WPO/870/2025 dated 19.2.2026. The writ petition was filed challenging the order passed by the Municipal Building Tribunal dated 29.8.2025 in BT Appeal no.117 of 2012 by the appellants in APOT/36/2026. The point of maintainability of the writ petition was raised by the appellants in APOT/46/2026 on the ground that the High Court would not have jurisdiction under Article 226 of the Constitution of India to entertain to the decision of the Municipal Building Tribunal.

It is contended by Mr. Banerjee, learned senior advocate for the appellants in APOT/36/2026 that, as a condition for grant of stay of demolition, deposit of security money for a sum of Rs.50 lakhs was not legally permissible. The same was made refundable to the appellants in the event the appellants were unsuccessful on the point of maintainability. It is submitted that the order under challenge before the writ petition was not a money decree. Under such circumstances, the provisions of Order 41 Rule 5(3) and (5) of the Code of Civil Procedure would not be attracted. It is further submitted that the writ petition is maintainable, as has been held by the Hon'ble Apex Court time and again.

Mr. Agarwal, learned advocate for the private parties in the writ petition and appellant in APOT/46/2026 submits that, the deposit of money was directed as a condition for stay and to secure the cost awarded by the Municipal Building Tribunal. He submits that the writ petition was not maintainable. If a party is aggrieved by an order of a Tribunal, the remedy would be under Article 227 of the Constitution of India. The facts of the case in nutshell, prior to filing of the writ petition are discussed below.

A demolition proceeding had been initiated in respect of the subject premises by the Special Officer [Building], Kolkata Municipal Corporation by demolition case no.31-D/7/2012-13, BR-VII. The proceeding was brought against one Mr. Sushil Kumar Jain of premises no.21, Ballygunge Park Road, that is, the appellant no.2 in APOT/36/2026. Although violation of the Building Rules had been detected, the prayer of the appellants for retention of the unauthorized portion was considered. It was found that a gate was fixed on the mandatory side open space, but the same was not a permanent structure and could be removed at any time. Such gate did not cause any obstruction to the free movement of any fire brigade vehicle. It was found that the deviations were not so grave and serious. The

infraction of the building rules could not be said to be major deviations. Moreover, such deviations were within the sanctioned area.

Decisions of the High Court were relied upon to hold that the deviations would not ipso facto result in demolition. Thus, the Special Officer [Building] was of the view that sufficient cause in favour of the person responsible for such constructions existed for retention of some of the unauthorized portions. Accordingly, it was ordered that :-

“that no order for demolition is hereby passed in respect of impugned unauthorised constructions subject to comply with the following preconditions, within 30 days from the date of the communication of this order. Those conditions are (1) P.R. must produce a certificate from any KMC panelled Structural Engineer certifying that the structural stability and the foundation of the impugned constructions are safe and sound and the materials used as well as workmanship are as per the latest edition of National Building Code of India, (2) he must furnish an affidavit declaring on oath that he will not make any construction whatsoever in the impugned premises without prior sanction from the KC authority, (3) he must furnish a N.O.C. from W.B.F. & E.S. if not furnished earlier and (4) he must pay the necessary retention charges of the KMC as calculated by the deptt. in a separate sheet of paper attached and supplied with this final order. On non compliance of either of the conditions within the above stated specified period the KMC authority shall demolish the same at the cost and at the risk of the P.R.

Copy to P. R. for his/her information and necessary action.”

In compliance with the said order, it is contended that regularization charges as demanded by the Corporation had been paid.

Aggrieved by the decision of the Special Officer [Building] an appeal under section 400(3) of the Kolkata Municipal Corporation Act, 1980 was filed by the Rajat Garden Residents Association, that is, the appellant in APOT/46/2026.

The Municipal Building Tribunal was of the view that the findings of the Special Officer [Building] were not tenable in law and the distinction

sought to be made by the Special Officer [Building] in respect of the major, grave and non-grave constructions, were contrary to law. Reference was made to the decision of the Calcutta High Court in Ghanashyam Das vs. Kolkata Municipal Corporation. It was recorded that, there were violations of the FAR and those could not be regularized. Cost of Rs. 10,00,000 was awarded to the Association.

This order has been challenged by way of a writ petition in WPO/870/2025. The point of maintainability of the writ petition was raised by Mr. Agarwal before His Lordship. His Lordship was of the view that on account of voluminous records and because all the records were not available, the issue of maintainability could not be decided at the initial stage. The writ petition was required to be heard. However, considering the fact that the dispute was with regard to an unauthorized construction, His Lordship was of the view that a sum of Rs.1 crore should be deposited by the appellant in APOT/36/2026. It was further recorded that, instead of Rs.1 crore a sum of Rs.50 lakhs should be deposited, as suggested by the learned advocate for the appellant in APOT/36/2026. The deposit was to be made with the Registrar, Original Side, of this Court within eight weeks from date of the order. It was directed that in case the petition was dismissed on the ground of maintainability, the deposit shall be returned to the petitioner upon compliance of formalities. However, the order is silent as to what would be the fate of the money if the writ petition failed on merits. Secondly, when the order under challenge is not a money decree, the question of deposit of either Rs.1 crore or Rs.50 lakhs did not arise. This is a case where the authority of the Corporation, in exercise of discretion and power under the statute, regularized the deviations. The Tribunal was of the view that the regularization was improper and directed demolition. The dispute is whether the demolition order was justified or whether the regularization/ retention

order was justified. This aspect has to be decided upon by His Lordship, first being satisfied that the writ was maintainable in view of the specific allegation of Mr. Agarwal. Mr. Agarwal submits that the order impugned may be vacated and the learned trial Judge may be directed to hear out the writ petition on the point of maintainability first. He submits that, there should not be any order of stay of the demolition in the meantime.

He submits that the question of jurisdiction to hear the writ petition must be decided by His Lordship. Unless the point of jurisdiction was decided, order of stay could not be passed. Reliance is placed on the decision of the Apex Court in *Asma Lateef And Another vs. Shabbir Ahmad And Others*, reported in [2024] 4 SCC 696.

We are not inclined to decide on the point of maintainability of writ petition as this point has to be decided by His Lordship. We are only on the issue as to whether, as a condition for stay of demolition, money could have been directed to be secured. In our considered view, the facts of this case do not require such a harsh measure.

With regard to Mr. Agarwal's contention that such order was passed to secure the cost awarded by the Tribunal, is not borne out by the facts. Although, the order reflects that the learned Advocate for the appellants conceded to deposit Rs. 50 lakhs, the law is well settled, that such submission would not bind the appellants, in the absence of a formal authorization to the learned Advocate to make such submission.

Now, the question arises as to whether, till the decision is taken by His Lordship on the point of maintainability of the writ petition, the demolition order should be allowed to be implemented. In our view, the appellants in APOT/36/2026 were successful before the Special Officer [Building]. Upon payment of certain amount towards regularization of the unauthorized portions, they retained those portions. Such order was challenged in the

appeal and reversed. The order is now under challenge in a writ court. There are two questions before the writ court. First, whether the jurisdiction of the writ court extended to the adjudication of the correctness of the order of the Municipal Building Tribunal, in exercise of power under Article 226 of the Constitution of India or whether the sole remedy of the appellants in APOT/36/2026 would be before the High Court under Article 227 of the Constitution of India. Secondly, if the maintainability is decided in the affirmative, whether the decision of the Municipal Building Tribunal was erroneous or whether the decision of the Special Officer [Building] was erroneous. The above two issues are yet to be decided. If demolition takes place, nothing survives before the writ court and the writ petition becomes infructuous. The situation will become irreversible as the property of the appellants will be broken down without the appellants getting an opportunity to have their writ petition heard and/or without throwing a proper challenge to the order of the Building Tribunal. On the other hand, the demolition can take place at anytime after the issues are decided, even if the same is delayed on account of the litigation.

Under such circumstances, we direct that the demolition order will remain stayed for a period of two months, within which time the question of maintainability of the writ petition shall be decided by His Lordship. The matter will proceed on the basis of such determination. We make no observations on the merits of the claim of either of the parties. His Lordship will decide all issues independently. This order of stay is only to balance equities, but shall not prevail upon the learned Judge while deciding the matter.

The impugned order is set aside.

Both the appeals and the applications are disposed of accordingly.

(SHAMPA SARKAR, J.)

(AJAY KUMAR GUPTA, J.)

pkd.