

**IN THE COURT OF ADDITIONAL SESSIONS JUDGE,
1ST FAST TRACK COURT, BICHAR BHAWAN, CALCUTTA**

Criminal Appeal No. 222 of 2022

CNR – WBCS01-001120-2022

**Present : Annada Sankar Mukhopadhyay (JO Code-WB 00863)
Addl. Dist & Sessions Judge,
1st Fast Track Court, City Sessions Court,
Bichar Bhawan, Calcutta.**

An Application U/S-374 of The Code of Criminal Procedure as against the Judgement and order dated 26.09.2022 passed by Learned 2nd Municipal Magistrate, Calcutta, in Criminal Miscellaneous Case No. 1476 of 2016 (U/s. 401A of KMC Act, 1980) arising out of Ekbalpore P.S Case no. 357 dated 12.06.2016.

Md. Akbar Ali @ Jonny

.....Appellant.

Vs

(1) The State of West Bengal,
(2) Assistant Engineer, K.M.C.

.....Opposite Parties/Respondents.

Date of Judgement:- **20.05..2023**

J U D G E M E N T

This Criminal Appeal is directed against the judgment and order of conviction passed by the Learned 2nd Municipal Magistrate, Calcutta on 26.09.2022 against the accused person being the appellant herein, in connection with offence U/s. 401A of Kolkata Municipal Corporation Act (hereinafter refers to K.M.C Act, 1980) in Criminal Miscellaneous Case No. 1476 of 2016 in connection with Ekbalpore P.S Case no. 357 dated 12.06.2016.

Being aggrieved by and dissatisfied with the order of conviction and sentence, the appellant preferred the instant criminal appeal on the following grounds:

i) For that the Ld. Magistrate failed to evaluate that the allegation of the construction is on a portion not demarcated by the Investigating Officer and the complainant (KMC) Engineer, Building Department;

ii) For that the Investigating Officer as deposed collected 401 notice in this particular case in his chief is not relevant to this case, has not been properly evaluated by the Ld. Magistrate in the judgement which is liable to be set aside;

iii) For that the learned Magistrate failed to evaluate that the IO had not taken the statements u/s 161 of Cr.P.C of the complainant and without such the investigating officer filed charge-sheet;

iv) For that the learned Magistrate had based upon the case laws and environmental effect thereon for construction but failed to evaluate in the whole judgement that neither the accused is involved not the construction is endanger as admitted by the prosecution witnesses for sake of argument even;

v) For that without evaluating the documentary status the Ld. Magistrate hold the accused to be the person in charge for the construction is completely erroneous and the same is liable to be set aside.

Points for determination.

Whether the order of conviction, sentence, and payment of fine, passed by Learned Trial Court is correct?

DECISION WITH REASONS

The brief facts of the case of the prosecution is that on the basis of complaint lodged by Mr. Nabin Kumar Mondal, Assistant Engineer (C), Building Department, Borough No. IX of Kolkata Municipal Corporation before the Officer in Charge of Ekbalpore P.S., the said P.S. Case No. 357 of 2016 dated 12.06.2016 was started under Section 401A of the Kolkata Municipal Corporation Act on the allegation of unauthorized/illegal/unlawful construction of shuttering form work, reinforcement work for slab over 3rd floor without sanction plan at 42B/1, Brawn Field Row, Ward No. 78, Borough No. IX, PS-Ekbalpore (being the case premises).

The said case was investigated and after completion of the investigation, the investigating officer (in short 'I.O.') submitted charge-sheet against the accused person Md. Akbar Ali @ Jonny being the appellant herein and vide said P.S. Charge-sheet No. 328/2017 dated 07.08.2017 U/s. 401A of the Kolkata Municipal Corporation Act (KMC Act in short). After submission of the charge-sheet, Learned Senior Municipal Magistrate after taking cognizance, transferred the case to learned

Municipal Magistrate, 2nd Court, Calcutta for trial and disposal. Learned Municipal Magistrate, 2nd Court framed charge against the accused person U/s. 401A of the Kolkata Municipal Corporation Act and hold trial. During the course of trial, learned Trial Court examined total four witnesses and after completion of the trial, held the accused person guilty for the offence U/s. 401A of the Kolkata Municipal Corporation Act and sentenced the accused/appellant Md. Akbar Ali @ Jonny to suffer imprisonment for one and half years (01+ ½) and to pay fine of Rs.50,000/- i.d. to suffer simple imprisonment for six (06) months for committing the offence punishable u/s 401A of KMC, Act and also directed the Municipal Commissioner to demolish the unauthorized/unlawful construction at the case premises no. 42B/1, Brawn Field Row, Ward No. 78, Borough No. IX, PS- Ekbalpore.

Being aggrieved by and dissatisfied with the impugned sentence and fine, the accused person/appellant Md. Akbar Ali @ Jonny preferred the instant appeal praying for setting aside the judgement and order.

In the course of hearing of the appeal, learned Advocate for the appellant submitted that the main allegation is unauthorized construction at the roof of 3rd floor. He has further submitted that prosecution failed to produce any document to show that who made construction over the existing house and who is the owner of the said premises. He has further submitted that inspection book has not been produced before this Court wherefrom from it can be ascertained that who is the actual owner of the case premises. Ld. advocate for the appellant further submitted that no role played by the appellant in the case construction. He has further submitted that Assistant Engineer came to know on local enquiry about the appellant but he did not make any enquiry in whose name sanction plan for two storied building was made and he has not submitted the day to day inspection report before the Court. He has further submitted that there is no proof that he made spot visit on the case premises and he is the FIR maker. Ld. advocate has further submitted that the accused person is liable to be acquitted from this case due to having no direct or circumstantial evidence against him and prayed for setting aside the impugned judgement and order.

Learned Advocate for the KMC submitted that prosecution witnesses disclosed the name of the accused/appellant and he admitted that there is no such document to show that accused is connected with the case construction. He has further submitted that it is fact that there was construction of G+3 building without having any sanction plan and the premises in question is a Thika property. He has further submitted that PW4 was party member of the accused and no sanction plan was filed for found and the IO has issued notice u/s 91 of Cr.P.C. He has further submitted

that demolition is the only solution. Accordingly he prayed for affirmation of fine so imposed by learned Trial Court.

The instant case filed by the KMC is on the allegation of the unauthorised construction made by the accused person without taking any sanction plan from the KMC. To that effect and to establish the same, four prosecution witnesses were adduced and to challenge the said contention of the prosecution, the accused person appeared and face the trial.

It reveals from the evidence of the PW-1 Nabin Kumar Mondal, the Assistant Engineer of the Kolkata Municipal Corporation that on the basis of complaint received by KMC, he along with SAE Bholanath Mukherjee visited the case premises on 28.05.2016 and found shuttering form work, reinforcement work for slab over 3rd floor without sanction plan at 42B/1, Brawn Field Row, Ward No. 78, Borough No. IX, PS-Ekbalpore and there was no sanction plan for such construction. On local inquiry they came to know that Md. Rafique, Jonny and others were promoters and person responsible for the construction of the building at the case premises. Accordingly SAE issued stop work notice and he sent police intimation to the Ekbalpore PS on the basis of inspection report of Sub Assistant Engineer Bholanath Mukherjee and on the basis of case report as submitted by SAE P, he lodged FIR before Ekbalpore PS. This witness also identified the letter of complaint (Exbt. 1).

In cross examination, this witness stated that he he did not make enquiry as to whose name sanction plan was issued in respect of the case premises and he did not inform police as to who is owner of the case premises. He admitted that he has no witness to prove that they/accused persons did not sign the service return. PW1 further stated that he heard during local enquiry that accused Jonny was carrying out construction at the case premises and he admitted that he has no document to show that accused Jonny is connected with the case construction.

PW-2 and PW-3 both the independent witnesses have stated that they do not know the case premises and also do not know Md. Akbar Ali and both of them had not given any statements to police.

PW-4, the Investigating officer, who narrated the process of investigation and identified the formal FIR (Exbt. 2), photographs (Exbt. 3 series), rough sketch map (Exbt. 4). In reply to the question in cross examination, this witness admitted that he did not collect any document like agreement, assessment record or deed in the name of the accused Md. Jonny regarding the case premises. He also admitted that he did not get any document except letter of complaint in the name of accused Jonny regarding involvement in the case construction. He further admitted that he did not

collect any document to show that accused Jonny was owner or promoter of the case construction and he never saw the accused on the spot during his investigation.

S. 401A. Construction of building in contravention of the provisions of the Act or the rules made thereunder :

(1) Notwithstanding anything contained in this Act or the rules made thereunder or in any other law for the time being in force, any person who being responsible by himself or by any other person on his behalf, so constructs or attempts to so construct or conspires to so construct any new building or additional floor or floors of any building in contravention of the provisions of this Act, or the rules made thereunder as endangers or is likely to endanger human life, or any property of the Corporation whereupon the water-supply, drainage or sewerage or the road traffic is disrupted or is likely to be disrupted or is likely to cause a fire hazard, shall be punishable with imprisonment of either description for a term which may extend to five years and also with fine which may extend to fifty thousand rupees.

Explanation.--"Person" shall include an owner, occupier, lessee, mortgagee, consultant, promoter or financier, or a servant or agent of an owner, occupier, lessee, mortgagee, consultant, promoter or financier, who supervises or causes the construction of any new building or additional floor or floors of any building as aforesaid.

In the case of the prosecution, the case premises is situated at 42B/1, Brawn Field Row, Ward No. 78, Borough No. IX, PS-Ekbalpore. To prove a case u/s 401A of KMC Act the most vital ingredient is serving of stop work notice upon the person responsible and during trials of this case it reveals that the officials of KMC served stop work notice upon the person responsible (in short 'PR') but they did not sign the same. It also appears that during trial of the case no such stop work notice was produced before the Ld. Trial Court. It was neither ascertained by the investigating officer nor by the complainant whether the accused person was actually owner or promoter or is/are standing in any of the status of the definition appended to section 401A(1) of the KMC Act. The most vital charge-sheeted witnesses such as Sub-Assistant Engineer and the Inspector of the Assessor & Collector Department were not adduced as witness in this case and the reason best known to the prosecution why such vital witnesses have not been brought on evidence. There is not a single document from which it can be shown the accused person is the owner or promoter of the case premises. From the evidence it is found that the prosecution alleged that he is promoter of the case premises but no document to that effect is brought before the Court by adducing evidence. The local person from whom the I.O and the witness came to know that he is promoter is not cited or adduced as witness to substantiate the claim.

In a criminal trial, prosecution has to establish the case beyond shadow of doubt that the accused person committed the offence but the case of the prosecution

consists of full of doubts which can never be a fit case for conviction. There is no evidence that the accused/appellant is the promoter of the case premises. Learned Court gave importance upon the corroboration but did not consider contradiction. Learned Magistrate relied on the photographs but such photographs did not show any address of the subject of photo of the construction and from such photograph it cannot be assured that it is the photo of the case premises. There is no believable evidence that the appellant/accused person is the person responsible so defined in section 401A of the KMC Act and the evidence is not sufficient to rely to uphold the impugned judgement.

Learned Magistrate exercised the power under section 584 of the KMC Act directing the Municipal Commissioner to demolish the case premises but the said power is under question before the Hon'ble High Court and the same is under consideration of the larger Bench of the Hon'ble High Court and therefore the said order cannot be affirmed by this Court being sub-judice.

Having considered the entire evidence this appellate Court is of the view that the prosecution is unable to prove and establish without even minimum doubt that the accused person is coming under definition of the '*person responsible*' in respect to the case premises. No document is placed before the Court to establish that the accused/appellant is owner as alleged and no development agreement is placed for consideration. There is no believable evidence that the accused person is owner/occupier/developer or the promoter of the case premises and therefore he cannot be held as the person responsible for the alleged unlawful construction. Therefore, the impugned judgement requires interference of this Court. The judgement and order impugned cannot sustain and is liable to be set aside in respect to the appellant and the appeal is eligible to be allowed.

Hence, it is,

ORDERED

that the instant Criminal Appeal is allowed on contest and the judgement passed by the learned Municipal Magistrate, 2nd Court, Calcutta in Criminal Miscellaneous Case No. 1476 of 2016 and order dated 26.09.2022 holding the appellant guilty to the offence under section 401A of the KMC Act are hereby set aside.

Appellant/accused person Md. Akbar Ali @ Jonny is acquitted from the case and be set at liberty at once and also be discharged from bail bond liability.

The Municipal Commissioner is at liberty to proceed in accordance with section 400 of the KMC Act and the Rules made thereunder and this order is not a bar upon corporation to proceed in accordance with law.

A copy of this order together with lower Court record (LCR) be sent back to the learned 2nd Municipal Magistrate, Calcutta forthwith for information and necessary action.

Dictated & Corrected by
Sd/- A. S. Mukhopadhyay

Sd/- A. S. Mukhopadhyay
Annada Sankar Mukhopadhyay
(JO Code-WB 00863)
Addl. Dist & Sessions Judge,
1st Fast Track Court,
Bichar Bhawan, Calcutta.