

(2022) 11 CAL CK 0015

In the Calcutta High Court

Case No : W.P.A. No. 21399 Of 2007, C.A.N. 1 Of 2007, (Old No. C.A.N. 9249 Of 2009)

Vinay Kumar Singh

APPELLANT

Vs

Kolkata Port Trust & Others

RESPONDENT

Date of Decision : 09-11-2022

Acts Referred:

Public Premises (Eviction of Unauthorised Occupants) Act, 1971 — Section 2(g), 4(1)

Citation : (2022) 11 CAL CK 0015

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Debabrata Saha Ray, Neil Basu, Prabal Kumar Mukherjee, Ashok Kumar Jena

Final Decision : Disposed Of

Judgement

Sabyasachi Bhattacharyya, J

1. The "International Engineering and Construction Company" entered into a lease-agreement with the Kolkata Port Trust (KoPT) on June 4, 1973 for a period of 30 years commencing from February 1, 1972. The said lease deed was signed on behalf of the lessee by the present petitioner as its sole proprietor.

2. Subsequently, there was communication between the petitioner and the KoPT and offers and counter-offers were made in respect of the renewal of the lease deed of the petitioner. Ultimately, by a quit notice dated June 8, 2007 (Ref. No. Lnd.4545/II/Loose/07/813), the KoPT directed the petitioner to quit, vacate and deliver vacant and peaceful possession of the lease hold property. It was also indicated in the notice that in default, the matter would be placed before the Estate Officer for eviction, recovery of arrear rental dues and damages. The present writ petition has been preferred against the said quit notice. A further relief has been prayed for a direction upon the KoPT to execute a 99 years' lease-deed in favour of the petitioner.

3. The learned Senior Advocate appearing for the petitioner, at the outset, takes an objection as to maintainability of the writ petition on the ground that the same has been preferred by one Vinay Kumar Singh in his personal capacity although, in the writ petition, the International Engineering and Construction Co., that is, the lessee has been described as a private company, which is an independent and separate juristic entity in the eye of law.

4. Learned counsel appearing for the petitioner, while dealing with the point of maintainability, submits that it will be evident from the documents on record that the petitioner is the sole proprietor of the International Engineering and Construction Company, a sole proprietorship concern having no separate and distinct juristic entity from the petitioner.

5. It is further argued that there was a concluded contract between the KoPT and the petitioner, which received the sanction of the concerned Ministry of the Government of India, for granting lease for a further period of 99 years in favour of the petitioner in respect of the disputed property.

6. Learned counsel places reliance on the minutes of the proceedings of the 8th Special Meeting of the Board of Trustees, KoPT held on September 15, 2003 where such proposal was allegedly finalized.

7. However, it is submitted that subsequently, the impugned quit notice was issued on June 8, 2007 alleging that the petitioner had inducted sub-tenants and erected structures without permission from the KoPT in an unauthorised manner, which is a major breach of the erstwhile lease-deed.

8. It is submitted that the constructions-in-question were not unauthorised, nor was there any unauthorised sub-tenancy given by the petitioner.

9. Learned counsel for the petitioner submits that after a concluded contract for further lease of 99 years was substantially entered into between the parties and penalty having been paid by the petitioner for the alleged constructions on the demand of the KoPT, the petitioner and/or his concern could not be labelled as an 'unauthorised occupant'. Hence, the KoPT acted without authority in issuing the purported quit notice to the petitioner under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (for short, "the PP Act").

10. Learned counsel places reliance on several correspondences between the parties and the minutes of the Board of Trustees' meeting dated September 15, 2003 in support of such contention.

11. Learned counsel next argues that there has been no prior formation of opinion by the Estate Officer that the petitioner is an 'unauthorised occupant' within the contemplation of Section 4(1) of the PP Act.

12. As such, the issuance of the quit notice was de hors the law.

13. It is further contended that there was a lapse of four years between the Government approval of grant of fresh lease to the petitioner and the quit notice,

which effaces the efficacy of the said purported notice.

14. Learned counsel for the petitioner places reliance on the judgment passed by the Supreme Court in Tarsem Singh Vs. Sukhminder Singh [(1998) 3 SCC 471] to indicate the characteristics and nature of a concluded contract. Learned counsel then cites a Division Bench Judgment of the Allahabad High Court, reported at 1992 SCC OnLine All 234 [Suresh Chandra Tewari Vs. District Supply Officer and another], for the proposition that a question as to maintainability cannot be raised for the first time at the stage of final hearing, if not raised earlier.

15. Learned counsel places reliance on Kanak (Smt) and another Vs. U.P. AvasEvamVikasParishad and others, reported at (2003) 7 SCC 693, to reiterate that when the writ petition was entertained by this Court and affidavits were exchanged, the point of maintainability was never urged by the KoPT. Such objection was also not raised on any occasion when the interim order was subsequently extended. Thus, the respondent cannot not raise the point of maintainability on the ground of alternative remedy at the final hearing stage.

16. Learned counsel also relies on Ganga Retreat and Towers Ltd. and another Vs. State of Rajasthan and others, reported at (2013) 12 SCC 91, to urge that it would not be a sound exercise of judicial discretion to relegate the petitioners to an alternative remedy of civil suit belatedly at the final stage of the writ petition, even if disputed questions of fact in relation to a completed contract of sale are in issue.

17. The learned Senior Advocate appearing for the KoPT argues that, in the present case, there was no concluded agreement between the parties for issuance of a fresh lease at any point of time whatsoever. It is submitted that the minutes of the relevant meeting of the Board of Trustees do not reflect any consent or approval from the Government for grant of such lease. At best, negotiations were going on between the parties, which never attained finality.

18. The payment of penalty for unauthorised construction etc., cannot ipso facto justify the allegation of renewal of lease.

19. The learned Senior Advocate next argues that when the quit notice was served, the lease had already expired by efflux of time and, as such, the petitioner was an unauthorized occupant within the contemplation of the PP Act at that juncture. Hence, the writ petition against the quit notice ought to be dismissed.

20. It is submitted that insofar as the prayer for execution of a fresh lease-deed is concerned, the same tantamounts to the relief of specific performance, which cannot be entertained or granted by the writ court.

21. That apart, it is pointed out by the learned Senior Advocate for the KoPT that it was even recorded in an interim order passed by this Court at the outset of the writ petition that the proceedings for eviction and recovery of arrear rents

initiated by the KoPT against the petitioner had not been stayed. Subject to payment of current occupation charges as well as deposit of the amounts mentioned in the said order dated September 17, 2007, a co-ordinate bench had restrained the Estate Officer from passing any final order without the leave of court. After having participated full-fledged in the trial before the Estate Officer, it does not lie in the mouth of the petitioner now to challenge the quit notice, the validity and legality of which is a subject-matter of decision before the Estate Officer also, before the writ court.

22. It is further argued that the petitioner had, in fact, sub-let the property in an unauthorised manner and made unlawful constructions without the permission of the KoPT on the disputed property, for which the petitioner is also liable to be evicted under the PP Act.

23. A thorough consideration of the materials on record does not indicate that there was any concluded agreement between the parties for execution of a fresh lease-deed of 99 years or otherwise between the parties.

24. From a communication by the KoPT dated January 8, 2003 (at page 40 of the Writ Petition), it is seen that the KoPT demanded penalty amounting to Rs.60,019.37p for unauthorised structures which had already been demolished by the petitioner.

25. For the first time, in the communication dated January 13, 2003 of the International Energy and Construction Company, the petitioner gave a proposal for extension of the lease by 15 years with an option to increase the period to 99 years later. Such request was replied to by the KoPT in its communication dated January 14, 2003 where it was indicated with the matter of extension of lease could not be examined due to existence of breach by way of unauthorized construction. It was specifically iterated that it was the sole discretion and prerogative of the KoPT as lessor whether or not to extend the lease and to decide, if extended, then under what terms and conditions, since the lease had expired without any option of renewal. Apart from other indications in the communication, it was mentioned that the Central Government, at that time, was inclined to grant lease of 99 years without any option of renewal by realizing value of land as premium upfront followed by annual rent of Re. 1 per square meter, enhanced every 10 years by 25 per cent, in the case of the petitioner, "subject to approval of the Board and Central Government" for lease of 99 years with effect from February 1, 2002, for which the premium upfront would be to the tune of Rs.50,13,201/-The non-refundable and non-adjustable premium was to be Rs.6,07,477/-, with security deposit Rs.1,89,346 along with monthly rent of Rs.15,779/- to be escalated at 5.1 per cent per annum every year with an additional provision of re-fixation up to the schedule rent every 5 years if the schedule rent is then higher than the rent payable. It was also mentioned that lease of 15 years was being discouraged then by the Ministry. Ultimately, the KoPT clearly mentioned in the communication that M/s. International Engineering and Construction Company was requested to intimate their "acceptance" vis-à-

vis grant of lease of 99 years with effect from February 1, 2002 so that the matter might be "placed before the appropriate authority for examination". As such, for all practical purposes, it was a counter-proposal given by the KoPT to International Engineering with regard to 99 years' lease.

26. Vide letter dated January 17, 2003 (Page 43 of the Writ Petition), the International Engineering and Construction Company confirmed the acceptance of the offer of 99-years' lease on payment of Rs. 50,13,201/-upfront and requesting the KoPT-authorities to get all approvals from the appropriate authorities at the earliest. In the meantime the erstwhile lessee would make arrangements for the funds. Four sets of approved drawings were also sought by the erstwhile lessee from the KoPT.

27. In its next communication dated February 18, 2004 (/February 20, 2004), the erstwhile lessee reiterated its request for the KoPT to confirm the acceptance of the former's offer on the subject land for 99 years' lease. Similar requests were repeated by the erstwhile lessee vide letters dated April 19, 2004, July 20, 2005, September 13, 2005, January 19, 2006, January 4, 2007 and April 10, 2007 (all the said communications are annexed to the writ petition).

28. It is clear from the said communications that, all along, negotiations were going on for the purpose of entering into a fresh lease-deed for 99 years. The petitioner had repeatedly requested the KoPT to "accept" its "offer" of such lease, however, without any acceptance of the same being there on record on the part of the KoPT.

29. If we come to the minutes of the Special Meeting held on September 15, 2003 by the Board of Trustees, KoPT, annexed at page 59 (Annexure P-8) of the writ petition, it is seen that it was recorded in such minutes, by referring to a resolution bearing Resolution No.126 adopted on the proposal for grant of lease, that subsequent to finalization of the proposal, a communication was received from the Ministry of Shipping, Government of India that element of Municipal Tax should also be recovered along with the premium upfront. Accordingly, the amount of premium upfront recoverable in this case would work out to Rs.60.35,553.13p including Municipal Tax and not Rs.50,19,171/- as indicated in the proposal. Consequential amendment of the recoverable amount of premium upfront was sought accordingly and agreed to by the Board.

30. As such, we merely see that from the end of the Government of India no acceptance to any proposal had been issued but merely a fresh offer had been suggested, incorporating the Municipal Tax. Hence, at best, even at that stage we find that there was no consensus ad idem between the parties but a new proposal was raised.

31. Hence, the argument that there was a concluded contract between the parties does not stand on solid ground.

32. Neither the payment of penalty for alleged unauthorised construction made

by the petitioner, nor the subsequent deposits made on ad hoc basis in terms of the ad interim order of this Court dated September 17, 2007 (which was clearly mentioned to be without prejudice to the rights and contentions of the parties and subject to further orders) conferred an aura of finality on the ongoing negotiations.

33. As such, there does not arise, in the present case, any question of the KoPT having entered into a fresh lease-deed at any point of time. In the absence of a concluded contract at any stage, there cannot be any scope of directing a performance of such still-born contract.

34. Even the proposals of the petitioner did not comprise any final offer at the initial stage but merely comprised two alternative proposals, for 15 years' or 99 years' lease.

35. However, inasmuch as the objection with regard to maintainability of the Writ Petition is concerned, the same cannot be upheld, although the petitioner stated in Paragraph Nos.2 and 3 of the Writ Petition that the International Engineering and Construction Company is a private company and that the petitioner is one of the Directors thereof. There are several reasons for turning down such objection. First, as rightly argued by the petitioner and held by the Supreme Court in *Kanak (Smt)* and another (*supra*) and by the Division Bench of the Allahabad High Court in *Suresh Chandra Tewari (supra)*, since the KoPT never took the objection as regards non-maintainability of the writ petition at any earlier point of time, either at the inception or in its affidavit-in-opposition or even when the interim order was extended from time to time, the KoPT is precluded from raising such objection at the eleventh hour when the writ petition is being heard finally.

36. Contrary to the contention of the learned Senior Advocate for the KoPT, the objection as to maintainability does not hit the root of the Writ Petition in view of the same not being a pure question of law or inherent lack of jurisdiction. The maintainability issue has primarily been raised on the ground that the lessee is an independent juristic entity, distinct and separate from the present petitioner, in view of being a company incorporated under the Company Law. However, it is noticed from the affidavit-in-opposition of the KoPT itself, filed in connection with the Writ Petition, that no objection as to maintainability has been raised therein. Rather, in Paragraph no.3(1) of the opposition, it is admitted by the KoPT itself that M/s. International Engineering and Construction Company (IECC) is a sole proprietorship with Mr. Vijay Kumar Khanna as the Proprietor. Such contention has been reiterated in sub-paragraph (ii) of Paragraph no.3 of the opposition. Hence, the KoPT not only failed to raise any objection as regards maintainability on the ground as taken now, but it was admitted by the KoPT in its opposition that the said concern is a sole proprietorship, which signifies, in other words, that the petitioner, being the sole proprietor, is identical with the said concern inasmuch as juristic representation is concerned.

37. As regards the question of non-maintainability of a writ petition for a relief of

specific performance is concerned, in any event, in view of the above observations to the effect that there was no concluded contract between the parties, there does not arise any question of grant of such relief on merits and the point of jurisdiction of the writ court to grant such relief pales into insignificance.

38. From the materials annexed to the writ petition and pleaded therein, even without going into any disputed question of fact requiring evidence, it transpires, for the reasons as discussed above, that there was no consensus ad idem between the parties with regard to grant/renewal of a fresh lease deed to the petitioner.

39. Insofar as Tarsem Singh (*supra*) is concerned, the Supreme Court elaborated the essential elements of a free consent therein. Even without going into the question as to whether the parties to such alleged agreement were proceeding on the same understanding, from the facts of the present case it is not elicited that any concluded contract was entered into between the parties.

40. The question of applying the principle laid down by the Supreme Court in *Ganga Retreat and Towers Ltd.* (*supra*) does not arise, as the question of alternative civil remedy does not come into the picture at all in view of the observations made above negating any concluded contract between the parties.

41. Even apart from the disputed questions of unauthorised induction of sub-tenant and construction by the petitioner on the disputed plot, as on the date of the issuance of the quit notice, the original lease between the parties had already expired on January 31, 2002, that is, on efflux of 30 years after the date of its commencement on February 1, 1972.

42. Section 2(g) of the PP Act defines "unauthorised occupation" in relation to any public premises as the occupation by any person of the said premises without authority for such occupation, and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer), under which he was allowed to occupy the premises, has expired.

43. In the present case, even independent of unauthorised construction and subletting, the lease had already expired by efflux of time, thereby attracting the definition of unauthorised occupation as per the PP Act. The premises, without dispute, are public premises within the contemplation of the said Act. As such, the argument that there was no prior determination of the unauthorised occupation of the petitioner is not tenable in the eye of law.

44. As regards the alleged lapse of time between the 'approval' of the Government and the quit notice is concerned, in any event, such delay of four years is no ground to preclude a proceeding for eviction and recovery of arrear rents and damages under the PP Act. In any case, in the instant lis, as discussed earlier, there was no Government approval or acceptance at any point of time for

any grant/renewal of fresh lease in favour of the petitioner. What was discussed in the Special Meeting of the KoPT was merely the added rider on the part of the Government to the proposal to be issued to the petitioner for grant of a fresh lease of 99 years, to the effect of clubbing the Municipal Taxes with the premium amount.

45. In such view of the matter, there is no valid ground for the writ petitioner to challenge the quit notice on any ground whatsoever as the same was issued well within the authority of the KoPT.

46. That apart, the petitioner has participated in the hearing before the Estate Officer for eviction and recovery of arrear rents and damages and merely the passing of final award was restrained by this Court till disposal of the present writ petition.

47. Hence, there does not arise any question of reopening the chapter of challenging the quit notice in the writ petition.

48. Hence, WPA No.21399 of 2007 is dismissed on contest, without, however, any order as to costs. It will be open to the Estate Officer, in her/his final order/award, to incorporate the adjustment/refund of the amounts already deposited by the petitioner pursuant to the orders of this court in accordance with law. The Estate Officer, in passing the final award, shall not be prejudiced by any of the observations made herein, apart from adjusting/directing refund as deemed fit of the amount already deposited/paid by the petitioner in favour of the KoPT.

49. Accordingly C.A.N. 1 of 2007(Old No. C.A.N. 9249 of 2009) is also disposed of.

50. Urgent certified copies, if applied for, be issued by the department on compliance of all requisite formalities.