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**(2014) 03 CAL CK 0023**  
**In the Calcutta High Court**  
**Case No : W.P. No. 5633 (W) of 2014**

Haran Ghosh

APPELLANT

Vs

Kolkata Municipal Corporation

RESPONDENT

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**Date of Decision :** 25-03-2014

**Acts Referred:**

**Citation :** (2014) 4 CHN 137

**Hon'ble Judges :** Soumitra Pal, J

**Bench :** Single Bench

**Advocate :** Subir Sanyal and Kamal Mishra, Advocates for the Appellant; Barin Banerjee and Sima Chakraborty, Advocates for the Respondent

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## Judgement

Soumitra Pal, J.—In the writ petition, the petitioner has challenged the order dated 7th August, 2013 passed by the Executive Engineer (C) Building Department, Kolkata Municipal Corporation allowing the private respondent Nos. 7 to 12 to retain the unauthorized construction made by them in the car parking space on the ground floor at premises No. 74A, B.T. Road, Kolkata which was in deviation of the sanctioned plan on the ground that it is ultra vires the provisions of the Kolkata Municipal Corporation Act, 1980 (for short "the Act") and the Kolkata Municipal Corporation Building Rules, 1990 ("Rules" for short). Prayer is for a direction on the Corporation to demolish the unauthorized construction and to restore the car parking space. After the matter was taken up, the learned advocate for the petitioner had filed a supplementary affidavit enclosing the order dated 24th May, 2012 passed in Demolition Case No. 44-D/1/11-12, Ward No. 005, Borough No. 1 (Kolkata Municipal Corporation vs. J.P. Chowdhury) by the Joint Municipal Commissioner (Revenue and Supply), authorized by the Mayor-in-Council to function as Special Officer (Building), whereby he had directed "for retention and regularization of all the impugned unauthorized construction including shortfall of car parking spaces as mentioned in the precis" on payment of fees/charges. It is submitted by the learned advocate for the petitioner that since the Act and the Building Rules do not confer authority or

jurisdiction on the officials of the Corporation to pass an order of retention and regularization of an unauthorised construction on payment of money, the order may be directed to be set aside.

2. Learned advocate appearing on behalf of the respondent No. 11 submits that without going into the controversy an order may be passed directing the Director General (Building-II), Kolkata Municipal Corporation, the respondent No. 5 to sanction the revised plan which is pending.

3. Learned advocate appearing on behalf of the respondent No. 12 submits that the writ petition is not maintainable since the petitioner should have availed himself of the alternative remedy under section 415 of the Act by preferring appeal before the Municipal Building Tribunal. Submission is since civil suit has been filed and an interim order has been passed, no order may be passed.

4. Learned advocate appearing on behalf of the State submits that since the Act and the Rules do not confer power or jurisdiction on the Special Officer (Building) of the Corporation to retain and regularize the building constructed unauthorizedly on payment of fees and/or charges and the question of jurisdiction can be gone into in a writ petition, the writ petition is maintainable.

5. Heard learned advocates for the parties. There is no dispute that the Joint Municipal Commissioner by order dated 24th May, 2012, had directed retention and regularization of all the impugned unauthorized construction, including shortfall of car parking spaces, on payment of fees.

6. The questions are whether the writ petition is maintainable and whether the Kolkata Municipal Corporation Act, 1980 and the Kolkata Municipal Corporation Building Rules, 2009 confer power and/or jurisdiction on the Special Officer (Building) to regularize a building raised illegally on payment of fees.

7. It is clear from the provisions of the Act and the Rules, that neither the Act nor the Rules confer power on the authorities of the Corporation to retain and regularize a building constructed illegally on payment of charges/fees. Therefore, as in the instant case, the Joint Municipal Commissioner, authorized to function as Special Officer (Building), had no jurisdiction under the Act and the Rules to pass an order dated 24th May, 2012 directing retention and regularization of an unauthorized construction on payment of fees and/or charges, the writ petition is maintainable.

8. So far as the other question is concerned since sections 392, 393 and 394 of the Act stipulate that before raising a building or even for addition or repair prior sanction of the Municipal Commissioner is mandatory and there is no scope for post facto sanction and regularisation and a building can be regularized only in cases as enumerated under section 413A of the Act, that is, where it has been constructed by a person who has come from erstwhile East Pakistan, now Bangladesh and as in view of said statutory provisions there is no scope for discretion under section 400(1), the order of retention and regularisation passed

by the Joint Municipal Commissioner is arbitrary and illegal. Therefore, the order dated 24th May, 2012 cannot be sustained and is, thus, set aside and quashed. Hence, the writ petition is allowed. Accordingly, the Joint Commissioner, Kolkata Municipal Corporation, the Executive Engineer (Building), Kolkata Municipal Corporation and the Director General (Building--II), the respondent Nos. 3, 4 and 5, respectively shall demolish the construction within four weeks from the date of communication of this order. In the event pursuant to the order dated 24th May, 2012 necessary fees and/or charges have been paid by the person responsible, the authorities of the Corporation shall refund the amount within a period of thirty days from the date of communication of this order. So far as the prayer of the respondent No. 11 for consideration of the revised building plan since submitted before the authorities, the authorities of the Corporation shall consider the same and shall pass a reasoned order to be communicated to the said respondent within three months from the date of communication of this order.

9. Since the writ petition is disposed of at the stage of admission without calling upon the respondents, including the private respondents, to file affidavits controverting the allegations made therein, allegations made are deemed not to have been admitted by them.

11. No order as to costs. Urgent Photostat certified copy of this order, if applied for, be furnished to the appearing parties on priority basis.