(2016) 05 CAL CK 0075

CALCUTTA HIGH COURT

Case No: F.M.A. No. 2737 of 2015 and C.A.N. No. 3076 of 2015

State of West Bengal	APPELLANT
Vs	
Mery Bharati Mazumder	RESPONDENT

Date of Decision: May 5, 2016

Citation: (2016) 3 CalLJ 105

Hon'ble Judges: Mr. Aniruddha Bose and Mr. Sankar Acharyya, JJ.

Bench: Division Bench

Advocate: Mr. Rajdip Ray, Advocate, for the Respondent/Writ Petitioner; Mr. Naba Kumar Das, Advocate, for the Appellants

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Aniruddha Bose, J. - This appeal and the connected stay application are against an order of the learned First Court passed on 22nd September, 2014 invalidating in substance a decision of the State Government canceling allotment of approximately 10 cottahs of land bearing plot No. 256 in Block B-4 in Kalyani Town in the district of Nadia. This plot was originally allotted in favour of one Samarendra Nath Ghosh by the State Government in the year 1963. The arrangement was for long term lease. Admitted position is that possession of the plot was given to the original allottee, as it appears from page 36 of the stay petition. In the writ petition out of which this appeal arises, it has been pleaded that the entire salami was paid by the original allottee. The writ petitioner, who is the sole respondent before us was transferred the lease rights in respect of the said plot by the original allottee. In the writ petition, out of which this appeal arises, the writ petitioner upon obtaining permission from the appropriate authority of the State Government, and possession of that plot was given to the writ petitioner on 7th March, 1988. These facts are available from paragraphs 1, 2, 3 and 4 of the writ petition. It does not appear, however, that the actual lease agreement was entered into by and between the State Government and the original allottee what has been annexed to the writ

petition, as anexure "P1", and described as a lease-agreement in paragraph 3 thereof is photocopy of application for lease comprising of terms and conditions relating to allotment of the plot.

2. Allotment of the writ petitioner has been cancelled primarily on account of failure on her part to make construction thereon within two years from "the date of lease, i.e., within 14.08.1988". The lease agreement was cancelled on 31st October 2012. The petitioner''s prayer for revocation of the resumption order was rejected on 27th September 2013. The writ petition, out of which this appeal arises was in substance allowed by the First Court, setting aside the impugned order with further direction to grant mutation of the land in question.

3. The State has preferred the appeal against this judgment and order. The main grounds on which the appeal is preferred is that the writ petitioner did not respond to notices requiring her to explain reasons for delay in making construction. It is contended on behalf of the State that the order of termination was rightly passed as the plot remained unutilized for twenty-six years. It is also the case of the appellant that no lease was executed in favour of the respondent/writ petitioner and she did not have clear title over the plot in question.

4. By consent of the learned counsel for the parties, we are taking up this appeal for hearing simultaneously with the stay petition as we find all the relevant papers have been annexed to the different affidavits filed in connection with the stay petition. None of the parties have sought to rely on any other papers or documents. Learned counsel for the writ petitioner has also waived the requirement for formal service of notice of appeal.

5. There are certain stipulations on the strength of which allotments have been made to applicants of plots of land at Kalyani. This appears from the standard form agreement, annexed at page 32 of the stay petition. This agreement is in the form of a lease application, with stipulation to the effect that the applicant would duly complete the lease of the said plot in duplicate within such period as may be fixed by the Government after demarcation of the plot of the site. The consideration sum in the form of premium and salami to be paid by the allottee has also been specified in the said document, but that factor is not of much relevance in this proceeding as no dispute has been raised on behalf of the State in course of hearing over any outstanding dues. There are certain other obligations imposed on the potential lessee in this standard form agreement itself, and we shall reproduce here Clause 9 thereof. This clause stipulates:-

"9. That besides the usual covenants contained in a lease of similar nature in respect of lands, the lease shall contain covenants to be observed and performed by me/us as Lessee/Lessees as follows:-

(a) To pay the annual rent reserved on the date and in the manner as may be prescribed by you.

(b) To pay all rates taxes outgoings and other impositions whatsoever, payable in respect of the demised land whether by the owner or by the Lessee/Lessees.

(c) To construct the building, according to the rules as may be prescribed and according to plans elevations designs and section as may be sanctioned by the Government or by any local or statutory authority in that behalf, within five years from the date of lease.

(d) To use the land only for the purpose of erecting a building for residential purpose and for no other purpose whatsoever without the previous consent in writing of the Government.

(e) Not to sub-divide the plot.

(f) Not to transfer or assign the leasehold interest without the previous consent in writing from the Government. The decision of the Government shall be communicated to the lessee within thirty days from the date of the receipt of the application.

(g) Not to mortgage or charge the leasehold interest of the Lessee/Lessees and the building to be erected thereon without the previous consent in writing of the Government, such consent not being unreasonably withheld in case of bona fide necessity.

(h) Should the Lessee/Lessees die after having made a bequest of the leasehold premises and the building to be erected thereon in favour of more than one person or die intestate having more than one heir then in such case the persons to whom the leasehold premises with the buildings thereon be so bequeathed or the heirs of the deceased Lessee, as the case may be, shall hold the said property jointly without having any right to have a partition of the same by metes and bounds or they shall nominate one person amongst their number in whom the same shall vest.

(i) To observe and perform and comply with all requisitions as may from time to time be made by the Government or any local or statutory body in respect of the land and buildings and structures that may be erected by the Lessee/Lessees in the demised premises.

(j) Not to allow the demised premises or the buildings and structures to be erected thereon to be so used as to cause any annoyance or inconvenience to the occupiers of adjoining or neighbouring premises.

(k) To bear and pay all expenses incurred in respect of preparation, execution and registration of the lease to be executed by you in my/our favour including the stamp duty and registration fees payable therefor.

(l) Right to you to re-enter and possess the demised premises in default of observance and performance by the lessee/lessees of the terms, conditions and covenants of the lease."

6. Clause 10 of the same instrument stipulates:-

"10. On being called upon by the Government I/we shall within a week have lease deed executed Registered upon payment of the appropriate stamp duty payable therefor."

7. We enquired from Mr. Das, learned counsel appearing for the State as to whether the relationship of the parties in Kalyani Township in connection with such Government land is guided by any other statutory instrument or the aforesaid document by which allotment is made is the sole instrument guiding the relationship of the parties. On instruction, Mr. Das submitted that so far as the State and the respondent/writ petitioner are concerned, fundamental terms of their relationship is to be guided by aforesaid document dated 28th March, 1962 which formed the basis of allotment made to the original allottee, Samarendra Nath Ghosh. As we have already observed, no subsequent lease deed pertaining to the same plot of land was brought to our notice. Thus we find that there is no other subsequent instrument which qualifies or modifies the relationship of State and the allottee in connection with the land in question, apart from the terms and conditions contained in the application for allotment dated 28th March 1962. There has been subsequent allotment and exchange of communications requiring certain steps to be taken, but these were supplemental to this parent instrument. This document assumes the characteristic of an agreement, as there is acceptance of the offer made by said Samarendra Nath Ghosh endorsed by a State Official (Assistant Secretary, Development Department, Government of West Bengal) on 12th February 1963. The next instrument which is brought to our notice is a certificate of possession dated 7th March 1988, on which the signatures of both original allottee and the writ petitioner appear. In paragraph 3 of the stay petition, however, it has been acknowledged that the plot was transferred to the writ petitioner and the same was recorded in her favour on 10th October 1986.

8. It is submitted by Mr. Das that the State has been seeking completion of construction for compliance of Clause 9(c) of the said instrument since the year 1988 and in this regard, he has relied on a show-cause notice dated 27 January, 1988 which appears at page 7 of the affidavit-in-reply of the State to the affidavit-in-opposition of the respondent/writ petitioner. This notice, inter alia, requires clearance of due amounting to Rs.4950/- and further stipulates that Registration of the lease deed with the Government is to be completed by 15th March 1988. In Clause 4 of this notice, there is further stipulation that construction on the plot is to be started by 31st March 1988.

9. There is no direct evidence of service of this notice on the respondent/writ petitioner. This notice has been annexed to the affidavit-in-reply of the appellants in the stay petition. Thus, the respondent-writ petitioner had no opportunity to deal with this notice. But we shall proceed in this appeal on assumption that this notice was served. There was no communication from the authorities on the

subject-dispute until the authorities issued a show-cause notice dated 8th November 2011, under Memo No.1739/B-4/256, signed by the Estate Manager, Kalyani, Urban Development Department, Government of West Bengal. The respondent/writ petitioner had actually started taking steps for construction on the said plot by submitting building plan before the Kalyani Municipality on 19th May, 2012. This was sanctioned by the Municipality on 26th May, 2012 as it appears from ''Annexure-A'' of the affidavit-in-opposition to the stay petition. The respondent/writ petitioner upon obtaining sanction of the plan claims to have completed construction and the completion certificate by the Municipality was issued on 17th December, 2012. The actual completion, as it appears from the certificate, was effected in the month of October, 2012. Prior to that, however the authorities claim to have been seeking to exercise their right of re-entry because of non-completion of the construction within the five year period. The show-cause notice of 8th November, 2011 was issued requiring the respondent/writ petitioner to explain within 15 days as to why the State Government shall not exercise its right of resumption and re-entry. Stand of the State is that this notice was returned by the postal authorities with the endorsement "not known". This show-cause notice charged the writ petitioner for not having made construction within two years from the date of lease, i.e., within 14th August 1986. In this regard, the State has relied on clause 9(c) of the parent instrument and paragraph 4 of the affidavit meant to have been sworn by the writ petitioner on 14th August 1986. This affidavit, however, is not before us and does not form part of materials on record.

10. Mr. Das has also taken us through two other memoranda dated 19th October 2012 and 31st October, 2012 bearing numbers 1230/B-4/256 and 1271/B-4/256 dated 31st October 2012. The first memorandum contains order of cancellation of allotment for having failed to construct the house and the next one contains an order for handing over possession to the State. Both these memoranda have been issued by the Estate Manager, being the third appellant before us. It has been submitted on behalf of the appellants that these two memoranda had also returned unserved with postal remarks "not known and left" respectively.

11. It is submitted by Mr. Ray, learned counsel for the writ petitioner that she did not receive these notices. The State also had not exercised their right of re-entry which was to be effected within fifteen days from the date of issue of the memorandum dated 31st October 2012. In the meantime, the writ petitioner contends that she had submitted her building plan on 19th May 2012 and this was sanctioned by the authorities on 26th May 2012. She had taken steps for construction thereafter and completed construction within the month of October 2012. On 26th November 2012, she informed the Estate Manager that construction had been completed. She asked for registration of the lease-deed in the same communication. Her explanation for delay in making construction was financial hardship. She also disclosed in this letter (of 21st November 2012) that she had to shift her residence on account of personal problems ten years back, and gave an address at Bally, Howrah as her residential

address. In response to this letter, she was called for personal hearing on 28th January 2013. In the said hearing before the Estate Officer, she was informed that her allotment had been terminated. On 4th February 2013, the writ petitioner made a fresh representation seeking reconsideration of the decision of termination of lease, which was followed with a reminder on 20th March, 2013. As these two letters went unresponded, she made an application under the Right to Information Act, 2005 seeking "registered details" in respect of the subject-premises. Thereafter, she received a memorandum bearing no.1553/B-4/256 dated 27th September 2013 issued by the Estate Manager, Kalyani by which prayer of the writ petitioner for revocation of the resumption order was rejected. In the writ petition, prayers had been made for invalidation of the rejection memorandum of 27th September 2013 as well as the termination memorandum of 31st October 2012.

12. The First Court allowed the writ petition without calling for any affidavit primarily on the reasoning that construction by the writ petitioner had been completed without any objection on the part of the authorities. The authorities were directed to effect mutation of the land. The judgement and order is assailed by Mr. Das, learned counsel for the appellants on various grounds, but the main ground which has been urged before us is that the termination of allotment had been given effect to, and the writ petitioner had no title over the land as the lease-deed had not been executed.

13. What remains undisputed in this case is that the respondent/writ petitioner had failed to complete construction within a period of 5 years from the date she had entered into possession of the said plot. It is also the admitted position that between 1962 and 1987, the plot remained vacant and permission was accorded to transfer to the writ petitioner the vacant plot only. We find from the parent instrument, the terms and conditions specified therein forming the basis of the relationship between the parties that the State had reserved its right to exercise re-entry after resumption if construction was not completed within five years from the date of lease. This is contained in clause 9(c) of the said document, which we have reproduced earlier in this judgement. But learned counsel for the State has not brought to our notice any formal lease-deed which might have had been executed by the original allottee. So far as the notice of 27th January 1988 is concerned, even if we proceed on the basis that it was served, no proceeding was initiated in connection therewith. The impact of that notice cannot be held to have had any effect on the later orders or notices, as these orders do not bear any reference to the notice of 27th January 1988. That notice required completion of registration of lease-deed by 15th March 1988. In our opinion, that notice ought to be treated as lapsed. The State has never acted on that notice. The fault of the writ petitioner pointed out in the subsequent orders is failure to complete construction on the subject-land. In any event, the notice of 1988 was issued at a time when the five year period had not lapsed from the time the writ petitioner had made entry into the subject-plot. It has been held by the learned First Court:-

"Considered the submissions made by the learned counsel appearing for the parties. It is undisputed that the petitioner raised construction and also completed. However, respondent authorities did not take any step and/or raised any objection at the time of construction over the land in question. At this juncture the authorities are not permitted to take back the land. Accordingly, the impugned order passed by the concerned authority is set aside. Respondent authorities are further directed to grant mutation of the land in question in favour of the petitioner within six weeks from the date of communication of this order. This writ petition is, thus, disposed of."

14. We have considered the submissions of the learned counsel for the parties. It is fact that the writ petitioner has been negligent to a large extent in completing construction on the plot in question. Her explanation for not responding to the notices and orders dated 8th November 2011, 19th October 2012 and 31st October 2012 is also weak. Her case on this point is that she had to shift her residence for personal reason and she was not residing at her given address. It was her obligation, in such a situation, to inform the authorities of such change of address. But such default, by itself cannot empower the authorities to pass any order they wish to. An order in a proceeding which is allowed to ex-parte will also have to conform to law. Even deliberate refusal by a party to participate in a proceeding cannot expose such party to be subjected to greater form of penalty than what is permissible in law.

15. In the parent instrument, we do not find that there is any mandatory provision that failure to complete construction within the five years period would automatically result in cancellation of allotment. This power of resumption and re-entry has been left at the discretion of the State authorities. We do not think it is necessary for us to refer to any authority in support of the proposition that discretion of this nature has to be exercised in a reasonable manner. The authorities did not exercise the right or re-entry or resumption for several decades, and only became alert after construction was completed. Moreover, we do not think the aforesaid Clause 9(c) can at all be invoked in the case of the writ petitioner since the aforesaid clause provides that construction should be made within 5 years from the date of lease. The State Government, in terms of Clause 10 of the same instrument is to call upon the allottee to execute lease agreement, and such lease-agreement in such a situation is required to be executed within a week thereof. No such lease agreement has been executed in this case. The only notice in which the subsequent allottee, being the writ petitioner had been called upon to execute the lease-agreement was the notice dated 27th January 1988, but no step was taken in pursuance of the said notice, and this notice was never acted upon. No second call to effect execution of the lease-agreement has been brought to our notice by the appellants, and all subsequent notices and orders proceed on the basis of non-completion of construction. But obligation to complete construction accrues in terms of the instrument dated 28th March 1962 only after execution of the deed of

lease.

16. The argument that the writ petitioner does not have proper title also is not sustainable, as in the notice of 8th November 2011, it has been acknowledged by the State that the writ petitioner had acquired leasehold interest of the original allottee. In the memorandum of 19th October 2012, it has been inter-alia recorded:-

"And Whereas, after mutation of your name on record as allottee of plot No. B-4/256 at Kalyani all obligations contained in the lease agreement have been vested with you as the lessee and holder of the plot."

The same stand of the State has been reflected in the memorandum dated 31st October 2012. This being the stand of the State, it becomes apparent that right to construct in this case was not dependent upon prior execution of the lease-agreement. The authorities have treated the parent instrument to be the guiding factor, and found the writ petitioner defaulter for having failed to make construction on that basis, along with failure to meet the clauses the affidavit, the copy of which was not brought to our notice. Signing of the parent instrument and consequential delivery of possession of the plot might have had entitled the writ petitioner to make construction on the plot, but failure to make such construction in the absence of execution of the lease deed could not have exposed the petitioner to be subjected to the resumption clause, as such power could be exercised only after execution of the lease. This can be the only interpretation of clause 9 of the parent instrument, in particular having regard to the opening sentence thereof. The foundation of the termination and resumption order is not failure to execute the lease-agreement, but it is failure to make construction within specified time.

17. Even if we proceed on the basis that sub-clause (c) of Clause 9 becomes operable from the date a plot is placed in possession of an allottee, in the case of the writ petitioner, there appears to have been repeated waiver of such right or exercise of power of resumption or re-entry on the part of the authorities. They did not take any effective measure to enforce their right and on the other hand allowed the status quo to continue over a long period of time. Actual steps were taken around the time the construction had started. In such a situation, we would have to assess the strength of the cases of the competing parties on the basis of equity. The writ petitioner, by making construction on the subject-plot has altered her possession to her detriment, in a situation where the authorities did not take any step to proceed with or implement their various notices till the year 2012. In this appeal, we have considered the fact that the writ petitioner was also in default in not properly dealing with the notices in question. While she cannot take benefit of her own negligent act, the authorities independently had also defaulted in exercising their right. In the factual context of this case, where both the parties were in default to a degree, we feel we shall have to assess the comparative hardship and take that factor into consideration while adjudicating on the disputed issues. In this case, in our view, the writ petitioner scores on this count, as she has completed construction

of the building on the subject-plot.

18. Mr. Das wanted us, in the event we were not inclined to confirm legality of the action of the State, to remand the matter to the First Court as the writ petition was allowed at the threshold and the authorities did not find any chance to sustain their case on the basis of affidavits or documents. In the judgement impugned, we do not find any prayer was made for filing affidavit. In the memorandum of appeal, various grounds have been taken but lack of opportunity to file affidavit to the writ petition is not one of the grounds on which this appeal has been preferred. We have elaborately heard the parties in this appeal after exchange of affidavits on all the points urged before us on merit. In such circumstances, we do not think any useful purpose would be served by remanding the matter to the learned First Court. We do not find any merit in the appellants'' case. We accordingly dismiss the appeal and sustain the judgment under appeal. As we are dismissing the appeal, the connected application being C.A.N. 3076 of 2015 shall also stand dismissed.

19. There shall be no order as to costs.

20. We, however, make it clear that we are sustaining the case of the writ petitioner having regard to the peculiar circumstances of this case and this judgment shall not be treated as a precedent for other plots in respect of which default has been made by the allottees. Each case, needless to add, would require individual adjudication, based on its own factual context.

21. Urgent certified photostat copy of this order, if applied for, shall be given to the parties as expeditiously as possible on compliance of all necessary formalities.

Aniruddha Bose, J. - I agree.