

(2000) 09 CAL CK 0039

Calcutta High Court

Case No: Writ Petition No. 11440 (W) of 2000

Prahlad Rai Goenka

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Sept. 4, 2000**Acts Referred:**

- Calcutta Municipal Corporation Act, 1980 - Section 401A
- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 2A

Citation: (2000) 2 ILR (Cal) 359**Hon'ble Judges:** Dilip Kumar Seth, J**Bench:** Single Bench**Advocate:** Debasis Kundu, Prabir Banerjee and R.P. Agarwal, for the Appellant; Pradip Kumar Gupta and Amrita Sinha for State and G. Roy Chaudhuri and J. Pal, for the Respondent

Judgement

Dilip Kumar Seth, J.

In this writ petition initially the Petitioner did not make the Corporation a party to the proceedings. The writ petition was directed only against the Police authorities seeking relief to the extent that the Police should not interfere with the repairing works of the building undertaken by the Petitioner pursuant to a sanctioned plan. Subsequently, the Corporation has since been added as a party Respondent.

2. The Petitioner had originally filed a suit being Title Suit No. 455 of 2000 in the City Civil Court at Calcutta seeking declaration against the Corporation that the Petitioner is entitled to undertake and effect necessary repairs in terms of the notice and the plan sanctioned by the Corporation and also an injunction restraining the Corporation from interfering with the work of repair undertaken by the Petitioner/Plaintiff therein in terms of the notice and the sanctioned plan by the Corporation. On March 21, 2000, an injunction was granted against the Corporation restraining it from interfering with the repairing of the building by the Petitioner/Plaintiff according to the sanctioned plan. Subsequently, the Police had been interfering with the Petitioner's repairing work and had arrested some of its

employees on the alleged ground of exercising power u/s 401A of the Calcutta Municipal Corporation Act, 1980.

3. The learned Counsel appearing for the Petitioner contends that in order to circumvent the order of injunction the Respondent had taken recourse to Section 401A without intimating the Petitioner as to what violation it had committed. It has further been contended that the Corporation can not resort to Section 401 or 401A in view of the pendency of the interim order which is being extended from time to time on account of the conduct of the Corporation in seeking adjournment. Thus, the order issued is without jurisdiction, void and is in violation of the interim order granted by the Civil Court. He points out that if such a situation is permitted there would be a likelihood of endangering the judicial system by inviting anarchy in the process. So long the injunction is subsisting, until it is vacated, the Corporation can not take any steps as against the Petitioner so long he carries on repair works strictly according to the sanctioned plan.

4. The learned Counsel appearing for the Corporation, on the other hand, points out that there was an inspection in which certain deviations have since been noted on the basis whereof Section 401 was resorted to. According to him, it is only a stop work notice that has been given. The Corporation contemplates initiation of a proceeding u/s 400 which prescribes elaborate procedure in which the Petitioner would have opportunity to contest the same. According to him by reason of Section 401 it is open to the Corporation to take recourse to the said provision as soon as there is a deviation from the sanctioned plan. If the Petitioner carries on the repair works according to the sanctioned plan and it does not commit any deviation then the Corporation has no jurisdiction to intervene; He, further, contends that as soon as recourse is taken to Section 401 by reason of Sub-Section 3 assistance of Police can be taken by the Commissioner if the situation so warrant. Therefore, there is no infirmity in the process undertaken by the Corporation.

5. The learned Counsel appearing for the State draws my attention to Sub-Section 2 and contends that the jurisdiction of a Civil Court is barred and as such the Corporation cannot be restrained from taking any steps u/s 401 by way of an injunction granted by the Civil Court and as such the injunction subsisting cannot debar the Corporation from resorting to Section 401. It is also contended by him that if there are any violation of the order of injunction the remedy of the Petitioner is Order 39 Rule 2A of CPC which the, Petitioner had not undertaken. He, further, points out that by reason of Sub-Section 3 of Section 401 the Police have authority at the behest of the Corporation to prevent the Petitioner from avoiding compliance of notice u/s 401.

6. I have heard the respective learned Counsel at length.

7. Admittedly, the Petitioner had been granted sanction for rearing of the building and pursuant to which he had undertaken the repair works. The Petitioner had filed the suit on the basis of the cause of action as pleaded in para 12 of the plaint, which is quoted below:

12. The cause of action of the suit arose on 28.8.96 when the Defendants issued the notice to the Plaintiffs for effecting repair and also on 23.6.97 when plan was sanctioned and on subsequent dates when the Plaintiffs made payment for effecting such repair works and lastly on 19.1.2000 when the Plaintiffs issued a letter to the Defendants informing them about the repair works and such cause of action is continuing since then day to day and all such cause of action arose at premises No. 161, Rabindra Sarani, Calcutta-7, P.S. Burrabazar within the jurisdiction of the Ld. Court.

8. On the basis of the cause of action the Petitioner had made following prayers:

(a) Declaration that the Plaintiffs being the owners of the suit premises are entitled to undertake and effect necessary repairs of the suit premises in terms of the notice and plan sanctioned by the Calcutta Municipal Corporation and the Defendants have no right to interfere with the work of repair undertaken by the Plaintiffs;

(b) Parmanent injunction restraining the Defendants and their men and agents from interfering and disturbing with the work of repair in terms of the Notice and sanctioned plan by the Calcutta Municipal Corporation.

9. Thus it shows that the cause of action was based purely on the question that the Corporation had given notice to the Petitioner u/s 411 on August 28, 1996, for effecting certain repairs. Thereafter on June, 23, 1997, the Corporation had sanctioned a plan and that the Petitioner had made payments for effecting such repair and on January 19, 2000, when the Petitioner had informed the Corporation of the question of repair. The Petitioner has really sought for a declaration with regard to his entitlement in carrying on repair and injunction that he may not be disturbed while repairing. There is nothing to show in the suit that the Corporation is obstructing the repair works. Only allegation that has been made in paras 8 and 9 of the plaint to the extent that the Corporation had been interfering with the repair work without giving any notice. It has not disclosed any particular date as to when interference was effected by the Corporation. In para 12 no date of such interference has also been disclosed. The only allegation that finds place in para 7 is that the Corporation had stopped the work of the Petitioner on March 10, 2000. Thus, the allegation is that no notice was served for stopping the work.

10. Be that as it may, except the statement made in para 7 of the plaint there is nothing to warrant in filing of the suit. The moment it is alleged that the Corporation had asked to stop the work in that event the Corporation cap do it u/s 401 which is by implication a matter covered u/s 401 in respect whereof no suit can lie under Sub-Section 2 of Section 401. Thus without making any specific averment with a crafty drafting, the Petitioner had sought to ease the plaint out of the mischief of Sub-Section 2 of Section 401. However, while granting the injunction the Court was alive to the situation. Therefore, the City Civil Court, in its order dated March 21, 2000, specifically provided that the Corporation shall be restrained from interfering with the repair work if such work is undertaken strictly on the basis of the plan sanctioned by the Corporation on June 23, 1997. Thus, the

injunction was confined to the extent of repair strictly in accordance with the sanctioned plan. The said interim order had never restrained the Corporation from taking any steps u/s 401.

11. Since there are allegations that there has been deviation, which, however, is disputed by the Petitioner and when it is not open to this Court to enter into a disputed question of fact which has since been disputed by the parties, the question falls within the jurisdiction of the Corporation to ascertain as to whether there has been any deviation. In case there is any inspection report that there has been deviation in that event the injunction granted by the Civil Court does not prevent the Corporation from resorting to Section 401. At the same time despite such injunction by reason of Sub-Section 2 of Section 401 the Corporation cannot be prevented from taking steps u/s 401.

12. Mr. Kundu had contended that Sub-Section 2 relates to a stage before Section 401 is resorted to. It is not related to any stage after 401 is resorted to. In my view, the submission of Mr. Kundu does not seem to be a sound proposition of law. In as much as even if any suit is filed but still then after Section 401 is resorted to the Corporation cannot be prevented from taking any steps or passing any order u/s 401 unless the validity of Section 401 is challenged. Then again, the question of challenge goes to the root as to whether any step can be taken u/s 401 or not and as such then again the question comes to the same situation, namely, that it is a question as to whether the Corporation should be prevented from taking any step u/s 401 when the validity of the notice u/s 401 is challenged in a suit. Therefore, what is prohibited in Sub-Section 2 cannot be negated by a round about method by challenging the validity of a notice u/s 401 after it is issued. Thus there cannot be any embargo on the Corporation to resort to Section 401. At the same time the Civil Court has no jurisdiction to grant an injunction restraining the Corporation from resorting to Section 401 or from taking any steps for passing any order after it had resorted to Section 401.

13. It is alleged that a notice u/s 401 was issued on February 12, 2000. The Petitioner contends that no such notice was ever received by the Petitioner. But as soon as the question comes to this Court this Court can go into such question. However, in the present case if no notice is issued in that event a notice may again be issued. Be that as it may, by reason of the facts involved in this case and the Corporation having disclosed that a notice has been issued it is no more necessary to go into the question since the works had already been stopped, only on the ground of technicalities.

14. In such circumstances, the Corporation may resort to Section 400, if there is any deviation, and complying with the formalities and the procedure laid down therein through which the Petitioner has a remedy by way of contesting such proceedings and pointing out that there is no deviation. In case it is found that there is no deviation in that event the Petitioner may be permitted to carry on the repair works in, terms of the sanctioned plan. If there is no deviation it shall be open to the Corporation to take appropriate steps. However, if such proceeding has been initiated or if no notice is issued to the Petitioner in

that event the Corporation may do so within two weeks from date and complete the procedure as early as possible, preferably within 3 months. Provided, however, if the Petitioner seeks any adjournment or seeks time, in that event, such period should be excluded for the purpose of calculating the period of 3 months, as aforesaid.

15. Mr. Kundu has also contended that the Petitioner can not resort to Section 415 since the order to stop work is not an order u/s 400 or u/s 416. This proposition seems to be sound. But then it does not permit the Petitioner to file a suit and obtain an interim order. However, if Section 400 is resorted to in that event Section 415 can be invoked by the Petitioner if he is so aggrieved.

16. Section 401 indicates sufficient ingredients conferring jurisdiction on the Corporation to resort to Section 401 for stopping the work. In the present case there are certain allegations which may justify resorting to Section 401 but subject to final decision by the authority itself in the proceedings that will be undertaken in the light of the observations made hereinabove.

17. Let it be noted that I have not entered into the merits of this case and all questions have been kept open and can be agitated at appropriate stage before the appropriate forum by the respective parties, as the case may be.

18. With the above observation this writ petition is disposed of. There will be no order as to costs.

19. If an urgent xerox certified copy of this order is applied for the same may be supplied as early as possible.

Writ petition disposed of.