
(2011) 04 CAL CK 0002
In the Calcutta High Court
Case No : Writ Petition No. 218 (W) of 2011

Partha Dey

APPELLANT

Vs

Kolkata Municipal Corporation

RESPONDENT

Date of Decision : 01-04-2011

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 364, 390, 392, 396, 396(2)
Constitution of India, 1950 — Article 226

Citation : (2012) 4 CHN 138

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Advocate : Hirak Mitter, Deb Dutta Sen and Moloy Kumar Seal, for the Appellant; Achinta Banerjee, for the Respondent

Judgement

Indira Banerjee, J.—The main question involved in this writ application is, whether compliance with principles of natural justice, is essential for demolition of the three upper storeys of a building, constructed without sanction, in violation of section 392 of the Kolkata Municipal Corporation Act, 1980, hereinafter referred to as "the KMC Act." The petitioner, who claims to be a Civil Engineer, applied for sanction of and was sanctioned a building plan for construction of a four storeyed building (Ground + Three) at the premises specified in paragraph 3 of the writ petition. A copy of the sanctioned building plan is annexed to the writ petition. According to the petitioner, construction of the building has been completed and some interior work is in progress.

2. In or about May, 2010, Kolkata Municipal Corporation, hereinafter referred to as KMC, issued a notice u/s 401 of the KMC Act, calling upon the petitioner to stop all construction, including additions and/or alterations at the premises in question. Guards were also posted to ensure that no further construction was carried out.

3. By a letter served on KMC on 24th August, 2010, the petitioner undertook to suspend all work, and requested the Executive Engineer of the concerned

Borough to withdraw the guards.

4. It is alleged that on 28th December, 2010, some persons claiming themselves to be representatives of KMC started demolishing the fifth floor of the building, whereupon the petitioner filed this application under Article 226 of the Constitution of India. On 31st January, 2011, this Court passed an interim order, restraining the respondents from proceeding with the demolition, which has from time to time been extended.

5. There can be no dispute that while a building plan was sanctioned for construction of a ground + three storeyed building, the petitioner constructed a seven storeyed building (basement + ground + six) having a height of about 20.30 metres.

6. The short question in this writ application is whether a demolition order could have been passed, without giving the petitioner an opportunity of hearing.

7. Section 392 of the 1980 Act provides that no person shall erect or commence to erect any building or execute any of the works specified in section 390, except with the previous sanction of the Municipal Commissioner and in accordance with the provisions of Chapter XXII of the 1980 Act and of the rules and regulations framed under the 1980 Act in relation to erection of building or execution of work.

8. u/s 396, the Municipal Commissioner is required to sanction the building plan or the execution of work unless building or the work could contravene any of the provisions of sub-section (2) or sub-section (3) of section 396 or sections 405 or 406 of the 1980 Act. Sections 405 and 406 are not attracted in this case.

9. Section 396(2) empowers the Municipal Commissioner to refuse sanction of a building or a work on any one or more of the following grounds:

i) Contravention of the provisions of the 1980 Act or any rules and regulations framed thereunder or of any other law for the time being in force.

ii) Notice of sanction being devoid of material particulars and/or not in accordance with the Rules and Regulations.

iii) Want of material information.

iv) Absence of sanctioned lay out plan u/s 364, where necessary.

v) Encroachment of Government land or land vested in KMC.

vi) No access from any street.

10. Section 398(1) of the 1980 Act provides that where, within a period of 60 days, or in cases falling under clauses (b) to (m) of sub-section (1) of section 390, within a period of 30 days of receipt of notice, the Municipal Commissioner does not refuse sanction for erection of a building, or erection of any work, or upon refusal, does not communicate the refusal to the person who has given the notice, such person may make a representation in writing to the Mayor. Section

398(2) provides that where the erection of a building or the erection of any work is sanctioned, the person who has given the notice shall erect the building or execute the work in accordance with such sanction and shall not contravene the provisions of the 1980 Act or any Rules or Regulations framed thereunder or any other law in force.

11. Section 398A imposes a bar to construction of building exceeding thirteen and a half metres in height. Section 400 of the 1980 Act provides as follows:

400. Order of demolition and stoppage of buildings and works in certain cases and appeal.--(1) Where the erection of any building or the execution of any work has been commenced, or is being carried on, or has been completed without or contrary to the sanction referred to in section 396 or in contravention of any of the provisions of this Act or the rules and the regulations made thereunder, the Municipal Commissioner may, in addition to any other action that may be taken under this Act, 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 within such period, not being less than five days and more than fifteen days from the date on which a copy of the order of demolition with a brief statement of the reasons therefor has been delivered to such person, as may be specified in the order:

Provided that no order of demolition shall be made unless such person has been given, by means of a notice served in such manner as the Municipal Commissioner may think fit, a reasonable opportunity of showing cause why such order shall not be made:

Provided further that where the erection or the execution has not been completed, the Municipal Commissioner may by the same order or by a separate order, whether made at the time of the issue of the notice under the first proviso or at any other time, direct such person to stop the erection or the execution until the expiry of the period within which an appeal against the order of demolition, if made, may be preferred under sub-section (3).

(2) The Municipal Commissioner may make an order under sub-section (1), notwithstanding the fact that the assessment of such building has been made for the levy of the (property tax) on lands and buildings.

(3) Any person aggrieved by an order of the Municipal Commissioner made under sub-section (1) may, within thirty days from the date of the order, prefer an appeal against the order to the Municipal Building Tribunal appointed u/s 415.

.....

(7) Where no appeal has been preferred against an order made by the Municipal Commissioner under sub-section (1) or where an order under that sub-section has been confirmed on appeal, whether with or without modification, the person against whom the order has been made shall comply with the order within the period specified therein, or as the case may be, within the period, if any, fixed by

the Municipal Building Tribunal on appeal, and on the failure of such person to comply with the order within such period, the Municipal Commissioner may himself cause the building or the work to which the order relates to be demolished and the expenses of such demolition shall be recoverable from such person as an arrear of tax under this Act.

(8) Notwithstanding anything contained in this Chapter, if the Mayor-in-Council is of the opinion that immediate action is called for in relation to a building or a work being carried on in contravention of the provisions of this Act, it may, for reasons to be recorded in writing, cause such building or work to be demolished forthwith.

12. Mr. H.K. Mitter appearing on behalf of the petitioner emphatically argued that where erection of any building had been commenced in contravention of the provisions of the 1980 Act, the Municipal Commissioner might, in addition to any other action that might be taken under the said Act make an order directing that the erection shall be demolished by the person at whose insistence the erection work had commenced, but after giving him an opportunity of hearing. Mr. Mitter referred to the first proviso of section 401(1) which restrains the Municipal Commissioner from passing an order of demolition without giving the affected person an opportunity of hearing. Mr. Mitter argued that KMC was obliged to give the petitioner an opportunity of hearing by issuing a notice to the petitioner.

13. Mr. Achinta Banerjee, appearing on behalf of KMC on the other hand, argued that KMC had exercised power u/s 400(8) of the 1980 Act. Section 400(8) empowers the Mayor-in-Council to cause immediate demolition if it is of the opinion that immediate action is called for. It would perhaps be pertinent to note that there are separate provisions for removal of dangerous buildings. Removal of dangerous buildings is governed by section 411 of the 1980 Act and the various sub-sections thereunder.

14. If the Municipal Commissioner is of the opinion that any building or wall or anything affixed thereto is in a ruinous state or is likely to fall or is otherwise dangerous, he might cause a written notice to be served on the owner and to be put on some part of the wall or building or served on the occupier, if any, of the building requiring such owner or occupier to forthwith demolish, repair or secure such wall, building or thing. Section 411(4)(a) empowers the Municipal Commissioner to forthwith or with such notice as he thinks fit, demolish, repair or secure or cause to be demolished, repaired or secured any such wall or building or thing affixed thereto, on the report of the Chief Municipal Architect and Town Planner certifying that such demolition, repair or securing of the building, wall or thing is necessary for the safety of the public or the inmates of the building. In such case, the Municipal Commissioner might cause the inmates of the building to be summarily removed. Any action taken by the Municipal Commissioner under sub-section (4) is to be deemed to have been taken lawfully and in good faith unless the contrary is proved.

15. It is difficult to accept the submission of Mr. Mitter that power u/s 400(8) is subject to the satisfaction of the Mayor-in-Council of the building being dangerous and requiring immediate demolition for public safety.

16. Section 400(8) is in relation to construction in deviation of sanctioned plan and/or without sanctioned plan and/or otherwise in contravention of the requisite building rules.

17. Mr. Mitter cited the judgment of a Single Bench of this Court in Sunil Chandra Dey vs. State of West Bengal & Ors. reported in (2007) 2 CLJ (Cal.) 674 and the judgment of another Single Bench of this Court in Ranjit Kar Vs. Calcutta Municipal Corporation, S

18. In Ranjit Kar vs. Kolkata Municipal Corporation (supra) Samaresh Banerjee, J. expressly held that sub-section (1) of section 400 does not take away the power of KMC under sub-section (8) of section 400. His Lordship observed that sub-section (8) of section 400 itself provided that notwithstanding anything contained in the Chapter, if the Mayor-in-Council was of the opinion that immediate action was called for in relation to a building or a work being carried on in contravention of the provisions of the KMC Act, the Mayor-in-Council might for reasons recorded in writing cause such building or work to be demolished forthwith. Banerjee, J. held that the conditions precedent for exercise of power under sub-section (8) of section 400 was formation of requisite opinion of necessity of immediate action and recording of reasons for directing demolition.

19. In Ranjit Kar's case (supra) no records were produced to show that opinion u/s 400(8) had ever been formed by the Mayor-in-Council or that reasons had been recorded by the Mayor-in-Council for directing demolition.

20. In Sunil Chandra Dey (supra) Dipankar Dutta, J. held as follows:

Exercise of power u/s 400(8) cannot be arbitrary or capricious but must satisfy the test of reasonableness. One of the reasons for which the validity of section 400(8) was upheld by the Division Bench appears to be that since power thereunder is exercisable by the Mayor-in-Council, being the second highest body entrusted to carry out the duties of the Corporation, that itself is a safeguard. Although Courts should not normally interfere with matters relating to public safety and security since it is within the domain of the administrative authorities and they are best suited to assess the situation and handle it depending upon the peculiar needs and necessities within their personal knowledge, judicial review of such action nevertheless cannot be and is not excluded and this Court in exercising judicial review power would be competent to examine the materials placed before it for ascertaining whether the resolutions of the Mayor-in-Council are tainted with illegality, irrationality and procedural impropriety or not and in the process the trust and confidence reposed in it by the Division Bench has been honoured by it or not.

From a conspectus of the statutory provisions it seems to be clear that even for

exercise of drastic powers u/s 400(8), the Corporation authorities do not enjoy unbridled and unfettered discretion but a duty is cast on them to discharge certain statutory obligations and in the process to act reasonably. The records placed before this Court have been looked into meticulously reveal that resolutions were passed by the Mayor-in-Council on items which were not included in the main agenda but on outside agenda items. There is no material in the records to establish that the relevant papers were circulated to the members of the Mayor-in-Council beforehand. Assuming *arguendo* that these cases called for emergent action, on the anvil of Reg. 16(3), consideration of the cases as outside agenda items without circulation of papers by itself may not be faulted. However, no order of the Mayor granting permission to place a case on the agenda of the meeting in terms of Reg. 16(3) form part of the records placed before this Court. Finding out the satisfaction recorded by the Mayor dispensing with circulation of the papers to the members of the Mayor-in-Council, in such a circumstance, obviously does not arise and consequently no reason is discernible in support of inclusion of the cases as outside agenda items for discussion without circulation of papers. This affords sufficient ground for this Court to form an opinion that the requirements of Reg. 16(3) were not adhered to in the present cases and procedural impropriety renders the decisions taken vulnerable.

21. There can be no doubt that exercise of power u/s 400(8) cannot be arbitrary or capricious and must satisfy the test of reasonableness. However, the question is whether exercise of power u/s 400(8) can be said to be either arbitrary or unreasonable or capricious when two or three floors are constructed without any sanction whatsoever.

22. In Sunil Chandra Dey's case, six writ petitions were disposed of by a common judgment and order. In case of 5 of the writ petitions there were deviations from sanctioned plan. In case of one of the writ petitioners, the department on inspection found unauthorized construction of RCC frame structure on 3rd and 4th storeyed without sanction. His Lordship meticulously quoted the agenda for the meetings of the Mayor-in-Council as also the resolutions taken therein. The resolutions in all the cases were more or less identical. One of the resolutions is extracted hereinbelow by way of illustrative example "Considering the facts as stated above, it is resolved that the unauthorized building be demolished forthwith u/s 400(8) of the KMC Act."