

(2001) 02 CAL CK 0037

In the Calcutta High Court

Case No : A.P.O. No. 481 of 1998 and W.P. No. 421 of 1997

Officer-on-Special Duty, Calcutta Improvement Trust and
Others

APPELLANT

Vs

Pranab Kumar Marik and Others

RESPONDENT

Date of Decision : 05-02-2001

Acts Referred:

Calcutta Improvement Act, 1911 — Section 78, 78A
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 91, 92

Citation : (2001) 2 CALLT 562 : (2001) 2 CHN 57 : (2002) 1 ILR (Cal) 258

Hon'ble Judges : Malay Kumar Basu, J;Altamas Kabir, J

Bench : Division Bench

**Advocate : Mr. Jayanta Mitra and Mr. Santi Bhusan Mukherjee, for the Appellant;
Mr. Swadesh Ranjan Bhunta, Mr. Arup Bhattacharjee and Mr. Arup Chatterjee, for
the Respondent**

Final Decision : Dismissed

Judgement

A. Kabir, J.—The respondent Nos. 1 to 4 in this appeal are assignees of a leasehold interest in respect of a plot of land measuring 3 cottahs 13 chittacks and 31 square feet, being plot No.7 of Calcutta improvement Scheme No. LXIV.

2. The lease in respect of the aforesaid plot was initially granted by the Trustees for the improvement of Calcutta in favour of one Ajit Kumar Hazra, Dwijendra Nath Hazra and Amar Nath Hazra on 18th June. 1962 for a period of 99 years with option of renewal for a further period of 99 years on various terms and conditions.

3. One of the covenants made by the Lessees and to be performed by them is as follows:

"6. Not to assign or transfer in any way or to mortgage the said land without the previous consent in writing of the Chairman of the board."

4. The less or on its part made several covenants to be performed by it. including the following :

"2. that the board will on the written request of the lessee made three months before the expiration of the term hereby created and if there shall not at the time of such request be any existing breach of non-observance of any of the convenience on the Lessee grant to him a lease of the said land for the further of 99 years from the expiration of the said term at the same rent and containing the like covenants and provisions as are herein contained with the exception of the present covenant for renewal."

5. Ajit Kumar Hazra died intestate on 22nd October, 1969 leaving behind him surviving his widow, Smt. Protiva Sundari Hazra, and three sons, namely, Dharendra Kumar Hazra, Dwijendra Nath Hazra and Amar Nath Hazra as his heirs. By a Deed of Assignment dated 18th September, 1982. the said Smt Protiva Sundari Hazra and others assigned there said lease-hold interest in the aforesaid lands in favour of the writ Petitioners/respondents No. 1 to 4 herein.

6. The said writ petitioners/res pendants Nos. 1 to 4 in their turn entered into an agreement with Sri Shib Narayan Ghosh and Smt. Sukla Ghosh on 26th March, 1995 for assignment of their lease-hold interest in the demised lands, subject to the approveal of the Calcutta improvement Trust in writing in accordance with the covenants contained in the Deed of lease dated 18th June, 1962.

7. The writ petitioners/respondents thereafter applied to the appellants for grant of such written approval for assignment of their lease-hold interest in the demised lands, but despites repeated requests there was no response from the appellants.

8. On 26th December,1996 the writ petitioners/respondents gave notice to the appellants that in case permission to transfer and assign their leasehold interest in favour of Shir Shib Narayan Ghosh and Smt. Sukla Ghosh was not granted within 7 days from the date of receipt of the notice, they would be compelled to move the Court for redressal of their grievances. Since the appellants remained silent, the respondent Nos. 1 to 4 filed the writ petition, being W.P. No. 421 of 1997, inter Alia, for a writ in the nature of Mandamus commanding the respondents to accord necessary permission and/or approval to assign and/or sub-lease the demised lands strictly in conformity with the express covenants contained in the Deed of Lease dated 18th June, 1962.

9. Although there was no response from the appellants prior to the filing of the writ petition in the affidavit-in-opposition the appellants offered to grant permission upon payment of certain fees which would be 50% of the difference between the consideration to be obtained by the transferor and the original premium per cottah duly brought up to date by applying the inflation index.

10. The learned single Judge accepted the contention of the writ petitioners/respondents and upon holding that the appellants had acted in a wrongful

manner and had wrongly tried to extract money from a citizen without due authority of law, allowed the writ petition and directed the appellants to grant permission for assignment of the lease in writing within four weeks from the date of the order and to pay the cost of the application., assessed at Rs. 40.000/- within the said period.

11. Aggrieved by the said order of the learned single Judge. The Calcutta Improvement Trust and its authorities have preferred this appeal contending that the learned single Judge had order in law and in fact in passing the judgment and order impugned in the appeal and by imposing cost of Rs. 40,000/-.

12. Appearing on behalf of the Calcutta Improvement Trust and its authorities, Mr. Jayanta Mitra submitted that the proposed fee was on account of transfer-cum-mutation fees which the Trustees were entitled to levy.

13. Mr Mitra submitted that the terms and conditions of the Deed of Lease and/or the covenants of the Lessor and the Lessees did not bar the imposition of such transfer-cum-mutation fees and the same could be made a condition for consent to assign or transfer the lease-hold Interest in the demised lands. Mr. Mitra urged that as the owner of the said lands the Calcutta Improvement Trust was entitled to Imposed transfer-cum-mutatton fees in exercise of the normal Incidence of ownership for grant of such permission to assign or transfer the lease-hold Interest in the demise lands.

14. In support of his submissions, Mr Mitra referred to a single bench decision of this Court in the case of Suhrit Mitra v. Corporation of Calcutta & Ors. (62 CWN 186) wherein the Corporation"s right to temporarily close a public Square was held to be a normal Incidence of ownership of the Corporation in respect of the public square u/s 349 of the Calcutta Municipal Act, 1951. Mr Mitra submitted that similarly in the Instant case the Calcutta Improvement Trust was also entitled to exercise such normal Incidents of ownership in respect of the demised premises, by levying transfer-cum-mutation fees for grant of permission to assign or transfer the lease-hold Interest in the demised lands.

15. In this connection. Mr. Mitra also referred to several other decisions of this Court in (1) Ganapati Sur & Anr. v. State & Anr. (74 (2) CWN 660] Girija Singh and Another Vs. The Corporation of Calcutta and Others, and (3) Shree Madhusudan Mills Ltd. Vs. Corporation of Calcutta and Others, .

16. Mr. Mitra pointed out that in all the said decisions it had been uniformly held that the Corporation In exercise of its rights of ownership could do certain things without Interfering with the public user of the public streets, foot-paths, pavements of which it was the owner.

17. Mr. Mitra submitted that according to the terms of the lease initially granted in favour of Ajit Kumar Hazra and others, the Lessees have been paying ground rent of Rs.5/- per annum for the demised premises and were taking steps to enrich themselves by transferring the lease-hold Interest while depriving the

Calcutta Improvement Trust of a portion of the benefit thereof.

18. Mr. Mitra submitted that a meeting of the Land and Flat Allotment Committee of the Trustees was held on 19th June. 1996, where the application for assignment of the lease by the writ petitioners/respondents Nos. 1 to 4 in favour of Shri Shib Narayan Ghosh and Smt. Sukla Ghosh was taken up for consideration and it was, *inter alia*, resolved as follows:-

(a) CIT may grant permission to the applicants to transfer/assign/sublease the said plot for the residual period as desired by them on payment of transfer-cum-mutation fee. The said fee would be 50% of difference between original lease premium updated by multiplying it by Inflation index of the year of transfer divided by cost of Inflation Index of the year of lease and followed by Income Tax Act dealing in Capital Gains and documented premium consideration of the plot between the transferor and the transferee.

(b) Other terms and conditions would, however, remain the same. But proper attention should be given while documenting the Rules and Regulations of Land use and development Control Plan of CMDA, in force for the area in question.

(c) The draft deed or transfer should be approved by CIT before the same was registered.

(d) Amount to be paid to be determined by CIT as under Clause (a) would have to be paid in full by the transferor before the documentation took place on demand. Decision of CIT to be intimated to the authority concerned for necessary action.

19. Mr. Mitra submitted that such a decision had been taken by the said Committee keeping in mind and order passed by this Court in Matter No. 1107 of 1996, (*Miss Angur Bala Shaw & Ors. v. Calcutta Improvement Trust & Ors.*), wherein a direction had been given for payment of the amount as aforesaid by way of premium and not by way of consideration.

20. Referring to some of the provisions of the Calcutta Improvement Trust Act, 1911, Mr. Mitra urged that under the Act the Trustees were empowered to perform various acts which relate to normal incidents of ownership. Including the right to charge betterment fees. Mr. Mitra submitted that the distinction between a "tax" and a "fee" was quite clear. While a "tax" is a compulsory extraction of money by a public authority for a public purpose and is not payment for services rendered, a "fee" is a charge for special services rendered by a Governmental agency having an element of *quid pro quo*.

21. In this regard reference was made to the decision of the Hon'ble Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, where the said views were expressed.

22. Mr. Mitra submitted that the appellants had not acted arbitrarily in the matter but had exercised certain rights which as the owner of the demised premises

they were entitled to-exercise and the learned single Judge had erred in holding that the appellants had acted in a wrongful manner and had wrongly tried to extract money from a citizen without due authority of law.

23. Mr. Mitra submitted that the writ petitioners/respondents had themselves requested the appellants by their letter of 12th September, 1996, to determine the transfer-cum-mutation fee and to inform them of the same at an early date in view of the order passed in Angurbala Shaw's case (supra). It was not, therefore, open to the writ petitioners/respondents to contend otherwise at a subsequent stage.

24. Appearing for the writ petitioners/respondents, Mr. Swadesh Ranjan Bhunia urged that as had been observed by the learned single Judge the appellants were entitled to receive the rents for the demised premises during the pendency of the lease and under the terms and conditions of the lease they were not entitled to any other amounts from the lessees. Referring to section 108 of the Transfer of Property Act, Mr. Bhunia submitted that no additional monetary terms could be imposed by the appellants for granting permission to transfer or assign the lease-hold interest and the learned single Judge had rightly held that an attempt to do so would be without due authority of law.

25. Mr. Bhunia urged that one of the convenience of the Board of Trustees was to grant a lease of the demised lands for a further term of 99 years at the same rent. It was, therefore, clearly the intention of the less or not to make any additional monetary demands even for grant of a fresh lease for 99 years after the expiry of the existing period of lease.

26. Mr. Bhunia submitted that the appellants were fully aware of the position since no such demand was made when permission was granted to the original lessees to assign their lease-hold interest in the lands in question to the writ petitioners respondents. It was urged that even if an oral commitment was made, the same would stand excluded by the written contract as was explained by the Hon''ble Supreme Court in the case of Bai Hira Devi and Others Vs. The Official Assignee of Bombay, in the context of sections 91 and 92 of the Evidence Act, 1872.

27. On the question of betterment fees leviable u/s 78A of the Calcutta Improvement Trust Act. 1911, Mr. Bhunla referred to the decision of the Hon''ble Supreme Court in the case of Sheikh Gulfan and Others Vs. Sanat Kumar Ganguli, wherein while considering the said question, the Hon''ble Supreme Court held that land acquired for carrying out any of the provisions of the aforesaid Act could not be subjected to betterment fee. It was also held that betterment fee is levied against a land, because its value is increased as a result of the Improvement scheme, and so section 78A authorizes the Board to recoup itself by levying such fee. Mr. Bhunla submitted that such circumstances did not exist in the Instant case which could have justified even the levying of betterment fees.

28. Mr. Bhunia then referred to the Lessee'' covenant not to assign or transfer or

mortgage the demised land without the previous consent in writing of the Chairman of the Board. Mr. Bhunia urged that the said covenant did not vest any right in the Trustees to make additional monetary demands for granting consent or to unreasonably withhold such consent.

29. In support of his submission, Mr. Bhunla referred to the decision of the Hon^{ble} Supreme Court in the case of Raja Kamala Ranjan Roy Vs. Baijnath Bajoria, where it was observed that when a lease included a covenant allowing assignment with the lessor's consent, such consent was not to be unreasonably withhold. It was further observed that such a condition relieved the Lessee from the burden of the covenant if the lessor withhold his consent unreasonably.

30. The next decision cited by Mr. Bhunla in this regard is that of the Madhya Pradesh High Court in Shanker Prasad Goenka and Another Vs. The State of Madhya Pradesh, where a similar covenant was involved and it was held that in regard to a provision or a covenant in a lease allowing the Lessee to transfer the lease only on prior sanction or consent of the less or, the law was well-settled that the less or was not entitled to refuse sanction or consent for extraneous reasons and the grounds for refusal should have a rational connection with the property actually leased. It was also held that the less or could not withhold the sanction for obtaining some collateral advantage or for imposing on the intended assignor or transferor any greater burden than had been imposed by the lease and that the sanction could not be withhold arbitrarily or vexatiously.

31. Mr. Bhunia submitted that provisions had been made in the Calcutta Improvement Act regarding the sources of income of the Trustees and the Trustees would have to be confined to such sources only and they could not resort to other methods not provided in the statute for raising money. Mr. Bhunia urged that there was a difference between a natural person and a statutory authority. While a natural person could exercise all incidence of ownership unless prohibited by law, a statutory authority could exercise only such powers as had been conferred on it by statute. Since its sources of income were specified in the statute it could not create a new source by way of transfer-cum-mutation fees.

32. Mr. Bhunia submitted that the Calcutta Improvement Trust and its authorities were bent upon making unlawful and unjust enrichment in a mala fide manner by demanding transfer-cum-mutation fees, which was not sanctioned by the statute. In lieu of giving consent to the writ petitioners/ respondents to transfer their lease-hold interest on the demised premises.

33. Reference was also made to Halsbury's "Laws of England" volume 9, Paragraphs 1326 and 1333, where similar views have been expressed.

34. Mr. Bhunia contended that the purported right of the Calcutta Improvement Trust and its authorities to impose transfer-cum-mutation fees had not been pleaded by the appellants before the learned single Judge and the appellants were not entitled to raise the same at the appellate stage.

35. On the question of costs imposed by the learned single Judge, Mr. Bhunia submitted that the same was a matter of discretion and had been rightly imposed.

36. From the submissions made on behalf of the respective Parties and the materials on record we are of the view that no interference is called for with the judgment under appeal.

37. Under the lease, the appellants were entitled to the lease rents during the pendency of the lease. Neither the lease deed nor the provisions of the Calcutta improvement Act, 1911, contemplates the levying of transfer-cum-mutation fees. The decision of the appellants to impose such charges in lieu of granting permission to assign or transfer the lease-hold interest in the demised premises appears to be extraneous both to the terms and conditions of the lease and the provisions of the aforesaid Act.

38. Significantly, no such fee had been demanded by the appellants when the initial lessor applied for transfer of their lease-hold interest in favour of the writ petitioners/respondents.

39. The decision of the Hon'ble Supreme Court in *Komala Ranjan Roy's* case (supra) makes it clear that when a lease deed contains a covenant allowing assignment or transfer with the consent of the lessor, such consent should not be unreasonably withheld.

40. The views expressed by the Madhya Pradesh High Court in *Shankar Prasad Gocnka's* case, cited by Mr. Bhunia, are apposite to the facts of this case and we agree with the learned single Judge that the Lessor is not entitled to demand any further consideration in lieu of granting sanction for assignment or transfer of the lease-hold interest. The attempt to do so is without authority of law.

41. The incidence of ownership, as sought to be urged on behalf of the appellants, was exercised when the initial lease was granted. Once the lease was granted, the parties thereto were bound by the terms and conditions and the covenants contained therein. There was, therefore, no further scope for the lessor to exercise such ownership rights dehors the provisions of the lease deed and the statute and to impose a greater burden upon the lessee than was provided for therein. The decisions cited by Mr. Mitra do not help the appellants' case since the Trustees acted beyond the powers vested in them in demanding transfer-cum-mutation fees which is not contemplated either by the statute or the Deed of Lease.

42. In our view, the question of charging betterment fees u/s 78A of the Calcutta Improvement Act 1911, does not arise in the facts of this case, as there is nothing on record to show that the demised lands have been benefited by any development work carried out by the appellants.

43. However, as to the cost awarded by the learned single Judge the same appears to be excessive and not warranted in the facts of the case.

44. We, accordingly, dismiss the appeal on merit, but set aside the portion of the impugned judgment relating to payment of cost of Rs. 40.000/-. The parties will bear their own costs upto the stage of appeal.

All parties to act on a xerox signed copy of the operative portion of this judgment on the usual undertakings.

45. Appeal dismissed

M.K. Basu, J.

46. I agree.