

**(2004) 08 CAL CK 0048**

**Calcutta High Court**

**Case No:** Writ Petition No. 13290 (W) of 2001

Makhanlal Agarwalla

APPELLANT

Vs

Kulti Municipality and Others

RESPONDENT

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**Date of Decision:** Aug. 25, 2004

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2

**Citation:** (2005) 1 CALLT 584

**Hon'ble Judges:** Pratap Kumar Ray, J

**Bench:** Single Bench

**Advocate:** Probal Kumar Mukherjee, for the Appellant; Sanjib Seth and Dipankar Dutta, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Pratap Kumar Ray, J.

Heard the learned advocates for the parties.

2. In the instant case, the petitioner has prayed for the following reliefs :

- a) A writ in the nature of mandamus commanding the respondent Municipal Authority or their men, agent and subordinate to take legal action against the respondent Nos. 5 and 6 for non-compliance of the provision of the West Bengal Municipal Act forthwith.
- b) A writ in the nature of mandamus commanding the respondent to demolish the unauthorized construction of the respondent Nos. 5 and 6 which is not in accordance with the sanctioned building plan.
- c) A writ in the nature of certiorari calling upon the respondent authority to transmit the entire records relating to this case before this Hon'ble Court so that after perusal of the same conscientious justice may be administered.

e) An interim Order in terms of prayer (a) and (b) as above.

3. This writ application has been affirmed by one Sri Sanjoy Kr. Piruka alias Agarwal, son of Sri Babul Piruka alias Agarwal as constituted attorney of the writ petitioner Makhanlal Agarwal. The petition was affirmed on 4th September, 2001. This writ petition has been opposed by filing affidavit-in-opposition by the private respondents 5 and 6. In the affidavit-in-opposition it has been contended that on identical cause of action, the writ petitioner already has filed a civil suit being Title Suit No. 213 of 2000 through his constituted attorney Sri Sanjoy Kr. Piruka as the plaintiff on behalf of Makhanlal Agarwal. It has been further contended that in an application under Order 39 Rules 1 and 2 praying an Order of injunction restraining construction work was filed and after hearing the learned civil Judge (Junior Division), 2nd Court at Asansol, rejected the application by the Order dated 22nd February, 2001 by holding, inter alia, that the Court did not find any deviation of construction by the defendants from the sanctioned plan. Further, it is held by the trial Court below who decided the injunction application that Kulti Municipality being a necessary party was not impleaded in the suit. It has been further submitted before this Court that challenging the Order dated 27th February, 2001 passed by the civil Judge (Junior Division). 2nd Court at Asansol in the aforesaid Title Suit, an appeal was filed being Misc. Appeal No. 10 of 2001, which now has been decided against the present writ petitioner who was appellant therein by rejecting the appeal. The learned advocate for the petitioner, however, submits that cause of action of civil suit was on a different angle. In the writ petition, however, it appears that there is no whisper of the pendency of the civil suit rejecting the injunction application filed by the writ petitioner and pendency of the Misc. Appeal against the Order of rejection of injunction application. Having regard to such state of affairs now this writ application to be decided.

4. Before going into the merits of the issue, the writ application could be decided applying the doctrine of parallel proceeding. Reliance may be placed on the case Agricultural and Processed Food Products Vs. Oswal Agro Furane Ltd. and others, of the Apex Court and the judgment Bombay Metropolitan Region Development Authority, Bombay Vs. Gokak Patel Volkart Ltd. and Others, whereby and whereunder the Apex Court has settled the law by holding that it is the abuse of process of law to agitate in different forum for identical relief on the identical facts and identical cause of action. To test the applicability of the aforesaid Apex Court judgment some factual issues are now being dealt with. The plaint of the Title Suit as referred to has been annexed to the opposition at page 57. Paragraphs 5, 6, 7, 9, 10, 11 and 12 of said plaint reads thus:

"5. That on the adjoining north of the A schedule property the defendants have got their residential house as described in the schedule below.

6. That the defendant have started construction on the B schedule property by blocking the windows and ventilation of the residential house of the plaintiff, i.e. a

schedule property.

7. That there was an old building over the B schedule property and by demolishing the old structures the defendants have started raising illegal construction by blocking the construction by blocking the windows and ventilation of the plaintiffs house.

9. That the defendants have no right to raise the construction over the B schedule property by blocking the windows and ventilation of the plaintiffs house and as a result of which the passage of air and light of the plaintiffs house will be totally affected and the plaintiff will have to face serious hardships.

10. That the plaintiff has already filed complaint before the Chairman, Kulti Municipality for stopping such illegal construction but the defendants are adamant and determined to carry out such illegal construction violating the legal provisions.

12. That inspite of filing of the said case the defendants have collected all the building materials over the suit property to raise such illegal construction and on 10.11.2000 the

defendants engaged their men and labouers to arise the said construction over the B schedule property.

5. In the writ application the petitioner has prayed for the reliefs as already quoted. On a bare perusal pf the contents of the plaint and the writ application, it appears that the factual matrix are identical in both the two cases, viz., in the civil suit as well as in the writ application, save and except the mode of challenge. In the Title Suit, the present writ petitioner being the plaintiff has contended that the without the sanctioned building plan respondents No. 5 and 6 of this writ application who were defendant Nos. 2 and 3 have started construction and accordingly prayed for appropriate decree, viz., declaration, title and Interest over the suit property and Order of restraint to construct by the defendants. In the writ application, no averment has been made about the pendency of the said civil suit, though the suit was filed on 15th November, 2000 before the learned Court below whereas the writ application was affirmed on 4th September, 2001. There is a total concealment of the material facts by the writ petitioner about pendency of a civil suit on identical issue and relief. Furthermore, it appears from the opposition that the application under Order 39 Rules 1 and 2 CPC as filed before the learned trial Court below was rejected by the Order dated 27th February, 2001, i.e, long prior to filing of the writ application on 4.9.2001. That injunction application was dismissed by the learned Civil Judge (Junior Division), 2nd Court at Asansol in Title Suit No. 213 of 2002 by the Order dated 27.2.2001 on holding to this effect:

"I find no deviation in construction from the sanctioned plan prima facie case at this stage. Further, the plaintiff made complaint to the Chairman, Kulti Municipality from whose office plan is sanctioned, but surprisingly he has not made Kulti Municipality

a party to this suit for a factual disposal of the suit. In view of the aforesaid, I am of the opinion that the plaintiff has not been able to make out a *prima facie* case for temporary injunction. Hence, the application filed by the plaintiff is hereby dismissed on contest."

6. The appeal was preferred by the present writ petitioner through his constituted attorney Sri Piruka, who affirmed the affidavit of the writ application being Misc. Appeal No. 10 of 2001 challenging the aforesaid Order passed by the learned trial Court who heard the injunction application. The memo of appeal was filed on 13.3.2001 as it appears from the document annexed at page 82 of the opposition. Further, it appears that the matter was heard by the Appellate Court and ultimately hearing was adjourned to 8th September, 2001. During the pendency of such, this writ application was affirmed on 4th September, 2001 praying for identical relief to stop construction work which was the subject matter of the injunction application under Order 39 Rules 1 and 2 of the said civil suit as was rejected and such rejection Order was subjudice. Hence, it appears from the records as are admitted by the parties herein that the plaintiff being failed to have, a favourable Order of Injunction to resist the construction works by respondents Nos. 5 and 6, moved this writ petition even during the pendency of the Misc. Appeal, might be on apprehending before hand that the Misc. Appeal would be dismissed, to get identical Order which was rejected by the learned Judge (Junior Division) while disposing of the injunction application. Furthermore, the finding of the civil Court there was no deviation from the sanctioned plan in the matter of construction work as made in the Order dated 27th February, 2001 as already quoted which now has been confirmed by the civil Judge (Senior Division) at Asansol in Misc. Appeal No. 10 of 2001 upon dismissing the said Misc. Appeal has reached a finality by judicial Order passed by competent authority which cannot be interfered with in writ jurisdiction which is not under challenge and which is not challengeable even in a writ proceeding.

7. Furthermore, the petitioner has not come with clean hands by disclosing all the material facts, viz., pendency of a civil suit before the competent civil Court, rejection of injunction application resisting the construction works of respondent Nos. 5 and 6 and pendency of a Misc. Appeal against such rejection. Had there been disclosure of such, surely the High Court at the motion stage would have rejected the writ application and as already there was a finding by the learned trial Court who heard the injunction application "that *prima facie* there was no violation of the sanctioned plan In the matter of construction work".

8. It is a settled law now that the power in the writ jurisdiction as exercised by the High Court is a discretionary jurisdiction. Having regard to such state of affairs, this Court concludes that the writ application is nothing but a parallel proceeding during the pendency of a civil suit wherein an injunction application to resist the construction work was rejected and the writ application was not moved disclosing all the material facts.

9. Having regard to my aforesaid findings, since it is an abuse of the process of law of higher degree, the writ application is required to be dismissed with a heavy cost as an exemplary measure. Having regard to such state of affairs, the writ application is accordingly dismissed with a cost of. 500 G.Ms i.e. Rs. 8500/-, which to be paid to the contesting respondent Nos. 5 and 6 within a month by the writ petitioner.

Stay as prayed for by the petitioner is vehemently opposed by respondent Nos. 5 and 6. Such prayer is accordingly refused.

10. Xerox certified copy of the order, if applied for, be given on urgent basis.