

(2017) 03 CAL CK 0064
In the Calcutta High Court
Case No : 2877 of 2016?(CAN 2641 of 2016)

Debashis Mullick

APPELLANT

Vs

Monoj Kumar Datta & Ors.

RESPONDENT

Date of Decision : 21-03-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 41 Rule 11](#) -
Calcutta Municipal Corporation Act, 1980, Section 397, Section 48, Section 400(1),
Section 411(1), Section 400(5), Section 48(3)(b)

Citation : (2017) 03 CAL CK 0064

Hon'ble Judges : Jyotirmay Bhattacharya, Asha Arora

Bench : DIVISION BENCH

Advocate : Runu Chowdhury,?Mekhla Sinha, Bidyut Banerjee.?Nandita Bhattacharya, ?Alok Kr. Ghosh,?Swapn Kr. Debnath

Final Decision : Disposed off

Judgement

1. By the impugned order No. 14 dated 5th February, 2016 passed by the learned Judge, XIIIth Bench, City Civil Court at Calcutta, the plaintiff's application for temporary injunction was allowed by the learned Trial Judge.
2. The following order was passed by the learned Trial Judge in the impugned order:- "It is ordered that the defendant Debashis Mullick being the owner of the suit premises and the Kolkata Municipal Corporation are hereby restrained from evicting the plaintiff Manoj Kumar Dutta without following due process of law. It is further clarified that the Municipal Commissioner is only authority of the KMC to issue notice under Section 401 of the KMC Act, but no one else. There is no Building Rules and Notification by State Government authorising the Municipal Commissioner to delegate power on any authority possessing a decree in civil and structural or construction engineering having five years in field of design and constructions of structure of building of different types. The assistant engineer or subassistant engineer having no structural specialisation cannot say about the structural condition of R.C.C. of the building."

3. The instant appeal was admitted for hearing under the provision of Order 41 Rule 11 of the Code of Civil Procedure on 25th July, 2016. Today when the application for stay filed in connection with the said appeal was being considered by this Court, we were requested by the learned counsel appearing for the appellant to dispose of the appeal itself on merit.

4. Since the papers which are necessary for disposal of the appeal are available before us, we have decided to dispose of the appeal by dispensing with the requirement of filing paper books in this appeal.

5. Let us now consider the merit of the instant appeal in the facts of the present case.

6. Two suits are pending before the learned Trial Court. One of such suits was filed by the appellant herein against the respondent no.1 for his eviction. It was claimed by the appellant therein that the respondent no.1 is a trespasser in the suit property. The said suit was registered as Title Suit No. 6 of 1995. The other suit was filed by the plaintiff/respondent no.1 herein seeking declaration of his tenancy right in respect of the suit property. In the said suit, not only the appellant herein was added as a defendant but the municipal authorities were also added as defendants therein. The said suit was registered as Title Suit No. 46 of 2015. Both the aforesaid suits are pending in a common court i.e. 13th Bench, City Civil Court at Calcutta.

7. In the declaratory suit filed by the respondent No. 1 herein, he filed an application for temporary injunction for restraining the defendant/opposite parties from demolishing the suit premises and/or any part thereof till the disposal of the suit. Temporary injunction was also sought for against the appellant herein for restraining him from ousting the respondent No. 1 from his lawful tenancy i.e., the suit premises during the pendency of the suit. Ad interim relief in similar form was also prayed for by the respondent No. 1 in his said application.

8. It was stated therein that he being a lawful tenant in the suit premises cannot be evicted from the suit premises otherwise than in due course of law. It was also alleged in the said application that the Municipal authority has no right to demolish the suit premises. The legality of the demolition notice which was served upon the respondent No. 1 was also challenged in the said application for temporary injunction.

9. The learned Trial Judge while dealing with the plaintiff's application for temporary injunction held that since the demolition notice was not issued by the Municipal Commissioner, the entire proceeding for demolition was vitiated as the authority which initiated such proceeding for demolition was not vested with such authority under the Act. The learned Trial Judge held that there is no provision under the Kolkata Municipal Corporation Act which authorises the Municipal Commissioner to delegate his authority to any officer of the Kolkata Municipal Corporation. The learned Trial Judge also held that the stability of such illegal

construction which was assessed by sub-assistant Civil Engineer having Bachelor Degree only cannot be relied upon as the sub-Assistant Engineer has no specialised knowledge to assess the structural stability of the building as per the National Building Code as the said engineer did not have any Master Degree on the subject.

10. Holding as such, the learned Trial Judge passed a temporary injunction by restraining the appellant herein being the owner of the suit premises and the Kolkata Municipal Corporation from evicting the plaintiff/respondent No.1 herein without following due process of law. It was also clarified that the Municipal Commissioner is the only authority of the Kolkata Municipal Corporation to issue notice under Section 401 of Kolkata Municipal Corporation Act but no one else and since such notice was not served by the Municipal Commissioner, the entire demolition proceeding was vitiated.

11. The legality of the said order is under challenge in this First Miscellaneous appeal.

12. On perusal of the impugned order, we find that the authority of the Municipal Commissioner to delegate his power under the said Act upon any sub-ordinate officer was questioned by the learned Trial Judge as according to the learned Trial Judge there is no such provision under the Act which authorises the Municipal Commissioner to delegate his authority upon any sub-ordinate officer.

13. Let us first of all consider as to how far the learned Trial Judge was justified in coming to such conclusion.

14. Section 48 of the Municipal Corporation Act 1980 deals with delegation of powers and functions. Presently we were concerned that the power of delegation enjoyed by the Municipal Commissioner under the said Act. As such, we refer to Section 48(3)(b) of the said Act which deals with delegation of power of the Municipal Commissioner in the manner as aforesaid:- "Section 48(3)(b). The Municipal Commissioner may by order delegate, subject to such conditions as may be specified in the order, any of his powers or functions including the powers of functions under Section 397, sub-Section (1) of Section 400 and sub-Section (1) of Section 411 to any other officer or any employee of the Corporation."

15. Such being the provision in law, we cannot agree with the learned Trial Judge that the Commissioner of Kolkata Municipal Corporation does not enjoy the power to delegate his authority under the said Act to any other officer or employee of the Corporation.

16. Here is the case where we find that the notice under Section 401 of the Kolkata Municipal Corporation Act was issued by the Sub-Assistant Engineer (Building) to whom the power of the Commissioner was delegated.

17. As such, we hold that the initiation of such demolition proceeding by such an authority enjoying power by virtue of the delegation made by the Municipal Commissioner in his favour, is not illegal.

18. We also disagree with the findings of the learned Trial Court that the Sub-Assistant Engineer having Bachelor Degree in Civil Engineering is not competent enough to report on the structural stability, safety and sound condition of the building.

19. Be that as it may here is the case where we find that challenging the conditional order of demolition, the plaintiff/respondent No.1 being the person responsible for such unauthorised construction preferred an appeal under Sub-Section (3) of Section 400 before the Municipal Tribunal but ultimately the said appeal was dismissed for non-compliance of the condition which was imposed by the Hearing Officer (B) for retention of the unauthorised construction.

20. As such we have no hesitation to hold that the conditional order of demolition which was passed by the Building Tribunal, attained its finality.

21. Such an order of demolition passed by the Municipal Authority which was not interfered with by the Appellate forum, Cannot be challenged before any Civil Court in view of the provision contained in Sub-Section (5) of Section 400 of the said Act which provides that save as provided in this Section, no court shall entertain any suit, application, or other proceeding for injunction or other relief against the Municipal Commissioner to restrain him from taking any action or making any order in pursuance of the provisions of this Section.

22. Taking into consideration the aforesaid provision of the Kolkata Municipal Corporation Act, 1980, we are of the prima facie view that even the relief which is claimed by the plaintiff/respondent No.1 against the Municipal authority, cannot be granted as the causes of action on which such relief was claimed are not entertainable by the Civil Court in view of the aforesaid provision of the Municipal Act.

23. Mr. Banerjee, learned Advocate appearing for the respondent No.1 however, submits that since the impugned construction was mentioned in the IB report of the Assistant Assessor/Collector for the Assessment Year 1/85-86 recording therein the existence of the impugned construction, the Municipal Authority cannot describe those the impugned construction as unauthorised construction.

24. Fact remains that no building plan has been submitted to show the legality of such construction. Even assuming that the existence of the impugned construction was assessed by the Municipal authority and the existence of such impugned construction also was mentioned in the IB report, still then there is no provision under the Kolkata Municipal Corporation Act, 1980 which makes such impugned construction immune from demolition because of assessment of unauthorised construction by the Municipal Authority.

25. In this regard, we can refer to Sub-Section (2) of Section 400 of the Kolkata Municipal Corporation Act.

26. As such, we hold that the impugned order is required to be modified only to this extent that the injunction order which was passed against the Municipal

Authority stands discharged with this rider that the injunction order which was passed against the defendant/appellant herein being the owner of the suit premises is not disturbed by this court..

27. Both the appeal and the application are thus, disposed of.

28. Urgent Photostat certified copy of this order, if applied for, be supplied to the Learned advocates for the parties immediately.