

(2011) 07 CAL CK 0097

In the Calcutta High Court

Case No : A.P.O.T. No. 644 of 2010, G.A. No. 3767 of 2010, ATA No. 1 of 2006
and A.P.O.T. No. 163 of 2011

Moloy Kumar Das

APPELLANT

Vs

Krishna Chandra Adhikari and Another
Lohia Vs Gopal Adhikari and Another

RESPONDENT

Date of Decision : 13-07-2011

Acts Referred:

Trusts Act, 1882 — Section 1, 34

Citation : (2011) 3 CHN 691

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Jishnu Chowdhury, Chayan Gupta, Abhijit Sarkar, in A.P.O.T. No. 644 of 2010, Hiram Mitra, Ajit Kr. Choubey, Seema Choubey and Suchismita Ghose, in A.P.O.T. No. 163 of 2011, for the Appellant; Swapan Kumar Mullick and M. Paul, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—These two appeals were heard together, one after the other, as those arise out of the same proceeding u/s 34 of the Indian Trusts Act ("Act") and to some extent, are interlinked.

2. APOT No. 263 of 2010 is at the instance of a third party in a proceeding u/s 34 of the Act who has been admittedly dispossessed by the Special Officer appointed by the Court in the proceedings, and is directed against order dated August 16 & 17, 2010 passed by a learned Single Judge of this Court by which His Lordship disposed of two applications filed by the Appellant, being GA No. 1469 of 2006 and GA No. 2478 of 2009, by giving leave to the Appellant to approach appropriate forum for establishing his legal right in the property and also giving him liberty to file appropriate application seeking leave to sue the Special Officer, if necessary. The learned Single Judge, however, directed return of the machineries belonging to the Appellant to him which were lying in the

symbolic possession of the Special Officer and physical possession of the Applicant u/s 34 of the Act after making inventory of those articles.

3. The other appeal being APOT No. 163 of 2011 is at the instance of a promoter whose bid to promote the property which is the subject-matter of the application u/s 34 of the Act was found to be the highest and consequently, was selected by the court in the past for development, and is directed against order dated March 3, 2011 passed by the selfsame learned Single Judge by which His Lordship refused prayer (b) of the application being GA No. 3752 of 2006 filed by the applicant u/s 34 of the Act by which he prayed for direction upon the Special Officer to deliver possession of the entire premises in question to the Appellant after acceptance of his offer with police help. His Lordship while refusing such prayer restrained the Appellant and the applicant u/s 34 of the Act as well as the Special Officer from transferring or alienating any portion of the building and land appertained thereto to anyone without the leave of the Court until the Kolkata Municipal Corporation decided the question as to whether the developer constructed the building in accordance with the sanctioned plan. The Kolkata Municipal Corporation was directed to report within six months on the said question.

4. The facts giving rise to filing of these appeals may be summed up thus:

a) One Sri Sri Radha Banshidhari Thakur, a Hindu deity being represented by its next friend and shebait, viz. Krishna Chandra Adhikary, filed an application u/s 34 of the Indian Trust Act before this Court being A.T.A. no 1 of 2006 and prayed for the following reliefs:

i) The Petitioner be discharged from and/or allowed to retire from the office of shebait and trustee of the debutter estate of the deity Sri Sri Radha Banshidhari Thakur created through the will dated 10-1-1932 of Smt. Mann Kumar Dassi, deceased and the said 4th son of the Petitioner being Gopal Adhikari be appointed as the shebait and managing trustee in place and stead of the Petitioner on the same terms and conditions, and further to that to appoint your Petitioners younger son Chinmoy Adhikary to act as a trustee;

ii) Liberty to given to the shebait of the aforesaid debuttar estate to deal with the present occupiers of 11, Mathur Sen Garden Lane, Calcutta and to evict the trespassers therefrom with the help of the local police of the Jorabagan P.S. and if necessary a special officer be appointed for the purpose with a direction to the local Jorabagan P.S. to render all possible assistance to him;

iii) Liberty be given to the aforesaid debutte estate to have the property at 11, Mathur Sen Garden Lane to be developed by a suitable developer so that a proper abode and mandir be constructed to house the said deity;

iv) Liberty to be given to the shebait to shift the said deity from Brindaban to the newly constructed mandir after development of all, Mathur Sen Garden Lane, Calcutta, if both the trustees are in agreement for the same;

v) Liberty be given to the shebait and trustee to sell the said Brindaban property at the best available price after the shifting of the deity, or in the alternative to construct an "Asram" to house pilgrims for proper and better utilization of the said property;

vi) Direction be given to the shebait and trustee to invest the sale proceeds of the Brindaban property and the income from the development of 11, Mathur Sen Garden Lane, Calcutta, be deposited in maximum interest yielding deposits so that the purposes for creating the debutter and the direction and desires of the settler be properly implemented;

vii) Any other suitable direction be given or orders passed as to this Hon'ble Court deem fit and proper; "viii) Costs of this application do come out of the funds of the estate.

b) According to the averments made in the said application, one Mann Kumari Dassi was the original owner of the property which is the subject-matter of the application and she installed the deity, being the applicant, by creation of a Debottar Estate and fixing the line of succession of the Shebaits. According to the Petitioner, the said Mann Kumari by way of a testamentary disposition created a trust by way of Debattor and such Will has been duly probated by this Court.

c) In paragraph 19 of the application before this Court u/s 34 of the Act, it is admitted by the applicant that the property in question was in occupation of the trespassers or unauthorised occupants without disclosing their identity.

d) On March 29, 2006, the learned Single Judge, before whom the matter was moved, after going through a supplementary affidavit filed by the applicant, was satisfied that the amount of expenditure of the Debottar estate far exceeded the amount of income thereof and that there was no way out to solve the problem of maintaining the proper seva-puja of the deity who was then installed in Brindaban and the temple at Brindaban was in possession of the third parties. In such a situation, as suggested to His Lordship, the property in question in Kolkata should be developed and the deity should be shifted to the Kolkata in a portion by construction of a temple which would be equivalent to the space then occupied by the deity in Brindaban. Consequently, His Lordship directed the shebaits to advertise in two newspapers inviting the intending developers to submit their proposals. By the selfsame order, His Lordship permitted the applicant shebait to retire as prayed for and appointed two of his sons as joint shebaits in his place. By the said order, His Lordship also appointed Mr. Biswajyoti Mitra, a learned Advocate, who was present in the courtroom, as a special officer without any remuneration for reporting the condition and the state of affairs of the property in question. The order dated March 29, 2006 is quoted below:

The Court: - Supplementary affidavit has been filed indicating the income and expenditure of the debutter estate.

It appears that the amount of the expenditure far exceeds the amount of the income. This puja always runs with deficit. There is no way out to solve the problem for maintaining the proper seva puja of the deity at present at Brindaban. However, it is difficult to manage and run and even to perform seva puja. The mandir at Brindaban is under the physical possession of third party who is appropriating the income, profits and issues therefrom and to the exclusion of the deity.

Under these circumstances, the shebait has suggested a scheme for proper utilisation and management of the assets and properties of the deity. It is suggested that an immovable property being premises No. 11, Mathur Sen, Garden Lane, Calcutta-700006 which is not the abode of the deity could be developed with the help of the intending developer with a condition a suitable space shall be provided for reinstallation or shifting of the deity and to make a small temple for performing seva puja. The space must be equivalent to the space now occupied by the deity in Brindaban.

Accordingly, I grant permission to the shebait concerned to advertise in the newspaper once in "Sanmarg", once in "Aajkal" and once in "The Statesman" to invite the intending developer for the purpose of developing and constructing a suitable building keeping apart the space for construction the temple.

This advertisement shall be done within a period of three weeks from date. On the receipt of the offers from the intending developers the same shall be placed before the Court. It is appropriate to have a valuation of this property which is sought to be given to the developer for development on such terms and conditions as may be negotiated by the shebait with the intending developer and subject to approval of the Court.

The Petitioner is unable to carry out the function as the shebait. Therefore, he is discharged on his prayer and in his place and stead Mr. Gopal Adhikari and Chinmoy Adhikari be appointed shebait trustees.

Mr. Biswajit Mitra, learned Advocate, who is present in Court is willing to act as Special Officer to make a report as to the condition and state of affairs of the property, without any remuneration and security for the aforementioned purpose. Let the Special Officer submit his report on Monday week.

Matter is adjourned for six weeks from date.

All parties concerned including the Special Officer are to act on a signed xerox copy of this order on the usual undertaking.

e) Pursuant to such direction, the learned Special Officer inspected the premises and submitted his report showing that the same was under the lock and key and he not only could not enter inside for that reason but also was chased by outsiders when he tried to enter the premises. The said report is quoted below:

On 7-4-2006 the signed copy of the minutes of the order passed herein by the

Hon"ble Justice Sengupta was served upon me by the Ld. Advocate of the Petitioner. Due to paucity of time I gave verbal notice to the Petitioner through his Ld. Advocate who also assured me that he would inform the newly appointed Shebaaits/Trustees as also to the Respondent. I fixed Saturday 8-4-2006 at 9:00 a.m. to visit the premises No. 11, Mathur Sen Garden Lane, Calcutta - 700 006 to carry out the order of the Hon"ble Court.

Accordingly on 8-4-2006 at 9:00 a.m. I went to the said premises accompanied by Sri Gopal Adhikari and I was assured that all parties concerned were duly notified by Sri Gopal Adhikari and his Learned Advocate and that no one had any objection to my visit and carrying out the order of this Hon"ble Court. The premises was identified to me by Sri Gopal Adhikari. Inside views of the premises was not possible from outside.

On external inspection I found a one storied building on the Western side of the Lane which is about 8 ft. wide and runs parallel to B.K. Pal Avenue and is near the crossing of B.K. Pal Avenue with Nimtolla Ghat Street and the premises is at about 100 yards distance from Jorabagan police station. The said front side building was totally unoccupied but there were locks whose keys could not be produced by Gopal Adhikari. However, from external inspection I found the building to be dilapidated especially on the roof that it could fall down at any moment.

I then attempted to go inside through the gate at the Northern end of the building. At this I was resisted from persons inside the premises and also from persons who were outside the building. None of the persons disclosed their names. The persons were very threatening and threatened to manhandle me and they also abused me. Thus I could not proceed further.

I thereafter informed the local P.S. in writing and informed everybody in the same way that I would visit on the next day (9-4-2006) at 11:00 a.m.

On 9-4-2006 I first went to the local P.S. accompanied by the said Gopal Adhikari and the P.S. gave 2 police personnel for my protection.

Thus on 9-4-2006 at around 11:30 a.m. again I visited the premises along with two police officers. The same persons again came out but on seeing the 2 police officers they did not obstruct me, and I could enter the premises.

On entering the premises I found that there is a one storied structure in a dilapidated condition whose roofs are made of asbestos which is broken at different places. One room about 120 sq.ft. seems to be occupied by unknown persons but I could not ascertain as to what activity they were involved in. All other portions were under lock and key. More than half of the total area inside was open to sky with two large trees and full of thorn bushes. Apart from the room as above the rest is filled with garbage. The persons present did not disclose their names or identities or the purpose of their occupation. From local enquiry it has been found that during late night sometimes some people get in as

they have a key to one door, otherwise the premises is absolutely vacant. This fact was reconfirmed by some persons who claimed to be members of Ankur a local Organisation involved in Social work. It appeared to me that the total area of the premises by estimation will be a little more than 4 Cottahs and no trace of any permanent residence was found by me. This report is prepared at my observation made on 8-4-2006 and 9-4-2006 as aforesaid."

5. In such a situation, the learned Single Judge by order dated April 17, 2006 directed the learned Special Officer to take physical possession of the property with the assistance of the local police, in case of resistance, after giving notice of 30 days if he found that there was any permanent settlement. His Lordship gave liberty to the persons in possession to come and raise objection, if any. The learned Special Officer was specifically directed that if he found "any physical possession or occupation in permanent way", he should not evict such person without service of notice. The aforesaid order is quoted below:

The Court: Pursuant to my order dated March 29, 2006, the advertisement has been issued. However, at the present moment no offer is forthcoming. However, time is too short. So, the court should wait for sometime to see whether the offerers come forward or not. The Special Officer has submitted a report to the court and found that the property is an old and dilapidated one and in any moment the property may be occupied by any unauthorised occupant. It is reported that if the possession of the house is taken by the Special Officer, it will be protected and in that case price of the property might be commensurate to the real valuation of the same. Accordingly, I direct the Special Officer to take physical possession of the property. In the event he finds any permanent settlement is there, he shall serve a notice upon him or her and after waiting for 30 days he shall take possession of the same with the help of the local police station if he finds any resistance. Any person or persons who might be in possession of the property, may come to this Court and raise objection, if so advised. The matter is adjourned for a fortnight. Before taking possession, the Special Officer shall make an inventory of the entire property in question. If he finds any physical possession or occupation in a permanent way, he must not evict without serving the aforesaid notice.

All parties concerned including the Special Officer and the Officer-in-Charge of the local police station are to act on a signed xerox copy of this order on the usual undertaking.

6. On May 5, 2006, the learned Special Officer pursuant to the above order having dispossessed the present Appellant, he came up with an application before the learned Single Judge being G.A. No. 1469 of 2006 praying for modification of the order dated 17th April, 2006 and for directing the Special Officer to hand over the possession back to the Appellant.

7. The case made out by the Appellant in the said application was as follows:

i) The Receiver dispossessed the Appellant from the property where the

Appellant was carrying on his business and removed all goods and machineries hypothecated to the Indian Bank, Rabindra Sarani Branch, Kolkata, without having any order of this Court. The intending developer demolished all the business-rooms of the Appellant as a result of which not only the Appellant but his employees had been thrown to a state of unemployment and starvation and in the process, the learned Special Officer caused damages of about Rs. 15 lac to the Appellant.

ii) One Trilak Chandra Das, the grandfather of the Appellant, was inducted as a tenant in the property measuring 5 cottahs of land at a monthly rent of Rs. 40/- by the original land owner, namely, Smt. Mann Kumari Dassi, the creator of the Debutter Estate and she with her own hand issued rent bill in the name of the forefather of the Appellant and thereafter, Nandalal Adhikary and his son, Shri Krishna Chandra Adhikari, the original applicant, received rent from the forefather of the Appellant and issued rent bills in their own hand writing. Those rent bills were collectively marked as Annexure A to the said application.

iii) After the abolition of the zamindari system in Calcutta, the Government of West Bengal had become the owner of the land in question and the Appellant had become a thika tenant/praja under the Government of West Bengal.

iv) The Appellant had paid the taxes both as occupier and owner of the land in question to the Calcutta Municipal Corporation in the name of Tilak Chandra Das, now deceased.

v) It is a settled principle of law that even a trespasser cannot be ousted or evicted from any land without the due process of law and in the instant case, the Appellant was legally and lawfully enjoying the said property and could not be evicted by filing the present application u/s 34 of the Act because according to Section 1 of the Act, all private and charitable trusts and endowments have been excluded by the operation of the Act.

8. On the basis of the aforesaid application, the learned Single Judge by order dated 19th May, 2006 directed the Special Officer to restore the Appellant to the possession on certain conditions as indicated in the order. The said order dated 19th May, 2006 is quoted below:

By this application one Maloy Kumar Das carrying on business under the name and style of "Pravash & Company" as sole proprietor thereof has approached this Court contending that he is not liable to be evicted by the Special Officer appointed by this Court. The Special Officer is present in Court and he has reported orally to his learned Counsel Mr. Mitra that at the time of his first visit no one was found to be in occupation of the room in question. However, he found some old machines were lying thereat. In this application I find there are documents which show that the applicant was in possession but whether manufacturing activity, as contended by the applicant, was being carried on or not is a wholly disputed question of fact and that cannot be decided unless I get affidavit-in-opposition. Mr. Mullick appearing for the Petitioner in the original

proceeding has come up with affidavit-in-opposition in anticipation. Let the affidavit-in-opposition be kept on record. Copy of the affidavit-in-opposition shall be applied to the advocate on record of Mr. S. Talukdar as well as to the Special Officer.

I am of the prima facie view that the applicant is entitled to be restored in possession because I find prima facie there are documents which show that the Petitioner has to meet the commercial commitments with the third party. Unless this applicant is restored to possession, there would be multiplicity of judicial proceedings and it may so happen the third party will be prejudiced. Keeping in view the aforesaid facts, I restore the applicant to possession on the terms as follows:

The Special Officer shall open the padlock and restore the possession of the applicant upon his written undertaking that in the event he wants to quit and vacate the room in question he must hand over the possession to the Special Officer. He shall remain in possession for a period of fortnight from date. In the event he deposits a sum of Rs. 50,000/- with the Special Officer, he shall remain in occupation for another one month and within the aforesaid period of one month if a further sum of Rs. 50,000/- is deposited with the Special Officer by the applicant, he shall remain in possession until further orders of this Court. The Special officer on receipt of the aforesaid amounts shall keep the same in a short term fixed deposit in Standard Chattered Bank in his own name. The applicant shall go on paying, in the event the application is not disposed of earlier, a sum of Rs. 2,000/- per month as occupation charges to the Special Officer, who shall keep it in the same account.

This order is passed without prejudice to the rights and contentions of the parties.

The Special Officer shall remain in symbolic possession and shall make a surprise visit to see the condition of the portion of the premises. This order, however, is restricted to this applicant only and the other portion of the premises will be dealt with by the Special Officer in terms of the earlier order of this Court.

Affidavit-in-reply shall be filed within two weeks after the summer vacation. The matter would be taken up on the first available Friday upon expiry of four weeks after the summer vacation when the Original Side matters will be taken up by me.

Special Officer shall supply copy of the report to Mr. Talukdar's advocate on record on usual terms.

For his job the Special Officer shall be paid remuneration assessed at 300 Gms. to be paid by Mr. Talukdar's client.

In default of deposit of the amounts by the applicant aforesaid, the Special Officer shall take physical possession of the room in question.

Special Officer and all parties concerned are to act on xerox signed copy of this

dictated order.

9. The Appellant, however, did not comply with the aforesaid terms imposed by the learned Single Judge and consequently, did not avail of the benefit of the interim order and ultimately, by the order dated 16th and 17th August, 2010 the learned Single Judge disposed of G.A. No. 1469 of 2006 and G.A. No. 2478 of 2009 by directing return of the machinery of the Appellant in his favour after holding that the Appellant was in possession of the property at the time of dispossession.

10. Being dissatisfied, the Appellant has preferred APOT No. 644 of 2010.

11. It appears from record that the applicant u/s 34 of the Act filed an application before the learned Single judge being G.A. No. 3752 of 2006 thereby praying for the following reliefs:

a) The offer made by Sri Monoj Kumar Lohia pursuant to the Orders passed herein dated 29.03.2006 and 17.04.2006 as stated in Annexure "D" hereto being the highest offer be accepted.

b) the Ld. Special Officer be directed to immediately deliver possession of the entire Premises No. 11, Mathur Sen Garden Lane, Calcutta-700006 to such highest offerer in a full vacant condition after acceptance of the offer, with police help if necessary;

c) The Petitioner as Shabait of the Trust estate be given liberty to enter into a proper development agreement with the said highest offerer incorporating the agreed terms and conditions and in keeping with the relevant orders passed and the terms mentioned in the said orders;

d) Cost of this application be paid to the Petitioner from out of the funds of the estate.

e) Such further order/orders as to Your Lordships deem fit and proper.

12. On such application being moved, another learned Single Judge of this Court by order dated August 29, 2007 passed an order in terms of prayer (a) and (c) for the time being. The said order dated August 29, 2007 is quoted below:

The Court: Subject to further hearing of this application since Pravash & Company has used an opposition to this application there would only be an order in terms of prayers (a) and (c) of the petition for the time being.

Let this matter appear for further hearing on 5th September, 2007.

For the time being, it is made clear that the Petitioner will be entitled to proceed freely in terms of the order passed hereinabove today.

All parties concerned are to act on a xerox signed copy of the minutes of this order on the usual undertakings.

13. Ultimately, the said application being G.A. No. 3752 of 2006 came up for hearing before the learned Single Judge and by order dated 3rd March, 2011 the learned Judge refused to grant order in terms of prayer (b) for the time being with further order restraining the developer and the Shabait as well as the Special Officer from transferring or alienating any portion of the building and land appurtenant thereto to anyone else without the leave of the Court.

14. Being dissatisfied, the selected developer has come up with the other appeal being APOT No. 163 of 2011.

15. Mr. Chowdhury, the learned Advocate appearing on behalf of Moloy Kumar Das, the 3rd party, who has been dispossessed, has strenuously contended before us in support of APOT No. 644 of 2010 that the learned Single Judge all through acted illegally in not only appointing a Special Officer but also giving him power to dispossess the occupier thereof in a proceeding u/s 34 of the Act. Mr. Chowdhury submits that even on the basis of the averments made in the application u/s 34 of the Act, it appears that the property belonged to a debotter estate and thus, the Act could not have any application to the facts of the present case. The learned Single Judge, according to Mr. Chowdhury, should have summarily dismissed the application on that ground alone.

16. Mr. Chowdhury next contends that if it is assumed for the sake of argument that Section 34 of the Act applies to the facts of the present case, even then within the scope of the said provision of the Act, the learned Single Judge could not have passed any direction for removing any person in possession of the property through the help of Special Officer and Police. According to Mr. Chowdhury, once it has been admitted in the application u/s 34 of the Act itself that the property was in possession of trespassers, the learned Single Judge, at the most, could advise the Trustee to file appropriate suit for recovery of possession against those persons in occupation. Mr. Chowdhury contends that in a proceeding u/s 34 of the Act, the Court cannot pass any direction for removing the person in occupation inasmuch as such power is beyond the province of the Court dealing with an application under that provision of the Act.

17. Finally, Mr. Chowdhury contends that once the Court itself came to the conclusion that the Appellant was in possession of the property, it was the duty of the Court to pass order of restoration without asking his client to file appropriate suit to establish his title to the property. Mr. Chowdhury further contends that the learned Single Judge could not impose any condition of deposit of money as a condition for restoration of possession when the Court acted without jurisdiction in authorising the learned Special Officer to take possession of the property and his client was admittedly dispossessed by an illegal order.

18. Mr. Chowdhury, therefore, prays for setting aside the order dated 16th and 17th August, 2006 and for restoration of his client's possession to the property with further direction for reconstruction of the structure then in existence.

19. Mr. Mullick, the learned Advocate appearing on behalf of the original

applicant, has, however opposed the aforesaid contentions of Mr. Chowdhury and has contended that the Appellant was a trespasser and as such, had no right to get back possession. Mr. Mullick further contends that even according to the trade licence filed by the Appellant, his business was restricted to only 300 sq. ft. and thus, he was not in possession of the entire property. Mr. Mullick submits that the documents filed in support of the application for restoration did not justify any order of restoration and the learned Judge rightly passed direction by giving liberty to the Appellant to establish his title before the appropriate forum. According to Mr. Mullick, unless the Appellant proved his lawful title to the property as a tenant, no question of restoration arose. Mr. Mullick, thus, prays for dismissal of the appeal.

20. Mr. HIRAK MITRA, the learned Senior Advocate appearing on behalf of the Appellant in the appeal being APOT No. 163 of 2011 preferred by the selected developer, contended that his client was selected by the Court after being found to be the highest bidder for development and the owner of the property was directed to enter into an agreement for development and consequently, his client entered into an agreement and even developed the property in accordance with the plan sanctioned by the Corporation and thus, it was the duty of the learned Single Judge to regularize the construction by permitting his client to transfer the property when his client has advanced huge amount for construction of the building.

21. Mr. Mullick, the learned Advocate appearing on behalf of the applicant u/s 34 of the Act supports the contention of Mr. Mitra.

22. Mr. CHOWDHURY, the learned Advocate appearing on behalf of the Appellant in the other appeal, has, on the other hand, opposed the contention of Mr. Mitra and has submitted that although no permission was granted to take possession, the developer in collusion with the Special Officer and the newly appointed Shabait dispossessed his client and demolished the structure and as such, the developer has no right to pray for regularisation of the construction illegally done in detriment to the right of his client who was in possession. Mr. Chowdhury, in this connection, relies upon the earlier order passed by the learned Single Judge by which the learned Single Judge found the developer guilty of contempt for taking possession without the consent of the Court. Such being the position, according to Mr. Chowdhury, it is a fit case where the appeal preferred by the developer should be dismissed and there should be an order of demolition of the construction made in violation of the Court's order with a direction upon the developer and the shabait to reconstruct the structure of his client. Mr. Chowdhury, thus, prays for dismissal of the APOT No. 163 of 2011.

23. We first propose to dispose of the appeal filed by Moloy Kumar Das, admittedly dispossessed by the Special Officer on the strength of the order of the learned Single Judge.

24. After hearing the learned Counsel for the parties and after going through the

materials on record, we find that in the application u/s 34 of the Act, the applicant has admitted that Mann Kumari created a debattor and that by virtue of her Will which was duly probated, a line of succession of Shebait was laid down. A copy of the Will was placed before us. We find that the debattor estate was created by Mann Kumari during her life time and by the Will, she laid down a line of succession of shabait in respect of such debottar property. Thus, on the face of such fact, the provision contained in Section 34 of the Act has no application as the Act does not apply to a debottar property owned by a deity. The learned Single Judge, therefore, on the very first day of moving the application should have after going through the averments made in the application u/s 34 of the Act summarily dismissed the application as not maintainable. All the orders passed in the proceedings including the appointment of Special Officer, giving him right to take possession and advertise and even permitting him to enter into an agreement with the developer by way of an interim measure was illegal as the very proceedings were not maintainable in law.

25. If we assume for the sake of argument that the trust was created by the Will, even then, so far as the debottar property is concerned which was created by the testatrix during her lifetime would not form part of the trust as the Act has specifically excluded a trust of religious nature from its operation.

26. Apart from the aforesaid fact, the jurisdiction u/s 34 of the Act is advisory in nature and within the narrow range of such application, there was no scope of dispossessing a person in possession by appointment of a Special Officer with the help of Police. When in the application u/s 34 of the Act, the applicant himself admitted his dispossession by the trespassers, a court having jurisdiction u/s 34 of the Act should have advised the trustee to file an appropriate suit for eviction of such trespasser, but it was beyond the authority of the court to pass an order of dispossession of those alleged trespassers by way of appointment of a Special Officer for the purpose of authorising him to take step for development of the property in question.

27. We further find from the order impugned that the original applicant u/s 34 of the Act expressed before the learned Single Judge to retire as shebait and on his desire, and the learned Single Judge appointed two of his sons as Shebait. Such a course of action is also ex facie illegal because admittedly the original applicant has other issues who were not made parties to the proceeding and the line of succession of Shebaitship having been laid down in the Will of Mann Kumari, there was no scope of appointing next Shebait at the wish of the retiring one even in a regular civil suit in the absence of all the natural heirs of the existing Shebait even in terms of the Will of Mann Kumari. Thus, the appointment of the next Shebait was also patently illegal and beyond the scope of the application u/s 34 of the Act which is, in our opinion, not maintainable.

28. The fact that the Moloy Kumar Das was in possession of the property is not in dispute and the learned Single Judge has also found such fact and no appeal or cross-objection against the order impugned has been filed by either the original

applicant u/s 34 of the Act or the newly appointed Shebait in the proceedings. Once we find that the Special Officer appointed by a Court in a proceeding which was really not maintainable has dispossessed somebody in possession of immovable property and such fact has been brought to the notice of the court by the person dispossessed, the court should immediately pass an order of restoration of possession and also should pass necessary order against the applicant for compensating the person dispossessed at his instance. At that stage, there is no scope of imposing conditions for getting back possession or asking the dispossessed person to go to court to file a regular suit against the Special Officer. On the other hand, the court should after restoring possession to the dispossessed give liberty to the applicant to file suit for recovery of possession from the alleged trespasser in the proper forum, if he is so advised, because it was the mistake of the court to dispossess the person in possession in a proceeding which is not maintainable and even if the same were maintainable, an order of dispossession even of a trespasser in such proceedings was beyond the scope of Section 34 of the Act.

29. Even in a proceeding u/s 34 of the Act, there is no scope of adjudicating the nature of right of a person in possession, and as such, we are unable to enter into such question as suggested by Mr. Mullick and we feel it as our duty as appellate court to restore the wrong done to the dispossessed by passing an appropriate order because according to the law of the land as it stands, even a trespasser of an immovable property who is in settled possession thereof can be evicted only by due process of law even at the instance of the lawful owner thereof. From the materials placed before us, there is no trace of doubt that the Appellant was definitely in settled possession of the property and the dispossession of the applicant u/s 34 of the Act has been admitted in the petition itself.

30. A plain reading of Section 34 of the Act unmistakably suggests that the provision contained therein is an enabling one. The section enables a trustee without instituting a suit to apply to a principal civil court of original jurisdiction for its opinion, advice or direction on any question in respect of the management or administration of the trust property. While disposing of such an application the court does not enjoy the power of appointing a special officer and then to direct him to dispossess a person in possession of the trust property. In this connection we may profitably refer to the case of *Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another*, wherein it has been explicitly held that u/s 34 of the Act a court can only give opinion, advice or direction on any presented question in respect of the management and administration of the trust property and not on any other matter. The Supreme Court categorically held that the jurisdiction to be exercised by the court u/s 34 of the Act is limited and held: "The jurisdiction conferred on the court u/s 34 is a limited jurisdiction. Under that provision, the court has not been conferred with overall jurisdiction in matters arising under a trust deed. The statute has prescribed what the court can do and inferentially what it cannot do. From the fact that the Court has been

conferred powers to grant only certain reliefs, it follows as a matter of law that the court has been prohibited from granting any other relief."

31. Therefore, the order of the learned Trial Judge is plainly beyond the scope of Section 34 of the Act and the learned Single Judge has thereby usurped more authority than what the legislature was willing to confer upon it. His Lordship ought to have further appreciated that Section 34 does not apply to a religious trust. In fact, all religious and charitable trusts are outside the application of this Act. The learned Trial Judge has thereby committed a serious error in passing such direction without appreciating this scope of the section or the Act and the limits of the court's jurisdiction and that too without also appreciating the effect of the order passed on the person affected.

32. We, therefore, set aside the order impugned in this appeal. We propose to consider the relief that we should give to Moloy Kumar Das, after disposing of the appeal preferred by the developer which we have heard analogously and the same is disposed of herewith as detailed below.

33. This appeal is at the instance of a selected developer in the above proceeding u/s 34 of the Act and is directed against the order passed by the learned Single Judge by which His Lordship refused prayer (b) of the application filed by the applicant u/s 34 of the Act which we have quoted above while narrating the facts of the case.

34. In the case before us, there is no dispute that the Appellant was selected as the highest bidder and the Shebaitis were permitted to enter into an agreement with the Appellant subject to the final decision of the application as by that time, Provash and company whose owner was Moloy Kumar Das, had already opposed the prayer as would appear from the order of the court dated August 29, 2007 already quoted by us.

35. Thus, if a Court permits the shebaitis to merely enter into agreement with the Appellant subject to the final decision by refusing the prayer of handing over possession of the property to the developer and the said developer without taking such leave from the court decides to demolish the existing structure and make new construction, such act of the Appellant must be described as outrageous and it appears that the learned Single Judge has already held such act as contemptuous and passed penal order for taking possession by imposing fine of Rs. 5000/- and such order has been accepted by the developer. We are unable to accept the submission of the Appellant that the previously existing structure, on its own, had collapsed. Even if it were so, such a fact did not authorise the developer to remove those collapsed structure and construct a new building on that place when prayer for handing over possession of the property had been refused.

36. Thus, by interim order of August 29, 2007 passed by the learned Single Judge permitting the applicant u/s 34 of the Act to enter into an agreement with the developer subject to the final decision of the application, no right accrued in

favour of the Appellant to start construction on the site and such act has been done in deliberate violation of the order passed by the court in collusion with the applicant and the Special Officer. Once the construction was started, it was the duty of the Special Officer to draw the attention of the court to such fact, but for reasons best known to the learned Special Officer, he remained a silent spectator in the matter till the building was completed.

37. We, thus, find that no order can be passed in favour of the developer for regularisation of the structure and to have the benefit of the agreement of development entered into with the shebait.

38. We now propose to consider the effective order that should be passed in the appeal filed by Moloy Kumar Das. As indicated earlier, it has been well established that Moloy was in possession of the factory situated in the property as would appear from the various papers filed before the learned Single Judge and after taking over of possession by the Special Officer no other person has approached this Court complaining dispossession. The Special officer of the court having dispossessed him on the strength of an illegal order of the learned Single Judge in a proceeding which is not maintainable, the court cannot avoid its liability to restore possession to the Appellant even if he is ultimately found to be a trespasser. In this proceeding there is no scope of deciding his status and thus we do not enter into such question. We do not approve the order of the learned Single Judge asking the Appellant who has been illegally dispossessed by the court to go to the proper forum to establish his title.

39. The learned Single Judge, on the other hand, should have passed necessary order for restoring the earlier position by directing the Special Officer to reconstruct the factory at the cost of the applicant u/s 34 of the Act and to put the Appellant in the possession of the property.

40. Now that the developer has constructed an illegal building without taking any leave of the Court, we direct the developer to demolish the building and remove the materials at his own cost within three months from today. The learned Special Officer will handover the possession of the entire property to Moloy immediately after the demolition of the building. The applicant u/s 34 of the Act will pay a sum of Rs. 3 lac as a lump sum compensation within two months from today to Moloy to enable him to reconstruct his factory and to recover damages suffered due to illegal dispossession, with liberty to him to recover any further amount by filing an appropriate suit and proving the actual damages suffered by him for illegal dispossession. While calculating the damages, the appropriate court will adjust the amount of Rs. 3 lakh, if paid in the meantime. So long the amount of Rs. 3 lakh is not paid to Moloy, the entire land in question will remain charged for such payment.

41. If the present structure is not removed by the developer within three months from today, the same should be demolished at the instance of the court at the cost jointly and severally payable by both the developer and the applicant u/s 34

of the Act on the prayer of the person dispossessed before this Court.

42. The appeal filed by the third party who was dispossessed is, thus, allowed to the extent indicated above with costs which we assess at Rs. 50,000/- payable by the applicant u/s 34 of the Act. The appeal filed by the developer is dismissed without any order as to costs.

Sambuddha Chakrabarti, J.

43. I agree.