

13. 23.08.2022
Ct. No.6
Tanmoy

M.A.T. 1027 of 2019

**Kolkata Municipal Corporation & Ors.
-Versus-
Sri Ashoke Sen & Ors.**

**With
IA No: C.A.N. 2 of 2019 (Old No: C.A.N. 8331 of 2019)**

Mr. Alok Kumar Ghosh, Adv.,
Ms. Era Ghose, Adv.

...for the appellants/K.M.C.

Mr. Sujash Ghosh Dastidar, Adv.,
Mrs. Maheswari Sharma, Adv.,
Mrs. Tulika Banerjee, Adv.

...for the respondents/
writ petitioners.

Affidavit of service filed in Court today be kept with
the records.

By consent of the parties, the appeal and the
connected application are taken up together for hearing.

This appeal is directed against a judgment and
order dated May 2, 2019, whereby W.P. No. 8421(W) of
2017 was partly allowed.

The writ petitioners approached the learned Single
Judge with the case that they were the owners of a
property adjacent to a 'Jheel'. The private respondents,
in the garb of cleaning the 'Jheel', encroached upon the
property of the writ petitioners and even demolished the

boundary wall. The learned Judge in the concluding paragraph of the impugned order observed as follows:-

“The Court is not issuing any mandamus for recalling any order of conversion as the basis of such prayer is very uncertain. However, the Court directs the respondents to restore the land of the petitioners to its original condition by reconstructing the boundary wall and refilling the soil which had been excavated from the land of the petitioners by the respondents. Such action is to be taken by the respondents within a period of four weeks from the date of communication of the order.”

Being aggrieved, Kolkata Municipal Corporation has come up in appeal before us.

In spite of service on the private respondent no.7, he has not appeared. Attempted service on the respondent no.8 has not been successful.

Mr. Ghosh, learned Advocate appearing on behalf of the Corporation, vehemently argued that although it is correct that the Corporation engaged the private respondents to clean up the ‘Jheel’ in question, no property of the writ petitioners was damaged or was encroached upon by them. The learned Single Judge passed the impugned order relying on the principle of ‘non-traversal’ inasmuch as no affidavit-in-opposition was filed by the respondents before the learned Judge. Disputed questions of fact are involved. It was brought to the learned Judge’s notice that a civil suit has been instituted by the writ petitioners against the private respondents herein seeking declaration and injunction in respect of the property in question. The suit is

pending. The question as regards encroachment upon the land of the writ petitioners is also an issue in that suit. The impugned judgment and order ought not to have been passed.

Mr. Ghosh Dastidar, learned Advocate appearing for the respondents/writ petitioners, submits that there is no dispute that the property in question belongs to the writ petitioners. There is also no dispute that the agents of Kolkata Municipal Corporation have encroached upon their property. In such an admitted factual scenario, the writ Court has all the powers to grant appropriate relief to the aggrieved party.

Having heard learned Counsel for the parties we are of the view that this is not a fit case where the learned Judge should have issued a *mandamus* on the respondent Authorities. Disputed questions of fact are involved. The principle of 'non-traversal' does not necessarily require the Court to act upon the averments made by a petitioner even if no written objection from the respondents is forthcoming. In an appropriate case, of course the Court can pass an order or a decree invoking the principle of 'non-traversal' where no written objection has been filed by the respondents/defendants. However, in our considered view, this is not such a case. We have also noted above that a civil suit is pending between the writ petitioners and the private respondents in respect of the property in question.

Learned Advocate for the writ petitioners requested us to permit the writ petitioners to construct the boundary wall at their own cost, on their own land saying that the cost of such construction shall not be claimed by them from anybody. Mr. Ghosh, learned Advocate representing the Corporation, says that nobody can possibly have any objection to such a course of action.

Accordingly, we set aside the order under appeal. However, we permit the writ petitioners to construct the boundary wall at their own cost, on their own land making sure that nobody else's land is encroached upon thereby. We also clarify that no observation made in this order shall have any bearing on the proceedings in the civil suit pending between the writ petitioners and the private respondents.

In the event, anybody resists the writ petitioners as regards construction of the boundary wall on their own land, the writ petitioners may approach the Officer-in-Charge of the local Police Station for assistance and if the Officer-in-Charge is satisfied that the writ petitioners are constructing the boundary wall on their own land without encroaching upon any other property, the Officer-in-Charge shall extend all co-operation to the writ petitioners to complete construction of such boundary wall.

The appeal being M.A.T. 1027 of 2019 and the connected application being IA No: C.A.N. 2 of 2019 (Old No: C.A.N. 8331 of 2019) are accordingly disposed of.

Let urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with all necessary formalities.

(Rai Chattopadhyay, J.)

(Arijit Banerjee, J.)