

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE**

**BEFORE:
HON'BLE JUSTICE RAJA BASU CHOWDHURY**

WPO/870/2025

Ashok Kumar Jain & Anr.

Versus

**The Municipal Commissioner, Kolkata Municipal
Corporation & Ors.**

For the petitioners	:	Mr. Arindam Banerjee, Sr. Adv. Ms. Anamika Bari, Adv.
For the KMC	:	Mr. Nilotpal Chatterjee, Adv. Mr. Gopal Chandra Das, Adv. Ms. Ananya Das, Adv.
For the respondent Nos. 3 to 5.	:	Mr. Ankit Agarwala, Adv. Mr. Altamash Alim, Adv. Ms. Alotriya Mukherjee, Adv.
Heard on	:	14.05.2026, 15.05.2026, 19.05.2026, 20.05.2026, 21.05.2026, 21.08.2026 and 24.08.2026
Judgment on	:	06th October, 2026.

RAJA BASU CHOWDHURY, J. :

1. Challenging the order dated 29th August, 2025 passed by the Municipal Building Tribunal, Kolkata Municipal Corporation in B.T. Appeal No. 117 of 2012 (*Rajat Garden Residents' Association v. The Municipal Commissioner & Ors.*), the instant writ petition has been filed.
2. At the very outset, it must be noted, when the matter came up for consideration at the interim stage, this Court having heard the learned

advocates appearing for the respective parties and though a point of maintainability of the writ petition was raised by the private respondents on the issue as to whether this Court under Article 226 of the Constitution of India can entertain the writ petition, however, having regard to the voluminous records involved and since, the order passed by the Special Officer (Building) had been reversed by the Municipal Building Tribunal whereby the direction of the Special Officer (Building) allowing the regularisation of the unauthorised construction was set aside, this Court was of the view that the writ petition can be heard by keeping the point of maintainability as raised by the respondent nos. 3 to 5 open, to be decided at the time of final hearing.

3. Further, considering the fact that the matter pertains to illegal construction, this Court was also of the view that to pass any interim direction of stay, the petitioners should be put to terms and accordingly, a sum of Rs. 1 crore should be deposited by the petitioners. At that stage, since, the learned senior advocate representing the petitioners had submitted that instead of Rs. 1 crore, if a sum of Rs. 50 lakhs is directed to be deposited, the same would relieve the petitioners of heavy financial burden, as such, considering such fact, this Court directed a sum of Rs. 50 lakhs to be deposited by the petitioners with the learned Registrar, Original Side of this Court within a period of eight (8) weeks from the date, for the time being. Further, while issuing such direction by its order dated 19th February, 2026, this Court directed that there shall be an unconditional stay of the order impugned for a period of

eight (8) weeks and in the event, the aforesaid amount as directed was deposited, the stay shall continue till the disposal of the writ petition or until further order whichever is earlier. Simultaneously, considering the fact that voluminous records have already been filed without going into the same, the records of the Tribunal were also called for by directing the respondents to produce the entire records. The petitioners were also directed to file the records in the form of paper book within a period of ten weeks from date. It was further made clear that if the deposit as directed was not made, the stay would automatically stand vacated.

4. It is a matter of record that challenging the above order, an appeal was filed, which was registered as APOT 36 of 2026. By order dated 25th March, 2026 the appeal was disposed of by directing this Court to decide on the following two questions:

- (i) whether the jurisdiction of the writ Court extended to adjudication of the correctness of the order of the Municipal Building Tribunal, in exercise of powers under Article 226 of the Constitution of India.
- (ii) whether the sole remedy of the writ petitioners as appellants before the tribunal, would lie before the High Court under Article 227 of the Constitution of India.

5. Accordingly, by setting aside the order passed this Court, the Division Bench directed that the demolition order will remain stayed for a decision on the question of maintainability of the writ petition. This order was, however, not brought to the notice of this Court immediately,

much later on 7th May, 2026 this Court upon being apprised of the above order had placed this matter under the same heading “To Be Mentioned”. When the learned advocates appearing for the parties had placed the above order passed by the Division Bench before this Court for consideration, this Court noting the directions issued by the Division Bench, had directed the matter should be taken up for final consideration and accordingly, upon considering the convenience of the advocates for the parties, the matter was taken up for final consideration. Since then, the matter was heard. The learned advocates for the parties had also advances extensive arguments, not only on the scope of maintainability of the writ petition but also on merits. As per the arguments advanced, the following questions fall for consideration;

- i. Whether the jurisdiction of the writ Court extended to adjudication of correctness of orders of the Municipal Building Tribunal in exercise of powers under Article 226 of the Constitution of India or whether the sole remedy of the writ petitioners would lie before the High Court under Article 227 of the Constitution of India?
- ii. Whether the order passed by the Municipal Building Tribunal can be perverse or be sustained on contest?

6. On the issue of maintainability, Mr. Agarwala learned advocate appearing for the respondent nos. 3 to 5 has submitted that the Tribunal is constituted under Sections 415 of the Kolkata Municipal

Corporation Act, 1980 (hereinafter referred to as the “said Act”). Sub-section (3) of Section 415 of the said Act lays down the criteria/manner of constitution of the Tribunal, the same provides that the Chairman or a Judicial Member shall be a person who is or has been a member of the West Bengal Higher Judicial Service (WBHJS) having such experience as may be prescribed. A Bench of the tribunal consists of a Judicial Member and a Technical Member. Consequentially, the tribunal is a statutory tribunal discharging quasi-judicial functions. In terms of sub-section (8) of Section 415 of the said Act, the provisions of Limitation Act, 1963 are applicable to the tribunal and therefore the tribunal has the trappings of a Court. According to him, the tribunal is also vested with the powers of judicial review and in support thereof, reliance has been placed on the judgment delivered by a Coordinate Bench of this Court in the case of ***Shrimati Anima Saha v. The Kolkata Municipal Corporation & Ors.*** in **C.O. 3457 of 2011** rendered on 18th January, 2012. On the identical issue, reliance has also been placed on the judgment delivered in the case of ***Ghanashyam Das v. The Kolkata Municipal Corporation & Ors.***, reported in **(2014) 4 CHN 296** to distinguish between the powers exercisable under Articles 226 and 227 of the Constitution of India. He has also placed reliance on the judgment delivered by the Hon’ble Supreme Court in the case of ***Shalini Shyam Shetty & Anr. v. Rajendra Shankar Patil***, reported in **(2010) 8 SCC 329**. Reliance has also been placed on the judgment delivered by the Hon’ble Supreme Court in the case of ***Radhey Shyam & Anr. v.***

Chhabi Nath & Ors., reported in **(2015) 5 SCC 423**, and the judgment delivered by a Coordinate Bench in the case of **Pabitra Kumar Naskar @ Shyamal Kumar Naskar v. The State of West Bengal & Ors.**, in W.P. 15348(W) of 2018 on 15th November, 2018, wherein the Coordinate Bench in paragraph 6 of such judgment by placing reliance on the judgment delivered by the Hon'ble Supreme Court in the case of **Radhey Shyam & Anr.** (supra) had held that a writ petition under Article 226 of the Constitution of India against an order passed by a statutory Tribunal exercising judicial function is not maintainable, and accordingly had dismissed the writ petition.

7. Mr. Trivedi, learned senior advocate representing the petitioners, has, however, submitted that the appeal from an order passed by the Special Officer (Building), who happens to be a delegate of the Municipal Commissioner, is before a statutory tribunal. According to him, both the Articles 226 and 227 are part of the Basic Structure of the Constitution and such powers cannot be taken away by statutory enactments. In this context, he has placed reliance on the judgments delivered in the case of **Hari Vishnu Kamath v. Syed Ahmad Ishaque & Ors.**, reported in **(1954) 2 SCC 881**, and **L. Chandra Kumar v. Union of India & Ors.**, reported in **(1997) 3 SCC 261**. Reliance has also been placed on the judgment delivered in the case of **Surya Dev Rai v. Ram Chander Rai & Ors.**, reported in **(2003) 6 SCC 675**, wherein the Hon'ble Supreme Court has *inter alia*, categorically held that challenge to an order passed from a sub-ordinate Court/Tribunal would lie both under Article 226

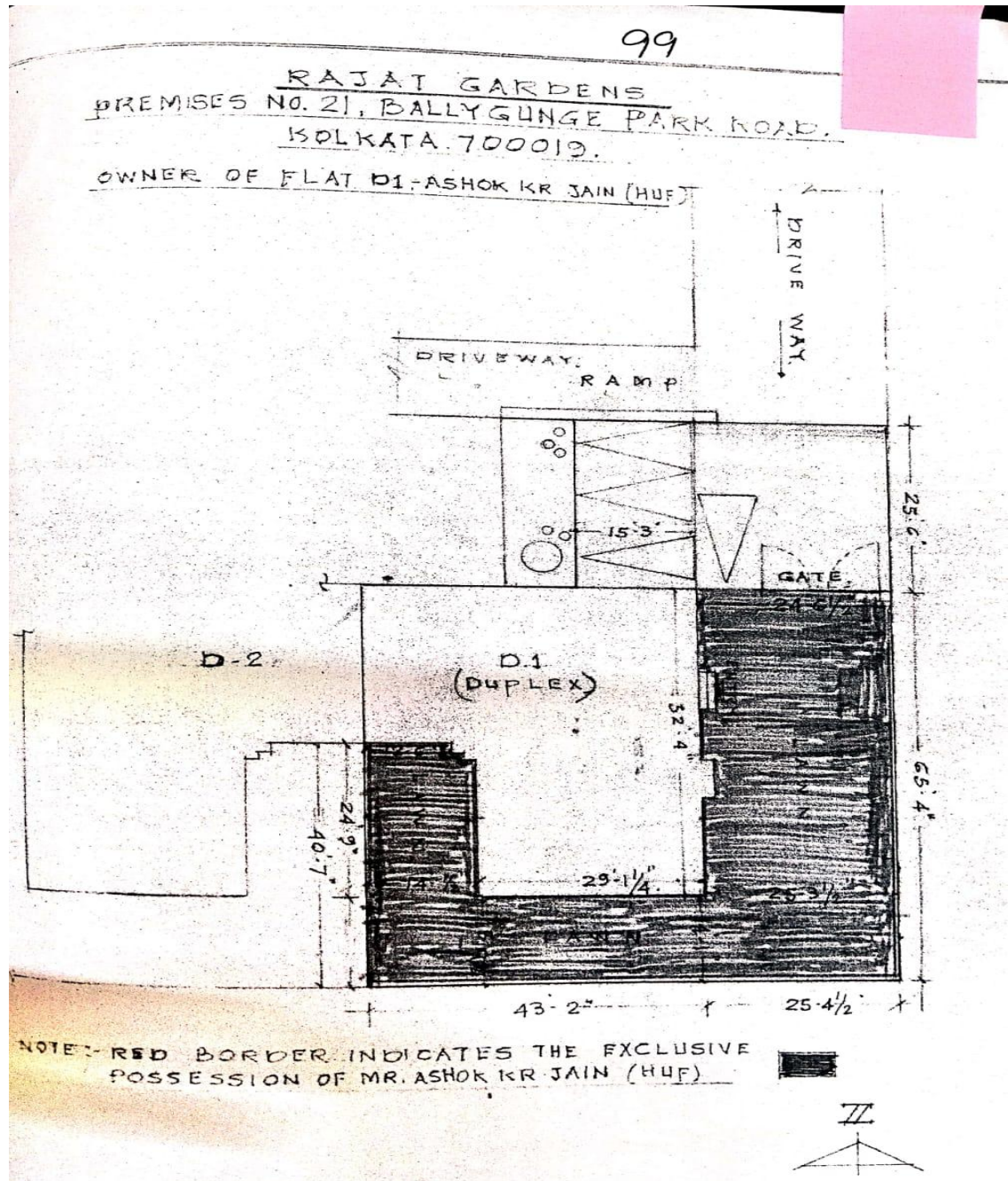
and 227 of the Constitution of India. The proposition enunciated in the case of ***Surya Dev Rai*** (supra) that a writ of Certiorari would lie against orders of any subordinate court or tribunal within its jurisdiction, has been partly overruled by the judgment delivered in the case of ***Radhey Shyam & Anr.*** (supra) to the extent that judicial orders of the Civil Court are only amenable to the writ jurisdiction under Article 227 of the Constitution of India and any contrary view thereof in the case of ***Surya Dev Rai*** (supra) stands overruled. He submits that the Municipal Building Tribunal is undoubtedly a statutory tribunal constituted under the provisions of Section 415 of the said Act, simply because, the Chairman of the Tribunal is statutorily required to be a serving or a retired member of the West Bengal Higher Judicial Services, the Tribunal cannot be equated with a civil court. In this context, by referring the term “civil court”, he would submit that the same referred to a court having jurisdiction to decide disputes of civil nature within the meaning of Section 9 of the Code of Civil Procedure, 1908. Such courts may be constituted by any central or state law e.g. The Bengal, Assam and Agra Civil Courts Act, the City Civil Courts Act and the like. According to him, the tribunal is not a civil court and its orders are amenable to challenge either under Article 226 or under Article 227 of the Constitution of India. The judgment and order of the tribunal do not come within the exception carved out in paragraph 29.1 of the judgment delivered in the case of ***Radhey Shyam & Anr.*** (supra). Accordingly, in view of the undisturbed part of the ratio of the judgment delivered in the

case of **Surya Dev Rai** (supra), the judgments and orders passed by the Municipal Building Tribunal can be assailed before the Hon'ble High Court under Article 226 of the Constitution of India. This issue is no longer *res integra*. Even otherwise though in the case of **Kanak Projects Ltd. v. Amrita Bazar Patrika Pvt. Ltd. & Ors.**, reported in **2006 SCC OnLine Cal 621**, a Division Bench of this Court had held that an application under Article 226 of the Constitution of India is not maintainable against a judicial order of the tribunal, the said part of the ratio of the judgment delivered in the case of **Kanak Projects Ltd.** (supra) was doubted and was referred to a Full Bench of three (3) Hon'ble Judges in the case of **Bhowanipore Gujarati Education Society & Anr. v. Kolkata Municipal Corporation & Ors.**, reported in **AIR 2009 Cal 140 (FB)**. The said issue has finally been put to rest by the Full Bench of this Court. In such circumstances, he submits that the judgment delivered in the case of **Pabitra Kumar Naskar @ Shyamal Kumar Naskar** (supra) which cannot be reconciled with the ratio of **Radhey Shyam & Anr.** (supra) should not be accepted by this Court and to the extent the same is *per incuriam*.

8. Though, the issue of point of maintainability was argued by the parties however, since, the Court had directed the parties to also argue the matter on merits, accordingly, the parties have also argued on the merits. The petitioners as also the respondent nos. 3 to 5 have advanced extensive arguments on merits. The municipality has also advanced arguments. I shall deal with the same in the latter part of the judgment.

9. Although, I find that extensive arguments have been made on the point of maintainability, since the issues raised ought not to be decided divorced of facts, before proceeding further the facts giving rise to the case at hand are noted briefly hereinbelow.
10. The petitioner no.1 is the owner of duplex flats being No. D-1 on the ground and Flat No. 105 on the first floor (being Duplex Flat D-1 S/E, Premises No. 21, Ballygunge Park Road, Kolkata, which is a multi-storeyed complex (B+G+5 storied building). The had been constructed sometimes in the year 2000-2001. The petitioner no.1 claims to have acquired interest in the petitioner no.1's duplex by a register deed of conveyance executed on 11th December, 2003.
11. As would appear therefrom, the petitioner no.1 also purchased and acquired the exclusive right of user over in respect of the entire South/East open space measuring about 2550 sq.ft., more or less adjoining the said duplex flat (divided and demarcated portion of reserved open space on the ground floor level) to the exclusion of other flat owners, in the said building.
12. The petitioner no.2 purchased the petitioner no.1's duplex by a registered deed of conveyance dated 18th December, 2009. As would appear from the said conveyance, the petitioner no.2 also purchased, *inter alia*, the exclusive right over and in respect of the South/East open space measuring about 2550 sq.ft., more or less (being the divided and demarcated portion of reserved open space) adjoining to the flat being part of the duplex, on the ground floor of the building. To morefully

appreciate the extent of the open space purchased by the petitioner nos. 1 and 2, the disclosure made by the petitioners in the petition in the form of a schmatic diagram is extracted hereinbelow:



13. According to the petitioners, the open space is within the exclusive area of the petitioners' property and the maintenance thereof, is also exclusively with the petitioners. According to the petitioners, in the year

2004 certain complaints were lodged against the petitioners with the Municipal authorities at the instance of the predecessor of the respondent no.3, which gave rise to a proceeding under Section 400(1) of the said Act bearing D. Case No. 62-D/2003-04, Br.-VIII (in short, the “first proceeding”). The subject matter of the said proceeding was installation of a grille gate on the “left side” by way of reinstallation along with a wall of 0.95 meter to support the framed grille pillar as also a small temple of three (3) meter diameter at the South/East corner of the building. A divider wall with fish tank and small artificial hill on the ground floor also formed subject matter of the said proceeding. The petitioners stated that the complainants’ insisted that the constructions were unauthorised. The said first proceeding was heard on contest by the respondent no.2 who by a reasoned order dated 31st January, 2004 disposed of the same by not passing any order of demolition in respect of the alleged unauthorised constructions forming the subject matter of the proceeding. Charges of Rs. 7073/- was, however, levied by the Building Department of the KMC upon the petitioner nos. 1 and 2 and the payment whereof was made as a condition for the retention of the said portion. The said amount, according to the petitioners, was paid on 12th February, 2004 and other conditions noted in the order was also fulfilled, which follows that the undertaking in the form of an affidavit as directed, declaring that they will not make any unauthorized construction whatsoever in the said premises was also filed. In view thereof, all the structures impugned in the first proceeding became

lawful structures under the post constructional retention order. According to the petitioners, the said order dated 31st January, 2004 by which such retention had been directed, has not been challenged and the same has attained finality, the same is binding on the parties since more than the last 20 years.

14. It is also the petitioners' case that certain civil disputes had arisen between the Association of Owners being the predecessor of the respondent no.3 with the Developer of the said premises and the land owner. The dispute was over the right, title and interest of conflicting claimants including the perceived right over common areas of the building and the premises. The said arbitral proceeding culminated in a compromise award dated 21st June, 2006, with the terms of settlement forming part of the award. From the aforesaid award, it was specifically declared that the claimants have no right over the duplex Flat Nos. D-2 and 106 along with attached Lawn/open space measuring 2500 sq.ft., approximately, at the Southern part of the premises of the said duplex flat and the said Lawn/open space is the integral part of the said duplex complex and that the Flat No. D-2 and 106 (Duplex) belongs to Sri Rajesh Goenka exclusively and he has since been possessing the same and 106 (Duplex) flat along with attached Lawn/open space measuring 2500 sq.ft. approximately as mentioned hereinabove.
15. The petitioners stated that the separating wall between the exclusive spaces serving the petitioner no.1's duplex and the petitioner no.2's duplex was subsequently pulled down voluntarily by the

petitioners and the fish tank and ancillary small structures with the wall were also removed. According to the petitioners, after it was conclusively accepted, agreed and declared by all parties and recorded in the said compromise award that the open space between two duplex flats of the petitioners exclusively belonged to the petitioners and that the other flat owners and/or the maintenance company did not have any right or claim over the same, the petitioners made certain minor renovation work. According to the petitioners, they covered a portion of the said ground floor open space with a roof cover and used the balance portion to erect a small staircase, which started from the ground floor continued and ended exclusively within the petitioners' portion of the property. The small staircase merely connected the rear end of the open space with the first floor flat of the duplex of the petitioners after providing for a small stair cover. According to the petitioners, the said constructions were in fact renovations and did not and/or could not involve the violation of any major building rules.

16. Records reveal that the complaint was lodged before the Municipal authorities for alleging unauthorised constructions and a proceeding under Section 400(1) of the said Act wherein Case no. 31-D/VII/2012-13, Br. VII was initiated by the municipal authorities and the matter was placed before the respondent no.2 for hearing and determination of the same. The subject matter of the proceeding, according to the petitioners, were the construction of RCC slab at first floor level covering the courtyard portion along with staircase as well as other internal

deviations. There was also an allegation for construction of a small room towards South/East corner and two gates on the mandatory side open space. On this occasion as also the petitioners successfully had been able to resisted the demolition, and had been able to obtain an order of retention. Unfortunately, on an appeal being filed therefrom, the appellate authority upon scrutinising the materials on record including a technical opinion given by the Technical Member of this Bench on the aspect as to whether the unauthorised construction was a major or a minor deviation, and having also noted that the unauthorised construction seems not to be minor construction and therefore the order of the special officer building, exercising the powers of the commissioner under Section 400(1) of the said Act read with the third proviso, which was only confined to regularisation of minor deviation, and the unauthorised construction involving gross infringement of several provisions of the Building Rules and also noting that prior to the amendment of 2015, there was no power conferred to the Municipal Commissioner to regularise unauthorised construction, irrespective of whether the same was minor or major, set aside the order with a direction upon the Municipal Commissioner, KMC to take steps to demolish the unauthorised construction as per D sketch plan at per law within three months from the date of passing such order. The above order dated 29th August, 2025 forms subject matter of challenge.

17. Now proceeding to decide on the question of maintainability of the writ petition, though, the learned advocate appearing for the respondent

nos. 3 to 5 by placing reliance on the provisions of Section 415 of the said Act and the criteria for appointment of the Chairman or a Judicial Member from the West Bengal Higher Judicial Service, has insisted that the tribunal has trappings of a court, however, in my view, unless the judicial officer in exercise of its normal jurisdiction as a civil court passes any order, the order passed by the tribunal cannot be considered to be an order passed by the civil court under the Code of Civil Procedure. The aforesaid issue is no longer *res integra*. Even a learned District Judge functioning as a tribunal while entertaining and disposing of an appeal under Section 44(3) of the Estate Acquisition Act, 1953 does not act in exercise of its normal jurisdiction as an ordinary civil court under the Code of Civil Procedure and as such, in my view, the order passed by the Tribunal cannot be termed as judicial order as opined in the case of ***Atithi Ranjan Samanta v. Smt. Bangalata Samanta & Ors.***, by the Division Bench of this Court having neutral citation **2023:CHC-AS:13480-DB**. It is thus, well settled that an order passed by the tribunal constituted under Section 415 of the said Act, which is empowered to hear and decide appeals arising out of matters referred to in Section 400 or in Section 416 of the said Act, is a quasi-judicial body. Ordinarily, such orders are subject to judicial review before a High Court under Article 226 of the Constitution of India. In this context, it may be relevant to refer to the judgment delivered in the case of ***Hari Vishnu Kamath*** (supra) wherein the Hon'ble Court was, *inter alia*, pleased to hold that the High Courts have powers under

Article 226 to issue writ of certiorari, for correcting errors of jurisdiction as when an inferior court or tribunal acts without jurisdiction or in excess of it, or fails to exercise it. Certiorari will also be issued when the court or tribunal acts illegally in exercise of its undoubted jurisdiction, as when it decides without giving opportunity to the parties to be heard, or violates the principles of natural justice. It clarified that the court issuing certiorari acts in exercise of its supervisory and not appellate jurisdiction. One consequence of that is that the court will not review the findings of fact reached by the inferior Court, even if they be erroneous. This is on the principal that the court which has jurisdiction over a subject matter has jurisdiction to decide wrong as well as right, and when the legislature does not choose to confer a right of appeal against the decision, it would be defeating its purpose and policy, if the superior court were to rehear the case on the evidence, and substitute its own findings on certiorari. The other question that was considered was whether a writ could be issued when a decision of an inferior court or tribunal is erroneous in law. It was observed that such question had come up in the case of ***R. v. Northumberland. Compensation Appeal Tribunal, ex p Shaw***, reported in (1951) 1 KB 711, and it was held that when a tribunal made a speaking order and the reasons given in that order in support of that decision were bad in law, certiorari could be granted. It may also be noted that while in a certiorari under Article 226 the High Court can only annul the decision of the Tribunal, it can, however, under Article 227, do that and also issue further directions in

the matter. Following the above, the Court noted that it may therefore be taken as settled that a writ of certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case.

18. However, in this context, it may be noted that though in the case of **Surya Dev Rai** (supra) the Hon'ble Supreme Court categorically had laid down, *inter alia*, that both the challenges under Article 226 and under Article 227 would be maintainable against order of the subordinate courts and tribunals and though the parameter of exercise of power to issue certiorari under Article 226 and the supervisory jurisdiction under Article 227 of the Constitution of India are almost similar, with the sole difference that in a writ of certiorari under Article 226, the High Court may annul or set aside the act, order or proceeding but cannot substitute its own decision in place of the decision of the subordinate court or forum, whereas under the supervisory jurisdiction under Article 227, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court or forum as the court should have made in the facts and circumstances of the case. Incidentally, the aforesaid judgment was later considered by the Hon'ble Supreme Court in the case of **Radhey Shyam & Anr.** (supra). Although, Mr. Agarwala, learned advocate representing

the respondent nos. 3 to 5 by placing reliance on the judgment delivered in the case of **Radhey Shyam & Anr.** (supra) has tried to, *inter alia*, contend that the judgment delivered in the case of **Surya Dev Rai** (supra) stood overruled, and challenge to an order passed by the tribunal even under the certiorari jurisdiction cannot be maintained even before the Hon'ble Supreme Court, however, I find that the above judgment arises out of a reference order made in the case of **Radhey Shyam & Anr.** (supra) wherein the view expressed in the case of **Surya Dev Rai** (supra) was doubted. Having regard thereto, the matter was placed before a larger Bench by the Hon'ble Chief Justice to consider the correctness or otherwise of the law laid down in **Surya Dev Rai** (supra). Following the above, their Lordships while deciding the said cause in paragraph 5 had framed the following question:

“5. Thus, the question to be decided is: whether the view taken in Surya Dev Rai that a writ lies under Article 226 of the Constitution against the order of the civil court, which has been doubted in the reference order, is the correct view?”

19. It would appear from the above judgment that their Lordships after considering diverse authorities in paragraph 25 despite holding that all courts in the jurisdiction of a High Court are subordinate court to it and subject to its control and supervision under Article 227, observed that the order of the civil court stand on different footing from the order of authorities or tribunals or courts other than judicial/civil courts and accordingly, in paragraph 27 concluded that their Lordships

were of the view that the judicial orders of civil courts are not amenable to a writ of certiorari under Article 226, and the scope of Article 227 is different from Article 226. Unfortunately, this aspect was overlooked by the Coordinate Bench while considering the case of **Pabitra Kumar Naskar @ Shyamal Kumar Naskar** (supra). In the said case, His Lordship overlooked the fact that the Hon'ble Supreme Court in the case of **Radhey Shyam & Anr.** (supra) had only overruled the ratio of the judgment delivered in the case of **Surya Dev Rai** (supra) to the extent that the judicial orders passed by civil courts are not amenable to writ jurisdiction under Article 226 of the Constitution of India, as such the contrary view in **Surya Dev Rai** (supra) was only overruled. Having regard thereto, the judgment delivered in the case of **Pabitra Kumar Naskar @ Shyamal Kumar Naskar** (supra), in my view, which deals with an order passed by a tribunal and not a judicial order passed by a civil Court, does not lay down the correct law, and is not binding. This apart, the aforesaid issue has been finally put to rest by the Full Bench judgment of this Court in the case of **Bhowanipore Gujarati Education Society** (supra). The said reference was necessitated inasmuch as the Division Bench of this Court in the case of **Kanak Projects Ltd.** (supra) had observed that the orders passed by the respective tribunals forming subject-matter of challenge in those petitions being orders passed in exercise of judicial functions, its validity or propriety cannot be questioned in a petition under Article 226 of the Constitution and the remedy of the petitioners lie in an application

under Article 227 of the Constitution of India. It is having regard to such observations made by the Division Bench and the subsequent orders dated 9th October, 2007 and 15th November, 2007, passed in a bunch of writ petitions which were referred to the Chief Justice for constituting an appropriate Bench, for re-examining and/or reconsidering the matter regarding Constitutional issues raised in the order of reference. To appreciate the reference before the Court, the same is extracted hereinbelow:

“By orders dated 9th October, 2007 and 15th November, 2007, these groups of writ petitions were referred to the Chief Justice for constituting an appropriate Bench for re-examining and/or reconsidering the matter regarding Constitutional issues raised in the order of reference. The reference has been made in the following terms :—

“54. In the result, I am of the considered view that the objections regarding maintainability of these writ petitions on the ground that (1) a writ petition under Article 226 of the Constitution of India against an order passed by a statutory Tribunal exercising Judicial functions is not maintainable and it is only an application under Article 227 that would be maintainable; and (2) a writ petition under Article 226 of the Constitution of India against an order passed by a statutory Tribunal exercising judicial functions is not maintainable within the scope of the rules framed by this Court, — require reconsideration and, therefore, I direct that the cause papers of these petitioners be placed before the Hon’ble the Chief Justice for appropriate orders being passed.””

20. The Full Bench after deliberating on the subject and noting several authorities had answered the reference in paragraph 72 on the following terms:

“72. The Reference is answered as follows :—

(i) The writ petition under Article 226 of the Constitution of India against an order passed by a statutory Tribunal exercising judicial functions is maintainable.

(ii) The writ petition under Article 226 of the Constitution of India against an order passed by a statutory Tribunal exercising judicial functions is maintainable within the scope of the rules framed by this Court.”

21. In the light of the above, the issue as to whether a writ petition would be maintainable for considering a challenge to an order passed by a quasi-judicial authority as that of the tribunal is no longer *res integra* and has been long settled. In the light of the above, I find the writ petition to be maintainable and by overruling the objection raised, I take up the hearing of the matter on merits. The issue on maintainability, as referred by the Hon’ble Division bench stands answered.

22. From the facts noted hereinabove, I find that the order passed by the Special Officer Building was reversed by the appellate authority. It is also not in dispute and as pointed out by learned senior advocate for the petitioners that the Tribunal took into consideration additional materials in the form of technical report. It is also an admitted position between the parties that the contesting parties were not favoured with such report prior to a final decision by the tribunal. In this context, I find that Mr. Agarwala learned advocate representing the respondent nos. 3 to 5 by relying on the judgement delivered by the Coordinate Bench in the case of **Sourasis Nag v. The Kolkata Municipal Corporation and Ors.**, having neutral citation **2023:CHC-OS:4473** submitted that in identical set of facts though a challenge was raised to such an order

which considered a technical opinion of the technical member, without affording opportunity thereof to the parties, the objection appears to have been turned down by holding that there was hardly any scope for a litigant to file an exception to the opinion of the member of the tribunal. It was further held that the Technical Member of the tribunal is not the adversary of the petitioner and consequentially, the member is a part of the statutory adjudicatory process, thus, there was no question of the petitioner being aggrieved by non-supply of such opinion in such case.

23. In this context, reliance has also been placed on an unreported judgment delivered by the Division Bench of this Court in an appeal arising from the aforesaid order which was registered as APOT 252 of 2023. In the appellate order dated 31st August, 2023, I find that the Division Bench has refused to remand the matter to the Tribunal by, *inter alia*, observing as follows:.

“In so far as the first argument of breach of the principles of natural justice is concerned, we are completely in agreement with the learned Single Judge. The technical member is a part of the Municipal Building Tribunal. Forming of his opinion is a part of the adjudicatory process. Hence, the question of favouring the appellant or any party to the appeal with copy of such opinion in advance, does not arise. In any event, we must remember that the principle of natural justice is indicated by the Hon’ble Apex Court where, remanding the matter on the ground of breach of principles of natural justice would serve no useful purpose at all, and would be an empty formality. In the present case, the nature and extent of the unauthorised construction is such that absolutely no purpose will be served by remanding the matter to the Tribunal for fresh consideration. In fact, the Tribunal has observed, in our opinion rightly, that the unauthorised construction is of such a magnitude that it is incapable of regularisation.”

24. From the above, it would transpire that though the Hon'ble Division Bench had held that the technical member is a part of the Tribunal and though the parties are not entitled to advance copies of such opinion, the refusal to remand the matter was, however, on the ground that the same would serve no useful purpose at all and would be an empty formality, having regard to the nature and extent of the unauthorised construction involved in the said case as the tribunal in such a case had observed that the construction of such magnitude was incapable of regularisation.

25. On the aforesaid aspect, I find that the learned advocate for the petitioners have placed reliance on the provisions of Order XVIII Rule 18 of the Code of Civil Procedure. To morefully appreciate the same relevant provisions are extracted hereinbelow

“ Order XVIII

18. Power of Court to inspect.—*The Court may at any stage of a suit inspect any property or thing concerning which any question may arise and where the Court inspects any property or thing it shall, as soon as may be practicable, make a memorandum of any relevant facts observed at such inspection and such memorandum shall form a part of the record of the suit.”*

26. The senior advocate for the petitioners has also by placing reliance on the judgments delivered in the case of ***Raj Chandra Banik & Ors. v. Iswar Chandra Banik & Ors.***, reported in **AIR 1925 Cal 170 (DB)**, ***Ramnath & Ors. v. Dattatraya & Ors.***, reported in **AIR 1953 MB 15 (DB)** and ***T. Krishnaswamy Rao & Ors. v. Dundappa & Ors.***, reported in **AIR 1962 Mys 17 (SB)**, submitted that if, an opinion of the court is a relevant consideration

for deciding the controversy unless such opinion of court is offered to the parties, it is likely that the parties shall be seriously prejudiced. On this aspect, I find that though the Coordinate Bench of this Court in the case of **Sourasis Nag** (supra) had observed that there is no scope available to a party to be handed over with the opinion of the technical member to object to the same, such observations in my view was obviously made having regard to the nature of unauthorised construction. However, the general proposition that under no circumstances a party is entitled to a copy of the expert opinion before a decision is rendered which Mr. Agarwal, is interested to portray, in my view cannot be accepted for two reasons. Firstly, it is well-settled that none can be taken by surprise in a judicial proceeding, and the provisions of the Code of Civil Procedure having regard to Rule 53 of the *Rules of High Court at Calcutta Relating to Applications Under Article 226 of the Constitution of India* are applicable. Secondly, natural justice demands that if, any opinion is introduced by the members of the adjudicatory forum and such opinion is considered, it is elementary that such opinion must be made available for the party to respond to the same of course with an exception that natural justice shall not be extended if, the extension thereof is futile as held in the case of **Managing Director, ECIL, Hyderabad & Ors. v. B. Karunakar & Ors.**, reported in (1993) 4 SCC 727.

27. I find that the Division Bench of this Court while dealing with the above aspect in the case of **Sourasis Nag** (supra) was also of the view, no purpose will be served to remand the matter considering the extent of unauthorised construction. To test out the aforesaid proposition in the instant case, the order passed by the member of the technical committee has to be considered. To morefully appreciate the same, the relevant opinion is extracted hereinbelow:

“Technical Opinion

29.08.2025

Perused the impugned order of Ld. S. O. (Bldg.), KMC, memo of appeal and the documents of case record of Ld. S. O. (Bldg.)

After proper delving into the documents of case record of D-Case no-31-D/VII/2012-13, Br. VII, alongwith relevant D-Sketch, Precis and Inspection report the following observations are being revealed as stated below:

- 1. No Sanctioned plan from KMC of the impugned construction found.*
- 2. D- Sketch reflects unauthorized construction of area 66.29 sq.m (713 sq.ft) covering courtyard at ground floor along with a staircase upto 2nd floor level and two nos. Gate at mandatory open space in red colour.*
- 3. Precis shows violation of KMC Building Rule 62, 69, 77(2), 133 & 134.*
- 4. The Special Officer (Building) did not challenge the contents of the precis and demolition sketch plan and admitted the impugned unauthorized construction violating the above KMC Building Rule.*
- 5. The Special Officer (Building) passed the order dated 19.10.2012 for retention/regularization of the impugned unauthorized construction before the amendment (Regularization of building) Regulation 2015.*
- 6. The person responsible for impugned construction violates earlier order of S.O (Bldg.) passed on dated 31.01.2004 against*

D-Case No- 62-D/2003-04, Br. VIII. In 'ORDERED' portion (Page-6), sl.no.-(2) of the said order it was mentioned that "the P.Rs. must furnish an affidavit declaring that they will not make any unauthorized construction whatsoever in the said premises" but P.Rs. deliberately ignored the earlier order of S.O (Bldg.) and constructed the impugned construction without having any prior sanction from KMC as per provision 392 of KMC Act, 1980.

Hence considering all the above aspects and the area of unauthorized construction i.e. 713 sq.ft seems not to be minor construction, I am of the opinion for demolition of the unauthorized constructions marked in red colour in the D-Sketch."

28. Having regard to the nature of opinion given and especially when the same records admitted facts including the factum of the impugned construction being in violation of the previous undertaking provided in terms of earlier order of S.O (Bldg.) passed on 31st January 2004 in D-Case No- 62-D/2003-04, Br. VIII., and following the same having noted the unauthorised construction involves an area of 713 sq.ft., it was observed the illegal construction is not minor. Nothing has been placed before this Court to demonstrate that the non-supply of such opinion prior to taking a final decision has caused prejudice, in other words providing opportunity to controvert the same would have altered the outcome. Admittedly, there is no challenge to the demolition sketch plan or the infringement statement, in fact, to seek regularisation the impugned unauthorised construction was accepted. There is another aspect of the matter. The petitioners in breach of the undertaking previously given which was necessitated to regularise the first unauthorised construction, have

once again carried out further unauthorised construction of 713 sqft. The petitioners are repeat offenders and apparently do not bother for the law of the land. In the peculiar facts, non-supply of the opinion, in my view, would not constitute violation of principles of natural justice as supply thereof would not have made the difference.

29. The findings rendered by the Tribunal is supported by sufficient evidence. It is well settled that the Hon'ble High Court while exercising jurisdiction under Article 226 of the Constitution of India cannot substitute the findings returned by the tribunal by reappreciating evidence. The order also does not suffer from any jurisdictional error and is not perverse. Accordingly, the second question also stands answered. The writ petition fails and is accordingly dismissed.

30. There shall be no order as to costs.

31. Urgent photostat certified copy of this order, if applied for, be made available to the parties, on priority basis, upon compliance of all formalities.

(RAJA BASU CHOWDHURY, J.)