
(2015) 12 CAL CK 0045
In the Calcutta High Court
Case No : C.O. 3575 of 2015

Jetage Construction Pvt. Ltd. and Others APPELLANT
Vs
Allauddin and Others RESPONDENT

Date of Decision : 04-12-2015

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 400(1), 401, 48, 544, 546

Citation : (2015) 12 CAL CK 0045

Hon'ble Judges : Harish Tandon, J.

Bench : Single Bench

Advocate : Saktinath Mukherjee, Senior Advocate, Sandip Kr. De, Malay Kr. De and Suprio Ranjan Saha, Advocates, for the Appellant; Tarique Quasimuddin, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Harish Tandon, J.—This Revisional Application is directed against a judgment and order dated 28th August, 2015 passed by the Municipal Building Tribunal, Kolkata Municipal Corporation in B.T. Appeal No. 7 of 2015 by which the matter was remitted back to the Joint Municipal Commissioner, Kolkata Municipal Corporation to take a decision afresh after affording an opportunity of hearing to both the parties.

2. The impugned order of remand is passed as the Tribunal found that the proceeding for demolition of alleged unauthorized construction cannot be initiated in absence of a notice under Section 400(1) of the Kolkata Municipal Corporation Act, 1980. It is further observed that there is no finding recorded in the impugned order on conflicting reports filed by the inspecting officer in relation to the alleged unauthorized construction.

3. Admittedly, several Civil Suits including a Suit for eviction against the Opposite Parties are pending before the Civil Court and an order of injunction is operating against the Petitioner so far as it relates to the possession of the Opposite Parties

in respect of their tenancies are concerned.

4. A Writ Petition was moved before this Court complaining the inaction on the part of the Municipal Authorities in not taking any action against the unauthorized construction made by the Opposite Parties. By an order dated September 25th, 2014, the High Court directed the Kolkata Municipal Corporation to file a report on the alleged unauthorized construction at the premises in question. The report does not reveal any unauthorized construction made by the Opposite Parties. An affidavit containing the said report was filed by the Kolkata Municipal Corporation stating that no new construction was found at the site. It was further disclosed that a plan was sanctioned in respect of the premises in question the validity thereof has expired. The High Court did not find that the report has been submitted properly and directed the Kolkata Municipal Corporation to submit a second report. It appears that the second report dated January 22, 2015, contains the statements that a notice under Section 401 of the Kolkata Municipal Corporation Act, 1980 was issued against the predecessor-in-interest of the present Opposite Parties and there is an existence of an asbestos shed in the portion occupied by them constructed without sanctioned plan and without taking permission from the Kolkata Municipal Corporation. Taking into account the two conflicting reports filed before the High Court, the authorities were given liberty to proceed against the Opposite Parties for demolition of such unauthorized construction in accordance with law. It was explicitly made clear that the Municipal Commissioner shall afford an opportunity of hearing to all the parties and shall pass a reasoned order preferably within six weeks from the date of the communication of this order.

5. Undisputedly, the Municipal Commissioner delegated his power in exercise of the powers conferred under Section 48 of the Act upon the Joint Municipal Commissioner (G & D), who by an order dated 30th April, 2015 directed the demolition of one shaded structure at the first floor on the road side within one month from date. The Joint Municipal Commissioner observed that the Opposite Parties have failed to submit any document showing the sanctity of the structure sought to be demolished and treated the same as unauthorized. Pursuant to the said order, a notice under Sections 544 & 546 of the said Act is issued against the parties to this Revisional Application fixing the date on which the demolition shall take place. On the said date the Opposite Parties alleged to have issued a letter to the Director General (Building), Kolkata Municipal Corporation for giving twenty days time to demolish the unauthorized construction. It further appears that the Opposite Parties filed an appeal against the order of the Joint Municipal Commissioner (G & D) before the Municipal Building Tribunal and moved an application for stay. The Building Tribunal allowed the said application thereby staying the operation of the order impugned which was further challenged before this Court in C.O. 2645 of 2015. While disposing of the Revisional Application on 23.07.2015, this Court declined to interfere with such order and directed the Municipal Building Tribunal to dispose of the main appeal within four weeks from date of the communication thereof.

6. Mr. Saktinath Mukherjee, learned Senior Advocate for the Petitioner submits that the Tribunal should not have remanded the matter to the Corporation to initiate a fresh proceeding as a notice under Section 400(1) of the Code was not issued. He strenuously submits that the Petitioner is stopped either from challenging an order passed by the Joint Municipal Commissioner (G & D) or proceeding with the appeal after agreeing to demolish the unauthorized construction after having caused the letter dated 11.06.2015. In other words, he would submit that once the Opposite Parties have admitted the impugned structure to be unauthorized and agreed to demolish the same by themselves, such stand continues to bind him and therefore they cannot contend that there is no unauthorized construction at the premises. To buttress the aforesaid submission he relied upon a judgment of the Supreme Court in case of Smt. Ram Pyari and others Vs. Jagdish Lal, . He fervently submits that the nature of the structure has been held by the High Court in the Writ Petition as unauthorized and in absence of any further challenge before the Division Bench such order attains finality and therefore the order of remand passed by the Municipal Building is directly in conflict with the order of the High Court. He, thus, concludes that the Building Tribunal ought to have dismissed the appeal without interfering with the order passed by the Joint Municipal Commissioner (G & D).

7. Mr. Alok Kumar Ghosh, the learned Advocate for the Kolkata Municipal Corporation submits that since the order passed by the Building Tribunal has not been challenged by his client, his client shall abide by the decision taken in this Revisional Application and shall proceed accordingly.

8. In refuting the contention of Mr. Mukherjee, Mr. Tarique Quasimuddin, learned Advocate appearing for the Opposite Parties, strongly submits that the statute requires the service of notice before proceeding for demolition of a structure treating the same as unauthorized and therefore there is no infirmity in the impugned order by which the Tribunal held that such statutory mandate cannot be by-passed. He, further submits that the order passed in the Writ Petition does not conclusively say that the structure is unauthorized but in view of the findings recorded in the second report, the permission was granted to the Kolkata Municipal Corporation to proceed in accordance with law. According to him, the permission to proceed in accordance with law cannot be interpreted to act in violation of the provisions of the statute. It is submitted that the predecessor-in-title of the Petitioner have inducted his clients as tenant in respect of the first floor of the premises and all along collected the rent in respect thereof and thus the Petitioner being a subsequent purchaser cannot take a contrary stand that the first floor is unauthorized. Lastly, he submits that the first report submitted before this Court in Writ Petition clearly envisaged that there is no unauthorized construction at the premises which was not considered by the Joint Municipal Commissioner (G & D) in his order. On the letter dated 11th June, 2015, he submits that the said letter was issued under duress to avoid the demolition of the structure by the authority even when the appeal before the Municipal Building Tribunal was pending.

9. Having heard the respective submissions, the point which evolved therefrom is whether the Municipal Building Tribunal was justified in remanding the matter to the Joint Municipal Commissioner for taking fresh decision. Admittedly, the Writ Petition was filed alleging that the Corporation is not taking any steps for demolition of an unauthorized construction allegedly made by the Opposite Parties. The first report submitted by the Kolkata Municipal Corporation does not contain any statement regarding the unauthorized construction at the premises. However, the affidavit containing such report, discloses the issuance of a notice under Section 401 of the Kolkata Municipal Corporation Act, 1980 and was further silent on any action taken thereupon. The said notice appeared to have been issued upon the predecessor-in-interest of the present Opposite Parties who was admittedly the tenant at the premises. The High Court was not satisfied with such statements and the findings recorded in the first report, directed the Corporation to inspect the suit premises once again and submit the report. The second report revealed the existence of structure on the first floor appearing to be an old one but there is no reflection of its existence in the sanctioned plan. It was observed that such construction is unauthorized having not shown in the sanctioned plan. Because of the conflicting opinion, the Writ Petition was disposed of directing the Municipal Authorities to proceed against such unauthorized construction in accordance with law.

10. The meticulous reading of the order recorded in the Writ Petition cannot be construed as conclusive finding on an unauthorized construction which can further be gathered from a subsequent direction by which the Kolkata Municipal Corporation was directed to proceed in accordance with law after affording opportunity of hearing to the respective parties.

11. It was further brought to the notice of this Court in the Writ Petition that a proceeding has already been initiated as a notice under Section 401 of the Act was issued against the predecessor-in-interest of the present Opposite Parties. The Tribunal have overlooked the aforesaid fact and was swayed by the fact that if the statute requires a show-cause to be issued before passing an order for demolition neither the Court nor the authority can direct to act contrary to law. If the proceeding has been initiated at one point of time, which does not appear to have ended with passing of final order, it would be deemed to remain pending and can be proceeded with. There appears to be some disputes on the existence of the said notice which neither the Joint Municipal Commissioner (G & D) nor the Municipal Building Tribunal have dealt with. The Building Tribunal ought to have satisfied itself whether in fact the said notice was ever issued upon the predecessor-in-interest of the present Opposite Parties or not before coming to conclusion that the notice under Section 400(1) is a statutory mandate and no proceeding can be initiated or proceeded with in absence thereof.

12. It is a settled law that the Court cannot direct the authority to act contrary to law. In fact, this Court while disposing of the Writ Petition never intended to direct the authorities to act in violation of the statutory provisions and the

intention can be sufficiently gathered from the direction that the authorities were directed to proceed in accordance with law. Furthermore, the parties are not *ad idem* on their rival stands on facts and produced documents in support thereof which are required to be scanned and considered by a quasi-judicial authority.

13. So far as the letter dated 11th June, 2015 is concerned, according to the Petitioner there is a clear admission on the alleged unauthorized construction and therefore the Opposite Parties are estopped from challenging the order of demolition.

14. In case of Ram Pyari (*supra*) the tenant suffered an eviction decree from the Court of the first instance, the appeal before the first Appellate Court and the High Court could not yield result in his favour. The challenge was further made to Supreme Court in a Special Leave Petition which was dismissed directing that the order of eviction shall not be executed before three months from date on condition that the tenant shall file an undertaking before the Supreme Court within three weeks therefrom. No undertaking was filed and an application for contempt was taken out by the landlord alleging the violation of the order dismissing the Special Leave Petition. The point that arose before the Supreme Court was whether the tenant can be held guilty of the contempt of Court for non-filing the undertaking. In the above backdrop it is held that no person shall be allowed to mislead the Court with an intent to frustrate the order and directed the possession to be given to the landlord.

15. The aforesaid judgment, in my opinion, is not pointer to an issue raised by the Petitioner before this Court. Furthermore, the Supreme Court was considering whether non-filing of an undertaking would be construed as contemptuous act under the Contempt of Courts Act. Though it was held that it may not amount so but since the tenant secured the time by misleading the Court the direction was passed on the executing Court to see that the possession is delivered to the landlord. The ratio laid down therein cannot be stretched to the proposition whether a person shall be estopped from exercising the statutory right of an appeal or filing a Special Leave Petition before the Supreme Court. The point which clinches an issue is whether a person is estopped from challenging an order or proceeding with an appeal after having accepted the findings recorded in the impugned order relating to an unauthorized construction. The aforesaid point does not appear to have been urged before the Joint Municipal Commissioner (G & D) nor before the Municipal Building Tribunal. It is for the first time in this Revisional Application such point has been taken and therefore, this Court feels that the Tribunal ought to have considered such point.

16. All these points which have a material bearing in the appeal ought to have been addressed by the Tribunal and this Court does not find any justification in remanding the matter for fresh decision. The order impugned is, therefore, set aside.

17. The Building Tribunal is directed to reconsider the appeal in the light of the

observations made hereinabove and it goes without saying that before the final decision is taken an opportunity shall be given to the respective parties of hearing. It is open to the parties to urge any other point available to them before the Tribunal and if such point is taken, the Tribunal shall decide the same on merit in accordance with law.

18. The Revisional Application is, thus, disposed of.

19. There shall be no order as to costs.