(2012) 12 CAL CK 0032

Calcutta High Court

Case No: G.A. No. 3344 of 2010, APO No. 423 of 2010 and CS No. 3 of 2005

Pran Kumar Bhattacharyya		APPELLANT
	Vs	
Sukumar Bhattacharyya and Others		RESPONDENT

Date of Decision: Dec. 10, 2012

Acts Referred:

- Calcutta Municipal Corporation Act, 1980 - Section 178

Citation: AIR 2013 Cal 72 : (2013) 2 CHN 111

Hon'ble Judges: Nishita Mhatre, J; Anindita Roy Saraswati, J

Bench: Division Bench

Advocate: Pratik Bhattacharya, Mr. Anindya Lahiri, Mr. Subrata Bhattacharyya, Mr. Somnath Maiti and Mr. A. Santra, for the Appellant; Amitava Das, Raghunath Chakraborty and Mr. P.C. Pal Chowdhury for the Respondents No. 1, Mr. Jayanta Mitra, Mr. U.P. Mukherjee, Janardan Mondal and Mr. Indranil Nandi for the Respondent Nos. 2(a) to 2(C) and Mr. Barin Banerjee, Ms. Piyari Sengupta and Mr. Indranil Nandi for the Kolkata Municipal Corporation, for the Respondent

Final Decision: Dismissed

Judgement

Nishita Mhatre, J.

The Appellant/Defendant No. 1 and Respondent No. 1 Plaintiff and original Respondent No. 2/Defendant No. 2 are brothers. For the sake of convenience they will be referred to hereafter as they were in the suit.

The Plaintiff filed a Partition Suit being C.S. No. 3 of 2005 against his younger brothers, the Defendants on 19th January 2005. A preliminary decree was passed on 8th March 2005 wherein the shares of the three brothers were declared. All the properties, whether movable and immovable, of their deceased father were to be shared in equal proportion by the three brothers. A commissioner was appointed by the Court for partitioning the suit properties and a report from the Valuer and

surveyor was also called for.

Considering the Commissioner''s report and the report of the Valuer and surveyor, a compromise decree was passed on 19th December 2007. The terms of this compromise decree were to be given effect within two years and the final decree was to be passed after all the properties were partitioned. This decree was passed in G.A. No. 3419 of 2006. The properties to be divided were enlisted in the schedules annexed to the compromise decree. We are concerned with the property in schedule A. The property in Schedule ''A'' was divided into Lots A, B & C which fell to the share of the Plaintiff, Defendant No. 1 and Defendant No. 2, respectively.

2. G.A. No. 1361 of 2008 was preferred by Defendant No. 1 for appointment of the Receiver to oversee the construction of a building at the rear end of Lot B. Defendant No. 1 also filed G.A. No. 1493 of 2008 for setting aside the compromise decree on the ground that the terms of settlement could not be given effect as on partitioning the suit property, Lot B would not be habitable. It was contended by Defendant No. 1 that various permissions for constructing the building sought from the Kolkata Municipal Corporation had been rejected and, therefore, the terms of settlement were unworkable.

3. Several orders were passed in G.A. No. 1361 of 2008 and 1493 of 2008 by this Court. On 27th August 2008 Defendant No. 1 was directed to file a plan, within fifteen days, for the new construction that he proposed on Lot B. On 8th September 2010 G.A. No. 2944 of 2010 was preferred by Defendant No. 1 for reviewing the order dated 27th August 2010 on the ground that the order had been passed without considering the provisions of Section 178 of the Kolkata Municipal Corporation Act. The review application was dismissed on 14th September 2010 against which Defendant No. 1 preferred APO No. 423 of 2010 which is the present appeal. The Defendant No. 1 also preferred G.A. No. 3344 of 2010 in the appeal.

4. When this appeal came up for hearing before the Division Bench on 2nd February 2011, Defendant No. 1 that is the appellant herein was directed to submit, within a week of the order being passed, an application to the Kolkata Municipal Corporation for mutation of his allotted Lot in terms of the consent decree. The Corporation was directed to pass an appropriate order for mutating the names of the Lot holders in terms of the consent decree preferably within two weeks of the submission of the application for mutation. The Court observed that the objection raised by Defendant No. 1 with regard to the mutation of the Lots allotted in favour of the other shareholders was deemed to be withdrawn. A further direction was issued by the Division Bench that after the mutation Defendant No. 1 should submit a plan in the prescribed format to the competent authority of the Corporation for construction of a staircase, a kitchen, a reservoir and a toilet in the property allotted to him in terms of the consent decree. This direction was issued in view of the contention of Defendant No. 1 that Lot B was not habitable. The competent authority was directed to take an appropriate decision in the matter. The Division Bench further directed

that once the plan was sanctioned the construction of the aforesaid components should be completed within twelve weeks from the sanctioning of the plan by the Municipal Authorities. Till then the parties were permitted to enjoy the entire property as before. Allottees of Lot A & C were at liberty to construct in terms of the sanctioned building plans in their respective Lots without interfering with the rights of the appellant, that is the Defendant No. 1. All parties were directed to strictly adhere to the time schedule stipulated in the order.

5. On 8th June 2011 another order was passed by the Division Bench in which the Court noted that the Corporation had refused to take the necessary steps for separation of the proposed Lot B. In these circumstances the Court held that the entire matter should be re-examined and reconsidered for protecting the interest of the appellant. Parties were directed to maintain status quo in respect of the entire property in question and an interim order restraining the Corporation from giving effect to the order of apportionment was also passed.

6. A further order was passed on 20th June 2011 by the Division Bench directing the Defendant No. 1 to submit the proposed building plan in respect of Lot B directly to the Director General (Building), Kolkata Municipal Corporation for sanctioning the same. Similarly, plans were permitted to be submitted by the other Lot holders, that is, the plaintiff and defendant No. 2.

7. On 9th November 2011 the Division Bench noted that the Director General (Building) of Kolkata Municipal Corporation had submitted a report before the Court indicating that the plans submitted in respect on Lots A and B could not be sanctioned until the premises were separated with a definite boundary and mutated.

8. As we have mentioned earlier, G.A. No. 1493/09 was moved by Defendant No. 1 for setting aside the compromise decree dated 19th December 2007. By an order dated 22nd June 2009, the learned Single Judge (Patherya J) refused to grant any interim relief in the application. The learned Judge observed, inter Alia that, parties had acted upon the consent terms except in respect of construction money had been paid and received and the letter of allotment had been issued and portions relinquished.

9. G.A. No. 1361 of 2008, G.A. 1493 of 2009, G.A. 2719/2009, came up for hearing before the learned Single Judge (Sanjib Banerjee J). On 7th March 2011 the learned Single Judge disposed of G.A. No. 1361 of 2008 and G.A. No. 1493 of 2009 on the basis of the order passed by the Appeal Court on February 2, 2011. However, Defendant No. 1 was afforded the liberty to apply afresh in respect of other matters referred to in G.A. No. 1493 of 2009 which had not been considered by the Appellate Court. Since G.A. No. 2719 of 2009 was preferred by the Plaintiff for implementing the consent terms the learned Single Judge observed that the relief claimed in that application was dependent on the out come of the proceedings before the appeal

Court and, therefore, adjourned the application.

10. The Defendant No. 1 had preferred APOT No. 106 of 2011 against the decision of the learned Single Judge dated 7th March 2011 disposing of G.A. No. 1361 of 2008 and G.A. No. 1493 of 2008 in terms of the order passed by the Appeal Court on February 2, 2011 in APO No. 423 of 2010 that is the present appeal. The Division Bench dismissed the appeal finding that there was no scope to interfere with the impugned order passed by the learned Single Judge. Thus the order dismissing the application to set aside the compromise decree was confirmed.

11. Today we are concerned with APO No. 423 of 2010, which has been filed against the order dated 14th September 2010 passed in G.A. No. 2944 of 2010. The learned Single Judge dismissed the application which was in effect for a modification or review of the order passed on 27th August 2010. This application was filed by Defendant No. 1 on the ground that the order of 27th August 2010, directing defendant No. 1 to submit a plan to construct a structure in proposed of Lot B, had been passed contrary to the provisions of Section 178 of the Kolkata Municipal Corporation Act (hereinafter referred to as the KMC Act). While dismissing the application the learned judge observed that since the order was passed in pending applications there was no need to recall the order.

12. The issue before us is whether the learned Single Judge has incorrectly rejected G.A. No. 2944 of 2010 on 14th September 2010 by refusing to review his order of 27th August 2010.

13. The learned counsel for the defendant No. 1 submitted that the impugned order has been passed by the learned Single Judge without noticing the provisions of law. He drew our attention to the order of 27th August 2010 passed by the learned Single Judge directing defendant No. 1 to submit a plan for construction in Lot B so that the Corporation could sanction the same. He pointed out that the Corporation has found that no construction can take place in Lot B unless the three Lots are separated. The learned Counsel submitted that these three Lots cannot be partitioned and separated so as to implement the consent terms in violation of law. He pointed out that the Director General (Building) of the Corporation has found that no construction is permissible on Lot B as the Lots have not been separated. The learned Counsel submitted that the consent terms are unworkable as no building can be erected by the defendant No. 1 as specified by his architect. He points out that unless the entire one which falls within Lot B is demolished, it is not possible to erect a new structure. According to him the present structure which falls in Lot B is not habitable as it does not have a staircase leading to the upper floors, a kitchen, a water reservoir and a toilet. He submitted further that the consent terms make it clear that the property was to be partitioned into three Lots, each of which was to be made habitable. According to him since Lot B is not habitable, the consent terms cannot be implemented in their entirety. He submitted that the consent terms are void and, therefore must be set aside in the appeal because the terms do not

mention that the construction which is expected to be carried out in each Lot should be "in accordance with law". He further urged that the consent terms being void, they cannot be accepted as a decree in the suit. The learned counsel has taken us through the various provisions of law which according to him do not permit any construction on Lot B.

14. Before we proceed further it is necessary to note that G.A. No. 1493 of 2009 was filed for setting aside the compromise decree dated 19th December 2007. It was dismissed by the order of the learned Single Judge passed on 7th March 2011 in terms of the order of the Division Bench in the present appeal. An appeal was filed by the defendant No. 1 being APOT No. 106 of 2011 to challenge the order dated 7th March 2011. That appeal has been dismissed on 21st March 2011. Therefore, the question of setting aside the consent terms does not arise. The only issue which is relevant for our consideration is whether the order passed in the review application is incorrect.

15. In our opinion the learned Judge has not passed any illegal or incorrect order which requires interference in the appeal. The order which was passed on 7th March, 2011 was a common order passed in two applications, one which sought the implementation of the compromise decree in terms of the consent terms and the other praying for the compromise decree to be set aside. Significantly, both these applications were filed by defendant No. 1; on the one hand he chose to have the compromise decree implemented whereas on the other he contended that the decree should be set aside as it was void.

16. The learned Counsel for the Defendant No. 1 has sought to enlarge the scope of the appeal by contending that the compromise decree is unlawful. He has also pointed out that the Division Bench by its order dated 8th June 2011 passed in the present appeal has observed that the entire matter should be re-examined and re-considered. According to the learned counsel, therefore all points, including the validity of the consent terms, are in issue.

17. These submissions of the learned Counsel are untenable. The order of the Division Bench dated 8th June 2011 must be read in the context of its earlier orders. The order does not in our opinion mean that the question as to whether the compromise decree is unlawful can be reopened. All that, the Division Bench has observed at the interim stage is that the issues arising in the appeal should be re-examined and reconsidered so that the interests of the appellant No. 1 are protected. These observations were made because of the contention of the Defendant No. 1 that the building plans submitted by him cannot be sanctioned in terms of the existing law. We have considered the prayers in the present appeal which is directed against the order of the learned Single Judge dated 14th September 2010 refusing to review the earlier order passed on 27th August 2010. The order dated 27th August 2010, directing the submission of a plan to the Municipal Authorities was an interlocutory order passed in G.A. 2944 of 2010. The

interlocutory order passed on 27th August 2010 has not been challenged in the present appeal. Apart from, this the issue as to whether the compromise decree is unlawful has been put at rest with the dismissal of APOT No. 106 of 2010 by the Division Bench. Therefore, the only question which we called upon to decide is whether the review application has been correctly decided by the learned Single Judge when he passed the order on 14th September 2010.

18. We do not think that the learned Single Judge had committed any error. By directing the Defendant No. 1 to submit a plan for sanction by the Corporation. Whether that plan could be sanctioned in accordance with law is something that was within the domain of the officers of the Corporation. It was not for the Court to consider whether the plan which the defendant No. 1 proposed to submit was as per the building rules and regulations. It is obvious that only a plan which is in accordance with law can be sanctioned by the Corporation. If the plan submitted by Defendant No. 1 is not sanctioned it is for him to adopt appropriate steps to remedy the situation, either by challenging the order or by submitting a fresh plan.

19. We have noticed that time and again the Division Bench of this Court had passed orders to ensure that the parties to the compromise decree implement the terms of the settlement without prejudice being caused to any one of them. The Division Bench had directed the defendant No. 1 to submit a plan so as to make Lot B habitable. It appears however, that defendant No. 1 submitted a plan which was for constructing a new building on Lot B and it is in these circumstances that the competent authority refused to sanction the same. The import of the order dated 24th February 2011 passed by the Division Bench of this Court is unambiguous inasmuch as the plan which the defendant No. 1 was to submit was for the construction of a staircase, a kitchen, a water reservoir and a toilet in Lot B which fell to the share of Defendant No. 1 under the consent terms. Instead of submitting such a plan, Defendant No. 1 submitted a plan depicting the construction of a building at the rear end of Lot B and for connecting the same to the existing structure. It is in these circumstances that sanction for such a construction was denied.

20. We do not, therefore, think it necessary to consider whether the consent terms are legal and justified as the compromise decree has been passed. There was a challenge to that compromise decree by the defendant No. 1 and he sought revocation of that decree. The learned Single Judge having failed to pass any order on that application in favour of defendant No. 1, he filed APOT No. 106 of 2011 which has been dismissed.

21. In these circumstances we do not think that the order which has been passed in G.A. No. 2944 of 2010 on 14th September 2010 is illegal and, therefore, the appeal is dismissed. Urgent certified photocopies of this order, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.

Anindita Roy Saraswati, J.

I agree.

Nishita Mhatre, J.

Later :

The interim order which had been granted earlier by this Court on 08.06.2011 shall continue for a period of 8 (eight) weeks on the prayer made by the Learned Advocate for the appellant.

Anindita Roy Saraswati, J.

I agree.