

(2010) 09 CAL CK 0069

Calcutta High Court

Case No: Writ Petition No. 271 of 2009

Outram Club and Another

APPELLANT

Vs

Kolkata Municipal Corporation
and Others

RESPONDENT

Date of Decision: Sept. 2, 2010

Acts Referred:

- Calcutta Municipal Corporation Act, 1980 - Section 400, 400(1)
- Calcutta Municipal Corporation Building Rules, 1990 - Rule 100, 109, 3, 3(2), 54
- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Constitution of India, 1950 - Article 227

Hon'ble Judges: Tapen Sen, J

Bench: Single Bench

Advocate: A.K. Das Adhikari and Sudip Deb, for the Appellant; Alope Kr. Ghosh and Achinto Banerjee for K.M.C., Joy Saha and Aniruddha Mitra for Respondent No. 6 and Bhaskar Sen and Indranil Roy, for Added Respondent, for the Respondent

Final Decision: Dismissed

Judgement

Tapen Sen, J.

The Petitioner No. 1 is a Social Club registered under the West Bengal Societies Registration Act, 1861 and carries on cultural activities and is situated at 3, Outram Street, Kolkata. It was inducted as a tenant on 25.7.1982 in respect of the rear of the ground-floor of the main building by the owners by a written Agreement. The Petitioner No. 2 is the President of the Club.

2. The Municipal Building Tribunal, Kolkata and its Chairman passed an Order on 4.12.2008 in B.T. Appeal No. 40 of 2003 whereby and whereunder the said Appeal was dismissed on contest and the Order appealed against, being the Order dated 8.5.2003 passed in D. Case No. 532-D of 2001-2002 in respect of the said 3, Outram Street, Kolkata (hereinafter referred as the said Premises) was affirmed with a

direction upon the Club to comply with all the terms and conditions of the said Order and to carry out the demolitions under Part "B" of the said Order within 60 days from the date of the Judgment failing which it was Ordered that the Kolkata Municipal Corporation will demolish the same at their cost.

3. These are the subject matter of challenge before this Court in this Writ Petition and the Order is Annexure- P/5. The other Order against which the Appeal was preferred being Case No. 532-D of 2001-2002 dated 8.5.2003 has been brought on record vide Annexure- P/3.

4. According to the Petitioners, both the Orders are illegal, erroneous, suffer from material irregularity and therefore, should be quashed and set aside. According to the Petitioners, while granting the tenancy vide Agreement brought on record (Annexure-P/2), the Club was permitted to make constructions only in respect of some portions of their tenancy and after execution of the Agreement, the Club carried on different kinds of social activities in respect of the Premises in question (the tenanted portion) without any interruption till 2001. During this period, the Club made renovations/repairs/reconstructions in respect of said area without interruption and with the knowledge and consent of the owners thereof.

5. It is stated that sometime in the year 2001, the Respondent No. 6 filed a Writ Petition against the Club and other authorities of the Kolkata Municipal Corporation. It is stated that one of the Hon"ble Judges of this Court passed an Order directing the Corporation to visit the Premises in order to measure the constructions made by the Club. The said Writ Petition was filed on the basis of allegations that the Club had made various constructions in respect of the tenanted portions though the Club did not admit the same.

6. It is the further case of the Petitioners that the Municipal Authorities became influenced by the Respondent No. 6 and made certain queries and thereafter, they initiated a Proceeding u/s 400 of The Kolkata Municipal Corporation Act, 1980. The matter was heard before the Special Officer (Building) in the presence of the Secretary of the Club as well as in the presence of the Respondent No. 6. The allegations at that stage were that the Club had made unauthorised constructions in violation of Rules 54, 56, 57, 100 and 109 of The Kolkata Municipal Corporation Building Rules, 1990. According to the Petitioners, they had not made any unauthorised constructions but had only erected tubular framed structures and had fixed fibre sheet thereon in respect of the tenanted portions for protection against rain and sunlight and the same was permissible in terms of the tenancy Agreement. This, according to the Petitioners, was also permissible under Rule 3(b) of the Kolkata Municipal Corporation Building Rules, 1990. According to the further case of the Petitioners, they brought this fact to the notice of the Special Officer (Building) during the hearing and also submitted that the structure was lawful and that it did not obstruct the free-flow of area and light of the adjacent building.

7. The grievance of the Petitioners is that the learned Special Officer (Building), in spite of such facts having been brought to his notice, regularised a part of the structure marked as Part-A upon payment of the cost of erection but directed the demolition of the other part, which he marked as Part-B, without giving specific reasons therefore. This Order was passed on 8.5.2003 and being aggrieved by the portion of the Order of demolition, the Petitioners filed B.T. Appeal No. 40 of 2003 before the Municipal Building Tribunal, Kolkata Municipal Corporation. The Respondent No. 6 also filed an Appeal against the portion of the Order of retention of the said Order. The Appeal was heard on several dates, written arguments submitted but the grievance of the Petitioner is that the Tribunal, without considering the submissions or the written arguments, passed the impugned Order on 4th December, 2008 dismissing the Appeal. The cross-Appeal filed by the Respondent No. 6 was also not entertained. The Petitioners have a further grievance that the Tribunal failed to consider that repair/renovation/reconstruction which the Petitioners had made, were well within the purview of Rule 3(2) of the KMC Building Rules 1990 and the constructions being minor in nature, no one had been prejudicially affected. The Tribunal also failed to consider that the nature of the constructions/repairs/renovations did not violate any of the Rules and more particularly, Rules 54, 56, 57, 100 and 109 of the KMC Building Rules, 1990. The Petitioners also have a grievance that since such constructions/renovations/repairs were so minor in nature that the Tribunal had the discretionary power of allowing their retention but its approach was not at all liberal and it proceeded to pass an Order of demolition. Other similar grounds have been taken challenging the Order in the Writ Petition.

8. Affidavits-in-opposition have been filed by Subrata Kr. Roy (Respondent No. 6) as well as by Birendra Kr. Roy (the added Respondent No. 7) both are sons of Late Bankim Chandra Roy and therefore, they are brothers. While Subrata Kr. Roy is a resident of 3, Outram Street, Kolkata, Birendra Kr. Roy is a resident of 12, Hungerford street, Kolkata.

9. Since the two have filed separate Affidavits-in-opposition, it would therefore be appropriate to set out their cases separately.

Case of Subrata Kumar Roy (Respondent No. 6)

10. This Respondent has stated that he is one of the owners of the entire premises being 3, Outram Street, Kolkata and is one of the Trustees and beneficiaries of the Trust Estate of Late Bankim Ch. Roy (his father) together with the Trust Estate of Late Kalachand Roy (his paternal uncle). He has further stated that the Club in question was registered on and from May 2007 under The West Bengal Societies Rules Act, 1961 and as such, prior to May 2007, it had no locus standi or legal existence.

11. He has further stated that on or about 25.7.1982, an Agreement was entered upon between Sova Roy, Birendra Kr. Roy and himself, as Trustees of the Estate of Late Bankim Ch. Roy and Late Jyotsna Roy, Mrs. Arati Dutta and Mrs. Bharati Pyne as Trustees of the Estate of Late Kalachand Roy on the one hand, and the unregistered Club through his President, Ranabir Gupta (since deceased) on the other hand. According to this Respondent, the said Agreement however cannot be a valid "Tenancy" as the Outram Club, at the relevant time, had no legal existence and in that view of the matter, no valid tenancy can be said to have been created in favour of the Club and at best, it can be construed to be a licence to use a portion of the said premises which was subsequently cancelled/revoked in June 2004 and repossession suit instituted.

12. This Respondent has stated that after having been given permission to use and occupy the premises, the Club started raising unauthorised constructions and did not pay any heed to the express warnings of the owners and therefore, Sri Birendra Kr. Roy, one of the owners of the said premises (added Respondent No. 7) filed Title Suit No. 942 of 1991 before the Learned City Civil Court, Kolkata praying, inter alia, for a declaration/mandatory injunction etc. against the Club and its members. The City Civil Court at Kolkata passed an Order of injunction restraining the Club from making constructions but in violation of the said Order, the Club continued to raise unauthorised constructions and therefore, on 17.9.1991, the City Civil Court at Kolkata appointed one Sri B.M. Saha, Engineer Commissioner for local inspection. The said Engineer Commissioner conducted his inspection on 25.3.1995 and thereafter, on 3.7.1995, he submitted his Report clearly stating about the unauthorised constructions.

The said Report of the Engineer Commissioner has been marked at "A" to the Affidavit-in-opposition.

13. This Respondent has further stated that the Club continued with deliberate acts of illegal constructions and therefore, this Respondent also filed a Suit, being C.S. No. 22 of 1997 before the Calcutta High Court praying, inter alia, for a Declaration that the members of the said unregistered association, Outram Club, have no right, title or authority to make additions, alterations, constructions or encroachment and that such constructions should be demolished and removed forthwith.

14. On 30th July, 1997 the High Court passed an Order appointing one N.S. Dey, Engineer, as a Receiver with a direction to visit the premises and to ascertain the constructions which were alleged to have been made beyond the plans annexed with the Agreements. The said Receiver, after due inspection, submitted his Report on 8.2.1997 and the same has been marked as "B" to the Affidavit-in-opposition.

15. This Respondent has further stated that he repeatedly wrote letters to the KMC, the last of which was on 20.8.2001, requesting them to demolish the illegal and unauthorised constructions made by the Club and finally, some officials of the KMC

(Building Department), upon receiving the letter, inspected the premises and submitted a Report to the Director General (Building) of the said Corporation and according to this Respondent, it clearly stated about unauthorised constructions raised by the Club.

16. Even then, the Corporation did not take any steps and therefore, on 21.12.2001, this Respondent filed a Writ Petition being W.P. No. 2521(W) of 2001 before this Court and on 21.12.2001 itself, Hon"ble Mr. Justice Barin Ghosh passed an Order directing the Corporation to visit and inspect the premises and measure the constructions.

17. Thereafter, the officials of the Corporation inspected the premises and forwarded their proposals for demolition to the Director General (Building) on 5th March, 2002.

18. It is his further case that on 7.3.2002 the Director General (Building) took action u/s 400(1) of KMC Act, 1980 and on 18th March, 2002, the KMC filed an Affidavit in the High Court with a detailed sketch map which they termed as the "Demolition Plan" which showed the portions which were unauthorisedly raised by the Club. According to this Respondent, the Club could do little to challenge the said Affidavit and on the contrary, admitted the allegations made therein by not filing any reply to the same.

19. The Affidavit of the KMC filed in the Writ Petition has been marked as "C" to this Affidavit. This Respondent has further stated that 17.9.2002, another Hon"ble Single Judge of this Court, namely Hon"ble Mr. Justice Bhaskar Bhattacharya, after going through the said Affidavit, directed the Corporation to conclude the Proceedings for demolition within 2 months from the date of the Order.

20. The Corporation failed to comply with this Order and therefore, this Respondent filed a Contempt Application being C.C. No. 94 of 2003 against the Corporation and on 17.4.2003 the Corporation was directed to strictly comply with the Order dated 17.9.2002 by 17.5.2003.

21. In compliance of the said Order, the Special Officer (Building) heard the Demolition Case No. 532-D of 2001-02 and held that there were several unauthorised constructions and therefore directed the KMC to demolish the said constructions by its Order dated 8.5.2003. At the same time, it allowed the retention of certain portions. The said Order is marked "D" to this Affidavit.

22. Being aggrieved by the Order of retention of some portions, this Respondent No. 6 filed a Writ Petition before this Court on 5.8.2003 being W.P. No. 1594 of 2003. At the time of hearing, it transpired that an Appeal had been filed by the President of the Club challenging that part of the Order dated 8.5.2003 by which demolition had been Ordered, and therefore, on 8.9.2003 the said Writ Petition was disposed of directing the Respondent No. 6 to approach the Tribunal and file a cross Appeal.

Complying with the said Order, the Respondent No. 6 filed a cross Appeal on 6.11.2003 before the Tribunal challenging that portion of the Order dated 8.5.2003 by which, the Special Officer had directed the retention of some portions of the premises in question.

On 19th June, 2004, this Respondent No. 6 then terminated the right of permissive possession of the Club and by this legal Notice, demanded vacant possession of the premises. This letter is marked "F".

Thereafter on 4th December, 2008, the Tribunal passed the Order by which it directed the Corporation to remove those portions which were held to be unauthorised by the Special Officer by its Order dated 8.5.2003 and allowed the retention of the other portions which were so Ordered by the Special Officer upon payment of charges etc.

23. According to this Respondent, both the Special Officer (Building) as well as the Tribunal, by their Orders dated 8.5.2003 and 4.12.2008, allowed some portions of unauthorised constructions to be regularised upon payment of charges without taking into consideration that such permission/Order could have been given only to the owner/landlord and not to a tenant or occupier and also did not consider that the Landlords had never asked or prayed for the retention of any portion of the unauthorised constructions but had asked for demolition of the entire authorised constructions. According to this Respondent, the Club has no authority to challenge the Order of demolition and the unauthorised constructions must be demolished in terms of the Orders.

Case of Birendra Kumar Roy (Added Respondent No. 7)

24. This Respondent has stated that he is one of the Trustees of the Estate of Bankim Ch. Roy (Deceased). He is also the elder brother of the Respondent No. 6 and according to him, both are joint Trustees as well as beneficiaries of the Trust Estate of Late Bankim Ch. Roy.

25. He has further stated that a portion of Premises No. 3, Outram Street, Kolkata, which was tenanted to the Petitioner No. 1, is jointly owned by the Trust Estate of Bankim Ch. Roy and the Trust Estate of Kalachand Roy and that, in the capacity of co-Trustee and a beneficiary of the Trust Estate of Bankim Ch. Roy, he was a co-owner of 3, Outram Street, Kolkata including the portion tenanted to the Petitioner No. 1 and that he has substantial interest in the said property. He has reiterated the statements of the Respondent No. 6 with regard to his having filed Title Suit No. 942 of 1991 on 21.6.1991 before the learned City Civil Court, 5th Bench, Kolkata wherein he had challenged the unauthorised additions and alterations to the suit property being 3, Outram Street, Kolkata. He has also stated that on 15.9.1992, an Order of injunction was passed by the said Court restraining the Petitioner No. 1 and its men and agents from making constructions etc. on the tenanted premises. This Order, according to this Respondent, was confirmed on

19.7.2005. These two Orders are collectively marked Annexure-A to the Affidavit-in-opposition of the Respondent No. 7.

26. This Respondent has further stated that on 10th January, 2007, Title Suit being 942 of 1991, was ultimately Decreed and it was Declared that the Defendants, being the Petitioner No. 1 and its the then President and Secretary, have no right to make any addition, alteration etc. in respect of the tenanted premises. They were also restraining by an Order of permanent injunction from making any construction etc.

27. According to this Respondent, the Club is aware of the Decree because it had already filed an Application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 for setting aside the said Decree which, is still pending.

28. According to the further case of this Respondent, the Petitioners made unauthorised constructions on the Club Premises in which it was a tenant and the Respondent No. 7, a joint Owner. He has further stated that after the Tribunal passed its Order dated 4.12.2008, the Petitioners went up in Appeal before the Municipal Building Tribunal but they did not make this Respondent a Party to the said Appeal. He has further stated that the Writ Petitioners have deliberately suppressed the fact pertaining to the Suit and the Decree passed thereon and also about the fact relating to the earlier Orders of this Court with an oblique motive and did not also deliberately implead him a party to the Proceedings. On the basis of such suppression of facts, this Respondent has submitted, that the Writ Petition should be dismissed.

29. Other statements have been made with regard to the fact that while granting the tenancy in favour of the Petitioner No. 1, it was permitted to make constructions only in respect of portions specifically mentioned in the Agreement but the subject matter of the Writ Petition does not fall within that area. It is not relevant for this Court to record each and every statement made by the Respondent No. 7 as they more or less complement and supplement the statements and/or the stand taken by the Respondent No. 6.

Case of KMC

30. The Kolkata Municipal Corporation has also filed an Affidavit affirmed on 9.4.2009. Their stand is that the Writ Petition is misconceived and that admittedly there have been unauthorised constructions. Part-A constructions are not so grave in nature and therefore, they have been allowed to be retained by the Special Officer (Building) on terms and conditions set out in the Order itself but so far as Part-B constructions are concerned, they are grave in nature and therefore, they have been directed to be demolished by the Special Officer (Building). The Order of the Special Officer was not interfered with by the Municipal Building Tribunal. According to them, the Petitioners are law-breakers and the Writ Petition suffers from mis-representation and suppression of facts. They have further stated that the Proceedings u/s 400(1) was initiated pursuant to the Order of this Court and if such

constructions are allowed to stand, they would create several hazards such as fire, traffic etc., apart from the fact that the constructions were made in a haphazard manner without following the norms and practices of civil engineering and the structural stability of these constructions was also doubtful. They have further stated that in Civil Suit No. 22 of 1997, an Engineer-Receiver was appointed by the Court and his Report showed widespread illegal and unauthorised constructions made by the Club. The said Report was never challenged or objected to. They have further stated in another Writ Petition, being W.P. 2521(W) of 2001, the Kolkata Municipal Corporation had filed an Affidavit admitting the authenticity of the said Report. They have also strongly refuted the contentions of the Petitioners that the constructions made are sustainable or minor in nature.

31. Before this Court proceeds to adjudicate the matter, it would like to record that on 14th August, 2009, the following Order was passed by this Court:

WP No. 271 of 2009

IN THE HIGH COURT AT CALCUTTA

Constitution Writ Jurisdiction

ORIGINAL SIDE

Outram Club and Anr. Petitioners

v.

Kolkata Municipal Corporation Respondents

Mr. Ashoke Das Adhikari, Advocate

Mr. Sudip Das, Advocate

Ms. Soma Biswas, Advocate...for the Petitioners

Mr. Alope Kumar Ghosh, Advocate

Mr. Achinta Banerjee, Advocate...For K.M.C.

Mr. Aniruddha Mitra, Advocate...For the Pvt. Respdt. No. 6

PRESENT:

The HON"BLE JUSTICE

Tapen Sen

August 14, 2009

The Court: A Supplementary Affidavit has been filed annexing therein some photographs in order to establish that there is no violation and that the structures are all innocent which do not need the intervention of the Kolkata Municipal

Corporation in the manner sought to be done. However, Mr. Aniruddha Mitra, learned Counsel appearing for the Respondent No. 6, submits that the photographs appended to the Supplementary Affidavit are old photographs and the Petitioners have actually made substantial illegal constructions which need to be pulled down as they have made not only illegally but also without the consent of the landlord.

Upon such submissions being made, Mr. Alope Kumar Ghose, learned Counsel appearing for the Kolkata Municipal Corporation, promptly proceeded to support Mr. Mitra's submissions and under such circumstances, this Court is of the opinion that an Officer of this Court be appointed for purposes of taking current photographs of the areas in question and submit them to this Court for ascertaining the correct status. Both Mr. Mitra as well as Mr. Das Adhikary have suggested the name of Mr. Reetobrata Mitra, a learned Member of the Bar Library Club. Mr. Alope Kumar Ghose, learned Counsel appearing for the Kolkata Municipal Corporation, has also given his consent to the name of Mr. Reetobrata Mitra.

Under the circumstances, Mr. Mitra is directed to act as an Officer of this Court and proceed to the Outram Club and take photographs of the areas in question wherever buildings or structures have been made and submit those photographs to this Court on the next date of hearing. If necessary, Mr. Mitra may take the assistance of a professional photographer.

For the aforementioned purpose, this Court directs both the Petitioners as well as the Respondent No. 6 to jointly pay a sum of Rs. 11,000/- to Mr. Mitra which will cover his fees plus transport charges plus cost of photographs including expenses that he may incur towards charges for professional photographer's fees.

Let this matter appear in the list on 24th August, 2009. Interim Order shall continue till 1st September, 2009.

All parties are to act on a photostat signed copy of this Order on usual undertakings.

(Tapen Sen, J.)

(Quoted)

Thereafter on 24.8.2009, the following Order was passed:

WP No. 271 of 2009

IN THE HIGH COURT AT CALCUTTA

Constitution Writ Jurisdiction

ORIGINAL SIDE

Outram Club and Anr. Petitioners

v.

Kolkata Municipal Corporation Respondents

For Petitioner: Mr. Ashoke Das Adhikari, Advocate

Mr. Sudip Deb, Advocate

For Respondent No. 6: Mr. Alope Kumar Ghosh, Sr. Advocate

Mr. Aniruddha Mitra

BEFORE:

The HON"BLE JUSTICE Tapen Sen

Date: 24th August, 2009

The Court: When this case was called out, Mr. Sudip Deb, learned Counsel appearing for the Petitioner Club stated that pursuant to the order dated 14.8.2009, the Special Officer appointed by this Court namely, Mr. Ritabrata Mitra held a meeting with regard to the photographs to be taken but since there was a suggestion being made at the instance of the Respondents that the entire Club be photographed, he therefore, raised a doubt and stated that it was not clear to him as to how to carry out the order of this Court and therefore, he restrained himself till he received further intimation from the parties in that regard. This Court does not understand as to why the parties created a dispute before the Officer of this Court. From the order of the Special Officer (Building) at page 45 it is clear that the offending portion is all the structures that have been shown in Part "B". The Special Officer has himself allowed the retention of structures in Part "A" and therefore, this Writ Petition is obviously concerned with the structures of Part "B". Although this Court should have straightway refused to accede to such requests being made but nevertheless considering the difficulties expressed by the Special Officer, this Court clarifies that the words "areas in question" used in the order 14.8.2009 means that the photographs that are to be taken should be in relation to those areas where constitutions have been raised and which were ordered to be demolished and which have been indicated as Part "B" in the order of the Special Officer (Building) at page 45 of the Writ Petition. In view of the order of this Court passed today, let the matter appear in the list on 14.9.2009. The interim order shall continue till 10.11.2009 as a number of holidays intervene in between including the long vacation of this Court. All parties including the Special Officer are to act on a Photostat signed copy of this order on usual undertakings.

(Tapen Sen, J.)

(Quoted)

On 16.9.2009, this Court passed the following Order:

WP No. 271 of 2009

IN THE HIGH COURT AT CALCUTTA

Constitution Writ Jurisdiction

ORIGINAL SIDE

Outram Club and Anr. Petitioners

v.

Kolkata Municipal Corporation Respondents

BEFORE:

The HON"BLE JUSTICE Tapen Sen

Date: 16th September, 2009

The Court: Pursuant to the Orders passed by this Court the Special Officer, Mr. Ritabrata Mitra, appears and files a sealed envelope containing some photographs. He is directed to number them and hand the same over to the Court Officer. The Court Officer shall then file a Report indicating the total number of photographs filed. Mr. Ritabrata Mitra is requested to hand over a copy of each of the photographs to Mr. A.K. Das Adhikari, to Mr. Aniruddha Mitra and also to Mr. Alope Kumar Ghosh on payment of the expenditure incurred for printing such additional copies. Mr. Ritabrata Mitra also files the Minutes of the visit to the Outram Club on 12th September, 2009 which is taken on record. Mr. Ritabrata Mitra is directed to hand over copies of the said Minutes to the aforementioned three counsel within one week from today. Since the photographs and the Minutes have been submitted, Mr. Ritabrata Mitra is therefore discharged from his status of a Special Officer in this case. He submits that he has already been paid the necessary charges. In that view of the matter, he is discharged from all his obligation in this case. This Court records its appreciation for the Special Officer for having assisted the Court.

In view of the fact that the business of the Court does not permit this case to be taken up this side of the Puja holidays, let the same therefore be listed on the 28th of October, 2009.

Mr. Bhaskar Sen, a learned senior counsel of this Court appears and submits that his client namely, Mr. Birendra Kumar Roy is a co-landlord and he should therefore be made a party in this Writ Petition so that he can adequately represent his case before this Court. He submits that he has also got a decree against the Petitioners and/or declaration against them from a Civil Court of competent jurisdiction pertaining to illegal construction.

Be that as it may, since he has not been added as a party in this Writ Petition, it is desirable that they first file an application for impleadment of parties which will be considered on its own merits on the next date of hearing.

All parties are to act on a photostat signed copy of this Order on usual undertakings.

(Tapen Sen, J.)

(Quoted)

On 19.4.2010, the following Order was passed:

WP No. 271 of 2009

IN THE HIGH COURT AT CALCUTTA

Constitution Writ Jurisdiction

ORIGINAL SIDE

Outram Club and Anr. Petitioners

v.

Kolkata Municipal Corporation Respondents

For Petitioner: Mr. Ashoke Das Adhikari, Advocate

Mr. Sudip Deb, Advocate

For Respondent No. 4: Mr. Joy Saha, Advocate

Mr. Aniruddha Mitra, Advocate

For Respondent No. 7: Mr. Indranil Roy, Advocate

Mr. Arnab Mukherjee, Advocate

For K.M.C.: Mr. Alope Kumar Ghosh, Advocate

Mr. Achinta Banerjee, Advocate

BEFORE:

The HON"BLE JUSTICE Tapen Sen

Date: 19th April, 2010

The Court: Photographs submitted by the Special Officer, Mr. Ritabrata Mitra were opened with the consent of all the Parties appearing at the stage of hearing and they were perused by the Court. Opinion is reserved. It will be considered along with all pleadings including the Supplementary Affidavit filed by the Petitioner objecting to some of the Photographs.

(Tapen Sen, J.)

(Quoted)

The Report/Minutes of the Special Officer which was filed before this Court is reproduced below:

Minutes of the visit of the Special Officer at the Outram Club on 12th
September, 2009

PRESENT: Mr. Reetobroto Mitra, Special Officer

Mr. Sudip Deb, Advocate appearing with Mr. Durga Das Banerjee, Advocate for the
Petitioner- Dube & Co.

Mr. Meghojit Mukherjee, Advocate for the Petitioner

Mr. Sanjoy Goswami, President, Outram Club

Mr. Tapan Kumar Debnath, Secretary, Outram Club

Mr. Udayan Sen, Committee Member, Outram Club

Mr. Arindam Mitra, Advocate for the Respondent No. 6

Mr. Surata Roy in person-Respondent No. 6

Mr. Sanjoy Dhar, Architect on behalf of the Respondent No. 6

Mr. Ramesh Sinha Roy for the Respondent No. 6

Mr. Chandan Mukherjee, Photographer

As per the meeting held by the Special Officer on 7th September, 2009, the parties had met at the Outram Club on 12th September, 2009 at 11.30 a.m. to carry out the order of the Hon"ble Mr. Justice Tapan Sen passed on 14th August, 2009 and clarified upon the parties seeking to do so on 24th August, 2009.

The portions to be photographed as part of the constructions and/or portion of the club indicated in page 45 of the petition as being a portion of Part "B" were agreed and photographs taken.

In the process of taking the photographs, the parties engaged in serious altercations and disputes were once again raised as to what formed Part "B".

All the photographs excepting those relating to the A.C. Shed marked in red hatch and the Committee Room have been seriously disputed by Mr. Deb Mr. Deb submitted as follows:

Some of the photographs taken by the Photographer do not come under Part "B" as page 45 of the petition. He specifically points out that the photographs relating to the lawn bar as also the photographs of Passage-cum-room which have been identified as AC Shed in the demolition sketch plan as also the photograph of Committee room do not come under Part "B". Therefore, those photographs are not at all required to be taken which are not the subject matter of the dispute. The

photographs taken on some portions as pointed out hereinabove have already been regularised by the Kolkata Municipal Corporation.

The private respondent points out that-

The Order of the Special Officer (Building) of the Kolkata Municipal Corporation refers to the demolition sketch plan and the map and plan of the premises signed by both the owners and Outram Club to be read together and/or in conjunction with each other. So, the portions identified as Part "A" and Part "B" are very clear and there could be no dispute about the same. The photographs which have been taken relate to Part "B". the portions objected to by the counsel for Outram Club for which photographs have been taken certainly relate to Part "B". The private respondent submits that no such regularisation has been admitted by the owners of the premises and the matter is under challenge in an appeal under Article 227 of the Constitution before this Hon"ble Court.

It is obvious from the aforementioned submissions by the parties that there are disputes even in identifying the parts and portions of the premises being Part "B". However, as I have been directed by the Hon"ble Court to refer to page 45 of the Petition to ascertain the portions identified as Part "B", I have done the same and taken the necessary photographs.

It may be pertinent to note here that in spite of notice, the Kolkata Municipal Corporation Authorities chose not to attend the meeting on 7th September, 2009 and are also not present today.

(Reetobrato Mitra)

Special Officer

(Quoted)

32. The Report itself will show that the parties, even at the stage of photographs being taken pursuant to the Order of this Court, raised disputes before the Special Officer and therefore no useful purpose will be served in dealing with the photographs which are kept with the records of this case.

33. The Parties made detailed submissions with regard to their individual claims but, from the pleadings, the following pertinent facts appeared and they are as follows:

- | | | |
|---|------------|--|
| 1 | 21.6.91 | Respondent No. 7 filed TS No. 942 of 1991 before learned City Civil Court (Vth Bench), Kolkata |
| 2 | 1997 | Civil Suit (CS No. 22 of 1997) filed by the Resp No. 6 |
| 3 | 21.12.2001 | Order for inspection passed in WP No. 2521(W) of |

2001

- 4 5.3.2002 Letter to Director General (Buildings) for Demolition
- 5 7.3.2002 Director General (Buildings) initiated action under
Section 400(1) of the KMC Act- (Demolition Case No. 532-D/2001-2002)
- 6 18.3.2002 KMC filed an Affidavit in the High Court
- 7 15.9.1992 Order of injunction passed in TS No. 942 of 1992 by
the City Civil Court restraining the Petitioner and
and its men & Agents from making constructions
- 8 17.9.1992 Hon''ble Mr. Justice Bhaskar Bhattacharjee passed
an Order in WP No. 2521 (W) of 1997 directing
the KMC to conclude the Proceedings for Demolition
(Demolition Case No. 532-D/2001-2002) within TWO
- 9 2003 Since there was non-compliance of the Order passed
on 17.9.1992, the Respondent No. 6 filed a Contempt
Petition which was registered as CC No. 94 of 2003
- 10 17.4.2003 In the Contempt Petition, the Corporation was
directed to strictly comply with the Order dated
17.9.1992 by 17.5.2003
- 11 8.5.2003 Consequently, the 1st Order was passed by the
Special Officer in Demolition Case No.
532-D/2001-2002
- 12 5.8.2003 The R/6 was aggrieved with the Order of part
retention and as such he filed WP No. 1594 of 2003
- 13 8.9.2003 WP No. 1594 of 2003 was disposed of as an Appeal
had also been filed by the Club against the Order
dated 8.5.2003 by which portions of the premises
had been Ordered to be demolished by giving him
liberty to approach the Tribunal and file a
Cross-Appeal
- 14 6.11.2003 Respondent No. 6 filed Cross Appeal before the
Tribunal

- | | | |
|----|-----------|--|
| 15 | 9.6.2004 | Respondent No. 6 then issued a Notice to the Club terminating the right of the Club relating to permissive possession arising out of the Agreement |
| 16 | 19.7.2005 | Order dated 15.9.1992 [Order of Injunction passed in TS No. 942 of 1991 by the City Civil Court restraining the Petitioner Club and its men & agents from making constructions] was confirmed |
| 17 | 10.1.2007 | TS No. 942 of 1991 finally Decreed and it was DECLARED that the Defendants (being the Club and the then President & the Secretary) have no right to make any additions/alterations etc. in respect of the tenanted premises. They were also restrained by a Court Order of permanent injunction from making any constructions/repairs/renovations etc. |
| 18 | 4.12.2008 | Impugned Order passed by the Tribunal upholding the Order dated 8.5.2003 passed in Demolition Case No. 532-D/2001-2002 |

34. Thus, from the perusal of the aforementioned facts and circumstances, it will be evident that the Petitioner undoubtedly suppressed, in the Writ Petition, all facts pertaining to the Title Suit which was filed by the Respondent No. 7 on 21.6.1991 being T.S. No. 942 of 1991 which was ultimately Decreed on 10.1.2007 and the Order dated 19.7.2005 which was passed therein confirming the Order dated 15.9.2002 of the City Civil Court by which the Order of injunction had been passed restraining the Club and its agents and men from making constructions. The Petitioners also suppressed the fact relating to CS No. 22 of 1997 which was filed by the Respondent No. 6 before this Court and also the fact relating to the different Orders that were passed in W.P. 2521(W) of 2001 and specially, the Order dated 17.9.1992 passed by the Hon'ble Mr. Justice Bhaskar Bhattacharya in that Writ Petition directing the Kolkata Municipal Corporation to conclude the Proceedings for demolition within 2 months and the subsequent Order passed in the Contempt Petition being C.C. No. 94 of 2003 on 17.4.2003 directing the Corporation to strictly abide by the Order dated 17.9.1992 by 17.5.2003. It is pursuant to this Order that the first Order dated 8.5.2003 was passed by the Special Officer in demolition case No. 532-D of 2001. These were necessary facts to have been pleaded by the Writ Petitioners but it appears that no such statement was made in the Writ Petition. It is therefore, obvious that the Petitioners suppressed material facts before this Court. Had these facts not been brought to the notice of this Court by the Respondents, the Court may have been misled.

35. Having perused the Order that was passed by the Special Officer, this Court noticed that on the basis of factuals brought to his Notice, he correctly came to the conclusion that the demolition sketch plan, after having been compared with the map of the tenancy Agreement, contains structures which were not part of the Agreement. The demolition sketch map showed rooms, air conditioned sheds, Bar, Pantry, Lady's Rest room, Lady's cloak room, staff quarters, generator room, pantry, waste material store, sitting area etc. as well as some more areas which were not in terms of the Agreement. The Club also did not produce any documents before the Special Officer justifying the construction of these structures. According to this Court, when an Order of the Civil Court was granted restraining the Club and its men from making constructions as early as on 15.9.1992 and when the said Order was confirmed on 19.7.2005 and the Suit ultimately Decreed on 10.1.2007, the Club and its men and agents owed a responsibility to the Special Officer to explain as to how such constructions had come up notwithstanding the Order of restraint having been passed by the Civil Court. The relevant portion of the Order of the Special Officer is relevant to be quoted and the Order reads as follows:

The agreement provided for (i) to improve and modify an existing external pavillion along with the western side of the premises to include dressing room, toilet and mali's room of stated dimensions (see map and page 12 of the agreement). (ii) to construct a raised covered passage, an open verandah, to serve as a reception area-cum-passage of dimensions stated in the plan along with Northern face of the building (see map and page 5 of the agreement). These have been in place since 1982 and the Assessment records of 1992 would reflect this very clearly. The demolition plan submitted to the Hon'ble High Court compares the records of 1992 with the structures standing at present and correctly records the entirety of the structures as unauthorised. The external pavilion together with toilet an dressing room and (supposed malis room on the western side has been expanded in size way beyond the stated dimensions in the plan attached to the agreement, and the pavilion itself has been converted into a bar. It is an exactly similar matter to the open verandah on the Northern face, which has been covered up and converted into air-conditioned rooms. Besides all these widespread illegal constructions have been made on the Western, Northern and Eastern sides of the Tennis Lawn as well as (inter alia) on the North-West side of the main building which has been sufficiently detailed in the department's demolition plan.

(5) Photocopies of the Clubs reports of 2001 and 2002 have been submitted showing total sales of Rs. 50.61 lakhs for the Bar Account in 31st March, 2002 and the provisions account Rs. 32.47 lakhs. The Tennis account had income of Rs. 0.73 lakhs.

(6) The illegal and unauthorised construction have led to the amenities of the premises as a whole being severely and seriously disestablished and is causing continued widespread damage, both external and internal to the main building.

(7) The unauthorised construction have been made without permission of the owners of the premises and without any statutory permission from the CMC which are entirely illegal.

The demolition sketch plan vide D/Case No. 532-D/2001-02 has been compared with the map of the tenancy agreement. The map is furnished in the agreement of the tenancy dt. 28th June, 1982 duly signed by both the sides. The demolition sketch contains structures which are not shown in the agreement plan. Some spaces in the agreement plan are not denoted by any letter which speaks about no structures in those spaces. The demolition sketch plan shows room, A.C. shed, Arch Shed, Bar, Pantry, Ladies Rest Room, Ladies cloak Room, Tennis Pantry, Waste Material Store, Generator Room, Staff Quarter, Sitting area. Obviously some more areas have been constructed which are not as per the terms of agreement. The Club has not proceed any document justifying the construction of the structures which are not covered in the agreement plan. The club may be permitted to retain only those structures of the demolition sketch which are permitted in the agreement and duly shown in the agreement map signed by both the sides.

(Quoted)

36. The Appeal that was taken out before the Tribunal was returned with a finding that the said Appeal was not tenable and liable to be dismissed. Such a finding, in the opinion of this Court having been based on the following paragraphs, in the opinion of this Court, was correct and no error can be attributed to the Tribunal in coming to such a conclusion. The said paragraph reads as follows:

Over the aforementioned facts and circumstances and judicial decision of the Superior Courts, we find no illegalities in ordering not to demolish"/"retention" under the impugned order of So (B) (Part "A"). But at the same time we find no cogent ground/substances over the submission of the appellant towards the retention of the other parts of the construction under Part "B" (subject matter of the appeal). It is mentioned that not a single scrap of paper furnished by the appellant towards existence of the same that they have simply undergone repairing and renovation work. Moreso, Appellant being a tenant (accepted even for argument sake) have no right to construct and/or change the nature and character of tenancy without prior permission of the Landlord/Owner. No permission was also obtained from KMC. Respondent No. 3 being a complainant ♦ landlord also raised his objection from the very beginning as to their inconveniences and changes by the alleged construction. Accordingly judicial references made by Appellant under AIR 1972 (Cal) 459, 1989 (SC) 860 has no relevancy since there are objections and sufferings of the other complainant-landlord by the impugned construction. As to the cited decision of a judgment of this tribunal under B.T. Appeal No. 45 of 2003 we are to mention that the facts and circumstances of the earlier case are altogether different from the present case where permission for construction was granted by the major number of co-owners. But in the present case there is no such permission

was even obtained at all from the Landlords or KMC and thus citation is not relevant.

Summing up everything, in absence of any cogent document, we thus hold the view that the grounds under the appeal are not tenable and liable to be dismissed.

(Quoted)

37. On the claims of the respective Respondents with regard to their claim to the property was rightly not considered by the Tribunal by saying that it had no power like the Civil Court. It correctly therefore confined the Appeal only to the extent of the subject matter of the Order that was passed by the Special Officer (Building) and on the basis of the facts and circumstances taken into consideration herein and as mentioned above, rightly dismissed the Appeal on contest.

38. Considering the aforementioned facts and circumstances, this Court is of the view that none of the two Orders passed either by the Special Officer (Building) or the Municipal Building Tribunal on 8.5.2003 and 4.12.2008 in so far as they relate to the Order of demolition, deserve to be set aside by this Court as they do not suffer from any irregularity.

The Writ Petition is dismissed. No Order as to costs.

Upon appropriate Application(s) being made, urgent Certified copy of this Judgment, may be given/issued expeditiously subject to usual terms and conditions.

Later:

Stay of operation of this Judgment/Order is sought for. Such prayer is refused.