

(1998) 05 CAL CK 0010

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction, M.A.T. No. 1109 of 1998 with W.P. No. 3043 (W) of 1998

Jolly Begum and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 11-05-1998

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 397, 401
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 144, 144(5)

Citation : (1998) 3 CALLT 51

Hon'ble Judges : Satyabrata Sinha, J; Dibyendu Bhusan Dutta, J

Bench : Division Bench

Advocate : Mr. Saktinath Mukherjee, Mr. Ashok Banerjee, Mr. Tapas Kumar Banerjee, Mr. S. Khandekar and Mr. Susovan Sen Gupta, for the Appellant; Mr. Chandra Sekhar Das, Mrs. Dipti Bhattacharjee (II), Mr. Moloy Basu and Mr. G. Shrivastava, Mr. Dipankar Chakraborty and Mrs. Sima Chakraborty, for the Respondent

Judgement

S.B. Sinha, J.—Although initially this appeal was preferred against an order dated 26.3.98 passed by a learned single Judge of this court, keeping in view the points involved and as suggested by the learned counsel for the parties, we heard the writ application itself.

2. The writ petitioners who are three in numbers filed a writ application questioning an order dated 7th October, 1997 passed by the Commissioner of Calcutta Municipal Corporation as contained in Annexure "A" to the writ application.

3. The fact giving rise to the said application is as follows:-

4. A dispute had arisen as regard the right, title and interest, the extent of the said right involving three premises being premises Nos. 83/1, 84/13, and 94/3 situated at Topsia Road (South) between the petitioners and the private

respondents. The respondents No. 6 to 9 claimed right, title and interest in respect of premises No. 84/3, whereas the respondent No. 7 Shyammat Kumar Banerjee claims right, title and interest in respect of premises No. 84/3 as a thika tenant. It is admitted that a suit was filed in the original side of this court for specific performance of contract by Sk. Abdul Sali and Syed Anisur Rahim against Sachindra Nath Das. Nirmal Kumar Das. Bimal Kumar Das and Gopal Chandra Das, praying, inter alia, for a decree as against the said defendants to execute and register necessary deed of conveyance for premises No. 47/1 and 83/1, Topsia Road (South) Calcutta. jointly and severally as has been described in the agreement for sale entered into by the said parties. The said suit was filed on the ground that the said defendants agreed to sell, inter alia, 10 Cottahs of land in premises No. 47/1 and 10 Cottahs of land in premises No. 83/1, Topsia Road (South) for a consideration of Rs. 40,000/-, but despite their readiness and willingness to perform their part of the contract, they failed and/or neglected to execute a conveyance in their favour pursuant to the said agreement dated 13.8.94. The said suit was decreed within five days of its institution on consent on 13th April, 1987. In that case the plaintiff did not pay deficit court fees and such deficit court fees were deposited after the decree of the suit. A deed of conveyance dated 5th May, 1987 was executed by the defendants thereafter in favour of the plaintiffs which as noticed hereinbefore includes the petitioner No. 2. However, from the deed of conveyance produced before us it appears that 14 Cottahs of land in premises No. 93/1, had been transferred.

5. Although the learned counsel for the parties have taken us through various orders passed by this court subsequent to the passing of decree and also other proceedings initiated between the parties including a proceeding u/s 144 of the Code of Criminal Procedure, for the purpose of disposal of the writ application it may not be necessary to delve deep into the said matters. However, the following facts may be noticed.

6. One Puran Chandra Burman and Ratan Chandra Burman moved a writ application in this court being C.R. No. 10878(W) of 1987 alleging police inaction in respect of their property namely holding No. 84/3. Topsia Road (South). According to the writ-petitioners-appellants pursuant to the deed of sale executed in their favour in respect of premises No. 83/1. they filed an application for mutation of their names in the office of the Corporation of Calcutta and the same was allowed on 16th June, 1988. It appears strange that certain contempt applications have been filed at the instance of the writ-petitioner-appellants and in the said contempt application one Sri Partha Dutta was appointed as Special Officer. One Mr. Ikbal Ahmed, Advocate, acting on behalf of Balai Chandra Dolui and others claimed that his clients are Thika Tenants in respect of premises No. 83/1, Topsia Road (South). He in his letter dated 20th April, 1989 addressed to the Assessor. Calcutta Municipal Corporation, informed about necessity of verification of Municipal Corporation records so that the demarcation and construction of boundary wall can be undertaken. He also addressed a letter to the Special Officer on 21st April. 1989 acknowledging letter dated 2Gih April.

1984 and therein he further stated that his client was not a party in the original side suit and again reiterated that his client is a Thika Tenant in respect of the said premises since 1946. Allegedly, at the instance and under supervision of the said Special Officer, boundary wall around 83/1, Topsia Road (South) was constructed. However, there appears to be a dispute to the effect that while constructing such a boundary wall, encroachments have been made.

7. As noticed hereinbefore, the writ applications was filed by Burmans being 1987 CRI 10878 (W) which was disposed of by an order dated 19th May, 1989, wherein an observation was made that purchase of premises No. 84/3 having been made on 31.12.81. I.e. after coming into force of Thika Tenancy Acquisition and Regulations Act, 1981, the party should be at liberty to have their rights, title and interest adjudicated in appropriate forum. Admittedly, the respondent, Shri Shyamal Kumar Banerjee. thereafter filed a suit in the court of the learned Munsif. Second Court at Sealdah. The said suit, however, was confined to premises No. 84/3, Topsia Road (South). It appears that meanwhile, a proceeding u/s 144 of the Code of Criminal Procedure also initiated which was registered as M.P. Case No. 739/ 7 and allegedly with the police help writ-petitioners forcibly fixed a gate in the premises of the respondent, Shyamal Kumar Banerjee. An application was filed by Shyamal Kumar Banerjee u/s 144(5) of the Code of Criminal Procedure before the learned Magistrate and by an order dated 20th March. 1997, the police authorities were asked to maintain status quo in respect of the construction at the said premises. A revisional implication was moved by Sk. Abdul Salim against the said order which was summarily dismissed by a learned Judge of this court by an order dated 8th April, 1997. In the meantime, it appears that an application for grant of sanction of building plan was filed by the appellants herein, before the Calcutta Municipal Corporation and the same had been granted. The said building plan was allegedly sanctioned in March, 1997. The said Shyamal Kumar Banerjee having come to learn the said fact filed a complaint before the Commissioner. Calcutta Municipal Corporation alleging that the appellants had encroached a portion of premises No. 84/3, Topsia Road (South), Calcutta pursuant where to a stop-work notice in terms of section 401 of the Calcutta Municipal Corporation Act was issued. However, it appears that after representation had been filed by the appellants, the said order was revoked. A fresh complaint appears to have been filed in June, 1997 and a fresh notice had been issued. Another order u/s 401 of the said Act was passed on 9th July, 1997. A writ application was filed by Jolly Begun, which was marked as writ petition No. 13502(W) of 1997, questioning the aforementioned notice wherein two applications were filed--one by Shyamal Kumar Banerjee and others and the other by Salil Kumar Dutta and three others for being included as Parties respondents in the said writ-petition. The said writ petition along with the aforementioned two applications were taken up for hearing by Altamas Kabir. J. and by a judgment and order dated 11.7.97, the said learned Judge disposed of the said writ application and the aforementioned applications for addition of parties with the following directions:

"Accordingly, I dispose of this application as also two applications for addition of parties, with a direction upon the Municipal Commissioner to consider and dispose of the complaints made by the said applicants within two weeks from date and the first date of hearing shall be on 6th August, 1997 at 11 -30 a.m. No further notice need be given to the parties in respect of the first date as fixed by this court. It is expected that in order to facilitate the completion of the proceedings, all parties will co-operate with the Commissioner and not seek unnecessary adjournments.

Pending the disposal of the matter by the Municipal Commissioner, the petitioners shall not make any construction in any premises other than premises No. 83/1. Tapsia Road (South) Calcutta-46."

From a perusal of the said order, therefore, it appears that although writ petition was disposed of with the aforementioned directions, the petitioners-appellants were restrained from making any construction in any premises other than premises No. 83/1. Tapsia Road (South) Calcutta-46. Pursuant to or in furtherance of the said order, parties were heard by the Commissioner of the Calcutta Municipal Corporation and by an order dated 7.10.97. the said matter was disposed of in the following terms:

"The admitted fact is that a building plan vide Building Sanction No. 210 dated 12.3.97 was sanctioned by Calcutta Municipal Corporation in favour of Jolly Begum in respect of premises No. 83/1, Tapsia Road (South). Subsequently complaints were received from Mr. Salil Dutta and Mr. Shyamal Kumar Banerjee and others that sanction was obtained by Mrs. Jolly Begum by encroaching their land at premises No. 83/3 and 84/3, Tapsia Road (South).

In this connection it may be mentioned that while sanctioning the said plan the Corporation had to reply upon a declaration made by Mrs. Jolly Begum giving the site plan of the premises, since there was no site plan in the original deed whereby Jolly Begum acquired title in respect of said premises by purchase.

During hearing it was stated by complainants that a suit being T.S. No. 435 of 1989 is pending in a competent Civil Court and an order of injunction has been passed in that suit in respect of premises No. 84/3, Tapsia Road (South).

Apart from that, the complainants produced documents giving site plan in respect of their premises from which the statements of the complainants cannot be overruled.

In view of the matter and having regard to the fact that there is already a civil suit pending involving the same dispute, I think that the cause of justice shall be served if construction is kept abeyance till disposal of the pending suit.

However, the loss of time due to the pendency of the litigation before appropriate court shall go to the credit of plan holder if ultimately she succeeds in the proper court of law."

8. The instant writ application has been filed by the appellants herein again without impleading the clients of Mr. Srivastava and Mr. Basu. They were added as Parties on oral prayer.

9. Before we proceed to deal with the matter, we may notice that in the aforementioned suit filed by Sri Shyamal Kumar Banerjee being Title Suit No. 435 of 1989 and interim order of injunction was issued and the appeal was taken therefrom and in the appeal court although the order passed by the learned trial Judge stayed, Abdul Salim was restrained from making any construction whatsoever. We may however, place on record that Mr. Basu's clients are not Parties in the aforementioned suit nor premises No. 84/3. Is the subject-matter thereof despite the fact that the said respondents also filed a complaint petition before the Commissioner of the Calcutta Municipal Corporation.

10. The purport and object of the Calcutta Municipal Corporation Act clearly excludes the jurisdiction of the Commissioner to determine a boundary dispute. While disposing of the writ application, Altamas Kabir, J. also issued certain directions, but in our opinion, such directions were required to be complied with within the framework of the Calcutta Municipal Corporation Act, 1980. As regards sanction of a building plan, the Calcutta Municipal Corporation has certain statutory duties. It has also a right to remove the plan in the event it is found that such sanction had been obtained on a misrepresentation. Although the Commissioner, Calcutta Municipal Corporation, disposed of the matter in terms of the order dated 7.10.97 in the manner as aforesaid, a bare perusal thereof would show that he had tried to shirk the matter from his shoulder. The said authority was required to apply its mind as to whether the complaint petition filed by the respondents No. 6 to 9 as also S.K. Banerjee were within the four corner of the Calcutta Municipal Corporation Act or not. If the same comes within the purview of the jurisdiction in terms of the provisions of the said Act, he ought to have issued requisite notice to the appellant so as to enable them to show that the plan sanctioned in their favour was not obtained by misrepresentation and thus the provisions of section 397 of the Calcutta Municipal Corporation Act has no application. Admittedly, no such notice had been issued. A civil dispute between the Parties namely right title and interest and possession cannot be decided by an authority under the provisions of the Calcutta Municipal Corporation Act. As noticed hereinbefore a title suit is already pending. The clients of Mr. Banerjee being respondents No. 6 to 9, if they are of the opinion that any encroachment has been made by the appellant in any portion of the said land, they may also file an appropriate civil suit or take recourse to such remedies which are available to them in law. There cannot, however, be any doubt whatsoever that in the event the Commissioner, Calcutta Municipal Corporation comes to the conclusion that the building plan sanctioned in favour of the appellants had been obtained by them by misrepresentation, he is certainly entitled to initiate proper proceeding. Such a proceeding has got nothing to do with the pending suit and independent enquiry is possible to be made by the said authority in exercise of his statutory power. But while refusing to exercise such statutory power, in our

opinion, he could not have passed an order of injunction as against the appellant, which he could have only passed in terms of the provision of section 401 of the Calcutta Municipal Corporation Act, while asking the authorities to wait till the civil suit is disposed of. The Commissioner, Calcutta Municipal Corporation while passing the said order, has, therefore, failed to take into consideration the scope and ambit of his jurisdiction. He failed to pose unto himself the right question so as to acquaint himself with the correct facts so as to arrive at a correct conclusion and thus he misdirected himself in law. It further appears that the said authority has also failed to take notice of the fact that on earlier occasions notices u/s 401 of the Calcutta Municipal Corporation Act were served upon the appellants on two occasions and on both such occasions, such proceedings were revoked. A statutory authority has no inherent power either to pass an order of injunction or to pass any other order which is not within four corners of the said Act. As the Commissioner, Calcutta Municipal Corporation has not exercised its jurisdiction u/s 401 of the Calcutta Municipal Corporation Act nor could he do so in the facts and circumstances of this case unless appropriate proceeding u/s 397 thereof is initiated and this, the impugned order cannot be sustained. We may further observe that keeping in view the nature of injunction granted by the civil court, he could not have passed an order which is inconsistent with the order passed by the Civil Court. Such blanket order, in our opinion, has been passed wholly without jurisdiction.

11. For the reasons aforementioned, we are of the opinion that the only course left open to the Commissioner of Calcutta Municipal Corporation was to apply his mind so as to come to the conclusion as to whether the representation of the concerned respondents comes within one or the other provision of the Calcutta Municipal Corporation Act and if so, he may initiate appropriate proceeding. Such a proceeding, we may venture to repeat, would not hinder the process of law undertaken by one of the respondents in the civil court. It will be open to the parties to the civil court to apply for any other or further orders. The Commissioner, Calcutta Municipal Corporation is, therefore, directed to consider the matter afresh in terms of the judgment passed by *Altamas Kabir, J.* and dispose of the same in accordance with law and in the light of the observations made herein before. The matter may be disposed of at an early date and preferably within a period of eight weeks from the date of communication of this order.

12. We have been informed at the Bar that the entire structure is complete and only finished work is to be carried on. If the order of injunction passed by the civil court does not stand in the way of the appellant in carrying out the finishing work, they may be permitted to do so at their own risk and for that purpose they would not claim any equity and the same shall be subject to any order that may be passed by any competent court of law. However, the appellants, till determination of the matter by the Commissioner of Calcutta Municipal Corporation, may not create any third party right.

13. We make it clear that no further representation is required to be filed and the parties concerned may only file or supply such supplementary materials as may be found necessary for the purpose of proper adjudication of the matter. This appeal and the writ application are disposed of with the aforementioned observations and directions, but the parties shall pay and bear their own costs.

14. The learned counsel for the parties are at liberty to take down the gist of this order and communicate the same to the Commissioner of Calcutta Municipal Corporation who shall act on such communication.

15. Xerox certified copy of this order, if applied for urgently shall be given within three days.

16. The order of this court may be communicated through a special messenger at the costs of the appellant, which costs may be deposited within one week from date.

D.B. Dutta, J.

17. I agree.

18. Appeal disposed of