
(2019) 08 CAL CK 0003

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 10159 (W) Of 2009, 9635 (W) Of 2016

Jayanta Ray

APPELLANT

Vs

Kolkata Municipal Corporation & Ors

RESPONDENT

Date of Decision : 01-08-2019

Acts Referred:

West Bengal Inland Fisheries Act, 1984 — Section 17A, 17A(3), 17(A)(10), 17(11)
West Bengal Inland Fisheries (Amendment) Act 1993 — Section 1(2), 2(1)
West Bengal Land Reforms Act, 1955 — Section 4C
Code Of Civil Procedure, 1908 — Section 9A, 92

Citation : (2019) 08 CAL CK 0003

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Subir Sanyal, Biswajit Mukherjee, Swapan Debnath, Tanushree Das, Alok Kumar Ghosh, S.T. Mina, N. Pal

Final Decision : Dismissed

Judgement

Debangsu Basak, J

Two writ petitions have been taken up for analogous hearing as they involve the same immovable property. In WP No. 10159 (W) of 2009, which is referred to as the first writ petition for the sake of convenience, the petitioner has challenged the notice dated March 16, 2004 issued under Section 17 A of the West Bengal Inland Fisheries Act, 1984 as amended in 1993 and the decision dated February 2, 2009 of the second respondent. In WP No. 9635 (W) of 2016, which is referred to as the second writ petition for the sake of convenience, the petitioner has called upon the first respondent to provide water supply to the immovable property concerned.

Learned advocate appearing for the petitioner has submitted that, the impugned decision dated February 2, 2009 is without jurisdiction. By such decision, the authorities found a particular immovable property to be a water body governed under the provisions of the Act of 1984 as amended in 1993. He has submitted

that, the impugned order was passed by the Kolkata Municipal Commissioner. According to him, Kolkata Municipal Commissioner is not the competent authority under Section 17 A of the Act of 1993. He has referred to the notification dated July 15, 2005 in support of his contentions. He has relied upon 2013 Volume 10 Supreme Court Cases page 136 (Jagmittar Sain Bhagat & Ors. v. Director, Health Services, Haryana & Ors.), 2015 Volume 6 Supreme Court Cases page 412 (Foreshore Cooperative Housing Society Limited v. Praveen D. Desai (Dead) Through Legal Representatives & Ors.), 1990 Volume 3 Supreme Court Cases page 481 (British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashes Industries & Ors), 2012 Volume 1 Supreme Court Cases page 369 (T. Varghese George v. Kora K. George & Ors.) and 2003 Volume 4 Supreme Court Cases page 147 (Sarwan Kumar & Anr. v. Madan Lal Agarwal) in support of his contentions that, when, an authority passes an order without jurisdiction, the same is a nullity.

Referring to Section 1 (2) of the amended Act of 1993, learned Advocate appearing for the petitioner has submitted that, no notification under the amended Act of 1993 has been published by the Government. In absence of such notification, no effect can be given to the provisions of Section 17 A of the Act of 1984. Consequently, the impugned order is bad in law. He has contended that, no notification under Section 1 (2) of the amended Act of 1993 is available with the Government offices such as Government Press, Secretariat Library, Assembly Library, State Archive, State Central library, Cabinet Secretariat Library, New Delhi and the National Library. He has referred to the letter dated April 23, 2019 of the National Library by which, National Library has informed the petitioner that, the copy of the Calcutta Gazette dated June 16, 1994 is not available in the library. The Cabinet Secretariat Library, New Delhi has also informed the petitioner that, Calcutta Gazette dated June 16, 1994 is not available in its records. According to him, authenticated copy of the notification not being available, it has to be construed by the Court that, no notification under the Act of 1993 exists. He has referred to the order dated March 28, 2019 passed by the court and submitted that, the photo copy of the notification handed over by the learned Additional Advocate General, cannot be the authenticated copy of the notification. He has submitted that, it is not the authenticated copy of the notification. Similar photo copy was produced before the High Court in WP No. 16554 (W) of 2012 (Usha International Ltd. v. The Kolkata Municipal Corporation and others) when the Court disbelieved the authenticity and correctness of the photo copy and doubted the fact of issuance of such notification under Section 1 (2) of the amending Act of 1993. According to him, therefore, there being no authenticated copy of the Gazette Notification dated June 16, 1994 it has to be held by the Court that, no such notification exists. Consequently, Kolkata Municipal Commissioner had no jurisdiction to pass the impugned order.

Without prejudice to the earlier contention, learned Advocate appearing for the petitioner has submitted that, Section 17 A of the Act of 1984 is prospective in nature. Penal Action contemplated under Section 17 A (11) of the Act of 1984 is

a consequential measure in the event of violation of the provisions of Section 17 A of the Act of 1984. He has submitted that, the language used in Section 17 A of the Act of 1984 is such that, the provisions of such section are prospective in nature from the date of issuance of a Gazette Notification under Section 1 (2) of the amending Act of 1993. He has referred to Section 17 A particularly Sub-Section 3 to Sub-Section 10 of Section 17 A of the Act of 1984 and submitted that, the entire provisions of Section 17 A are prospective in nature. He has submitted that, once a water body has been filled up, prior to the provisions of Section 17 A of the Act of 1984 coming into effect, then, the provisions of Section 17 A of the Act of 1984 cannot be invoked to restore the property as a water body. In support of his contentions that, an amending Act is always prospective in nature unless specifically mentioned otherwise, learned Advocate appearing for the petitioner has relied upon 1994 Volume 4 Supreme Court Cases page 602 (Hitendra Vishnu Thakur & Ors. v. State of Maharashtra & Ors.), 2008 Volume 1 Supreme Court Cases page 391 (Sangam Spinners v. Regional Provident Fund) and 2009 volume 6 Supreme Court Cases page 99 (G. Sekar v. Geetha & Ors.). According to him, Section 17 A of the Act of 1984 being prospective in nature, the same cannot be given effect retrospectively. In the facts of the present case, the water body was filled up long prior to the amendment Act came into effect.

Learned Advocate appearing for the petitioner has referred to the impugned order dated February 2, 2009 and submitted that, there is no finding by the Kolkata Municipal Commissioner that, the water body was filled up after coming into force of the amendment Act of 1993 on June 16, 1994 or that, the property has been used as a water body subsequent to June 16, 1994. He has referred to the impugned order and submitted that, the Kolkata Municipal Commissioner framed two issues for consideration. He has referred to the two issues framed by the Kolkata Municipal Commissioner for decision. He has submitted that, no issue with regard to whether, the property in question was a water body or not and that, the same was filled up, either by the petitioner or his predecessor-in-interest after coming into the force of the amendment Act of 1993 on June 16, 1994, was framed and consequently not decided. Therefore, Kolkata Municipal Commissioner cannot impose any penal action upon the petitioner.

Learned Advocate appearing for the petitioner has submitted that, plot No. 193 was separated and mutated in three plots being plot No. 193A, 193G and 1251. Such plots are part of Dag No. 47. Dag No. 47 was and still is classified as a water body in the record of rights. He has submitted that, the basis on which the Kolkata Municipal Commissioner proceeded that, the plot continues to be classified as a water body in the record of rights, is without basis. According to him, merely recording of a plot as a water body in the record of rights does not prove the date when the same was filled up. He has submitted that, plot No. 193A and 193G were mutated in the name of the predecessor-in-interest of the petitioner on September 4, 1989. He has submitted that, there is no material on record to establish that, the petitioner filled up the water body subsequent to the

coming into force of the amendment Act of 1993 on June 16, 1994. He has submitted that, order of conversion in respect of plot No. 193G was passed after coming into force of the amendment Act of 1993. He has questioned the finding of the Kolkata Municipal Commissioner in this regard. According to him, the findings returned by the Kolkata Municipal Commissioner in the impugned order with regard to the notification under Section 17 A is not supported by any material and in any event, does not support the claim that, the petitioner is guilty of filling up of the water body. He has drawn the attention of the Court to the contents of the impugned order and submitted that, the Kolkata Municipal Commissioner did not deal with the notification dated August 5, 1994 in the impugned order. According to him, the petitioners were not aware of the existence of the notification dated August 5, 1994. In any event, there is no finding in the impugned order that, any violation at the behest of the petitioner took place after the notification dated August 5, 1994. He has questioned the finding of the Kolkata Municipal Commissioner that, the property in question is a water body and that, the predecessor-in-interest of the petitioner started the work of illegal filling up of the water body which was continued by the petitioner at the time of issuance of the notice under Section 17 A of the Act of 1984.

Learned Advocate appearing for the petitioner has submitted that, the impugned order suffers from perversity. The impugned order has not taken into consideration the fact of filing of a civil suit being Title Suit No. 340 of 1991 by the wife of the eleventh respondent against the vendor of the petitioner for declaration and injunction. He has relied upon a judgment and order dated October 18, 2012 passed in WP No. 16554 (W) of 2012 (Usha International Limited v. The Kolkata Municipal Corporation & Ors.) in support of his contentions. Referring to the impugned order, learned Advocate appearing for the petitioner has submitted that, the Kolkata Municipal Commissioner did not return any finding that, the property in question can be used as a water body as contemplated under the Act of 1984. In absence of such a finding, the impugned order cannot be sustained. He has prayed for quashing of the impugned order and the notice issued by the authorities.

Learned Advocate appearing for the Kolkata Municipal Corporation authorities has submitted that, the impugned order is appealable under the provisions of the Act of 1984. Moreover, the notification was produced by the learned Additional Advocate General pursuant to the order of the Court. Apart from such notification, there is no other notification under the Act of 1984. Such notification authorises the Municipal Commissioner to be the competent authority to exercise powers under Section 17 A of the Act of 1984. Consequently, the impugned order passed by the Kolkata Municipal Commissioner exercising powers under Section 17 A of the Act of 1984 cannot be faulted. He has submitted that, the Block Land and Land Reforms Officer discovered that, there was an act of filling up of the pond. Therefore, the process under the Act of 1984 was initiated to restore the pond as a water body.

Learned Advocate appearing for the private respondent Nos. 11 (a) to (f) of the first writ petition has submitted that, the earlier writ petition of the writ petitioner being WP 1042 (W) of 2004 was disposed of in favour of the writ petitioner. In such writ petition, the writ petitioner did not question the invocation of Section 17 A of the Act of 1984. The writ petitioner did not raise the question of jurisdiction and authority of the Kolkata Municipal Commissioner under Section 17 A of the Act of 1984. The writ petitioner is therefore precluded from raising such contentions, having waived the same while such contentions were available to the writ petitioner in the earlier writ petition. The writ petitioner was not dissatisfied with the order disposing of the earlier writ petition. It was the private respondent who preferred the appeal being APO 476 of 2004 against the order dated November 19, 2004 passed in the first writ petition.

Learned Advocate appearing for the private respondents has drawn the attention of the Court to the reply dated March 28, 2019 given by the Department of Fisheries Aquaculture Aquatic Resources and Fishing Harbours to the effect that, the notification dated June 16, 1994 was published in the extraordinary Calcutta Gazette on such date. Therefore, according to him, it does not lie in the mouth of the writ petitioner to challenge the existence of such notification. Referring to the notification dated July 18, 2005, learned Advocate appearing for the private respondents has submitted that, such notification is in respect of fishery district of West Bengal and not in respect of the jurisdictional areas of the Kolkata Municipal Corporation. In any event, there is a separate notification dated August 5, 1994 which confers the jurisdiction of the Kolkata Municipal Corporation area upon the Kolkata Municipal Commissioner to act as the competent authority under the Act of 1984. In any event, such notification stood superseded on July 20, 2017.

Learned Advocate appearing for the private respondents has submitted that, the total water body is equivalent to 56 decimals in Dag No. 47 Mouza Haridevpur, Ward No. 115. He has submitted that, premises No. 193A and 193G were purchased on May 25, 2001 and March 13, 2001 respectively. The erstwhile owner of premises No. 193G had obtained an Order dated April 6, 1998 from the Sub-Divisional Land and Land Reforms Officer, 24 Parganas (South) permitting change of classification of the land from pukur (pond) to bastu (homestead). He has referred to the writing dated April 20, 2018 issued by the Joint Director of Surveys, West Bengal to the effect that, the Sub-Divisional Land and Land Reforms Officer is not the competent authority to issue the order of conversion. The order of conversion therefore has no significance. The erstwhile owner of premises No. 193A did not obtain any valid order of conversion. The erstwhile owners of both the premises obtained mutation on the basis of the description of the land in conveyance deeds which deliberately misdescribed the properties concerned. According to him, Section 17 A of the Act of 1984 applies to the premises concerned. He has submitted that, the filling of the pond was done continuously and over a period of time. He has referred to the judgment and order of the Appeal Court dated March 26, 2007 and submitted that, municipal

records cannot be taken as conclusive proof with regard to the title of an immovable property. The mutation was done on the basis of conveyance deeds produced by the writ petitioner and that, such mutation has no relevance. According to him, there is no order of conversion passed by the competent authority under Section 4C of the Land Reforms Act, 1955. He has referred to the interim orders passed by the Appeal Court with regard to the property concerned.

Referring to the impugned order of the Kolkata Municipal Commissioner, learned Advocate appearing for the private respondents has submitted that, the impugned order gives reasons for arriving at the findings. The impugned order cannot be said to be perverse. He has questioned the addition of a private respondent in the writ petition who was not there in the earlier round of litigations. In such circumstances, he has submitted that, the writ petitioner is not entitled to any relief in the two writ petitions.

Learned Advocate appearing for the private respondent No. 12 has submitted that, the respondent No. 12 is not connected with the writ petition. The respondent No. 12 is neither a necessary nor a proper party in the writ petition. The respondent No. 12 had purchased the immovable property on March 12, 1992. Building plan was sanctioned by the appropriate authority on August 29, 2000. Construction of the building was made within 2002. The property owned by the respondent No. 12 does not contain any pond or water body. Water connection was given to the respondent No. 12 on July 17, 2003. The respondent No. 12 is also enjoying electricity connection at the premises. All rates and municipal taxes in respect of the property have been paid from time to time. The respondent No. 12 is in exclusive possession of the property.

Learned Advocate appearing for the private respondent Nos. 5 to 10 in the second writ petition has submitted that, the writ petitioner is not entitled to any relief in the second writ petition also. He has submitted that, the writ petitioner obtained the permission letter by suppressing material facts. The property in question is a water body. No construction can be made thereat. Therefore the question of granting permission for water supply or cleaning of the water pipeline does not arise.

The following issues have arisen for consideration in the two writ petitions :-

- (i) Are the impugned notice dated March 16, 2004 and the order dated February 2, 2009 without jurisdiction?
- (ii) Are the provisions of Section 17 A of the Act of 1984 as amended in 1993 not attracted with regard to the constructions appearing at the subject plot?
- (iii) To what reliefs, if any, are the parties in the two writ petitions entitled to?

The petitioner claims to be the owner of premises nos. 193A and 193G, Mahatma Gandhi Road, Kolkata 700 082. The two premises have been carved out of Dag No. 47 Mouza Haridevpur. Dag No. 47, Mouza Haridevpur was recorded as a pond in the record of rights maintained under the West Bengal Land Reforms Act,

1955. The predecessor-in-interest of the petitioner had applied for conversion of premises number 193G from a pond to homestead with the Sub-Divisional Land and Land Reforms Officer, South 24 Parganas, under the provisions of the West Bengal Land Reforms Act, 1955. By an Order dated April 6, 1998, the Sub-Divisional Land and Land Reforms Officer, had allowed the conversion. The petitioner had purchased premises number 193G on March 13, 2001. The petitioner had purchased premises number 193A on May 25, 2001. The petitioner had applied for mutation of his name with the Corporation authorities, subsequent to his purchase. The Corporation authorities had allowed the mutation. According to the petitioner, constructions at the subject premises were existing at the time of his purchase. Consequently, according to the petitioner, the provisions of Section 17 A of the Act of 1984 are not attracted as, the petitioner is not guilty of continuing any construction for converting the pond to a homestead. Whatever conversion, if at all, took place prior to the purchase by the petitioner. Therefore, the impugned notice to the petitioner could not have been issued on March 16, 2004 and resulted in the impugned decision dated February 2, 2009. Both the impugned notice dated March 16, 2004 and the impugned decision dated February 2, 2009 are without jurisdiction.

Section 17 A of the Act of 1984 came into effect from March 2, 1994. Section 17 A of the Act of 1984 is under Chapter IIIA which bars conversion of water area except for its use. Section 1 (2) of the West Bengal Inland Fisheries (Amendment) Act, 1993 requires a notification to be made for the purpose of giving effect to the amendment introduced by the amending Act of 1993. By a notification dated June 16, 1994, the State Government has, in exercise of the power conferred by Sub-Section (2) of Section 1 of the amending Act of 1993, appointed, June 16, 1994 as the date on which Section 17 A of the Act of 1984 shall come into force. On June 16, 1994, admittedly, the plot in question was a pond as, the application for conversion of the pond to a homestead was made by the predecessor-in-interest of the petitioner subsequent to the coming into effect of Section 17 A of the Act of 1984. As noted above, such application for conversion was ostensibly allowed on April 6, 1998. The petitioner as the purchaser stepped into the shoes of his predecessor-in-interest with the same rights and liabilities as that of the predecessor-in-interest in respect of the property concerned. In the facts of the present case, the predecessor-in-interest of the petitioner could not have converted the pond to a homestead in 1998 after coming into effect of Section 17 A of the Act of 1984. The conversion of the pond and the construction thereat by the predecessor in interest of the petitioner are in violation of the provisions of Section 17 A of the Act of 1984. The petitioner cannot, therefore, have a better or a higher right than that of his predecessor-in-interest in respect of the same plot merely because, the petitioner purchased the plot from his predecessor-in-interest subsequently. Petitioner cannot take the shelter that, he is not guilty of conversion of the pond or making a construction thereat subsequent to the coming into effect of Section 17 A of the Act of 1984.

As noted above, Section 17 A of the Act of 1984 came into effect from June 16,

1994 by virtue of a notification published in the Calcutta Gazette on June 16, 1994 itself. A copy of the Calcutta Gazette dated June 16, 1994 carrying the notification dated June 16, 1994 has been produced by the learned Additional Advocate General, pursuant to the order of the Court. There is nothing on record to disbelieve the learned Additional Advocate General when he has produced the notification dated June 16, 1994 in respect of Section 17 A of the Act of 1984. The contentions of the petitioner that, the provisions of the Section 17 A of the Act of 1994 has never been given effect to, by a notification published in the Calcutta Gazette, cannot be accepted, in view of the production of the copy of the Calcutta Gazette pursuant to the order of the Court. Usha International Ltd. (supra) has not decided that, a notification under Section 1(2) of the amending Act does not exist. In the facts of that case, no authenticated copy of the notification was produced. What was produced was a copy of such notification by the Kolkata Municipal Corporation. In the present case, the notification has been produced by the learned Additional Advocate General on behalf of the State pursuant to an order of the Court.

Jagmittar Sain Bhagat & Ors. (supra) has held that, jurisdiction cannot be conferred by consent of the parties or acquiescence or waiver. Merely because one of the parties did not object to the maintainability or the jurisdiction, it cannot be said that, the forum can assume jurisdiction if it otherwise did not have any. Foreshore Cooperative Housing Society Limited (supra) has explained the word 'jurisdiction' as used in Section 9A of the Code of Civil Procedure, 1908 in the context of the Maharashtra State Amendment. British India Steam Navigation Co. Ltd. (supra) has considered the issue of jurisdiction in action in personam. It has considered such aspect in the light of Private International Law. T. Varghese George (supra) has considered Section 92 of the Code of Civil Procedure, 1908. It has held that, a suit for framing a scheme for administration of a public trust is maintainable by two or more persons having interest in the trust and when such persons make out a case of breach of trust created for public purpose or seek directions of Court for administration of trust. Sarwan Kumar & Anr. (supra) has held that, decree passed by a Civil Court lacking inherent jurisdiction to entertain the suit in view of a specific bar contained in a special act governing the case, is a nullity. Objection regarding invalidity of such a decree can be raised at any latter stage including the stage of execution of the decree or in any other collateral proceeding.

No doubt an authority passing an order must have requisite jurisdiction to do so. Consent of the parties or the participation of the parties to the decision making process would not confer jurisdiction on an authority which it inherently lacked. The issue of jurisdiction can be raised at any stage and even in collateral proceedings. In the present case, the Kolkata Municipal Commissioner issued the impugned notice and passed the impugned order in exercise of powers under Section 17 A of the Act of 1984. It cannot be said that, the Kolkata Municipal Commissioner had acted without jurisdiction in doing so.

In view of the discussions above, the first issue is answered by holding that, the notice dated March 16, 2004 and the impugned Order dated February 2, 2009 are within the jurisdiction of the authorities issuing the same.

Hitendra Vishnu Thakur & Ors. (supra) has considered the issue of jurisdiction with regard to a criminal trial. It has held that, where, a statute which affects substantive rights, is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment. However, if a statute affects procedure, unless a construction is textually impossible, is presumed to be retrospective in its application. It goes on to say that, a statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication. Sangam Spinners (supra) has held that, every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. G. Sekar (supra) has held that, the question as to whether an amendment is prospective or retrospective in nature, will depend upon its construction. It has considered Hindu Succession Act, 1956 and the Hindu Succession (Amendment) Act, 2005 and held that, neither the 1956 nor the 2005 Act seeks to reopen vesting of a right where succession has already taken place. The operation of the statute is no doubt prospective in nature.

In the facts of the present case, the question whether Section 17 A of the Act of 1984 has retrospective effect or prospective in nature is called upon to be decided. Section 17 A came into force on June 16, 1994. On that date, admittedly, the plots in question were ponds. They were classified to be so in the record of rights. The conversion took place subsequently. The petitioner is the successor-in-interest of the person responsible of converting the pond into a homestead. The conversion was not in accordance with law. Permission under the Act of 1984 was not obtained by the predecessor-in-interest of the petitioner. The petitioner stepped into the shoes of the predecessor-in-interest of the petitioner in respect of the property concerned. The petitioner cannot have a better or higher right than that of the predecessor-in-interest of the petitioner in respect of the plots concerned. Therefore, it cannot be said that, the impugned order applied Section 17 A of the Act of 1984 retrospectively as against the petitioner.

The second issue is answered by holding that, the provisions of Section 17 A of the Act of 1984 stands attracted with regard to the constructions appearing at the subject plots.

The impugned order is well reasoned. A writ Court is not called upon to reappraise the evidence, substitute its own wisdom over the decision arrived at by the adjudicating authority unless, it is demonstrated and substantiated that, the decision is perverse. Such scenario does not exist in the facts of the present case. All contentions raised on behalf of the petitioner have been dealt with by the impugned order.

The third issue is answered by holding that, the petitioner is not entitled to relief in any of the two writ petitions. With, the impugned Order dated February 2, 2009 being sustained, no relief can be granted to the writ petitioner in the second writ petition. The petitioner is not entitled to any water supply at the property concerned as, the construction is on a water body which is required to be restored.

W.P. No. 10159 (W) of 2009 and W.P. No. 9635 (W) of 2016 are dismissed. No order as to costs.

Urgent certified website copies of this judgment and order, if applied for, be made available to the parties upon compliance of the requisite formalities.

Later:-

The prayer for stay made on behalf of the petitioner is considered and refused.