(2003) 12 CAL CK 0044

Calcutta High Court

Case No: Writ Petition No''s. 2825, 2826 and 2827 of 1999

Sm. Santi Devi Mittal, Satish Kumar Gupta and Smt. Bhanumoti Bajaj		APPELLANT
	Vs	
The State of West Bengal and Others		RESPONDENT

Date of Decision: Dec. 16, 2003

Acts Referred:

- Constitution of India, 1950 - Article 39
- Urban Land (Ceiling and Regulation) Act, 1976 - Section 10(1), 2, 5(3), 6, 6(1)

Citation: (2004) 2 CALLT 152 : (2004) 1 ILR (Cal) 109

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Advocate: Sakti Nath Mukherjee, P.K. Roy, C.S. Das, Ram Agarwal and S. Bhattacharya, for the Appellant;Ranjit Kumar Chatterjee, for the Respondent

Judgement

Amitava Lala, J.

On 18th June, 1974, the petitioner entered into an agreement for sale with the owner of the concerned piece of land since he was having a thika tenancy right thereon at the relevant point of time. Since the owner of the land failed to execute and register the sale deed the petitioner in the first writ petition instituted a suit being Title Suit No. 84 of 1983 before the appropriate Civil Court and obtained a decree. On the basis of such decree an execution proceeding was initiated but at the time of the registration of the sale deed a dispute cropped up which is germane for the purpose of due consideration by this Court. Such dispute is in respect of grant of permission by the Authority under Urban Land (Ceiling and Regulation) Act, 1976 which is required to be done before registration.

2. In an erstwhile writ petition being Matter of 2433 of 1989 (Satish Kumar Gupta and Ors. v. Competent Authority, Calcutta and Ors.) a Bench of this Court was pleased to pass an order on 22nd November, 1990. It is necessary for this Court to go into detailed recordings of the facts under such order for the purpose of coining to a conclusion. It appears that the owner of the land was submitted a return u/s 6(1) of the Urban Land (Ceiling and Regulation) Act, 1976 in 1985 and a draft statement was prepared in the year, 1986. The erstwhile owner filed his objection. However, the final settlement was prepared and published upon the owner in December, 1986. A declaration u/s 10(5) of the Act was made on 7th June, 1987 and a notification for taking possession of the disputed land was issued on 31st August, 1988. For the aforesaid reason, deed of conveyance in favour of the petitioner was not registered. All steps for vesting the land under the Act were already completed. According to the petitioner therein, although the vesting was completed prior to the execution of this sale deed but notification for taking up the possession u/s 10 of the Act was issued on 31st August, 1988 much after the execution of the deed of sale. It was also recorded therein that the petitioners submitted that no notice was issued by the competent authority upon them before taking a step under such Act. Relevant rent receipts were also produced before the Court for the purpose of establishment of the thika right of the present purchaser of the land in question. Upon taking into account all facts and circumstances of this case the impugned order and notifications were quashed by the Court and competent authority was directed to proceed de novo with the disputed proceeding after serving the notice to the owner as well as the present petitioner i.e. the purchaser of the land. Thereafter, the petitioner approached the Calcutta Municipal Corporation for mutating his name as purchaser which was accordingly done. The rates and taxes were being paid by such petitioner to such authority. The petitioner came to know that the Refugee and Rehabilitation Department acquired the land and was then proceeded to distribute pattas in respect of the self-same land in question to different parties of their choice. Then another writ petition was moved before this Court being W.P. No. 13671(W) of 1997 and upon being dissatisfied with the order passed therein an appeal was preferred. When a Division Bench of this Court was pleased to set aside the order passed by the learned single Judge, the execution and the distribution of pattas were quashed. The order of vesting under notification dated 31st August, 1988 was also quashed and set aside. A SLP was filed as against such order passed by the Division Bench whereunder the order of was substituted by a direction upon the authority under the Act to dispose of the proceeding at the earliest and the present possession of land in question of the respondent will not be disturbed till final disposal of the proceeding and the same will be abided by the result therein. If it is necessary to restore the possession of the land to the erstwhile owners then it will be open for the State Authority to take appropriate steps in accordance with law in evicting the land occupants and for handling over the land to the rightful owners pursuant to the order in the ceiling proceedings. In view of the order, the contempt application pending in the High Court was also treated to be

disposed of. In view of such order the interim orders including the order dated 20th August, 1998 will not survive.

3. The present writ petition is challenging the order passed by the competent authority being annexure ''O'' to the writ petition and order passed by the Appellate Authority being annexure ''Q'' to the writ petition.

4. When I go through the order of the competent authority I find that the original owner settled the land in different plots alongwith the petitioner as thika tenant in 1971772. It is also recorded that agreement for sale of landlord''s interest was also made in the year 1974. The title suit was filed and ex-parte decree was passed. When the owner did not execute the land, the petitioner got an order of execution through the intervention of the Court. Such purchase was also confirmed by the High Court. Since they have purchased the land they are the holders of the land under the Act and the proceeding cannot run as against the original owner. They have no land in excess of the ceiling limit. Their land cannot be vested. They are the thika tenants and holders as on the appointed date. Since the High Court has directed them to consider they considered the matter and held the transfer by way of execution of the decree for specific performance of contract cannot be said to be involuntary. But it is a voluntary transfer by the act of the parties. As such the said transfer/s is or are the subject to provision of the Act. The transfer which took place under decree of the Civil Court cannot be held good u/s 5(3) of the Act. In return u/s 6(1) of the Act no indication has been given about the thika tenancy and possession of the land by the petitioner. Had it been the case of possession prior to the operation of the Act it would have been obviously mentioned in the return but it has not been done so. This aspect categorically proves that the settlement of the land by the owner to the objectors as thika tenants is afterthought to evade the provision of the Act. The Appellate Authority affirmed the view of the competent authority particularly holding that the decree for specific performance of contract and the resultant execution of the conveyance through the Court cannot be equated with involuntary transfer in as much as there is violation in making the agreement for sale by the owner of the land who himself filed the return u/s 6 of the 1976 Act. In giving description of the legal provision, the Appellate Authority held that the involuntary transfer referred to in 1976 Act is strictly Court sales in execution of a charge decree, money decree and the like. It was also observed that any of decrees passed ex parte i.e. in the absence of the thika controller (having not been pleaded) is a nullity and the same is not binding upon him.

5. It is well established by now that the ''vacant land'' should be a vacant land in its true sense which does not include any construction of building on such premises or a vacant land with the appurtenant to such constructed building etc. u/s 2(q) of the Act. Therefore, the question arises when the petitioner was a thika tenant on a vacant land whether in true sense such land is vacant land or not. General definition of thika tenancy is that in the land of the owner a structure is made by the tenant.

Section 2(1) which speaks ''to hold'' with its grammatical variations, in relation to any vacant land, means-- (i) to own such land; or (ii) to possess such land as owner or as tenant or as mortgagee or under an irrevocable power of Attorney or under a hire purchase agreement or partly in one of the capacities or partly in other of the said capacity or capacities. Explanation under such section says where the same vacant land is held by one person in one capacity and by other person in another capacity then, for the purpose of this Act such land should be deemed to be held by both such persons. The true interpretation of this section is that ''holder'' of vacant land means the owner or the occupier as a tenant and in case of these two capacities both of them are to be treated as holders of the land. As per Section 3 of the Act no person is entitled to hold vacant land in excess of the ceiling limit. Factually, in the present case, the owner was having excess land when the thika tenant was having no excess land. But by virtue of the explanation, both of them can be construed as holders. Therefore, the requirement of law is to call for an explanation from both the holders holding under different categories and sort out the problems. In the instant case, disclosure was made by the owner about the excess land and the authority held that it was known to them that the land was occupied by a thika tenant. I am very candid to say that information not received by an authority cannot be said to be a non-disclosure of information by the occupiers. If it is non-disclosure the same will be the risk and responsibility of the owner but not of the tenant. Moreover, the desire of the Act is that after the disclosure an inspection is to be made. Had it been so that could have been reflected from the inspection report. Possibly no inspection was made. But the intrinsic evidence for settling the land for refugee and rehabilitation speaks that land was not freehold vacant land to come to a conclusion against the owner ignoring any right of the occupier. Section 4 of the Act speaks about the ceiling limit. Explanation u/s 4 at the end of the sub-section says that for the purpose of this section a person shall be deemed to hold any land on which there is a building irrespective of dwelling unit. If he owns the land and building or owns the land but possesses the building or possesses the land and building and if the possession is as a tenant under any lease etc. or possesses such land but owns the building, the possession being as a tenant under a lease or as a mortgagee under an irrevocable power of an attorney or a hire purchase agreement or partly in one of the capacities or partly in other of the said capacity or capacities as per Section 5(3) of the Act in any State to which the Act applies no person holding vacant land in excess of the ceiling limit immediately before commencement of the Act shall transfer any such land or part thereof by way of sale, mortgage, gift, lease or otherwise until he has furnished a statement u/s 6 and a notification regarding the excess vacant land held by him has been put under Sub-section (1) of Section 10 and any such transfer made in contravention of this provision shall be deemed to be null and void. In the instant case, thika tenancy was available prior to coming of the Act in 1976 and the agreement of sale of the property with such thika tenant i.e. the petitioner herein was also executed prior to coming of the Act. But the suit was instituted in the Civil Court and decreed after coming of the Act. Therefore, before

the applicability of the Act came in the year 1976 the alleged vacant land was occupied by the thika tenant obviously with structure otherwise the petitioners cannot be construed as thika tenant. Apart from that the embargo u/s 5(3) in transferring the excess vacant land is applicable in case of sale, mortgage, gift, lease or otherwise but there is no specific averment to furnish a statement u/s 6 like other sections that even if he is a tenant his name should be referred therein as an occupier of the land. Therefore, as in one hand, u/s 2(1) of the Act ''holder'' means expressly a tenant when u/s 5(3) there is no expression that the tenancy should also be included amongst others in giving declaration of the excess land. The petitioner has obtained a decree and decree is prevailing the field. Therefore, two questions are necessary to be answered:

(a) Whether the land occupied by a thika tenant with structure can be construed as a vacant land?

(b) Whether Section 5(3) of the Act can invalidate a decree of specific performance passed by the appropriate Civil Court?

6. Incidentally, one other important part is to be taken of note hereunder. On 12th June, 2003 in W.P. No. 2825 of 1999 (Smt. Shanti Devi Mitta v. State of West Bengal and Ors.) a similar question arose as herein. The Court held as follows:

"However, a suit was instituted subsequent to coming of the Urban Land (Ceiling and Regulation) Act, 1976 for passing decree in respect of agreement for sale executed prior to coming of such Act. Hence it is to be understood that the decree has to be retroactive on the date of the execution of agreement for sale was executed prior to the coming of the Act, therefore, it is also a disputed question about the applicability of the Act. In such circumstances when Section 42 of the Act says that it will override the laws meaning thereby notwithstanding anything contained in thereto any other law for the time being in force or any customs or usage or agreement or decree or order of a Court or Tribunal or other authority, it would be justifiable to come to a conclusion in respect of the question in State of Gujarat and Others Vs. Pethalji Nathabhai Chawda, that when conditions of legibility of prescribed exclusion of those are legible automatically take place. But I do not find such principle can be applicable herein. In any event when I find there is a dispute even about the applicability of the Act is concerned then the same should not be taken up likely to assume jurisdiction under the Act by any authority. The Appellate Authority erred in holding such party of the order. So far as the question of involuntary or voluntary transfer is concerned, the same may be strictly the Court sale in execution of a charge, decree, money decree etc. but I cannot hold specifically that the decree for specific performance cannot be said to be involuntary transfer as an absolute analysis. The question of voluntary transfer dictionarically meant that the same is made in between the parties out of their own volition but whenever one of the parties is not agreeable and interference of the Court is caused such justice in favour of one of such parties question of involuntary transfer cannot

be ruled out so easily.

Therefore, upon taking into account all aspects of the matter, I am of the view that the order of the competent Authority and Appellate Authority cannot be sustained."

7. But in drawing conclusion Court passed the following order:

"However to rule out any of the controversy I send the matter back to the Competent Authority to pass an appropriate order within a period of one month from the date of communication of this order without fail upon giving fullest opportunity of hearing and by passing a reasoned order hereto in the light of the judgment and order passed by this Court. For the purpose of effective adjudication petition, affidavits and all annexures herein can also be treated as part and parcel of such proceedings."

8. Learned counsel for the petitioner, at the time of delivering the judgment, intended to say that there is no necessity of going back to the authority under the Urban Land (Ceiling and Regulation Act, 1976. When two conflicting laws governing the factual field the best course would be interpretation by the writ Court. He further contended that if any adverse order is passed by such authority then there might be every possibility of construing the same as without jurisdiction. Again such challenge will be thrown to the writ Court or if available, before the Appeal Court. Therefore, the petitioner will never be in a position to use the land. Such submission struck me very much. Accordingly, on 19th June, 2003 I kept the matter in the list to come to a definite conclusion. But inspite of keeping such writ petition in the list no argument was advanced by the learned senior counsel being appearing at the time of hearing. Learned counsel having been present only sought for adjournment. Alternatively the judgment which had been delivered may be restricted only in respect of W.P. No. 2825 of 1999 (Smt. Shanti Devi Mittal v. State of West Bengal and Ors.). But I did not accept any of such submissions and judgment which had been delivered on 12th June, 2003 was made applicable not only to that case but also on other two writ petitions were similarly situated. But before final delivery when the files of other two writ petitions were placed before me I found that affirmative judgments in those two similarly placed writ petitions are awaiting for delivery. Immediately in the Court I had brought the fact to the learned counsels for the petitioners and direct not to apply for any certified copy of the judgment already delivered until second thought is given by the Court in the subject. I have reviewed the entire facts and came to a definite conclusion which is the matter of discussion hereunder. I am thankful to the parties to keep presence upon the Court to get best possible answer by giving second thought, I have carefully compared the judgment delivered in earlier one and the present one and found that irrespective of dates and time facts are materially identical to give the answer by the Court in respect of the above two questions.

9. No I give answers hereunder:

The answer to question No. (a):

10. The Calcutta Thika Tenancy Act, 1981 is an Act of the State introduced in the year 1981 to regularise certain special types of tenancy available in the City of Calcutta (Kolkata). The title of the particular enactment may give some impressions about the provisions of the Act, The principle of the Act of 1981 was to provide for acquisition of certain types of lands as per the Act. Such Act was amended in 1993 which substitute a new preamble in the place and instead of earlier one. The present preamble is to provide for acquisition of interest of landlords in respect of the lands comprised in thika tenancy and certain other tenancies and other lands in Calcutta and some other places given therein. In the Special Bench judgment reported in Lakshmimoni Das and Others Vs. State of West Bengal and Others, it was held that the legislation is intended fairly to abolish the rights of landlords over the lands held by thika tenants. Therefore, existence of a thika tenancy, when the Urban Land (Ceiling and Regulation) Act came into force in 1976, cannot be said to be an impeachable or fake defence to frustrate the process of law under such Act. The point germane for the purpose of due consideration is that when the Calcutta Thika and Other Tenancies and Lands (Acquisition and Regulation) Act, made effective in 1981 how the right of the thika tenancy can arise prior thereto. According to me, thika tenancy right was not created by 1981 Act. The existing thika tenancy was regularised and legalised by such Act. The only requirement is whether pre-existing elements of thika tenancy is available or not. Such element obviously be the construction of a structure on the land. Having so, can it be said that the land is simplicity ''vacant land'' as per Act of 1976? Therefore, when the land in question is hit by structure of the Act, 1976, any decision in connection thereto will be without jurisdiction and held as nullity. The claim of thika tenant cannot be ruled out to construe the land as ''vacant land''. Moreover, in a conflicting situation like above the possession will govern the field as last word. The petitioner was all along in possession either as thika tenant, or as decree holder/ purchaser in a suit from 1972-73 onwards till this date. Moreover, if the modified Act of 1981 is taken into account with its true spirit it will be seen that such original landlord cannot have nothing to say in respect of the land in question. Section 2 of the Act 1981 declares the policy of the State. The Act is made towards securing the principles specified in Clause (b) and (c) of Article 39 of the Constitution of India. If it is so, then such right cannot be taken back for distributing the land to the person/s through the Department of Relief and Rehabilitation. In such case there should be a direct conflict between policy and action of the State. Therefore, the circumstances are prevailing for consideration of the matter by this Court instead of sending the same to the authority.

To answer the question No. (b):

11. Section 5(3) under the Urban Land (Ceiling and Regulation) Act, 1976 categorically speaks about holding vacant land in excess of the ceiling limit

immediately before the commencement of this Act. If it is so, he will not be in a position to transfer such land or part thereof by way of sale, mortgage, gift, lease or otherwise until he furnishes a statement u/s 6 and notification regarding the excess vacant land held by him has been published under Sub-section (1) of Section 10. If any transfer is made in contravention, the same shall be deemed to be null and void. According to me, if existence of ''vacant land'' cannot be available immediately prior to coming of the Act can the Act, 1976 governs the case? My answer is ''no''. Admittedly, thika tenancy was created prior to coming of 1976 Act. Whether the Act came into force to legalise such tenancy is immaterial. Admittedly possessor of the land is different from the landlord holding less than the ceiling limit. Therefore, such possessor of the land is not attracted by the Act of 1976. Even thereafter if the original landlord shown such land as vacant land, the same is problem between the landlord and authority, the possessor cannot be made to suffer. At best such possessor could have served with a notice as a holder to explain his position. Even that was not done unless Supreme Court directed to do. Inspite of the same genuine grievance of the petitioner was turned, down with a fictitious plea of voluntary transfer. An arrangement for sale was executed between the then landlord and such thika tenant but when the landlord failed to convey the property a suit was instituted and decreed by a Civil Court. Moreover, the land with the structure possessed by thika tenant cannot be construed as vacant land. When the 1981 Act regularised the pre-existing structure on the vacant land 1976 Act cannot be made applicable. The structure on the land cannot be said to be illegal or unauthorised structure to bring under the zone of consideration of 1976 Act irrespective of any statement or no statement by the original landlord. The State law itself excluded such part. The land being available under item 18 of the list II i.e. The State List under Seventh Schedule of Article 246 of the Constitution of India, any question regarding such special feature is to be controlled by the State without any interference. For this reason inspite of abolition of 1976 Act effect cannot be given to a State unless it agrees. Moreover, 1981 Act being the Special Act was enacted with the assent of the President of India. Therefore, the special will certainly prevail over general.

12. Secondly, the right has subsequently been extinguished by a decree of the Court, therefore, cannot be thrown out by saying that it is not involuntary transfer. The 1976 Act says that without the permission of the authority any transfer by way of sale, mortgage, gift, lease or otherwise will be treated as null and void. Preparation of agreement for sale cannot be said to be a sale. It is a meet wish to sale. Such wish rise an expectation in the mind of the intending purchaser. Hence, if any purchaser observes his wish is getting extinguished or diminished by an act or conduct of owner of the land he has every right to take shelter of law. In such a case Court passes a decree for specific performance of contract which cannot be stated to be a voluntary transfer at all. The word ''voluntary'' comes out of ''volition''. If the ''volition'' of the parties are available there is no necessity to go to the Court of law.

But if the purchaser is compelled to get a decree and if the Court passes it how such sale can be established as voluntary transfer is unknown to this Court. Whether decree is passed on contest or ex parte has hardly anything to do in connection thereto. The initial refusal to convey the property inspite of making agreement for sale is the guiding factor. Therefore, sale, if any, with the intervention of the Court cannot be said to be a voluntary transfer at all.

13. Certain other elements of facts are to be taken into account in this respect. The thika tenancy was created in the year 1971/72. The petitioners entered into agreement for sale with the landlord in the year, 1974. Therefore, neither the Act, 1976 nor the Act, 1981 came into force at the material point of time. Respective title suits were filed in the year, 1983 when after long persuasion the original owner did not voluntarily execute the title deeds. The District Judge proceeded and passed a decree of specific performance in between 1985 to 1987 on all the three matters. Even thereafter when the plaintiff did not execute the title deeds the same were executed through the execution case before the appropriate Court in between 1986 to 1987. As against this background, the only element available for the Urban Land Ceiling Authority is that in the return u/s 6(1) of the Act no such fact had been disclosed by the original owner. My question is can it be said to be a fault of the purchasers? They were not holding land excess than the ceiling limit. Their cases are to be governed by the Civil Code. They had no business to make the authority as party defendant in the suit when admittedly their land holding is below the ceiling limit. It is for the landlord to appear in the suit and bring such fact to the notice of the Court. The Court ought not passed the decree had such fact brought to the notice of the Court. Even it could also brought to the notice of the Court at the time of execution. On the other hand, unless sale is complete with or without the intervention of the Court, the seller is bound to disclose the quantity of the land. The landlord had done so but authority did not chose to make any inspection unless it was directed by the Supreme Court. At the time of inspection the present petitioners being occupiers were present. It is recorded in the report that although a statement had been filed u/s 6(1) of the Act by the landlord he did not show the total area of the premises. According to him, the total area of the premises is 17 kathas 8 chattaks 12 square feet equivalent to 1171.69 centimeter which has been occupied by the 17 refugee families. It was learned that they were occupying the land in 80''s and they constructed kutcha huts with R.T. sheds on darma on the vacant land existing at that point of time. Another one is occupying a portion of the land and constructed a pucca structure but could not produce any title deed or any sanctioned plan. Apparently, unauthorised structure came up 8 to 9 years ago. The entire land was vacant on or before the appointed date under this Act. So far as the other premises being 19 kathas 12 chattaks 5 square feet equivalent to 1321.55 centimeter on the field a road and a park have been constructed by Calcutta Improvement Trust as stated by the residents of the locality. Draft statement as given by the competent authority is in respect of the petitioners. The objection u/s

8(3) of the Act was given by the petitioner. There cause of excess vacant land was not proved beyond doubt. But inspite of the same the appropriate authority and the appellate authority came to a conclusion that the petitioners are not entitled to any relief because transfer of property in a suit for specific performance of contract is a voluntary transfer. Under these circumstances, I do not find anything left to send the matter back for the purpose of reconsideration by the authority.

14. Therefore, the writ petition succeeds. The order passed by the authority and/or Appellate authority stand set aside. Thus the writ petition stands disposed of. No order is passed as to costs. The earlier order which has been passed on 12th June, 2003 and 19th June, 2003 in W.P. No. 2825 of 1999 (Smt. Shanti Devi Mittal v. State of West Bengal and Ors.) stands recalled and such writ petition as well as W.P. No. 2827 of 1999 (Smt. Bhanumati Bajaj v. The State of West Bengal and Ors.) as above be governed by the order passed by this Court.

Xeroxed certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the order and certified copy of this judgment.

All parties are to act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the Officer of the Court in respect as above.