

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side**

Present :- Hon'ble Justice Amrita Sinha

WPA No. 30705 of 2015

With

WPA No. 1513 of 2019

With

IA CAN 4 of 2020

With

WPA No. 5856 of 2020

With

WPA No. 10376 of 2021

Thermofriz Insulations Ltd. & Anr.

Vs.

The Kolkata Municipal Corporation & Ors.

For the writ petitioners	:-	Mr. Jaydeep Kar, Sr. Adv. Mr. Arindam Banerjee, Adv. Mr. Arpita Saha, Adv. Ms. Rituparna Chatterjee, Adv. Ms. A. Banerjee, Adv.
For the KMC	:-	Mr. Ashok Banerjee, Sr. Adv. Mr. Alok Kumar Ghosh, Adv. Mr. Gopal Chandra Das, Adv. Mr. Subhrangshu Panda, Adv.
For the State	:-	Mr. Bibek Jyoti Basu, Adv. Ms. Debarati Sen (Bose), Adv. ...In WPA 1513 of 2019 & WPA 5856 of 2020.
Hearing concluded on	:-	02.09.2022
Judgment on	:-	26.09.2022

Amrita Sinha, J.:-

The matter relates to the premises no. 53A, Diamond Harbour Road, Kolkata 700034 measuring approximately 90 kathas 10 chittacks and 19 sq. ft. within ward no. 119, Borough no. XIII under the jurisdiction of the Kolkata Municipal Corporation ('KMC' for short).

The petitioner no.1 is a Company incorporated under the Companies Act, 1956. The petitioner no.1 claims to be the sole proprietor of the proprietorship firm Swadeshi Pesticides (mentioned as Swadesi Properties in

paragraph 6, page 8 of WP No. 30705 (w) of 2015 and in paragraph 5, page 5 of WP No. 1513 (w) of 2019).

Mutti Lall Seal Estate, a Trust, was and still is the owner of the said premises. By separate deeds of lease allegedly registered before the competent authority, Kolkata, on diverse dates, the trustees of the Trust estate granted lease of the aforesaid plot of land in favour of the proprietorship firm Swadeshi Pesticides sometime in the year 1984, followed by supplementary deeds of lease in the year 1991 and 2011. The petitioner no.1, being the proprietor of Swadeshi Pesticides, claims to be the lessee of the said premises.

After obtaining the lease hold interest of the property, the petitioner no.1 applied for amalgamation of the properties taken on lease and the present amalgamated premises no. 53A, Diamond Harbour Road came into existence. The name of the petitioner no.1 has been incorporated in the municipal assessment book maintained by KMC upon mutation in the year 2014. The petitioners claim to be in possession of the said property upon payment of necessary rates and taxes.

The petitioners have averred in the writ petition that on or about 6th July, 2015 they got the knowledge of a purported foundation stone laid down by the KMC sometimes on 1st March, 2014 for construction of a proposed ward health unit on Seal Thakurbari Road. The petitioners allege that the said stone was laid without the knowledge or consent of the petitioners.

According to the petitioners, the entire property comprising of 90 kathas 10 chittacks and 19 sq. ft. is the private property of the petitioners and the petitioners never transferred any part or portion of the said property in favour of any person or KMC. The petitioners claim that no part of the property in question was ever possessed by the Corporation and allege that KMC has trespassed into the private property of the petitioners.

The petitioners assert that KMC does not have any right, title or interest over the portion of the said plot and is liable to remove its belongings from the said portion and hand over peaceful vacant possession of the plot in question in

favour of the petitioners so that the petitioners can enjoy the same as per their wish and desire.

As the Corporation took steps to construct a health centre over a portion of the said plot of land, the petitioners approached this Court by filing a writ petition being WP 25499 (W) of 2015. The said writ petition stood disposed of on 18th December, 2015 inter alia directing the respondent authorities to pass a reasoned order on the representation filed by the petitioners. The Court also restrained the Corporation from making any construction on the said premises or changing the nature and character of the said premises till the disposal of the representation filed by the petitioners.

Despite the order of Court, as the Corporation continued with the work of construction, the petitioners preferred the second writ petition being WP 30705 (W) of 2015 wherein order was passed on 30th December, 2015 restraining the Corporation from carrying out any construction on the said premises till the disposal of the representation filed by the petitioners.

In compliance of the order passed by the Court, the Municipal Commissioner considered the representation filed by the petitioner and passed a reasoned order on 11th September, 2018.

By the reasoned order dated 11th September, 2018, the Municipal Commissioner referred the issue of ascertaining the actual recorded owner and the character of the land measuring 72.08 sq. mts. within the 90 kathas 10 chittacks and 19 sq. ft. of land to the District Magistrate and Collector, South 24 Parganas based upon past records.

The Commissioner recorded that at present the aforesaid portion falls within the territorial jurisdiction of ward no. 119 of the KMC and the land will be used of setting up of a health unit to cater to the health service of the entire ward. The order further recorded that the big dia tubewell which exists in the said portion of the plot of land may be used for water supply in the area in case of acute water crisis of the locality.

Being aggrieved by the reasoned order dated 11th September, 2018 the petitioners filed the third writ petition WP 1513 (W) of 2019. The Court, by an

order dated 29th January, 2019 passed in the third writ petition, restrained the respondent authorities from making any construction at the said premises for a limited period. The said interim order has been extended from time to time.

By a letter dated 4th February, 2019 the Assessor Collector (South Suburban Unit) KMC requested the lessor i.e, the trustees of the Trust property and Swadeshi Pesticides represented by the petitioner no.1 to attend a hearing with all relevant documents on 13th February, 2019 to review the amalgamation of the premises nos. 53A & 53A/1, Diamond Harbour Road, Ward no. 119. Copy of the said notice was forwarded to the Chief Municipal Health Officer, KMC, Chief Valuer & Surveyor, KMC, Dy. Chief Municipal Officer, and the Executive Engineer (Civil/Br. XIII) with request to attend the hearing with all documents.

On 12th February, 2019 a legal notice was issued on behalf of the petitioners to forthwith cancel, rescind and revoke the hearing notice. The petitioner's representative attended the hearing held on 13th February, 2019.

The petitioners allege that on 6th March, 2019 certain men, claiming to be engaged by KMC proceeded to forcibly pull down a portion of the boundary wall surrounding the said premises and illegally demolished a portion of the boundary wall abutting Seal Thakurbari Road and proceeded to construct a separate wall inside the said premises on its northern side. The petitioners were compelled to file application for contempt in connection with the second as well as the third writ petition.

A General Application was also filed in connection with the third writ petition for an order of injunction restraining the KMC and its men and functionaries from interfering and/or disturbing the possession of the petitioners in the said premises. An order directing the respondents to restore status quo ante in respect of the said premises was also prayed for.

In the contempt application, the Municipal Commissioner affirmed an affidavit declaring that the alleged acts and actions complained of and referred to in the contempt application are not of any of the authorities of KMC. It was asserted that no action was taken on the part of the KMC to make any construction on the land in question.

Relying on the basis of the aforesaid averment made by the Municipal Commissioner, the Court was pleased to dispose of the contempt application by order dated 27th June, 2019 with liberty to the petitioners to remove the offending construction in accordance with law. The question of the perceived rights of the respondent authorities in a portion of the said premises and the reconstruction and restoration of the boundary wall were left upon to be decided in the pending writ petitions.

The petitioners claim that on 14th March, 2020 certain functionary persons claiming themselves to be the men and agents deployed by KMC came to the premises and pulled down the entire boundary wall facing Seal Thakurbari Lane and drove in a back hoe loader into the said premises. The petitioners were compelled to lodge a police complaint immediately thereafter. Steps were taken to enlist the pending writ petitions for hearing but due to the Covid 19 pandemic the hearing could not be held.

On 21st June, 2020 during the unlock phase one of the national lockdown, some other persons claiming to be the employees and agents of the Corporation forcibly re-entered the said premises with tools and construction equipment and started to excavate a portion of about one katha and odd. The petitioners lodged a further complaint before the police on 23rd June, 2020.

On enquiry, the petitioners came to learn that a noting was made in the inspection book maintained by KMC subtracting an area of about 72.08 sq. ft. equivalent of 1 katha 1 chittack and 10 sq. ft. and recording the same as “child part” of the premises in question in the name of the KMC having knowledge that the KMC does not have any right, title or interest over the said property. The said child part appears to have been approved by the Municipal Commissioner long ago that is on 26th February, 2019.

Being aggrieved by the impugned correction in the municipal records by hiving of an area of 72.08 sq. ft. equivalent to about 1 katha 1 chittack and 10 sq. ft. as child part from the amalgamated premises and recording the same in the name of the KMC, the petitioners filed the fourth writ petition being WP 5856 (W) of 2020.

The petitioners also filed an application in connection with the pending third writ petition and took steps for hearing all the writ petitions, but in view of the second wave of the pandemic the judicial activity of this Court being regulated to a considerable extent, the hearing matter could not be taken up for consideration by the Court. Taking advantage of the said situation the men and agents of the KMC, continued with the excavation work in full swing.

It came to the knowledge of the petitioners in and around April, 2021 that the KMC by way of suppression created the premises no. 53A/2 and the remaining portion of the said premises was renumbered as 53A/1, Diamond Harbour Road.

Challenging the aforesaid act of KMC in separating the portion of the said plot from the mother premises and creating child premises, the petitioners filed the fifth writ petition being WPA 10376 of 2021. The second, third, fourth and the fifth writ petitions are presently being adjudicated by the Court.

It is the specific contention of the petitioners that KMC being a statutory authority ought not to trespass into the private land of the petitioners. KMC has failed to show a single scrap of document in support of their possession of the land in question. KMC has intentionally not disclosed anything regarding their stand on possession of the portion of the land in question. There is no concept of creating child part in the municipal records. Adverse possession has not been pleaded by KMC. As twelve years' period has not elapsed from the date of taking over forcible possession, accordingly, KMC cannot claim their right through adverse possession. Relying only on the basis of long possession, KMC cannot exercise right over a portion of the said plot.

Corporation mutated the property in the name of the petitioners after verifying the records and the quantum of land possessed by the petitioners was recorded in the municipal assessment book. The Corporation does not have any right, title or interest over the portion of the plot of land which has been separated and recorded as a child part of the said premises. There is no valid ground/reason for de-amalgamation of the child part from the mother premises.

The petitioners pray for a direction upon the KMC to cancel/rescind and

revoke the purported corrected municipal records and to forthwith restore the municipal records including the municipal assessment book as was existing prior to hiving of the area of 1 katha 1 chitack and 10 sq. ft. as child part.

Prayer has also been made to remove any construction work that has been made by KMC on the aforesaid plot of land.

The petitioners refer to the provision of Section 535 of the KMC Act, 1980 relating to the power of the KMC to acquire and hold movable and immovable property, S. 536 relating to acquisition of immovable property by agreement, S. 537- the procedure when immovable property cannot be acquired by agreement, S. 538- power to hire or take on lease immovable property, S. 540- inventory of the properties of the Corporation, S. 248 relating to prohibition regarding sinking of tubewells, S. 249 relating to the Municipal Commissioner's direction to sink tubewell in some cases, S. 250 - register to be maintained by the Municipal Commissioner containing the inventory of the tubewells, public or private sunk in Kolkata which is to be updated from time to time, S.180 relating to revision of assessment, S. 183 - notice of transfers and Section 178(3) of the KMC Act, 1980 relating to the power of the Municipal Commissioner to amalgamate or separate lands or buildings or portions thereof.

In support of the prayer made in the writ petition the petitioners rely on the decision delivered by the Hon'ble Supreme Court in the matter of ***D. B. Basnett (dead), through legal representatives -vs- Collector East District, Gangtok, Sikkim and Anr.*** reported in ***(2020) 4 SCC 572*** wherein the Court held that the party would be entitled to the possession of the land as also damages for illegal use and occupation of the same by the respondent authority. The owner will be entitled to damages for wrongful use and possession of land which was not acquired in accordance with law.

The petitioners also rely upon the judgment delivered by the Hon'ble Supreme Court in the matter of ***Vidya Devi -vs- State of Himachal Pradesh & Ors.*** reported in ***(2020) 2 SCC 569*** wherein the Court held that the State being the welfare State, cannot be permitted to take the plea of adverse possession, which allows the trespasser to gain legal title over a property for over twelve

years. The State cannot be permitted to perfect its title over the property by invoking the doctrine of adverse possession to grab the property its own citizens.

Reliance has been placed on the decision delivered by the Hon'ble Supreme Court in the matter of ***Tukaram Kana Joshi & Ors.*** –vs- ***Maharashtra Industrial Development Corporation & Ors.*** reported in **(2013) 1 SCC 353** wherein the question before the Court was whether in a democratic body polity, which is supposedly governed by the rule of law, the State should be allowed to deprive a citizen of his property without adhering to law. The Court observed that the functionaries of the State took over possession of the land without any sanction of law and the Court held that the same must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode. The State specially a welfare State governed by the rule of law, cannot arrogate itself to a status beyond one that is provided by the Constitution. The Court was pleased to direct payment of market value of the land in dispute along with other statutory remedies.

Reliance has also been placed on the judgment delivered by the Hon'ble Supreme Court in the matter of ***Board of Wakf –vs- Government of India & Ors.*** reported in **(2004) 10 SCC 779** wherein the Court held that in the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time will not affect title. A party claiming adverse possession must prove that his possession is “*nec vi, nec clam, nec precario*”, that is peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, excavation, hostile and continued over the statutory period.

Learned advocates representing KMC vehemently opposes the submissions and prayers of the petitioners. It has been submitted that the title of the petitioners is not very clear in respect of the entire plot of land as the petitioners have intentionally and deliberately not revealed the deeds of lease in any of the writ petitions.

It has been submitted that the petitioner no.1 is not the lessee of the plot of land and the actual lessee that is M/s. Swadeshi Pesticide has not been impleaded as party respondent in the writ petition. The petitioners have also not impleaded the lessor of the property as respondent.

The disputed portion of the plot of land has a big dia tubewell implanted therein which has presently become defunct due to non use. The petitioners have not asserted as to who installed the big dia tubewell. The petitioners say that they did not implant the same. In the absence of the said assertion, it is to be taken that the said big dia tubewell was sunk by the government officials, as disclosed in the affidavit filed by the KMC.

It may be that the said big dia tubewell was sunk with the expressed consent/permission of the owner that is the trustees of the trust property. The right of the petitioners flows from the deeds of lease. The same is a vital piece of evidence which has conveniently not been produced before the Court. Through the writ proceedings the petitioners are trying to create evidence and correct the title to the property.

The respondents contend that the primary prayer of the petitioners is for recovery of possession and the said relief ought not to be granted by the writ Court. The petitioners ought to be relegated to the civil Court where decision may be taken upon perusal of evidence produced before the Court.

The learned advocate contends that possession of a property is distinguishable from having title over a property. The fact that KMC is in possession of the disputed portion of the property is evident as the petitioners have made a prayer for recovery of possession.

It has been argued that KMC does not claim title over the property but, admittedly, the possession of the same is with KMC for a considerable period of time by virtue of the big dia tubewell which was in existence for a long period and has presently become defunct because of the modern and developed water supply system by the KMC.

It has been argued that the petitioners are indirectly trying to dispossess the KMC from possession of the disputed portion indirectly through

the writ proceedings. It has been stressed that what cannot be done directly, cannot be done indirectly.

It is settled position of law that even a trespasser cannot be evicted without resorting to the provision of law. As the Corporation is in possession of the disputed portion for a considerable period of time, the Corporation may be evicted only upon proper exercise of law and not merely through the writ proceedings initiated by the petitioners. It has been submitted that the right to property is applicable both in respect of the petitioners as well as the respondent authority. Only because of the fact that the respondent authority is a State, the said authority ought not to be dispossessed by invoking provision of Article 226 of the Constitution of India.

According to the respondents the petitioners are trying to adopt a shortcut method to get rid of the KMC without adopting the proper procedure prescribed in law. As the Corporation was in possession even prior to the petitioners acquiring right in the property, accordingly, it has to be held that the possession of the Corporation is continuous, without any disturbance from the owner.

Notice of the Court has been drawn to the fact that certain paragraphs dealing with the factual aspect have been affirmed as true to the knowledge of the deponent. It has been contended that as the deponent was not in the picture at the relevant point of time, the deponent, under no stretch of imagination, could have direct knowledge of the issue in question. Knowledge is to be derived from the owner of the property who has not been impleaded as party respondent and as such vital facts and missing links cannot be ascertained conclusively.

In support of the aforesaid contention the respondents rely upon the judgment delivered by the Hon'ble Supreme Court in the matter of **Lallu Yeshwant Singh –vs- Rao Jagdish Singh & Ors.** reported in **AIR 1968 SC 620** on the issue that even a trespasser cannot be evicted or disposed without resorting to the proper provision of law.

Reliance has been placed on the judgment delivered by Hon'ble Supreme Court in the matter of **J. Jose Dhanapaul –vs- S. Thomas & Ors.**

reported in **(1996) 3 SCC 587** on the issue that in the absence of a proper party the writ petition would not be maintainable and proper adjudication cannot be made.

The respondents also rely upon the judgment delivered by the Hon'ble Supreme Court in the matter of ***Bharat Singh & Ors. -vs- State of Haryana & Ors.*** reported in **(1988) 4 SCC 534** on the issue that when a point is required to be substantiated by facts the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition. If the facts are not supported by evidence, the Court will not entertain the point. In a writ petition not only the fact but also the evidence in proof of such facts has to be pleaded and annexed.

It is the specific case of the KMC that the lease deed which is an important piece of evidence has not been annexed to the writ petition and in the absence of the same the writ petition will not be maintainable at the instance of the petitioners.

The respondents strongly pray for dismissal of the writ petition.

I have heard the rival submissions made on behalf of both the parties and have perused the materials placed before the Court.

It appears from the documents annexed to the writ petition and the submissions made on behalf of both the parties that both asserts right over the disputed portion of the plot of land. The petitioners claim lease right in respect of the property relying on the deeds of lease executed by the trustees in favour of one M/s. Swadeshi Pesticide whereas the Corporation exercises right over the property on account of long continuous possession through the big dia tubewell which is embedded in the disputed portion of the mother premises but has presently become defunct. KMC does not claim ownership of the disputed portion of land, but merely claims possessory rights.

For proper adjudication of the disputes amongst the parties it is absolutely essential to peruse the lease deeds. The same has neither been annexed nor produced before the Court. Though it appears from the documents annexed to the writ petition that the entire portion of land of approximately 90

kathas 10 chittacks and 19 sq. ft. has been recorded in favour of the petitioners in the municipal assessment book maintained by the KMC, but recording of the name of the petitioners in the municipal assessment book neither creates nor extinguishes title of any person whose name has or has not been recorded. Right to the property flows from the title deeds. For reasons best known to the petitioners, the same has not been annexed to any of the five writ petitions filed by them.

None of the parties are aware as to the date or the period during which the big dia tubewell was sunk and by whom. According to the affidavit filed by the KMC the big dia tubewell was sunk by the government officials. No record has however been produced before this Court with regard to the proper authority who sunk the tubewell and when.

Neither of the parties produced any evidence as to whether the tubewell was sunk with the expressed permission of the owner or not. The lease in question was executed in favour of the lessee in 1984. From the date of the lease till the date of laying the foundation stone for construction of the ward health unit, it does not appear that, none of the parties took any step in respect of the disputed portion of land.

The fact of existence of the dia tubewell inside the premises has not been disputed by the petitioners. As the big dia tubewell is presently defunct, as admitted by the KMC, it can be safely presumed that the same was not in use for quite some time, and most certainly, prior to the date of execution of the lease deeds. Can it not be taken that the big dia tubewell was in existence at one point of time and have presently become defunct due to non-use of the same? Will it be incorrect to infer that the owner never objected to the sinking of the big dia tubewell by the government officials as the same was for the benefit of the general public?

The petitioners have not asserted that the big dia tubewell was sunk for the benefit and use of the owner. On the contrary, KMC has submitted that the big dia tubewell was sunk for the use of the local people and the same may again be used for the benefit of the public at the time of water scarcity. It has been

submitted in Court that the size of the big dia tubewell suggests that the same was not meant for private use but for use of the public at large.

KMC has not been able to produce any evidence to show that the owner gave consent for setting up of the big dia tubewell on the said plot of land. Till such time the disputed portion of 1 katha 1 chittack and 19 sq. ft. was carved out from the total plot of 90 kathas 10 chittacks and 19 sq. ft., the entire plot was recorded in favour of the petitioners. It is only when the dispute cropped up with regard to the aforesaid portion of 1 katha 1 chittack and 19 sq. ft., did KMC create a child part within the mother premises.

At the same time, the Court cannot lose sight of the fact that the area in question did not originally fall within the jurisdiction of KMC but was later added within the boundaries of KMC. Possibly for the said reason, the Municipal Commissioner referred the matter to the District Magistrate & Collector, South 24 Parganas for verification of the past records.

As the tube well remained defunct for a considerable period of time, the owner could have surreptitiously removed the same and handed over encumbrance free possession to the lessee, but the owner did not take the risk of doing so. Even after taking possession of the lease hold property, the lessee could have removed the same without notice to anybody, as the lessee/ petitioner no.1 claims exclusive possession over the portion where the tubewell is sunk, but for some reason or the other, the petitioner no.1 refrained from doing so.

The big dia tubewell is still embedded and none is aware as to how and when the same came into existence. The mystery of the big dia tubewell can best be solved upon examination of witnesses and upon perusal of the title deed(s) of the property. There are several disputed facts which are to be ascertained conclusively prior to taking a decision in the matter.

The impugned order of the Municipal Commissioner dated 11th September, 2018 mentions that to consider the seriousness of the technical issues in the case as well as the public health related facilities required for the population of ward no. 119, a seven members' fact finding committee was constituted by the order of the Municipal Commissioner. A preliminary enquiry

and search of documents, records and different submissions were considered for preparation of a report which was submitted by the fact finding committee before the Municipal Commissioner on 6th September, 2018. A hearing was conducted. The departments namely water supply, law, health and assessment were represented in the hearing by the respective controlling officers. The petitioners were also represented by their learned advocate. The said report has neither been supplied to the petitioners nor brought on record.

However, the impugned order mentions that the premises no. 53A, Diamond Harbour Road was created after amalgamation of two premises in the year 2014. The big dia tubewell existed in the said premises prior to amalgamation. Though the impugned order does not specify that the KMC installed the said big dia tubewell, but it mentions that the then government authorities installed and maintained the said big dia tubewell.

There is no reference of the big dia tubewell in the file/record/plan/digitized map or the inventory list of the KMC properties of 2015-16 maintained by KMC. The same came to light only after the laying of the foundation stone on 1st March, 2014 for the proposed ward health unit. In the meantime, the mutation on amalgamation application made by the petitioner on 8th March, 2014 was granted on 24th June, 2018 only for revenue purpose. The impugned order mentions that the 'child part' has been carved out from the mother premises in greater public interest for setting up of a ward health unit and to render civic service to the inhabitants of the locality.

The tenor of the impugned order clearly reveals that there is no legal document in favour of KMC for holding on to the disputed portion of the land. KMC falls back on the plea of long uninterrupted possession.

Though KMC has raised an issue with regard to the locus of the petitioners to move the instant writ petition in the absence of the lessor, but fact remains that, the name of Swadeshi Pesticides, the proprietorship firm of the petitioner no.1 has been incorporated in the records maintained by the KMC as lessee. The mutation certificate issued by KMC in the year 2014 wherein the name of the petitioner no.1 appears as the representative of the sole proprietor

M/s. Swadeshi Pesticide in respect of 90 kathas 10 chittacks and 19 sq. ft. is annexed to the writ petition. The petitioner no.1 relies upon the said mutation certificate in support of its right, whereas, KMC claims right on the basis of long uninterrupted possession.

Even though the initial lease was executed in the year 1984 the petitioners, for reasons unknown, did not take steps for mutating or incorporating the name of the lessee in the records of the Kolkata Municipal Corporation within the time specified in the Act. The application for mutation on amalgamation was submitted on 8th March, 2014 and the same was allowed on 24th June, 2018. In the interregnum, the foundation stone for construction of the ward health unit was laid on 1st March, 2014 i.e. prior to the submission of the application for mutation by the petitioners.

As adverse possession has not been pleaded and as KMC does not claim ownership of the disputed portion, as such, the decision in Vidya Devi (supra) will not come to the aid of the petitioners. KMC only claims possessory right.

The Hon'ble Supreme Court in the matter of Karnataka Board of Wakf (supra) held that a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of its possession, (c) whether the factum of possession was known to the other party, (d) how long the possession has continued and (e) if possession was open and undisturbed.

The Court held that a person pleading adverse possession has no equity in his favour. Since he is trying to defeat the right of the true owner, it is for him to clearly plead and establish the fact necessary to establish his adverse possession. KMC has failed to satisfy the test as laid down by the Supreme Court.

When a person is in possession of a property there is no requirement of proving possession thereof. It is only when there is an intrusion on the said right, that the question of proving ownership/possession arises.

In the present case, the petitioners claim to be in possession of the property by way of separate indentures of lease executed in the year 1984 onwards and since thereafter there was no issue with regard to the ownership/ title/ possession of the property. It is only when in the year 2014 the foundation

stone was laid by the KMC, the petitioners stood up to protect their right by filing the writ petition in the year 2015. Since thereafter as many as five writ petitions have been filed by the petitioners to protect their title/possession over the property.

At this stage both parties claim to be in possession. It is absolutely not possible for the writ Court to arrive at a decision as to who ought to be the actual possessor of the disputed portion on the basis of the averments made and documents available before the Court. It will be highly improper to dispossess a party from the disputed portion without being satisfied as to whether the said party is holding the land in accordance with law or not.

As mutation neither creates nor extinguishes title, accordingly, creating a 'child part' will not rob away the petitioner no.1 from exercising its lawful right as lessee, provided the petitioner no.1 has all documents in support of its right.

In *Tukaram Kana Joshi (supra)* possession of the land was taken without any authority of law. Here, KMC claims to be in uninterrupted possession for a considerable period of time. Under which authority did KMC get possession of the land is the question, which is yet to be answered. Accordingly, the said decision does not help the petitioners.

In *D. B. Basnett (supra)* the Court held that the owner will be entitled to damages for wrongful use and possession of land which was not acquired in accordance with law. In the present case, there is nothing on record to show that KMC is holding the land wrongfully. On the contrary, KMC avers that the land was used for the general public, and the owner who could have rebutted the said contention, has not been made a party in the writ petition. The said decision also does not support the case of the petitioner.

In *J. Jose Dhanapaul (supra)* the Court held that in the absence of a proper party the writ petition would not be maintainable and proper adjudication cannot be made. The owner appears to be a necessary party who could have provided answers to a couple of issues raised. The proprietorship firm, which has an independent identity, and in whose favour the property is allegedly leased out

has also not been made party in the writ. Without all the creases being ironed out, proper relief cannot be granted.

In Bharat Singh (supra) the Court stressed on evidence. The evidences available on record in the instant case are not enough to either put into possession or to dispossess a party from the disputed portion. A cloud has been raised with regard to the right of the petitioners.

In Lallu Yeshwant Singh (supra) the Court laid down that even a trespasser cannot be evicted or disposed without resorting to the proper provision of law.

There is a specific provision in the Code of Civil Procedure relating to recovery of possession. None of the parties can be permitted to create evidence to perfect their title and recover possession in a shortcut manner without adducing proper evidence. The parties are accordingly relegated to the appropriate Court for relief. It is made clear that creating a child part in favour of KMC will not create any right, title or interest in favour of KMC and both the parties are directed to maintain status quo and further restrained from changing the nature, character and possession of the disputed portion till the rights of the parties are decided by the competent Court of law.

The Municipal Commissioner is directed to forward to the petitioners the report(s) of the fact finding committee relying upon which the impugned order dated 11th September, 2018 was passed by the Municipal Commissioner.

All the writ petitions and the connected applications stand disposed of.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)