
(1969) 06 CAL CK 0010
In the Calcutta High Court
Case No : Civil Rev. Case No. 846 (w) of 1965

Tarak Kumar Karki and Another	Vs	APPELLANT
The State of West Bengal and Others		RESPONDENT

Date of Decision : 13-06-1969

Acts Referred:

Bengal Municipal Act, 1932 — Section 102, 105, 108, 108(1), 2
Constitution of India, 1950 — Article 226

Citation : 73 CWN 952

Hon'ble Judges : A.K. Sinha, J

Bench : Single Bench

Advocate : Arun Kr. Dutt Jr. and Madan Kumar Roy, for the Appellant; Ranadeb Chaudhuri, S.C. Bose and Probodh Banerjee, for the Respondent

Judgement

A.K. Sinha, J.—In this Rule the petitioners pray for cancellation of certain resolution (annexure D to the petition) relating to the grant of lease of "Darjeeling Town Hall" a property of the Darjeeling Municipality in favour of the respondent No. 3. The facts as set out by the petitioners briefly are:

The petitioners are the residents of Darjeeling within its municipal limits, the petitioner No. 2 being also a rate payer of the Municipality. A Town Hall substantially at the expense of the then Maharaja of Cooch Behar was constructed sometime in 1917. Thereafter, he made a gift of this property to the Municipality of Darjeeling. Although the Town Hall was required to be used for the benefit of the general public within the municipal area of the Darjeeling Municipality under the Trust created by the then Maharaja of Cooch Behar, it was leased out in spite of protest made by the Youth Federation of Darjeeling to the respondent No. 3 for running a Cinema House sometime in 1955 for a period of 10 years with an option of renewal by the Municipality for a further period of 10 years.

On 16-5-65 a public meeting was held under the auspices of the Darjeeling Citizens Welfare Committee protesting against the reported renewal of the said

lease to the respondent No. 3. In spite of this there was such renewal of lease to the respondent No. 3 granted by the Municipality by the resolution of Commissioners in August 1965. That is how, the petitioners felt aggrieved and obtained the present Rule.

2. Upon these facts Mr. Arun Kumar Dutt, learned Advocate for the petitioners raises the following points:

(i) The lease of Town Hall for running a Cinema House is extraneous for the purpose of the Act and contravenes sub-sections 2 & 3 of Section 108 of the B.M. Act.

(ii) The Town Hall being a Municipal property within the meaning of Section 95(1) (f) of the Bengal Municipal Act, 1932 (referred to herein as the Act) can only be utilised for the purpose where municipal fund is applicable.

(iii) The impugned resolution or the lease falls within the scope and ambit of Clause XXXVI of Section 108 of the B. M. Act and as such being foreign to the purpose for which the Municipal fund is applicable they are invalid and inoperative.

(iv) The Town Hall being a Municipal property within the scope of 95 (i) (f) of the Act no lease could be granted nor it could be utilised for profits not warranted by terms of Section 95 of the Act.

(v) The subsisting lease is an unreasonable restriction on the petitioners' fundamental right as it tends to create monopoly in favour of the respondent No. 3 to the exclusion of the Municipal Authority itself and, therefore, is not in the interest of the general public.

3. Before I enter into the merits of the above point raised by Mr. Dutt I must notice that there are several hurdles to cross before the petitioners can successfully press the above points in this case.

The first is, one of delay. On the petitioner's own showing the lease of the municipal Town Hall was granted to the same respondent No. 3 for running a Cinema House from the year 1933. The impugned resolution now sought to be quashed in the present writ proceeding was really passed for continuation of the same lease by way of renewal for another 10 years from the year 1965. No explanation seems to have been given by the petitioners as to why they could not come to Court earlier for cancellation of such lease which is clearly being renewed from time to time by the Municipal Commissioners for the same purpose in favour of the same person from 1933. It is true that a resolution granting lease could not be challenged in a writ proceeding prior to the commencement of the Constitution but nevertheless it was open to the petitioners to file a suit for cancellation of the lease if such a lease was granted beyond the scope of the powers conferred upon the Municipal Commissioners under the Act. Even after the commencement of the Constitution there has been an inordinate delay and no reason has been assigned for moving this Court in its writ jurisdiction after

lapse of about 15 years. Mr. Dutt argued that the resolution of renewal of the same lease gave the petitioners a fresh cause of action and thus the question of delay in presenting this writ petition in this Court was immaterial. I cannot agree. It is well settled that the writ sought for in this Court under the provisions of Art. 226 of the Constitution is not a writ of right but of discretion. If the petitioners on their part have allowed the Municipal Commissioners to grant and renew lease of the Municipal Town Hall in favour of a third party for running the Cinema House for such a long period since 1933, they must be deemed to have lost their rights if any, to challenge the validity of any resolution, acts, or orders granting or renewing such lease in favour of a third party under the ordinary rule of estoppel, unless, of course, they can show sufficient cause to the satisfaction of the Court for not filing a suit or alternatively, even after the commencement of the Constitution, moving a writ petition in this Court within a reasonable time. In this case it is clear, even after the commencement of the Constitution, the petitioners ought to have come at the earliest opportunity in the year 1955 when the lease was renewed by the Commissioners in favour of the respondent No. 3 for identical purpose. Not having done so it must be held that there has been inordinate delay in moving this Court in its writ jurisdiction challenging the power of the Municipal Commissioners in granting lease of the Municipal Town Hall and therefore, present writ petition is barred on the ground of delay alone. It is true that mere delay in a writ proceeding is not by itself fatal but in the present case the position of the parties since 1933 on the basis of grant or successive renewal of the lease in respect of the said Town Hall has surely undergone great changes. The respondent No. 3 claims to have spent quite a large amount for improvement of the Hall from time to time for cinema purpose. It would be extremely unfair and unjust as both the municipality and the respondent No. 3 would be faced with great hardship and difficulties at such a distant date if the petitioners are allowed to unsettle things definitely settled through sheer lapse of time. In the facts and circumstances of the present case, therefore, the delay, in my view, which remains unexplained is fatal.

4. The second difficulty is that the petitioners have only prayed for cancellation of a resolution of the Municipal Commissioners relating to grant of a Lease from the year 1965 but the lease has already been granted and by virtue of such lease the respondent No. 3 is in possession and is actually running the Cinema Hall. In the present writ petition there is no prayer for cancellation of such lease or for restoration of possession. In absence of such prayer it is clear that no effective or enforceable writ can be issued. Even if such a writ as prayed for is issued canceling the impugned resolution, then also, in my view, the petitioners' remedy would remain ineffective and incomplete. The lease in favour of the respondent No. 3 or his possession on the basis of such lease in respect of the Town Hall will remain unaffected. It is well settled that a writ which will be infructuous, ineffective or fails to give complete remedy cannot be issued.

5. Then again, even assuming that the Court in exercising its power in writ jurisdiction can issue appropriate writs even though not asked for, then also writ

contemplated under Article 226 of the Constitution cannot be issued against a third party namely, the lessee directing cancellation of the lease and restoration of the possession of the demised premises. The question involved in one of title and possession of a third party which can only be agitated in a properly constituted suit. This is the view taken by the Supreme Court in a decision reported in (1) Sohanlal Vs. The Union of India (UOI), , Imam J. while dealing with identical question in somewhat similar circumstances observed inter alia at p. 532 (paras 6 and 7):

The appellant was accordingly given possession of the property after Jagan Nath's eviction. The appellant had complied with all the conditions imposed by the Union of India and a letter of allotment was actually issued to him and he entered into possession of the property in dispute under the authority of the Union of India. Did the appellant thereby acquire a legal right to hold the property as against Jagan Nath ? In our opinion, all these questions should be decided in a properly constituted suit in a Civil Court rather than in proceedings under Art. 226 of the Constitution.

...The property in dispute, however, is in possession of the appellant. There is no evidence and no finding of the High Court that the appellant was in collusion with the Union of India or that he had knowledge that the eviction of Jagan Nath was illegal. Normally, a writ of mandamus does not issue to or an order in the nature of mandamus is not made against a private individual.

That being so, the present writ petition for relief against the respondent No. 3 is clearly misconceived and must be held to be not maintainable.

6. At this stage I must observe that in course of hearing on 24-2-69 the petitioners made an application for amendment of the writ petition for adding certain grounds and also for cancellation of the impugned lease already renewed in favour of the respondent No. 3 in prayer portion in the substantive writ petition. In this application also the petitioners did not give any explanation as to why prayer for this amendment could not be made earlier. In absence of any sufficient or satisfactory cause for condonation of delay I cannot allow this application at this stage. In any case, even if I would have allowed the amendment of the prayer for cancellation of the impugned resolution, the position would not have improved as already discussed by me. As regards the grounds sought to be added by amendment it will be seen in another part of this judgment that Mr. Dutt, however, pressed the points in the same form involved in these grounds.

7. Now, reverting to the former question, I find, there is still another hurdle for the petitioners and that is the petitioners did not make any demand for justice by cancellation of the impugned resolution or lease renewed in favour of the respondent No. 3. It appears that a copy of the purported resolution at a public meeting held on 16-5-65 regarding the alleged grievance of the public against the reported renewal of the leasing out of the Town Hall by the Municipality to

the present lessee the respondent No. 3 was forwarded to the Governor of West Bengal and the Chief Minister and several other Ministers and some members of the Legislative Assembly and the Commissioners of Jalpaiguri Division but not to the respondents Nos. 2 and 3 who appear to be concerned Authorities responsible for the impugned resolution of the lease. It cannot be disputed that the resolution granting lease or the execution of the impugned lease are all acts of the said respondents and a writ in the nature of mandamus is the appropriate writ. In such a case, in absence of a demand for justice made to the respondents Nos. 2 and 3, it must be held, the petition is not maintainable.

8. In the above view of the matter it is sufficient to dispose of the present Rule. Even so, I will deal with the points on merits.

Although as many as five points have been taken, the substantially is one and that is, whether the Commissioners of the Municipality have power to lease out the Town Hall, a municipal property, to the respondent No. 3, an outsider, Mr. Dutt argued that the Municipal Commissioners had no such powers. Reliance was placed in support of such argument, firstly, on two English decisions reported in (2) 1875 and 1876 2 CD 634, Attorney General v. Corporation of Sunder Land and (3) (1915) 2 CD 154, Attorney General v. Shore Ditch Corporation, respectively. I fail to see how these decisions are of any assistance to the petitioners. In the first case, it appears that a plot of land was purchased as a park or a place of recreation for the people. It was clearly stipulated in the Deed of Trust that no building that might be erected should be used as a cemetery or burial ground or any hospital, lunatic asylum or the like buildings or any part thereof. The Corporation wanted to erect town buildings for accommodation of museum and library and public office. The objection taken was that any portion of the site could not be used for erection of town buildings or for any erection of buildings which is not needed for or incidental to the maintenance of the said park as a public walk or pleasure garden. In that context it was held that that the buildings which were intended for the above purpose were justified but not so in respect of "free public Library, Museum or Conservatory open for the use, convenience and recreation of the persons frequenting such walks and pleasure gardens". In fact the whole decision rested upon the construction of the deed of Trust to see whether the Trustees were bona fide carrying out the objects of the Trust.

In the next case, the Corporation u/s 2 sub-section (a) of the Bath and Houses Act, 1878 could let out any closed bath for music or dancing occasionally provided a license was obtained and no money for admission was taken at the doors. In contravention of this provision a closed bath was let out for a continuous period by the Corporation. It was held on an interpretation of the above provisions together with the proviso thereto of the Act and on the facts of that case that the performance of the dancing and music could not be allowed without a license being taken out and since the Corporation infringed the prohibition against "letting out the bath not as empty building and also otherwise

than occasionally and against taking money at the door" the relators were entitled to a declaration that such letting was contrary to the provisions of the said Act. It, therefore, seems to me clear that these two English decisions have no manner of application to the facts of the present case and they are no authorities for the proposition that the Municipal Commissioners under the Bengal Municipal Act have no power to lease out the Town Hall of the Darjeeling Municipality.

9. Mr. Dutt then argued that having regard to the provisions of section 95(1) and cl. (f) and clause XXXVI of sec. 108 of the Act the impugned resolution or the lease granted in favour of the respondent No. 3 was entirely invalid and inoperative as the Municipal property could be utilised for such purpose where the Municipal fund is applicable. It was contended that the purpose of the lease being foreign to the provisions of the above clause of sec. 108 to which the Municipal fund might be applicable, the Municipal Commissioners had, in any event, no power to grant such lease. It is really difficult to follow this complicated argument.

Section 95(1) and clause (f) provide:

95. (1) All property within the municipality of the nature hereinafter in this section specified, other than property maintained (by the Central or the State Government) or another local authority, shall vest in and belong to the Commissioners, and shall, with all other property of whatsoever nature or kind which may become vested in the Commissioners, be under their direction, management and control, that is to say,-

(a) * * *

(b) * * *

(c) * * *

(d) * * *

(e) * * *

(f) all buildings erected by the Commissioners and all lands, buildings or other property transferred to the Commissioners (by the Central or the State Government) or acquired by gift, purchase or otherwise for local public purposes.

From the above provisions it is clear that the Town Hall of the Darjeeling Municipality whatever may be the source of its acquisition, vested in the Commissioners and has since remained in their direction, management and control.

Now section 108(1) clause (xxxvi) provides:

(xxxvi) all acts and things which are necessary for carrying out the purposes of this Act, or which are likely to promote the safety, health, welfare or convenience of the inhabitants of the municipality, expenditure whereon may be declared by

the Commissioners, with the sanction of the (State Government), to be an appropriate charge on the Municipal Fund.

10. From the above provisions which is really a residuary clause for application of the Municipal Fund to all other acts and things not specifically mentioned, it seems to me baffling as to how it could at all stand in the way of Municipal Commissioners against granting lease of property belonging to the Municipality if otherwise the Commissioners have such powers either express or implied.

The municipal property and the municipal fund are two different subjects and they are so treated separately in part I and II respectively under two different heads, namely, "property, contact and liabilities" and the "municipal fund" under chapter IV of the Act. u/s 105 of the Act the municipal fund as constituted consists of all sums received by or on behalf of the Commissioner under this Act or otherwise and also the balance if any standing at the credit of the Municipal fund at the commencement of this Act.

This "municipal fund" may be made applicable by the Commissioners for various purposes specified under Clauses (i) to (xxxv) u/s 108 of the Act and to all other acts and things as noticed earlier which are necessary for carrying out the purpose of this Act as mentioned in clause (xxxvi). In the present case the rent or other charges payable on account of the lease granted by the Commissioners no doubt form part of the Municipal Fund and there is nothing to indicate from the "financial provision" under chapter IV of the Act that the sums so received on account of the lease could not be placed at the credit of the Municipal Fund. If that be so, then it is clear that the sums so received on account of the lease granted by the Commissioners shall be spent on matters specified under the Act or for carrying out the purpose of the Act. The question whether the Commissioners have power to grant the impugned lease has no bearing to the question either on the constitution of the Municipal Fund or the expenses that may be incurred by the Commissioners out of such fund. That being so, I do not think there is much of substance in the arguments of Mr. Dutt on the point. Even so, the matter does not end here. For it still remains to be seen whether the Municipal Commissioners have powers to grant lease of municipal property under the Act. I think there is little scope for speculation over this issue. For Section 102 of the Act provides:

The Commissioners at a meeting may purchase, take on lease or otherwise acquire any land for the purposes of this Act, and may sell, lease, exchange or otherwise dispose of any land not required for such purposes or which they have acquired for purposes of recoupment.

11. Having regard to the above provision of the Act, it seems to me clear that the Commissioners had enough power and in exercise of such power granted lease of the Municipal Town Hall as according to them it was not required for the purpose originally intended to serve. Although the word "land" is used in this section, it would include the cinema hall as according to definition under clause

(27) of Section 3 of the Act it also means "things, attached to the earth or permanently fastening anything attached to the earth." The only question that might crop up is whether the Municipal Town Hall ceased to serve its original purposes.

12. Mr. R. Chaudhuri, learned Counsel for the petitioners has contended that if such a power existed then the question whether or not the particular Municipal property intended to be leased out was required for the purpose for which it was acquired was a matter entirely for the Commissioners to decide in course of "their direction, management and control..." as provided u/s 95(1) of the Act. Reliance was placed on a decision of the Supreme Court reported in (4) City of Nagpur Corporation Vs. John Servage Phillip and Another, , where on interpretation of Section 58 of the City of Nagpore Act relating to the powers of the Corporation to promote public health action involving sending of delegation where promotion of public health becomes likely as a result thereof Sarkar J. (as he then was) inter alia (at CP 899, para 4 of the report) observed:

Lastly, it is not for this Court to decide how the delegation should have been constituted so that the appellant Corporation might have had the largest benefit from it. It was for the Corporation to decide how the thing which it had the power to do was to be done. It was not a case where it could be said that the delegation proposed to be sent would have been of no benefit to the appellant Corporation at all, and that is enough to prevent an interference by the courts in the method of the exercise of its undoubted power by the appellant Corporation.

13. Although the above observations have been made in a different context on a different act, I think the principle indicated is the same. In cases where, as here, once it is found that there exists such power in the Commissioners as to sell, lease, exchange or otherwise dispose of any land, it becomes a matter entirely for the Commissioners to decide in usual course of their management as to whether the lands intended to be disposed of are required for such purpose, and as to how and in what manner the disposal would be effected unless it could be shown that such disposal was wholly malafide or otherwise would be of no benefit to the Municipality. In this case it is clear that the petitioners did not raise either of these questions or make out any such case. On the contrary, it appears from the impugned lease that there are provisions in clause (5) (annexure B to the affidavit-in-opposition of respondent No. 3) for giving possession to the lessor on a previous notice in writing for temporary use of the Town Hall or any portion thereof if it is reasonably required for any public meeting or entertainment. Such being the terms and conditions of the lease it cannot be said that the Town Hall was required, according to the Commissioners, for the original purpose for which it was built. Equally, this clause goes to show that there was no want of bonafides on the part of the Commissioners in granting lease as they protected public interest by reserving their right to get temporary possession of the Hall if it was necessary in future for public meeting or entertainment. It cannot be doubted also that since the Town Hall was not

required for its original purpose, the Municipality was surely benefited by the rent derived from the lease. In any case, these are questions of fact to which there is little or no averments by the petitioners to the contrary in the petition. So, in absence of proper averments or a sufficient case stated in the petition it is unnecessary to pursue this matter further in the present case. That being so, it must be held that the Commissioners have powers under the Act and it did lawfully exercise such power by granting lease of the Town Hall to the respondent No. 3. This brings me to the last point in which the petitioners complain of unreasonable restriction on their fundamental right on the ground that the impugned lease tends to create monopoly in favour of the respondent No. 3 to the exclusion of the Municipal Authority itself. I cannot accept this contention. Firstly, because the petitioners themselves have no legal right which may be said to have been infringed by grant of such lease to the respondent No. 3. It is not their case that they were also the applicants for grant of the lease. Secondly, because if I have been able to follow Mr. Dutt, there cannot be any question of the exclusion of the Municipal Authority itself in granting a lease to the respondent No. 3. It is clear from clause (10) of the impugned lease, the option to renew the lease in favour of the respondent No. 3 lies not with the lessee, the respondent No. 3, but with the Municipality. So, there cannot be any question of creating monopoly. Here again also, it is for the Municipal Commissioners themselves and not for this Court to decide as to whether such a lease would be renewed in favour of the respondent No. 3 or not in future. The last point raised is, therefore, equally without any substance.

The result is the petition fails. The Rule is discharged. But there will be no order as to costs.