
(1999) 07 CAL CK 0038
In the Calcutta High Court
Case No : Writ Petition No. 9610 (W) of 1999

Ranjit Kar

APPELLANT

Vs

Calcutta Municipal Corporation

RESPONDENT

Date of Decision : 22-07-1999

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 401

Citation : 104 CWN 156

Hon'ble Judges : Samaresh Banerjea, J

Bench : Single Bench

Advocate : Rabilal Moitra, Bidyut Kr. Bhattacharyya and Amar Bhowmik, for the Appellant; L.C. Bihani, Suchandra Mukherjee and Naba Kumar Das, for the Respondent

Judgement

Samaresh Banerjea, J.—The petitioner in the instant writ-application has challenged the alleged illegal demolition of the portion on the roof of the premises No. 47A, Madhab Haider Road, Calcutta-700 034, as also non-consideration of a representation of the petitioner made before the Executive Engineer, Calcutta Municipal Corporation. It is the case of the petitioner that he is the owner of 3 (three) storeyed building at premises No. 47A, Madhab Haider Road, Cal-700034, which was constructed as per the building plan duly sanctioned by the Calcutta Municipal Corporation by plan No. 26308 dated January 5, 1985. It is alleged that as per the aforesaid plan the entire 3 (three) storeyed construction of the building was completed save and except some minor job towards stair-head room. It is the further case of the petitioner that he undertook some repairing work on the 2nd floor of the said building and for that purpose some bamboos were kept to take on the said repairing works.

2. On 26th September, 1998 the petitioner was (served with a notice issued u/s 401 of the Calcutta Municipal Corporation (C.M.C.) Act, 1980, directing the petitioner to stop forthwith all construction including addition, alteration at the said premises.

3. It is the case of the petitioner that no construction or repairing work was made by the petitioner after receipt of the said notice and thereafter the petitioner made repeated representation requesting the Executive Engineer, C.M.C. to visit the premises in question and to make adjudication for regularisation of the said repairing work. It was stated that no addition or alteration was made by the petitioner and the construction of the three-storeyed building has been made as per a sanctioned plan. Despite the fact the petitioner made repeated representation of the same nature again and again, the same was of no avail.

4. On 10th November, 1998 while the petitioner allegedly engaged some labours to dismantle the bamboos structure from the second floor some persons claiming themselves to be employees of the C.M.C; entered the premises and caused some damages on the roof of the 2nd floor by making few big holes to make the said floor inhabitable. Such demolition was made by strong hammer blows the vibration may affect the very structure of the premises, even thereafter the petitioner made several representations to the respondents but the same also were of no avail. Thereafter, the present writ application has been moved praying for a declaration that the aforesaid demolition was illegal and also for issue of a writ in the nature of Mandamus commanding the respondents to consider and take necessary steps on the basis of the representation made by the petitioner and to give permission to the petitioner for making necessary repairing work on the 2nd floor portion of the building.

5. The respondents C.M.C. have contested the proceeding by filing an affidavit. It is the case of the respondents that the petitioner was not seeking permission to make any repairing work in the said building but fact on inspection held on September 26, 1998 it was found that 14 columns were raised for the purpose of unauthorised construction on open terrace on the second floor for the purpose of raising second floor over the first floor in respect which there was no sanctioned plan at all.

6. It is the further case of the respondents that after such inspection, notice u/s 401 of the C.M.C. was issued on September 26, 1998, itself to stop such unauthorised construction and thereafter report of such unauthorised construction was placed before the Executive Engineer of Calcutta Municipal Corporation and it was found that such construction if allowed to stand, will create several hazards like fire, traffic etc. and it was also found that structure stability and strength of materials were also unknown to the C.M.C. particularly when the abutting road is 4" wide common passage and it may create several problems in future.

7. It is the further case of the respondents that after considering all aspect of the matter the Mayor-in-Council passed an order u/s 400(8) of the said Act and thereafter the demolition of such unauthorised construction as aforesaid was made. It is the further case of the respondents, under the facts and circumstances of the case there was no question of considering the

representation of the petitioner.

8. The learned advocate appearing for the petitioner has submitted, *inter alia*, that after invoking the provision of Section 401 by issuing a notice requesting the petitioner to stop the construction, the Calcutta Municipal Corporation could not have made the demolition in the manner as aforesaid without giving an opportunity of hearing to the petitioner. Referring to the provision of Section 400 of the said Act. It has been submitted although under the provision of Sub-section (1) of Section 400, the C.M.C. may in addition to any other action that may be taken against unauthorised construction may further direct demolition of the unauthorised construction in question, the same cannot be done without recording reasons for such proposed demolition and giving a reasonable opportunity to the person concerned to show cause against such proposed demolition. It has been submitted that admittedly the same has not been done in the instant case and the demolition has been made in gross violation of the principles of natural Justice and also in violation of the proviso of Section 400(1) of the said Act.

9. It has been further submitted that in any event it is not being the case of the C.M.C. that even after serving of notice u/s 401 of the said Act the petitioner continued with the alleged illegal construction, it was incumbent upon the respondent to explain the particular nature of the unauthorised construction or deviation which was being asked for time and again by the petitioner by making representation after representations. It is also the case of the petitioner that there was no occasion for the C.M.C. to effect such demolition by invoking the provisions of Sub-section (8) of Section 400 and no requisite opinion in respect thereof was ever formed. The learned advocate appearing for the C.M.C., however, submitted, *inter alia*, that the provision of Sub-section (8) of Section 400 having been invoked the same having been found to be necessary, the question of giving opportunity to the petitioner to show-cause against the proposed demolition u/s 400(1) of the Act does not arise.

10. It has also been submitted that it is for the appropriate authority, considering the material on record, to consider whether a particular situation warrants invoking the provisions of Sub-section (8) of Section 400 of the Act and in the instant case on the material produced before the Mayor-in-Council, the Mayor-in-Council being satisfied that the situation warrants invoking of such emergency provision, it is not for the writ Court to interfere in such matter particularly when it has been found on fact by the C.M.C. that the construction in question namely raising of 14 pillars on the roof of the second floor was wholly unauthorised.

11. Although the petitioner has claimed in the writ petition that he was only trying to make some minor repairing work, the C.M.C. on inspection of the premises having been found that 14 pillars were sought to be raised on the roof of the second floor with the purpose of raising one floor which is not covered by sanctioned plan, it is not for the Writ Court to go into such disputed question of fact.

12. The question, was whether the demolition in question has been effected by the C.M.C. in valid exercise of power as contained in the relevant provision of the Act. No doubt the said Corporation issued a notice u/s 401 upon the writ petitioner for stopping construction and thereafter the petitioner time and again made representations for pointing out the deviation from the sanctioned plan, if any, claiming that no addition or alteration in the premises was made as alleged beyond the sanctioned plan and the Corporation failed and neglected to even point out specifically to the petitioner the specific nature of the unauthorised construction.

13. Further, pointed out that on enquiry it was found that 14 pillars have been raised, what prevented the C.M.C. promptly to point out the same to the petitioner when such particulars have been specifically asked for by the writ petitioner and when in the notice u/s 401 of the said Act no particulars of such alleged unauthorised construction was mentioned except asking the petitioner to stop addition or alteration. In my view the Corporation certainly should have replied promptly if they are of the view that such construction was wholly unauthorised.

14. The failure of the Corporation, however, to furnish such particulars of unauthorized construction to the petitioner although specifically asked for cannot by itself make an order of demolition bad. I am also unable to accept the contention of Mr. Moitra the learned senior Counsel, appearing for the petitioner that when such notice u/s 401 was served the C.M.C. ought to have given an opportunity to the petitioner u/s 400(1) of the Act to show cause against the proposed demolition. No doubt as per the normal procedure the C.M.C. is bound to follow the aforesaid statutory provisions. But the provisions as laid down in sub-section (1) of Section 400 does not take away the power of the C.M.C. to exercise its power under sub-section (8) of Section 400. In fact Sub-section (8) of Section 400 itself provides 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.

15. In such view of the matter notwithstanding the provisions of subsection (1) of Section 400 it is open to the C.M.C. to invoke its power under Sub-section (8) of Section 400. Such power under sub-section (8) of Section 400, however, can only be exercised strictly in the manner provided in the said section. The provisions of Sub-section (8) of Section 400 itself indicate that this is indeed an emergency power empowering the C.M.C. to demolish a structure without even giving an opportunity of hearing to the concerned person. Under Sub-section (8) of Section 400 when such emergency power is exercised there is no question of giving opportunity to any person even to show to the C.M.C. that the construction in question is not unauthorized.

16. That being the position the power under sub-section (8) of Section 400

obviously can be exercised strictly in the manner it is indicated therein and not otherwise.

17. As it will appear from Sub-section (8) of Section 400 itself that such power can be exercised only if the Mayor-in-Council is of the opinion that the immediate action is called for in relation to any building or a work being carried on in contravention of the provisions of this Act. Before exercise of such power, therefore, it is incumbent upon the Mayor-in-Council to form the requisite opinion that immediate action is called for against the unauthorized construction. It is further incumbent upon the Mayor-in-Council to record the reasons in writing before directing demolition of the construction forthwith.

18. The aforesaid two provisions, therefore, namely formation of requisite opinion before exercise of such power and recording of reasons before directing demolition are condition precedent to exercise of such power under Sub-section (8) of Section 400.

19. Court pointed out that it appeared from the original records produced by the respondents that both of such condition precedents have not been fulfilled. No opinion has been formed by the Mayor-in-Council at all that an immediate action is called for in respect of demolition of the unauthorized construction in question. It also does not appear from the records that the Mayor-in-Council has recorded reasons for directing demolition of the unauthorized construction in question. From the original record produced before this Court by the C.M.C., it appears that a number of complaints were made by the local residents about alleged illegal construction made by the petitioner.

20. On 8th October, 1998 the Executive Engineer submitted a report on the basis of an inspection of the premises held on 26th September, 1998 that the owner of the premises being the present petitioner herein is doing construction of three-storied building from the roof of second floor by erecting 16 number of R.C.C. columns and the party could not produce any sanctioned plan in respect thereof. A notice u/s 401 of the C.M.C. Act was served upon the petitioner. In the said report the alleged unauthorized construction were particularized, namely the aforesaid 16 numbers of columns on the roof. In the said report it was also stated by the Executive Engineer that the "construction if allowed to stand will create several hazards like fire, traffic etc. Moreover structural stability and strength of materials are unknown to the department. Since abutting road is 4" wide common passage, it may create several problems in future. Considering the gravity and safety of the building as well as of the adjoining locality, the file is placed before you to deal the case u/s 400 of C.M.C. Act in suitable sub-section as it deems fit for". The said report was submitted to C.M.C. Ex. Engr (B) XIII & XIV. It also appears from the said note that there was an endorsement by City Architect (S) that C.M.C. (B) may kindly like to consider to pass order with the approval of the authority for taking action under suitable sub-section of Section 400. It was not stated either in the said note of the Executive Engineer as also of the City Architect that the position of the unauthorized construction is such that

immediate action is called for warranting invocation of Sub-section (8) of Section 400 of the Act. In another note dated 16th October, 1998, which has been endorsed on the back of the earlier note, it is that "may be proceeded u/s 400(8) if you kindly agree at least for the top floor by one Sri A Santra. On the left corner of the said note there is another endorsement to the effect CA(S)" got it signed by the M.M.I.C.(B). Lastly on the same page there is an endorsement of the Mayor of Calcutta Corporation to the effect approved in MIC.

21. No record has been produced before this Court showing the proceeding of the Mayor-in-Council wherefrom it can be said that the requisite opinion u/s 400(8) of the Act was ever formed by the Mayor-in-Council and what is the reason for which after formation of such opinion the Mayor-in-Council directed demolition forthwith without giving any hearing.

22. Although Mr. Bihani, learned senior Counsel appearing for the respondents, C.M.C. has strenuously argued before this Court that it will appear from the said endorsement that reasons why immediate action is called for warranting invocation of Section 400(8) of the Act is indicated in the said note of the Executive Engineer, which was approved by appropriate authority, I am unable to accept such contention of Mr. Bihani.

23. As pointed out herein before it is not for any other authority but only for Mayor-in-Council who is required to form necessary opinion for invocation of Sub-section (8) of Section 400 of the Act before directing demolition under the said provision and the reasons must be recorded. Requisite opinion, therefore, is to be formed by the Mayor-in-Council and not by the Executive Engineer or any other authority. Admittedly it will appear from the records that no such requisite opinion was ever formed by the Mayor-in-Council nor any reason has been recorded warranting demolition in the manner as aforesaid.

24. Even assuming that the approval of the note given by the Executive Engineer having been approved by the others and the Mayor-in-Council would amount to formation of the requisite opinion, even then in the instant case such note of the Executive Engineer is hardly of any help to the respondents. The Executive Engineer merely indicated about certain hazards which may like to occur if such unauthorized construction is allowed to stand, nowhere it has been stated that such hazards of such nature which led to serious consequences unless such unauthorized construction was removed forthwith.

25. On the contrary the said Executive Engineer himself very rightly left the matter to the decision of the appropriate authority considering the gravity of the situation and safety of the building as to what proper action to be taken u/s 400 of the Act. From the endorsement made by the authorities it is not clear at all why any immediate action is called for to demolish the unauthorized construction or the unauthorized construction is of such nature unless the same is removed forthwith the same was led to serious consequence and therefore exercise of such emergency power is necessary. In terms of the said note the decision of the

Mayor-in-Council, assuming the same was done, therefore, certainly is not after fulfillment of the condition precedents as laid down in the said provisions of the Act which the Legislature in its wisdom has very rightly introduced.

26. Normally the procedure is to give an opportunity to the person concerned to satisfy the Corporation that the construction in question is not unauthorized; the Legislature in its wisdom has enacted Sub-section (8) of Section 400 of the Act obviously keeping in mind that an emergency situation may called for immediate action when such opportunity can not be given.

27. In the instant case there is nothing in the record that such condition precedent was fulfilled before passing of such order. Because of the reasons stated above the exercise of power of the C.M.C. for demolition, invoking Sub-section (8) of Section 400, was wholly unauthorized and without jurisdiction and is wholly contrary to the provision of Sub-section (8) of Section 400 of the said Act.

28. The question, therefore, which is now left is what relief the petitioner is entitled to obtain in the instant writ petition. In my view, under the facts and circumstances of this case since demolition has already taken place, the only order which can be passed by the writ Court at this stage is that the Calcutta Municipal Corporation must give opportunity to the petitioner in full to satisfy itself that the construction in question was not unauthorized and in the event, the petitioner succeeds to satisfy the Calcutta Municipal Corporation that the construction in question was not unauthorized, the petitioner will certainly be entitled to claim damages and compensation against the Calcutta Municipal Corporation and shall be entitled to effect necessary repair of the damaged portion of the authorized construction, if any, caused by the demolition at the cost of Calcutta Municipal Corporation.

29. I, therefore, dispose of the writ application by passing the following order -

The petitioner within a fortnight from communication of the order shall make a detailed representation before the Chief Municipal Engineer (Building) in support of his contention, if any, that the construction in question which has been demolished was not unauthorized. On receipt of such representation aforesaid, the said Chief Municipal Engineer (Building) shall adjudicate the question after giving hearing to both to the writ petitioner as well as to the Executive Engineer (Bldg.) Borough No. XIII by passing a reasoned[^] and speaking order. It is made clear that both the parties in such adjudication proceeding will be entitled to lead evidence both oral and documentary both on the question whether the construction in question was unauthorized or not and on the question of assessment of damages, if any, and the Chief Municipal Engineer (Building) considering all aspects of the matter shall pass the order in accordance with law within a period of six weeks from the date of receipt of such representation of the writ petitioner. For the purpose of such adjudication, it will be open to the said Chief Municipal Engineer (Building) to hold inspection of the premises either

himself or through his nominee who, however, must not be the persons who submitted the reports, namely, the concerned Executive Engineer or otherwise.

30. Any of the parties. If aggrieved by the aforesaid order of adjudicating will be at liberty to prefer an appeal before the Municipal Building Tribunal.

31. Let a copy of this judgment be forwarded by the registry to the Mayor-in-Council and the Municipal Commissioner, Calcutta Municipal Corporation forthwith. Let a plain copy of the operative part of this judgment be given to the learned Advocate for the respective parties. Such plain copy shall be duly countersigned by this Assistant Registrar (Court).