

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Jul-31-2014

Judge : Soumitra Pal

Appellant : Appellant

Respondent : Respondent

Judgement :

ORDER

SHEET W.P.No.442 of 2014 IN THE HIGH COURT AT CALCUTTA Constitutional Writ Jurisdiction ORIGINAL SIDE MONICA LIU & ANR.

Plaintiff/Petitioner/Applicant Versus KOLKATA MUNICIPAL CORPORATION & ORS.Defendant/Respondent BEFORE: The Hon'ble JUSTICE SOUMITRA PAL
Date : 31st July, 2014.

For Petitioner: Mr.Chanchal Kumar Dutt, Advocate For KMC : Mr.D.Mondal,Advocate
The Court : In this writ petition, the petitioners have challenged the notice demanding a sum of Rs.89,82,188 for regularising unauthorized construction, levy of welfare cess of Rs.86,782 on the sanctioned plan and levy of Rs.8000/- as fees for raising unauthorised construction issued by the municipal authorities pursuant to the order dated 30th December, 2013 passed by the Deputy Chief Engineer (Building) (South).the Kolkata Municipal Corporation wherein order was issued directing retention of the unauthorised structure in a

demolition proceeding under sections 400(1) and 416 of the Kolkata Municipal Corporation Act, 1980 in respect of premises no.77/1A Christopher Road, Ward No.58, Borough-VII of the Corporation.

In order to appreciate the matter, it is appropriate to set out the relevant portion of the order dated 30th December, 2013, which is as under : ..This demolition proceeding was brought against Monica Liu and Michel Liu of Premises No.77/1A Christopher Road.

The departmental allegation is that three storied restaurant and residential building in one basement at side.

Building Rules violated are 51,55,56,57,62,104,109 & 110 of building Rule 1990 & Sec.416 of The Kolkata Municipal Corporation Act, 1980.

Hence this demolition proceeding.

The case of the P.R.is that the allegation is undisputed.

Retention of the unauthorised construction was prayed for.

There is no Complainant.

During hearing before the undersigned, the representative of the P.R.Sr.Ashis Kundu was found present and admitted the Unauthorised Construction and prayed for regularisation of the same.

He also told that an Old Restaurant was constructed about 10-15 years back.

It appeared from the case record that Basement & some columns from roof of Basement to 1st floor level at side has been regularised vide D/Case No.95D/2005-2006 by Sr.A.K.Mukherjee on dt.12.03.2009.

There is no complainant from any neighbourhood.

No one raised any question regarding such impugned structure.

No one ventilated any grievances for construction of the building which is not hampering the interest of any one.

Hence the demolition proceeding under consideration.

Now let me consider the Prayer of the Ps.R.for allowing retention of the impugned unauthorised construction & use as a restaurant.

This forum as a delegate of Municipal Commissioner Circular No.37 of 2010-11 not to order for demolition in each and every case of unauthorised construction & use as a restaurant of couRs.on finding sufficient cause.

In the current case I find that the deviated Unauthorised Constructions & use as a restaurant are so grave and serious and the infractions of building rules for the same, to my mind, are minor in nature.

It is prayed by the Ps.R.for regularisation of the same.

So, considering the above facts and circumstances, I am of the view that there is sufficient cause in favour of the Ps.R.for not passing any order for demolition and allowed to retain the same of couRs.subject to comply with certain preconditions and I believe that this will meet the ends of justice and equity.

So, the point is decided accordingly.

Hence,

ORDER

That no order for demolition & conversion is hereby passed in respect of the unauthorised construction subject to comply with the following preconditions, within 30 days from the date of communication of this order.

Those conditions are (1) Ps.R.must produce a Structural Certificate certified by KMC empanelled Structural Engineer certifying the Structure is Stable, Safe & Sound and the materials used are as per the latest edition of National Building Code of India (2) They must furnish an Affidavit declaring on oath that they will not make any constructions what-so-ever in the impugned premises without prior

approval from the K.M.C.(3) N.O.C.from W.B.F.& E.S.is required to be submitted (4) N.O.C.from Pollution Control Board is required to be submitted and (5) They will pay the necessary Retention & Conversion charges of KMC as calculated by the department in a separate sheet of paper attached and supplied with this final order.

On noncompliance 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 Ps.R. (Emphasis supplied) I find that though the allegation of unauthorised construction of the three storied restaurant and the residential portion in the basement and change of use was not disputed by the petitioners.that is the persons responsible for raising the said construction, surprisingly direction was issued to regularise the said structure on the basis of a Circular No.37 of 2010-11 issued by the Municipal Commissioner and subject to the compliance of conditions and payment of charges as there was no complainant and no one had questioned about the construction.

Learned advocate appearing on behalf of the Kolkata Municipal Corporation on instruction submits that it is apparent from the order dated 30th December, 2013 that earlier the petitioner had raised unauthorised construction from the roof of the basement to the first floor level which was regularised on payment of money.

The question is whether an unauthorized construction can be regularised on payment of money, be it called fees or penalty or charges.

Looking at the 1980 Act it is evident that section 392 completely bars a person to raise construction except with the previous sanction of the Municipal Commissioner.

Section 393 postulates that Every person who intends to erect a building shall apply for sanction by giving notice in writing of his intention to the Municipal Commissioner.

Therefore, it is explicit that no construction can be raised without having prior sanction.

In this context it is to be noted that in *Lipika Das versus the Kolkata Municipal Corporation & ORS.* reported in (2012) 4 WBLR (Cal) 483, while considering sections 392 and 393 it was held that no construction can be raised without having prior sanction from the authorities.

The argument of the petitioner that the Commissioner under section 400 of the 1980 Act has been given the power to exercise discretion to regularise cannot be accepted since it postulates that the Municipal Commissioner, may, make an order directing that such erection or work shall be demolished by the person at whose instance the erection or the work has been commenced or is being carried on or has been completed which is in addition to any other action that may be taken under this Act, which shows that after complying with the principles of natural justice, as evident from said section 400 along with the fiRs.proviso, if the Commissioner is satisfied that construction was undertaken without taking prior permission or in violation of the sanction plan, it has to be demolished.

It is to be noted that only section 413A of the 1980 Act confers authority on the Municipal Commissioner to regularise buildings, the construction on which has been made by persons displaced from East Pakistan (now Bangladesh) or by their successors in interest on lands occupied by such persons and completed before the commencement of the Calcutta Municipal Corporation (Amendment) Act, 1996 and where the documents of title to such lands have been granted by the State Government and constructions have been completed in conformity with the existing building rules of the Corporation.

In the instant case, it is surprising that the Deputy Chief Engineer (Building)(South).the Kolkata Municipal Corporation without adhering to the provisions contained in sections 392 and 393 of the 1980 Act and without considering the fact that under the law prior sanction for raising a building is mandatory, had directed retention on payment of charges.

Though it is the statutory duty of the municipal authorities to ensure that a building is raised in accordance with law, yet absence of the complainant was a ground for passing an order retention.

In my view, since regularisation of an unauthorised construction is alien to the provisions of the 1980 Act, direction for retention of an unauthorised building is a nullity.

In that view of the matter, the Circular no.37 of 2010-2011 is illegal, void and therefore, the same is set aside and quashed.

In this context it is very strange to note that the petitioner having earlier regularised the unauthorised construction on payment of so called penalty and/or fees and/or charges have again raised construction illegally and the municipal authorities ignoring the provisions of the 1980 Act has directed retention which is arbitrary, without jurisdiction and illegal.

It is to be noted that even if payments are made and so called order directing regularisation of an unauthorised construction is passed, in view of the provisions of the 1980 Act, the unauthorised structure still remains illegal.

Even, acceptance of taxes cannot cure the illegality.

Therefore, though the petitioners have not challenged the order dated 30th December, 2013 by which they appear to have benefitted, since the order dated 30th December, 2013 is void and illegal, the said order is set aside and quashed.

Accordingly, the notice of demand too having no foundation is also set aside and quashed.

Since the building is admittedly without sanction, the Deputy Chief Engineer (Building)(South) and the Executive Engineer, Borough-VII of the Kolkata Municipal Corporation, the respondent Nos.3 and 4 shall demolish the said unauthorised construction which is beyond the sanctioned plan, within four weeks from the date of presentation of a copy of the certified copy of this order and cost of such demolition shall be realized from the petitioners. The writ petition is dismissed with the above directions.

In the circumstances, the petitioners are directed to pay costs of Rs.5100/to the Kolkata Municipal Corporation.

(SOUMITRA PAL, J.) ssaha AR(CR)

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