(2009) 06 CAL CK 0005

Calcutta High Court

Case No: Writ Petition No. 621 of 2007

Sarita Agarwal		APPELLANT
	Vs	
Municipal Building Tribunal, Kolkata Municipal Corporation and Others		RESPONDENT

Date of Decision: June 29, 2009

Acts Referred:

- Calcutta Municipal Corporation Act, 1980 - Section 400(1), 400(8)

Citation: (2009) 3 CALLT 231

Hon'ble Judges: Tapan Kumar Dutt, J

Bench: Single Bench

Advocate: Pratap Chatterjee, Mr. Ranjan Bachwat, Mr. Amitesh Banerjee and Anju Bansal, for the Appellant; Saktinath Mukherjee, Chandranath Mukherjee, A. Chatterjee, S. Mukherjee and Rekha Ghosh, for Private Respondents, Mr. Aloke Kumar Ghose for the K.M.C and Mr. Dilip Chatterjee for the Respondent Nos. 3 and 4, for the Respondent

Final Decision: Dismissed

Judgement

Tapan Kumar Dutt, J.

This Court has heard the learned advocates for the respective parties. The petitioner''s case in brief is that the petitioner is a tenant in respect of a terrace flat at premises No.4A, Shambhunath Pandit Street, Kolkata (hereinafter referred to as the said premises) under the respondent Nos. 6 and 7 which was previously owned by Sri Satyendra Nath Maitra who had granted the said tenancy in favour of the petitioner''s late husband Sudesh Kumar Agarwal and after the death of the petitioner''s husband on 18th June, 1970 the said tenancy was transferred in favour of the petitioner and rent receipts were, accordingly, issued. Petitioner''s further case is that the said flat is in the same condition as it was at the time when the petitioner''s husband inducted as a tenant and the petitioner has not made any construction, alteration and/or reconstruction in or of the said flat. It appears from

the writ petition that on or about 15.01.1998 the respondent Nos. 6 and 7 purchased the said premises including the tenanted portion enjoyed by the petitioner and her family. The petitioner''s case is that the private respondents started harassing the petitioner by bringing various frivolous proceedings against the petitioner and also stopped accepting the rent tendered by the petitioner and the petitioner has been depositing the rent with the Rent Controller. Petitioner''s further case is that at the instance of the respondent Nos. 6 and 7 the respondent Municipal authority came to demolish the tenanted portion of the petitioner and it was only by act of god that the petitioner''s tenancy was saved from demolition - the petitioner had to move this Court in the writ jurisdiction and the respondent Municipal authorities were restrained, by way of an interim order, from proceeding u/s 400(8) of the Calcutta, Municipal Corporation Act, 1980 but the respondent Municipal authorities were granted liberty to take expeditious steps under the other provisions of the Act. The petitioner''s case is that the petitioner was subsequently served with a notice dated 21.06.2000 u/s 400(1) of the Calcutta Municipal Corporation Act, 1980 (hereinafter referred to as the said Act) wherein it was inter alia stated that the "Construction of (i) Asbestos shed 4.0m x 2.0m on the roof of 4th Storey (ii) Divided by the wooden partition at the 4th storey in stair block - All are without permission" and it was further alleged in the said notice that there were infringements of certain Building Rules. Following the said notice hearing took place and the respondent No.4 allowed the petitioner to retain the wooden partition at the 4th storey in the stair block without any payment of erection/re-erection charges and also allowing the petitioner to retain the asbestos shed subject to payment of erection/re-erection charges. The private respondent Nos. 6 and 7 filed an appeal against the said order dated 08.11.2000 and by an order dated 28.09.2001 the Municipal Building Tribunal set aside the order dated 08.11.2000 and thus allowed the said appeal and sent the case back on remand in the light of the observations made in the said order for fresh hearing. It appears that the private respondents have filed a suit in the Civil Court and parties have fought against each other on certain interlocutory matters. However, a second notice dated 10.07.2003 was issued by the respondent Municipal authorities u/s 400(1) of the said Act of 1980 and the matter was again heard by another Special Officer (Building) who by order dated 03.06.2004 declined to pass any order of demolition in respect of "deviated unauthorised constructions" subject to compliance with certain pre-conditions within 30 days from the date of communication of the order and those pre-conditions were (1) the petitioner must produce a certificate from any empanelled Structural Engineer certifying that the structural stability and the foundation of the impugned constructions are safe and sound and the materials used as well as workmanship are as per the latest edition of National Building Code of India, (2) the petitioner must furnish an affidavit declaring on oath that she will not make any construction whatsoever in the said premises without prior sanction from the Kolkata Municipal Corporation authority and that she will not claim any ownership on those unauthorised constructions and (3) the petitioner must pay the necessary charges, if any, for not passing any

demolition order and allowing the impugned constructions to stand, as per Building Rule 40(1)(c) of KMC Building Rules, 1990. It was further ordered by the Special Officer that on non-compliance of "either of the conditions" within the stipulated period the KMC authority shall demolish the same at the cost and at the risk of the petitioner.

2. It appears from the said order dated 03.06.2004 that the Special Officer (respondent No.4) found that prima facie it appeared to him that the constructions in question were made without any sanction and that no sanctioned plan could be shown to the respondent No.4. The respondent No.4 further observed that from the inspection book he found that at the 4th storey in respect of the period 1969-70 (4th quarter) there were four rooms + one big room + Asbestos shed - 2 (B+P) and the name of the occupier is Sarita Agarwal and that on paring such recordings with the demolition sketch he found that apart from those rooms, toilets, bath etc. one Puja room and one Asbestos shed room 4.0m x 2.0m were found in excess which have been shown in the demolition sketch as unauthorised. After having made such findings the respondent No.4 further found that the Inspection Book does not help the petitioner in any way to establish that the impugned constructions were in existence since 4th quarter of 1969-70. The respondent No.4 further came to the finding that he is unable to accept the submission of the petitioner to the effect that she is not in any way connected with the impugned unauthorised constructions. The respondent No.4 found that in his considered opinion petitioner is responsible for the impugned unauthorised construction. The respondent No.4 came to the conclusion that the petitioner has violated Rule 109 and 110 of the Building Rules since the impugned construction was made without sanction. The respondent No.4 was of the opinion that in view of section 400(1) read with section 48(3)(b) of the said Act the respondent No.4 being "delegate of the Municipal Commissioner" has got some discretionary power not to order for demolition in each and every case of unauthorised construction on finding sufficient cause. The respondent No.4 found that the impugned construction has been in existence for a long time if not from the 4th quarter of 1969-70 and the impugned construction is not so grave and serious and infraction of the Building Rules are very minor.

3. The respondent Nos. 6 and 7 challenged the said order dated 03.06.2004 before the Municipal Building Tribunal in an appeal being BT No. 72 of 2004. The said appeal was disposed of by order dated 4th April, 2007 and the said appeal was allowed and the order dated 03.06.2004 passed by the respondent No.4 was set aside with a direction upon the petitioner to demolish the impugned construction within 30 days from the date of the delivery of the said judgment and in default the Kolkata Municipal authority will demolish the same at the cost and risk of the petitioner. The Municipal Building Tribunal in the said order dated 04.04.2007 found that (1) admittedly the respondent Nos. 6 and 7 are the owners of the said premises and the petitioner is a tenant in the said property (2) admittedly a tenant has no right of construction and any deviation/addition/alteration/extension of the tenancy,

even if required, is to be made subject to written permission/consent of the landlord and for major construction permission of the Kolkata Municipal Corporation is also required. On perusing the Inspection Book concerned and also the certified copy of the purchase deed of the respondent Nos. 6 and 7 the Municipal Building Tribunal came to the finding that the puja room and the Asbestos shed room in question were not in existence within the tenancy of the petitioner and the said tribunal had sufficient reasons to believe that all such impugned constructions were made by the petitioner at her own risk for which she is responsible. The Tribunal further found that the order of the respondent No.4 is self-conflicting. The Tribunal was also of the opinion that the respondent No.4 had extended the right of retention of the constructions in question to a tenant, like in the case of an owner, when the owner of the premises has serious objection to it.

4. The said order dated 04.04.2007 passed by the said Tribunal has been challenged by the petitioner in the present writ application. It also appears from the writ petition that an ejectment suit has been filed by the respondent Nos. 6 and 7 against the petitioner.

5. The respondent Nos. 1 to 5 and the respondent Nos. 6 and 7 have filed their respective affidavits-in-opposition.

6. Having heard the learned advocates for the respective parties and having considered the written notes of arguments submitted on behalf of the respective parties and the other materials on record, it appears to this Court that the Kolkata Municipal Corporation authorities have taken the stand that the findings by the Municipal Building Tribunal and the conclusion of the said Tribunal on the basis of the findings as appearing in the impugned order are not correct and proper. The further submission made on behalf of the Kolkata Municipal Corporation authorities is that the order by which the petitioner was allowed to retain the construction in question is correct and proper and should be upheld.

7. The argument that was advanced on behalf of the writ petitioner was that the Municipal Building Tribunal while hearing an appeal from an order passed by the Special Officer (Building) could not have taken into consideration the civil disputes between the petitioner and the respondent Nos. 6 and 7 i.e. between the tenant and the landlords. The learned advocate for the petitioner further submitted that it was wrongly recorded in the impugned order that the Special Officer (Building) had opined that the structures were ''new'' since it would appear from the order of the Special Officer (Building) that nowhere the word ''new'' has been recorded in his order. The further contention on behalf of the writ petitioner is that a tenant can seek regularisation in respect of any unauthorised and/or illegal construction since a provision has been made in section 400(1) of the said Act of 1980 for service of notice upon an occupier. Another submission that was made on behalf of the writ petitioner was that in a case where it is found that the offending structures are not very serious and grave and the infraction of the Building Rules are not major the

Municipal authorities may allow person concerned to retain such structures. According, to the learned advocate for the petitioner, since in the instant case it has been held by the Special Officer (Building) that the offending structures are not grave or serious and the infraction of the Building Rules are minor, the question of demolition of such offending structures does not arise.

8. The petitioner''s learned advocate has relied upon a decision reported at Purusottam Lalji and Others Vs. Ratan Lal Agarwalla and Others, It will appear from such reported decision that in the said reported case the owners of the premises concerned had made the offending construction which was conversion of RT roof to a flat terrace roof by raising the heights of the walls. Thus, from the point of view of facts, the said reported case is not similar to the instant case. The nature of the offending constructions are different in the two cases and in the instant case it is the tenant who has made the offending structures. However, in paragraph 5 of the said reports the Full Bench of this Court was pleased to observe that it would appear from section 414 of the Calcutta Municipal Act, 1951 that a discretion was vested upon the Commissioner and such discretion was for the purpose of facilitating the scheme and the object of the Calcutta Municipal Act, 1951. Their Lordships were pleased to observe that such discretion must be used bona fide and not on any extraneous ground. Their Lordships was further pleased to observe that if in an appropriate case where it is found that there has been infraction of a certain rules, which cannot be relaxed or which has not been relaxed, the parties show sufficient cause to the Commissioner, for example, that the infraction is of minor nature or has not in any way affected the sanitation or ventilation and the amenities of the building in question and other adjoining premise, then the Commissioner has the discretion not to order demolition. The said reported case cannot be of any assistance to the petitioner since a particular basic question has arisen in the instant case as raised on behalf of the respondent Nos. 6 and 7. The Building Tribunal, in the impugned order, has observed that the demolition sketch map also shows the gate on the entry of the roof and different inspection report of the officers of the Calcutta Municipal Corporation also speaks how the petitioner obstructed the owners from having free access to the roof and how inspection could not be held due to locking of the said gate. Such observation can hardly be said to be a decision on a civil dispute between the landlord and tenant. The Building Tribunal has only recorded its findings from the materials on record before it.

9. The grievance made on behalf of the writ petitioner that even though the Special Officer (Building) had never opined that the structures in question were new yet the Building Tribunal has observed that the Special Officer (Building) has recorded such opinion does not really have any bearing on the decision of this case since it will appear from the order dated 03.06.2004 of the Special Officer (Building) that he had found that prima facie it appeared to him that the constructions in dispute were made without any sanction and the materials on record do not help the petitioner in any way to establish that the offending constructions were in existence since the

year 1969-70 4th quarter and that in his considered opinion the petitioner is responsible for the offending unauthorised construction.

10. The argument advanced on behalf of the respondent Nos. 6 and 7 was that the illegal construction made by the petitioner on the roof of the 3rd floor of the premises in question was not within the tenanted portion of the petitioner and that such illegal construction has stopped the ingress and egress of the landlords (respondent Nos. 6 and 7) to the roof of the 3rd floor. It has been argued on behalf of the respondent Nos. 6 and 7 that the writ petitioner has no locus standi to file the writ petition as she has no right to erect and/or apply for sanction of the construction in question. According to the learned counsel for the respondent Nos. 6 and 7 the Building Rule 4(8) of the relevant Building Rules gives exclusive right to the landlord to apply for sanction of a building plan. It is the case of the respondent Nos. 6 and 7 that a person who has no right to apply for sanction of a construction under the law cannot have any right to protect the illegal construction. The learned counsel for the respondent Nos. 6 and 7 has referred to section 5(4) of the West Bengal Premises Tenancy Act, 1997 and also the scheme of the West Bengal Premises Tenancy Act, 1956 and submitted that such Acts did not and/or do not permit the tenant to make any addition and/or alteration in the tenanted premises without the written permission of the landlord According to the said learned counsel, in the present case the writ petitioner made the offending construction not only without any sanctioned plan bill also without any kind of authorisation from the landlords (respondent Nos. 6 and 7). It is the further case of the respondent Nos. 6 and 7 that the said Act of 1980 does not contain any provision under which a tenant can be allowed to retain an illegal construction and the said Act of 1980 cannot regularise the constructions made by a tenant who is not entitled to make such construction unless the landlord agrees to the same in writing. It was further submitted on behalf of the respondent Nos. 6 and 7 that the illegal offending construction in the present case is not at all minor in nature and the same is damaging the premises of the respondent Nos. 6 and 7 and also causing obstruction to the ingress into and egress to the roof of the said premises where the landlord has the split unit of the Air conditioner and the water tank but the landlords are being prevented from properly maintaining such things owing to the obstruction to the free ingress and egress in respect of the said roof.

11. A number of decisions were cited on behalf of the respondent Nos. 6 and 7. Their learned advocate cited a decision reported at 2001(1) CHN 4 (C.M.C. & Anr. v. Abid Hossain and another case). In paragraph 12 of the said reports the Hon''ble Division Bench has been pleased to observe "A building erected by a person, who owns the land or who is authorised to erect a building on a piece of land, has a right to property in the building erected on such land. If a person erects a building on a land which belongs to the public, he has no right to property in the building. Similarly the building must be erected in accordance with the sanction. If a building has been erected without sanction, such erection being an illegal erection, no right

to property flows therefrom. Similarly a person, who is authorised to erect a building in accordance with sanction, erects a building in excess of the sanction or contrary to the sanction, to the extent the erection is beyond sanction or contrary to sanction, the person concerned cannot be said to have any right to property therein. "While considering the provisions of section 400 of the Calcutta Municipal Corporation Act, 1980, Their Lordships were pleased to observe in paragraph 13 of the said reports that "The purpose and object of exercise of power in both the situations are ane and the same, to prevent contravention of the provisions of the Act in relation to a building or a work being carried on." The learned advocate for the petitioner has tried to distinguish the said reported case by submitting that the infraction of Building Rules in the present case is of minor nature and the question of regularisation was not at all discussed in the said reports. From the impugned order, it appears that the Tribunal has found that the Special Officer (Building) has very casually considered such infraction of rules as minor and ignoring the effect of the said construction. The respondent Nos. 6 and 7 in their affidavit-in-opposition in paragraph 5(xvii) has stated that the offending construction is so grave and serious that it has already damaged the living room of the private respondents due to percolation of dirty water from the illegal bathroom constructed by the petitioner and the petitioner has also obstructed the natural air and light of the private respondents by restraining the private respondents from going to the roof by erecting unauthorised structures thereon. It has been further stated by the respondent Nos. 6 and 7 that the service engineers were not allowed to go to the roof to service the split units of the air conditioners. In paragraph 5(xviii) of the said affidavit-in-opposition the respondent Nos. 6 and 7 have stated that because of the fact that the free access to the roof has been obstructed by the petitioner, the private respondents are unable to maintain the roof and clean the overhead water tank thereby causing serious difficulties. Thus is is difficult to accept the stand taken by the writ petitioner that the offending construction is not of a grave and serious nature. Even though the question of regularisation might not have been the subject matter for consideration in the said reports yet it is found that in paragraph 12 of the said reports Their Lordships were pleased to observe as already quoted above. It will appear that the law contemplates that only a person who owns the land or who is authorised to erect a building on a piece of land has a right to property in the building erected on such land. In the present case, the petitioner is neither the owner of the building in question nor is he authorised under the law to make any construction in the premises in question. The relevant provisions of law governing the landlord and tenant relationship clearly prevents the tenant from making any addition to or alteration in the premises without the written consent of the landlord. Section 5(4) of the West Bengal Premises Tenancy Act, 1997 stipulates as follows:

No tenant shall make any addition to or alteration in the premises without the written consent of the landlord.

12. Under the relevant provisions of the West Bengal Premises Tenancy Act, 1956, read with the Transfer of Property Act, 1882 if a tenant makes any permanent construction without the consent of the landlord then in that event such act of the tenant can be a ground for eviction against the tenant. A tenant is not entitled under the law to make any permanent structure on the tenanted property without the consent of the landlord.

13. Thus we find that the effort of the part of the petitioner to make the said reported case inapplicable to the facts of the present case cannot succeed.

14. The next decision cited on behalf of the respondent Nos. 6 and 7 is the one reported at Kumuda Sundari Properties (Private) Ltd. and Others Vs. Namdang Tea Co. Ltd., . In the said reports the respondent No. 1 who claimed to be a monthly tenant under the appellant No.2 in respect of the ground floor flat at premises No. 11/1, Sunny Park, P.S. Ballygunj, Calcutta moved a writ petition in this Court praying that the purported plan sanctioned by the Calcutta Municipal Corporation in regard to a construction of a building at Premises No. 11 /1, Sunny Park be cancelled and/or quashed-and also for commanding the said Corporation to withdraw or recall or rescind the said plan. An Hon''ble single Judge of this Court directed the said writ petitioner/respondent No. 1 to serve the copies of the writ petition on the respondents in the writ petition and in the meantime granted an ex parte interim order of injunction inter alia restraining the landlords from making any construction in the Premises No. 11/1, Sunny Park and against such interim order an appeal was preferred before the Hon''ble Division Bench. In paragraph 5 of the said reports the Hon''ble Division Bench was pleased to observe that "Prima facie, before granting of permission under Rule 55 of Schedule XVI of the Calcutta Municipal Corporation Act, 1980, (1951?) the respondent No.1, who was a monthly tenant under the appellant No.2, was not entitled to receive any notice off hearing. Schedule XVI does not contain any provision for giving such notice or opportunity of hearing to the monthly tenant of the premises, in case the owner or the landlord of the said premises applies for sanction of a plan for building, rebuilding and/or additions or alterations." In paragraph 11 of the said reports the Hon''ble Court was pleased to observe "We, however, make it clear that in any future proceeding if commenced against the appellants, the present respondent No. 1, Namdang Tea Co. Ltd., need not be given notice of hearing." It is true that in the facts and circumstances of the said reports the right of a tenant to be heard at the time of sanctioning of a building plan was the subject-matter of consideration but it has been held in the said reports that under scheme of the Act that was involved in the said case the tenant was not entitled to such notice of hearing at the time of considering the sanctioning of the plan. An attempt made on behalf of the writ petitioners to distinguish the said reported case by submitting that the said reported case was dealing with a dispute between the landlord and the tenant at the pre-sanction stage cannot be of any assistance to the writ petitioners because even u/s 400(1) of the Kolkata Municipal Corporation Act, the Kolkata Municipal Corporation authority cannot allow a tenant

to retain unauthorised structures by making payment of certain charges as has been illegally ordered by the Special Officer (Building).

15. The other judgment cited on behalf of the respondent Nos. 6 and 7 is the one reported at 2002 (4) CHN 592 (Hallmark Consultants Put. Ltd. v. Municipal Commissioner, Calcutta Municipal Corporation & Ors.). In paragraph 8 of the said reports an Hon''ble single Judge of this Court was pleased to observe that "Where as sub-section(l) of section 400 of the Act authorises demolition of erection of any building or the execution of any work which 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 the provisions of the Act or the Rules and Regulations made thereunder, the same does not expressly authorises the Corporation to condone such erection or execution of work or to regularise the same; but sub-section(1)'' of section 416, however, specifically authorises the Corporation to permit change of user of a building. Similarly neither sub-section(l) of section 400, nor any other sub-section contained in section 400 of the Act authorise the Corporation to levy any fine or penalty or charges or damages for erection of any building or execution of any work without or contrary to the sanction or in contravention of the provisions of the Act or the Rules or Regulations made thereunder; but sub-section(4) of section 416 specifically authorizes the Corporation to levy and recover a fine if there has been an unauthorised user of the building in question. Chapter 38 of the Act deals with offences and penalties. None of the sections contained in the said Chapter, however, imposes any penalty for erection of any building or the execution of any work without or contrary to the sanction referred to in section 396 or in contravention of any of the provisions of the Act. Although sub-section(l) of section 400 of the Act '' authorises demolition or erection of any building or execution of any work without or contrary to the sanction or in contravention of the provisions of the Act or the Rules and Regulations made, thereunder but while conferring such power the legislature has consciously used the expression "may" and not "shall". Therefore, legislature has consciously conferred discretion upon the respondent Corporation in the matter of demolishing the erection of the building or execution of the work which 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 the Act or the Rules and Regulations made thereunder. This is because a small infraction of the sanction will be contrary to the sanction and similarly a slight infraction, of the Building Rules and Regulations made under the Act would be in contravention of such Rules and Regulations entailing demolition. Having regard to the fact that while a construction is being made there may be minor and insignificant infraction of the sanction or of the Rules and Regulations, the legislature has expressly conferred a discretion upon the respondent Corporation to permit retention of such construction but for that has not authorised the Corporation to claim either any fees or any penalty or any fine. The respondent Corporation being a statutory

Corporation can act only within the four corners of the statute by which it has been constituted as well as the Rules and Regulations framed thereunder and cannot act in a manner beyond. The respondent Corporation may also act in the manner it has been authorised to act by some other statute or Rules and Regulations framed thereunder but my attention has not been drawn to any Act or Rules or Regulations which authorise the Corporation to levy a fee or fine or penalty as a condition for retaining minor or insignificant infringement of the sanction or of the Act or of the provisions of the Building Rules and the Rules and Regulations made under the Act." Keeping in view the said reports in mind it will be seen that the Special Officer (Building)''s order, as indicated above, was without jurisdiction as he was not authorised to allow the writ petitioner to regularise the unauthorised constructions by making payment of certain amount for the purpose of allowing the writ petitioner to retain such unauthorised construction. This Court has already held above that it is difficult to accept the stand taken by the writ petitioner that the offending constructions are not of grave and serious nature considering the materials on record. The attempt on the part of the writ petitioners to wriggle out of the applicability of the said reports by banking upon the observations made in the said reports that the Calcutta Municipal Corporation can direct, in case of minor and insignificant infractions of the sanctioned building plan or the relevant Building Rules and Regulations, retention of such structures, cannot succeed as this Court has already found above that it cannot be said that the offending constructions are not grave and/or serious. It will appeal from the affidavit-in-opposition of the respondent Nos. 6 and 7 that the offending constructions are not minor and insignificant in nature.

16. The next decision cited by the learned counsel for the respondent Nos. 6 and 7 is the one reported in Mahendra Baburao Mahadik and Others Vs. Subhash Krishna Kanitkar and Others, . An 1 attempt was made on behalf of the writ petitioner to show that the said reports which was cited by the learned counsel for the respondent Nos. 6 and 7 in support of their submission that the proper course to deal with an unauthorised construction is to demolish the same is not applicable in the instant case since it does not rebut the proposition that in case of minor infractions of the sanctioned plan and/or the Building Rules retention of structures can be allowed. Thus the said reports are not of any relevance in the present case. This Court has already held that the offending constructions in the instant case are not minor in nature and as such the attempt on behalf of the writ petitioners to distinguish the said case cannot succeed.

17. The other judgment which was cited by the learned counsel for the respondent Nos. 6 and 7 is the one reported at Rameshwar Roy Vs. Baidhendra Kinkar Patra, . In paragraph 28 of the said reports the Hon''ble Court was pleased to observe that "Admittedly, the disputed western verandah is not a part of the appellant''s tenancy and it within the occupation of the plaintiff landlord as per his own statement since, the plaintiff/respondent in the plaint had categorically stated that the disputed

western verandah was not included within the tenancy of the defendant/appellant and/or it was not a part of his tenancy as his tenancy comprised of one room on the first floor, two rooms on the ground floor and user of common bath and privy. The learned trial Judge also came to a categorical finding that the disputed western passage on the first floor of premises No.5/2, Ram Kanai Adhikari Lane, Calcutta-12, was not within the tenancy held by the defendant/appellant in the suit premises. In such view of the matter, even if the defendant/appellant had illegally and/or forcibly occupied the said western verandah and converted the same into a kitchen and also made construction on the same, thereby committing nuisance and annoyance to the plaintiff/respondent, the plaintiff/respondent being the owner thereof should bring proper proceeding to get possession of the said verandah by ousting the defendant/appellant therefrom, treating him as a trespasser and/or unauthorised possessor of the said verandah, but cannot evict the defendant/appellant from his tenancy on the ground that his such acts amount to contravention of clauses (b) (d) and (e) of section 13(1) of the West Bengal Premises Tenancy Act, 1956 as according to us clauses (m), (o) and (p) of section 108 of the Transfer of Property Act, would only apply to the premises demised and not to any other premises or building." The learned counsel on behalf of the petitioner submitted that the said reports is not of much relevance in the present case since it dealt with the rights of landlords and tenant under the West Bengal Premises Tenancy Act and the issue whether the tenant has made any illegal constructions has to be determined in a suit and cannot be an issue in the writ petition. It is true that the said reported case did not deal with the provisions of the Kolkata Municipal Corporation Act, 1980 and the question of demolition of unauthorised constructions by tenants, but from paragraph 28 of the said reports it can be seen that if a tenant makes an illegal construction outside his tenanted portion by forcibly occupying any portion outside his tenancy then in that event the tenant can be treated to be a trespasser.

18. Thus, this Court finds, considering the facts and circumstances of the instant case and the judgments cited at the bar, that the Special Officer (Building) has acted illegally in allowing the writ petitioner to retain the unauthorised constructions in question by complying with certain conditions stipulated in his order mentioned above.

19. Submissions were made on behalf of the respondent Nos. 6 and 7 that the writ petitioner being a tenant having no right under the law to apply for sanction of any construction in the said premises can not have the right to protect the illegal construction and the writ petitioner cannot be allowed to retain the unauthorised and illegal construction made by her and it was further submitted on behalf of the said respondents that it is not within the purview of the Kolkata Municipal Corporation Act to allow regularisation of an unauthorised and illegal construction at the instance of a tenant. Such submissions on behalf of the said respondent Nos. 6 and 7 and also their further submissions made through their learned counsel that in the instant case the writ petitioner made the constructions in question not only

without any sanctioned plan but also without any authorisation from the landlords require serious consideration. The learned counsel appearing on behalf of the Kolkata Municipal Corporation authorities has tried to rely upon the provisions of section 400(1) in order to support his submission that the order of the Special Officer (Building) allowing retention of the impugned constructions in favour of the writ petitioner is correct and proper and such order should be upheld. The learned counsel on behalf of the writ petitioner also tried to emphasise on the provisions of section 400(1) of the said Act of 1980 where it provides for service of notice on the occupier in a proceeding under the provisions of said section. The learned advocate appearing on behalf of the Kolkata Municipal Corporation authorities attempted to make a distinction between the pre-sanctioned stage and the post-sanctioned stage. It was submitted on behalf of the Kolkata Municipal Corporation authorities that it is true that while obtaining a sanction of a building plan before making any construction one is required to fulfil the required formalities including the criterion of having his/her exclusive right to erect with supporting documents but the situation is different when the unauthorised construction is allowed to be retained while disposing of a demolition proceeding. The said learned advocate further submitted that the provisions of section 400(1) of the said Act of 1980 makes it clear that the unauthorised construction may be made not only at the instance of the owner but also at the instance of others including occupiers/tenants and therefore the said section provides that the proceeding should be initiated against the person at whose instance the impugned construction has been commenced or is being carried on or has been completed. Such submission has been recorded in the written notes of arguments also on behalf of the respondent Nos. 2, 3 and 4. Section 400(1) of the said Act of 1980 reads as follows:

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 therefore 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).

Explanation.-In this Chapter, "the person at whose instance" shall mean the owner, occupier or any other person who causes the erection of any building or execution of any work to be done, including alterations if any, or does it by himself.

20. Reading the aforesaid provision of law it will be clear that the order u/s 400(1) may be issued by the Municipal Commissioner to the person at whose instance the unauthorised and/or illegal construction has been commenced or is being carried on or has been completed. The expression "the person at whose instance" has been explained in the said section and it shall mean the owner, occupier or any other person who causes the erection of any building or execution of any work to be done including alterations, if any, or does it by himself. Thus a notice u/s 400(1) can be legally issued against a tenant in a premises if at the instance of such tenant the unauthorised/illegal construction has been done. But the provision of the said section indicates that the order under the said section is for demolition of the offending construction and not for the purpose of retention of any unauthorised/illegal construction made by a tenant. This is quite logical because of the reason that if a tenant without obtaining any permission from the landlord makes an unauthorised and illegal construction in the premises without the knowledge and/or consent of the landlord or forcibly, inspite of objection being raised by the landlord, makes such unauthorised/illegal construction, the landlord should not be saddled with the responsibility of demolishing such construction and incur expenses for the same. In other words, for the wrongful acts and the misdeeds of a tenant the landlord cannot be directed to make the atonement. Therefore, it is only proper that the tenant should clear his misdeeds, if he has committed any, at his own expense and that is the reason why the said section 400(1) stipulates that the-order under the said section should be directed against the person at whose instance the unauthorised/illegal construction is being or has been done. This does not and cannot mean that a tenant will be allowed to retain an unauthorised and illegal construction on the property of another person, namely, the landlord against the wishes of such landlord. If the tenant is permitted to retain such constructions which are unauthorised and illegal on the property of the landlord and against the wishes of the landlord then in that event it would definitely result in an anarchy. In such a case the landlord being the owner of the property will be seriously prejudiced as there would be a blatant infringement on his right in respect of such property. That apart, the law governing the relationship of landlord and tenant clearly stipulates that without the written permission of the landlord the tenant cannot make any addition to or alteration in the tenanted premises. The

question of the tenant being allowed to retain the unauthorised and illegal construction made by such tenant in any area outside his tenancy cannot arise at all since a tenant''s forcible occupation outside his tenancy renders him to be a trespasser in so far as the area outside the tenancy is concerned.

21. It will appear from Rule 4 of the Kolkata Municipal Corporation Building Rules, 1990 which deals with the procedure of sanction that sub-Rule (3) of the said Rule 4 stipulates that the notice contemplated under Rule 4(1) shall be accompanied by copies of documents showing that the applicant has exclusive right to erect, re-erect or alter any building or portions thereof upon the land. This indicates that a tenant in a premises cannot make such application for sanction of a building plan as per his desire and/or wishes unless the landlord gives such right to the tenant in writing. Even if the landlord gives written permission to the tenant to make any construction in any premises a question may still arise as to whether or not the tenant gets any exclusive right to make constructions and/or additions and alterations to any building. It is not necessary for this Court to deal with such question of ''exclusive rights'' since in the instant case the writ petitioner/tenant did not obtain any permission at all from the landlords /respondent Nos. 6 and 7. Thus, it appears that under the scheme of the said Act of 1980 and the relevant Building Rules no order could have been passed in favour of the writ petitioner/tenant allowing her to retain the illegal and unauthorised constructions in the premises in question even if such order happens to be a conditional one.

22. This Court is of the view that the submissions made on behalf of the respondent Nos. 6 and 7 to the effect that the Kolkata Municipal Corporation cannot regularise an unauthorised/illegal construction made by a tenant who is not entitled to construct unless the landlord agrees in writing, and that the Kolkata Municipal Corporation authorities cannot allow a tenant to retain any unauthorised/illegal constructions in the premises without the written consent of the landlord is of much substance.

23. In view of the discussions made above this Court does not find any merit in the writ petition which is, accordingly, dismissed. Interim orders, if any, stand vacated.

24. There will, however, be no order as to costs.

Urgent Xerox certified copy of this order, if applied for, will be given to the learned advocates for the respective parties upon compliance of all necessary formalities.