

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Justice Amrita Sinha

WPA 26556 of 2023

Ashok Agarwal & Anr.

Vs.

Kolkata Municipal Corporation & Ors.

For the writ petitioners	:-	Mr. Samim Ahammed, Adv. Mr. Arka Maiti, Adv. Ms. Saloni Bhattacharjee, Adv. Mr. Arka Ranjan Bhattacharya, Adv.
For the KMC	:-	Mr. Achintya Kumar Banerjee, Adv. Mr. Mihir Kundu, Adv.
Heard on	:-	29.11.2023
Judgment on	:-	29.11.2023

Amrita Sinha, J.:-

Affidavit-of-service filed in Court today is taken on record.

The matter relates to certain unauthorized constructions at premises no. 35B, Kshudiram Bose Sarani, Ward No. 3, Borough-I of the Kolkata Municipal Corporation.

The petitioners claim to be tenants of the subject premises. They rely upon an agreement for sale allegedly executed in the year 2007 in between the owners of the subject premises, the developer and the petitioners as purchasers. According to the said agreement for sale, the developers were supposed to provide the petitioners a decorated flat in the proposed building from the developer's allocation.

The petitioners submit that a portion in the car parking space in the ground floor of the subject premises, meant for the petitioners, was constructed and transformed into a flat. The same has been directed to be demolished by the impugned order dated 4th June, 2023 passed by the Special Officer (Building). The petitioners are aggrieved by the same.

The primary contention of the petitioners is that they were not afforded any opportunity of hearing prior to passing the order of demolition. There has been violation of principles of natural justice. The petitioners, being the occupiers of the subject premises, have a right to participate in the hearing process and defend the construction made.

It has been submitted that the order of demolition, though passed in June 2023, was never served or communicated to the petitioners and accordingly, they did not have any knowledge of the same. The petitioners lately obtained a copy of the order of demolition from the security officer of the subject premises and rushed to this Court for relief.

The petitioners rely upon various provisions of the Kolkata Municipal Corporation Act, 1980 and the building Rules framed thereunder in support of the submission that, the construction in the ground floor by which the car parking space has been transformed into a flat has scope for regularization. The construction is not necessarily required to be demolished.

The petitioners intend to prefer an appeal before the statutory appellate forum but submit that as the date of demolition is scheduled today, as such, some breathing space may be granted to the petitioners so that they may approach the statutory forum.

Learned advocate appearing for the Kolkata Municipal Corporation raises an issue with regard to the locus of the petitioners to file the present writ petition. It has been submitted that the petitioners, claiming to be tenants of a portion of the subject premises, do not have any right to challenge the order of demolition.

Reliance has been placed on the judgment delivered by this Court in the matter of **Sanjay Mehta & Ors. -vs- The Kolkata Municipal Corporation & Ors.** reported in **2006(2) Cal LJ 574.**

Reliance has also been placed on the instruction provided by the Assistant Engineer (Civil) and the Executive Engineer (Civil)/Building Department, Borough-I, Kolkata Municipal Corporation dated 28th November, 2023 mentioning that this is a case of unauthorized construction in deviation from the sanctioned plan dated 8th March, 2007. Various illegalities committed at the time of construction are mentioned in the report.

Prayer has been made for dismissal of the writ petition.

I have heard and considered the detailed submissions of both the parties.

The private respondent being one of the constituted attorneys of the owners of the subject premises refused to accept the copy of the writ petition which was sought to be served. The remark in the postal track report mentions that the postal article was 'refused' by the addressee. Refusal to accept the postal article amounts to good service and, accordingly, the matter is taken up for consideration by the Court in the absence of the private respondent.

On a perusal of the demolition order, it appears that 37 RCC columns above the average height of 2.5 mt. over the four storied sanctioned building, staircase upto half landing over the roof level, brick wall covering sanctioned covered car parking space have been made in deviation from the sanctioned plan. Demolition sketch plan with the infringements was prepared way back in the year 2009-10. Proceeding to deal with the unauthorized construction was initiated against the persons responsible for making construction long back. The proceeding, however, could not be concluded in view of several litigations pending before this Court.

One Dinesh Chandra Agarwal filed a writ petition before this Court being W.P. 12803 (W) of 2011 and the Hon'ble Court was pleased to pass order on 30th August, 2011 directing the Corporation to cause inspection and to take necessary steps, if unauthorized construction is detected.

On detection of the unauthorized construction, the demolition proceeding was conducted and it ultimately concluded by passing the impugned order of demolition in the month of June 2023. Admittedly, the petitioners were not afforded any opportunity of hearing.

As an issue has been raised with regard to the locus of the petitioners in maintaining the instant writ petition challenging the order of demolition and reliance has been placed on the judgment delivered by this Court in the matter of Sanjay Mehta & ors. (supra), the Court intends to decide the issue of locus of the petitioners first.

According to Section 400 (1) of the Kolkata Municipal Corporation Act, 1980 an order of demolition may be passed only after hearing the person at whose instance the erection or construction work has been commenced. As per

the Act, 'the person at whose instance' means, the owner, occupier or any other person who causes the erection of any building or execution of any work, including alterations or additions, if any, or does it by himself.

In Sanjay Mehta & Ors., the Court specifically laid down that a tenant, being an occupier of an unauthorized construction, cannot oppose demolition of an unauthorized construction by contending, inter alia, that though such construction is unauthorized but still then such construction should be retained to protect the tenant's occupation therein. In case of demolition of any unauthorized construction, a tenant may, at best, claim compensation for loss of his tenancy against his landlord who inducted the tenant but the tenant cannot resist demolition of an unauthorized construction on the plea of loss of his tenancy right.

The Court also answered the question as to whether the tenant, claiming to be occupier of the subject structure, be entitled to a notice for hearing. The Court answered the question in the negative.

It was held that the person whose right of hearing is not recognized at the trial stage cannot claim any right of appeal which is a continuation of the original proceeding.

According to the provisions of the Kolkata Municipal Corporation Act, 1980, only the owner, occupier and/or any other person who is responsible for such construction, is the person whose right of participation in the proceeding under Section 400(1) of the said Act is recognized.

The Court categorically made it clear that right of participation of the occupier, who is not responsible for such construction, is not recognized. 'Any person' carries a restricted meaning in the Act. The right of hearing is recognized for such person who is actually responsible for making such unauthorized construction.

In the instant case, the petitioners are not actually responsible for making the construction and, hence, do not have a right of audience.

The submission of the petitioners that not providing opportunity of hearing has resulted in violation of the principles of natural justice, cannot be accepted in the facts and circumstances of the instant case. I am of the opinion that the principle of natural justice cannot be stretched to such extent that it would

frustrate the very object and purpose of the statute. When the statute has laid down the specific category of persons who may be provided opportunity of hearing, it implies that the other categories have consciously been kept out of the zone of hearing.

The legislature in its wisdom found it wise to keep the hearing restricted to the category of persons mentioned in the Act. Permitting others to participate at the hearing stage will be *de hors* the law. The same will result in unending litigations resulting to inevitable delay in conclusion of the demolition proceeding. By this way the unauthorized construction will remain standing tall thereby encouraging the dishonest and unscrupulous builders to hold on to such unauthorized structures on some plea or the other.

That apart, it appears that in support of the tenancy, the petitioners have relied upon the rent receipts allegedly issued by the owners in their favour in March 2004. The respondents have disputed the said rent receipts. The owners of the subject premises have not been impleaded as party and it is only one of the constituted attorneys of the owners who has been arraigned as party in the instant proceeding. In the absence of the owners, the status claimed by the petitioners as tenants and the documents relied upon by the petitioners in support of their tenancy, remains doubtful.

In support of the submission that the petitioners purchased the subject property, reliance has been placed on the agreement for sale allegedly executed in the year 2007. Agreement for sale is not a document in support of ownership of a property.

The petitioners claim to be the tenants and purchasers of the subject property at the same time. None of the documents in support of their status is a verified document, as such; none can be relied upon by the Court.

From the submissions made in Court and the averments made in the writ petition, it appears that the petitioners have been set up by the builders only to stall the execution of the demolition order which was passed long ago. Showing any leniency or misplaced sympathy will promote unauthorized construction and will affect various fundamental and constitutional right of other persons. There should be no judicial tolerance of illegal and unauthorized construction even to the slightest extent. Such illegal act should be nipped at the bud and dealt with an iron hand.

The order of demolition and the infringement statement make it clear that there are massive deviations and unauthorized constructions at the subject premises which are required to be demolished immediately. The Court ought not to come to the aid of protecting such illegal acts, hence, refrains from exercising jurisdiction in the matter.

In view of the above, no relief can be granted to the petitioners in the instant case.

The writ petition fails and is hereby dismissed.

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

(Amrita Sinha, J.)