

12. 16.10.2023
bd. Ct.15

W.P.A. 10626 of 2018

The Swaranika Co-operative Housing
Society Limited

-vs-

The Kolkata Municipal Corporation & Ors.

Mr. Sanjay Mukherjee

Mr. Arghadip Das ... for the petitioner.

Mr. Uday Shankar Bhattacharya

Ms. Sudeshna Basu

Ms. Banani Bhattacharya ... for the respondent
nos. 8 to 11

Mr. Alak Kumar Ghosh

Mr. Gopal Chandra Das ... for the KMC

The petitioner has questioned the sanctioned plan which was accorded in favour of the private respondents by the KMC dated 20th July, 2017. It is submitted that wrongfully and without any authority private respondents are using passage of the petitioner society and the private respondents at the time of making an application to the concerned authority of KMC seeking sanctioned plan showed passage of petitioner society as KMC road and obtained the aforesaid sanctioned plan.

According to the petitioner society such act on the part of the private respondents attracts invocation of power under section 397 of the Kolkata Municipal Corporation Act, 1980 and accordingly such sanctioned plan which has been accorded in favour of the private respondents needs to be set aside immediately.

It is also contended that KMC has been approached on several occasions but no decision has been taken by the concerned authority of Corporation in terms of section 397 of the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as “said Act of 1980”).

KMC as well as private respondents are represented by learned advocates who have opposed the prayer of the petitioner on the ground that prior to instituting present writ petition seeking cancellation of the sanctioned plan accorded in favour of the private respondents a suit was instituted being Title Suit No. 311 of 2017 and the same was dismissed on the ground of non-prosecution on 5th June, 2018 by the Civil Judge (Senior Division), 7th Court, Alipore. In addition thereto it has also been submitted that the writ petition being WPA 21262 of 2017 was preferred by the petitioner society on the allegation of wrongfully trespassing on the land of the society by indulging in various unlawful activities. Said writ petition was disposed of by a coordinate Bench vide order dated 10th August, 2017 whereby leave was granted to the petitioner to preserve and protect his property by approaching the appropriate Civil Court of competent jurisdiction. Therefore, according to the respondents this writ petition is not maintainable and if the petitioner society has any grievance it is open to the said society to institute civil proceeding.

Having considered the submissions made on behalf of the parties this Court finds that writ of mandamus has been sought for by the petitioner society upon the KMC to set aside the sanctioned

plan dated 20th July, 2017 which was accorded in favour of the private respondents on invocation of the provision under section 397 of the said Act of 1980 but on scrutiny of the relevant materials it appears that prior to filing this writ petition first petitioner filed a writ petition being WPA 21262 of 2017 which was disposed of vide order dated 10th August, 2017 by a coordinate Bench. In the said writ petition petitioner society made an allegation against the private respondents that the private respondents wrongfully were trespassing on the land of the petitioner society by indulging in various unlawful activities. While considering entire gamut of the issue a coordinate Bench vide said order dated 10th August, 2017 made following observation:

“In view of the nature of grievance canvassed herein, I observe that it is open to the petitioner to preserve and protect his property by approaching the appropriate civil court of competent jurisdiction in accordance with law. Proceeding under Section 144(2) Cr.P.C. shall be continued with utmost expedition and be concluded at an early date”

Subsequently petitioner society filed a suit being Title Suit No. 311 of 2017 wherein following prayer was couched.

“ (b) for declaration that the plaintiff, the Swaranika Co-operative Housing Society Limited is the full owner of the suit land described in the schedule below and that the defendants, their men and agents have no

right, title and interest for taking possession in the said suit land and that the defendants, their men and agents have no authority or right to take any electricity line over the suit land and that the defendants have no right, title and authority to use internal passage of the Co-operative Society for coming in and going out;"

(emphasis supplied)

On perusal of prayer (b) it appears that use of the passage by the private respondents in this writ petition which is alleged to be owned by the petitioner society was one of the issues before the civil court. Ultimately, said suit being Title Suit No. 311 of 2017 was dismissed on the ground of non-prosecution by the Civil Judge (Senior Division), 7th Court, Alipore, taking into consideration a petition filed on behalf of the petitioner society wherein it was contended that in consideration of existence of deed of exchange dated 25th January, 1989 the petitioner society came to know that the defendant was the absolute owner of the suit property and on misconception of facts the said suit was instituted.

After dismissal of the suit vide order dated 5th June, 2018 the present writ petition has been instituted with a prayer for a direction upon the concerned authority of KMC to revoke the sanctioned plan which has been accorded in favour of the private respondents.

In view of the observation made by the coordinate Bench in the order dated 10th August,

2017 passed in the writ petition being WPA 21262 of 2017 at this stage the present writ petition with a prayer for revocation of sanctioned plan ought not to be entertained unless and until appropriate civil court of competent jurisdiction decides the right of the petitioner society over the passage, which is being used by the private respondents.

Another aspect is required to be delved into in this writ petition in view of provisions as contemplated under section 397 of the said Act of 1980. For better understanding of the issue section 397 is quoted below.

“397. Sanction or provisional sanction accorded under misrepresentation.- *If, at any time after the communication of sanction or provisional sanction to the erection of any building or the execution of any work, the Municipal Commissioner is satisfied that such sanction or provisional sanction was accorded in consequence of any material misrepresentation or any fraudulent statement in the notice given or information furnished under section 393, or section 394, or section 395, he may, by order in writing, cancel, for reasons to be recorded, such sanction or provisional sanction, and any building or any work commenced, erected or executed shall be deemed to have been commenced, erected or executed without such sanction and shall be dealt with under the provisions of this Chapter:*

Provided that before making any such order, the Municipal Commissioner shall give a reasonable opportunity to the person affected as to why such order should not be made.”

In terms of section 397 it appears that prior to revocation of sanctioned plan it has to be inferred by the Municipal Commissioner that there is material misrepresentation or fraudulent statements made by the parties at the time of notice given or information furnished under section 393 or Section 394 or Section 395.

In the present case the allegations of the petitioner society is showing passage, which is being used by the private respondents in order to have access to their land, as the road of KMC but according to petitioner society said passage is owned by said society. Unless the assertion of the petitioner society with regard to its right over the said passage is established by a declaration to be made by the appropriate Civil Court of competent jurisdiction in connection with a civil proceeding the finding cannot be made by the concerned authority of KMC that there is misrepresentation or fraud on the part of the private respondents which is pre-condition in invoking jurisdiction under Section 397 of the said Act of 1980. Therefore, it also transpires that at this stage the provision under section 397 is not attracted as prayed for in the present writ petition.

Accordingly, the writ petition stands

dismissed.

However, there shall be no order as to costs.

Urgent photostat certified copy of the order, if applied for, be given to the parties, upon usual undertakings.

(Saugata Bhattacharyya, J.)