

13. 20-04-2022

SA 15 of 2022

^{sg} Ct. 8

Koushik Dutta & Anr.
Versus
Kuntal Dasgupta & Ors.

Mr. Shyamal Chakraborty, Adv.
Mr. Biswajit Das, Adv.
Mr. Subhajit Chakraborty, Adv.
...for the appellants

Mr. Samrat Chowdhury, Adv.
...for respondent nos. 2&3

The second appeal is arising out of an order passed by the learned ADJ, 6th Court, Alipore in Title Appeal no. 186 of 2014 affirming the decrees/order no. 24 dated 20.08.2014. the impugned order was passed in connection with an application under Order 7 Rule 11 of the Code of Civil Procedure.

Shorn of unnecessary details, the plaintiff claims to be the owner of the flat in the suit property along with car parking space and undivided proportionate share of land in respect of the said flat together with proportionate share in common area and other rights as fully stated in the deed of conveyance dated 8th January, 2001. The plaintiff alleged that the roof right is common to all the occupiers and the plaintiffs have been using the said roof since 2001 uninterruptedly. In or about 2003, the defendant nos. 1 and 2 purchased two flats in the suit property and since 2010 they suddenly started raising construction in a portion of the northern side of the roof of the suit property illegally violating and disturbing the right of enjoyment of the plaintiff over and in respect of the suit property. The plaintiffs claim to have made

complaints with the defendants no. 8 and 9 and also to the officer in charge of the local police. On timely intervention of the police authorities the defendant no.1 initially stopped construction as they failed to produce any document of exclusive right to the roof and right to raise construction on the roof. However, subsequently in or about first week of April, 2010 the plaintiff came to learn that the defendant no. 1 and 2 purchased the roof right which was common to all the occupiers and purchasers of the suit property. The plaintiff alleged that the deed of sale on the basis of which such right is claimed by the defendant no.1 and 2, in so far as it confers any alleged right to use the roof exclusively is illegally as the said roof allthroughout remained a common and the plaintiffs have been using the said roof since 2001 uninterruptedly in terms of the rights conferred upon them under the deed of conveyance. The plaintiffs also alleged various discrepancies in the deed alleged to have been executed by the defendants no. 4 to 7 in favour of the defendant nos. 1 to 3. The plaintiffs alleged that the said deed is illegal and required to be delivered up and cancelled.

In view of invasion of right of the plaintiffs to use the roof and conferment of certain rights to the defendant nos. 1 and 2 by the other defendants inconsistent with the rights conferred upon the plaintiffs with regard to use and enjoyment of the roof and other rights the plaintiff filed a suit on 21st May, 2010 praying inter alia, for the following reliefs:

1) Decree for declaration that the plaintiffs have common right, title, interest in the said roof/impugned roof as described in the Schedule A and B below and the defendant nos. 3 to 7 have no right/authority to sell/transfer the said roof/impugned roof exclusively to the

defendant nos.1 and 2 in any capacity and in any manner whatsoever without consent of the plaintiffs.

2) Decree for delivery up and cancellation of the said ‘ impugned deed’ dated 25.03.2010 registered in the office of the Addl. Registrar of Assurance, Calcutta in Book no. I, CD Volume no.8, page nos 3501 to 3522, being no. 03039 for the year 2010.

3) Decree for declaration that the defendant nos. 1 and 2 have no right to encroach upon or occupy any portion of the said roof/impugned roof as described in the schedules A and B below exclusively and make any construction thereon in any manner.

4) Decree for declaration that the defendant no.1 , 2 and 4 have no right to prevent / disturb plaintiffs free ingress and egress of the said roof/impugned roof as described in the schedule A and B below in any manner.

5) Decree for declaration that the impugned construction described in the schedule C below is absolutely illegal/ unauthorised and also an encroachment/invasion/denial to the plaintiffs right and property.

6) Decree for perpetual injunction restraining the defendant no. 8 and 9 their men, agents, servants from permitting or sanctioning and allowing the said impugned construction as described in the Schedule C below and mutate the names of the defendant no. 1 and 2 in respect of the same.

7) Decree for perpetual injunction restraining the defendant no. 2 and 3 from making any construction on the said roof of the Premises no. 17 Palit Stree, Kolkata 700 029 as described in the Schedule A below.

8) Decree for perpetual injunction restraining the defendant no. 1, 2 and 4 from preventing or obstructing the plaintiffs free ingress and egress of the said roof/impugned roof as described in the schedule A and B below, in any manner.

9) Decree for mandatory injunction directing the defendant no. 1, 2 and 4 to remove the padlocks or any

obstruction from the entrance doors of the said roof/impugned roof as described in the Schedule A and B below an allow the plaintiffs free ingress and egress of the said roof/impugned roof.

10) Decree for mandatory injunction directing the defendants no. 1 and 2 to remove and demolish forthwith the said impugned construction, as described in the Schedule C below, and remove the debris and restore the said roof/ impugned roof to its original condition at their cost.

The defendant nos. 1 and 2 after receiving the summons entered appearance and filed the application for dismissal of the suit under Order 7 Rule 11 of the Code of Civil Procedure.

The grounds are:

- a) The plaint does not disclose any cause of action
- b) Non-compliance of the provisions of Section 586 of the Kolkata Municipality Corporation Act, 1980.
- c) Suit is barred due to initiation of proceeding by the KMC under Section 400(1) of the KMC Act prior to institution of the suit, suit is barred.
- d) The suit is also barred under Section 400(5) of the Kolkata Municipal Corporation Act, 1980.

The learned trial judge did not accept all the contentions. However, the learned court rejected the plaint on the ground that the suit is barred under Section 400(1) and 400(5) of the Kolkata Municipal Corporation Act, 1980.

The said judgement was upheld by the first Appellate Court.

In order to appreciate the nature of the order passed by both the courts below it is necessary to consider Section 400(1)

and Section 400(5) of the Kolkata Municipal Corporation Act, 1980.

“400. Order of demolition and stoppage of buildings and works in certain cases and appeal:-

(1) Where the erection of any building or the execution of any work has been commenced, or is being carried on, or has been completed without or contrary to the sanction referred to in section 396 or in contravention of any of the provisions of this Act or the rules and the regulations made thereunder, the Municipal Commissioner may, in addition to any other action that may be taken under this Act, make an order directing that such erection or work shall be demolished by the person at whose instance the erection or the work has been commenced or is being carried on or has been completed within such period, not being less than five days and more than fifteen days from the date on which a copy of the order of demolition with a brief statement of the reasons therefore has been delivered to such person, as may be specified in the order :

Provided that no order of demolition shall be made unless such person has been given, by means of a notice served in such manner as the Municipal Commissioner may think fit, a reasonable opportunity of showing cause why such order shall not be made :

Provided further that where the erection or the execution has not been completed, the Municipal Commissioner may by the same order or by a separate order, whether made at the time of the issue of the notice under the first proviso or at any other time, direct such person to stop the erection or the execution until the expiry of the period within which an appeal against the order of demolition, if made, may be preferred under sub-section (3).

Provided also that the Municipal Commissioner may by order, on such terms and conditions and on payment of such fees as may be prescribed by regulation, regularize the minor unauthorized erection or execution of any minor work without sanction under this Act, or minor deviation from the

sanctioned plan or execution of any minor erection or work in contravention of any sanctioned plan under this Act or the rules or the regulations made hereunder, as the case may be.

Provided also that the Municipal Commissioner may, by order, delegate his powers and functions under the first proviso and the third proviso of this sub section to the special Officers, appointed by the Municipal Commissioner with the approval of the State Government on such terms and conditions as may be determined by the corporation, and expenses for payment of such officers shall be borne on the Municipal Fund.

Explanation- For the purpose of this section, 'minor deviation' shall be such as may be determined by regulations.

Explanation.--In this chapter, "the person at whose instance" shall mean the owner, occupier or any other person who causes the erection of any building or execution of any work to be done, including alterations or additions if any, or does it by himself.

400.(5) Save as provided in this section, no court shall entertain any suit, application or other proceeding for injunction or other relief against the Municipal Commissioner to restrain him from taking any action or making any order in pursuance of the provisions of this section."

The learned Court seems to have overlooked the facts that the suit was a declaratory suit and no relief is claimed against the Municipal Commissioner to restrain him from taking any action or making any order in pursuance of the provision of Section 400(5) of the Kolkata Municipal Corporation Act.

The question of title cannot be decided by the authorities under the Kolkata Municipal Corporation. No relief has been claimed against the respondent nos. 8 and 9. The learned Trial judge as well as the appellate court proceeds on the basis as if the reliefs claimed in the suit can only be decided and or adjudicated

under the provision of the Kolkata Municipal Corporation Act. Both the courts are completely oblivious of the fact that the Kolkata Municipal Corporation has no jurisdiction to decide on the question of title and other reliefs including cancellation of the deed. It is purely a civil dispute and only the civil courts can decide the suit. In establishing the right the plaintiff may have to rely upon the sale deed and the sanctioned building plan. The reference to the sanctioned building plan for the purpose of showing the nature and extent of the right of enjoyment of the roof coupled with right to make construction on the roof does not make the suit barred under any of the provisions of the Kolkata Municipal Corporation Act.

Under such circumstances the appeal succeeds. The impugned orders are set aside.

The suit is restored to its original file. The trial court is requested to dispose of the suit on merits as expeditiously as possible, if required by passing peremptory directions with regard to procedural matters in order to make the suit ready for hearing.

The appellants shall be entitled to apply for interlocutory reliefs as the injunction application filed earlier by the petitioners/appellants failed due to rejection of plaint.

There shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)