

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.25193 of 2015

With

IA No. CAN 1 of 2021

With

CAN 2 of 2022

**L.M.J. Construction Private Limited and another
Vs.
The Board of Trustees
for the Port of Kolkata and others**

For the petitioners	:	Mr. Surajit Nath Mitra, Mr. D.N. Sharma, Mr. Reetobrata Kumar Mitra, Ms. Sananda Mukhopadhyay, Mr. Abhirup Chakraborty
For the KoPT	:	Mr. Kishore Dutta, Mr. Somnath Bose
Hearing concluded on	:	20.02.2023
Judgment on	:	28.02.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioner no.1, L.M.J. Construction Private Limited is a company engaged in the business of letting out landed properties on rental basis and the petitioner no.2 is one of its directors.
2. The present dispute relates to a property of the respondent no.1, Kolkata Port Trust (KoPT) bearing Plot No. D297 at P-51, Hide Road Extension, P.S.-Taratola, Kolkata- 700 088, measuring about 13378.03 Sq. Mtrs. The

First Belt comprises of 4220.40 Sq. Mtrs. and the Second Belt around 9157.63 Sq. Mtrs.

- 3.** The KoPT, by an Indenture of Lease dated January 12, 1971, let out the said property in favour of proforma respondent no.5, Avery India Limited for a period of 10 years with effect from January 24, 1969.
- 4.** An agreement for tenancy was subsequently entered into by respondent no.5, Avery, in favour of the petitioner no.1 on March 14, 2003. Vacant and peaceful possession of the land, with structures, was simultaneously hand over to the petitioner no.1.
- 5.** The KoPT had initiated an eviction proceeding bearing no. 394 of 2000 against respondent no.5 and an order of eviction was passed on March 7, 2011 by the Estate Officer in the said eviction proceeding. An appeal was filed against the same by proforma respondent no.5.
- 6.** In the meantime, in or about the month of September, 2014, a Notice was published by the KoPT in its official website, expressing its intention to grant "First Right of Refusal" to the sitting occupants of KoPT-properties on the terms and conditions stipulated therein.
- 7.** Admittedly, the petitioner no.1 had granted a leave and licence on April 1, 2013 to one Shree Venkatesh Films (P) Limited and one Magic Moments. However, the petitioner no.1 carried on paying rent and incidental charges to the KoPT-authorities.
- 8.** The petitioner no.1 applied on December 30, 2014 pursuant to the Notice published by the KoPT for availing provisions of the said notice as sitting occupants.

9. Thereafter, in view of the delay in processing such application, the petitioners filed a Writ Petition bearing WP No.22362(W) of 2015 and also filed an intervention application for being added as a party to another Writ Petition bearing WP No.19653(W) of 2015 filed by the KoPT for police assistance to implement the Eviction Order dated March 7, 2011 against Avery.
10. The writ petitions were taken up together on September 7, 2015 by a co-ordinate Bench and were directed to be listed before the said Bench on September 24, 2015. However, on September 13, 2015, a Sunday morning, the KoPT-Authorities, allegedly with CISF personnel, took possession of the disputed property and put a padlock over the main gate.
11. All this happened even when the petitioners' application dated December 30, 2014 pursuant to the Notice of the KoPT was kept pending by the KoPT for consideration.
12. Subsequently, on September 16, 2015, the KoPT-Authorities issued a communication, thereby rejecting the petitioners' application/representation dated December 30, 2014. The said refusal is under challenge in the present writ petition.
13. The learned Senior Advocate appearing for the petitioners contends that the premise on which such rejection took place were erroneous. One of the grounds was that during inspection on April 22, 2015, it was allegedly found that the petitioner no.1, L.M.J. was not in possession. However, the petitioner no.1 is very much in possession of the said property. Inasmuch as some portions of the property are concerned, those were licensed out by the petitioner no.1 in favour of Shree Venkatesh Films (P) Ltd. and Magic

Moments. However, a substantial portion of the property has all along been occupied by the petitioner no.1.

14. Another ground of rejection was that proforma respondent no.5 Avery, being the erstwhile lessee, was still in existence and had paid compensation charges even recently in respect of the premises. Hence, the condition of cessation of existence of the original/recorded lessee, a pre-requisite for consideration of a request for regularization of sitting arrangement as per the Notice of KoPT, was not applicable.
15. Learned senior counsel for the petitioners submits that there is nothing on record to show that any inspection was carried out on April 22, 2015. An inspection report relied on by the co-ordinate Bench was authored by the Land Manager of the KoPT, who was the same person who acted as an Estate Officer and had passed the order of eviction against Avery.
16. In the report of inspection submitted before the court, it was admitted that there were several structures containing files and other documents. However, it was suppressed that those documents and files belonged to the petitioner no.1, indicating that the petitioner no.1 is still in physical occupation of a substantial portion of the property.
17. Moreover, it was suppressed that access to such structures were obtained through the men and agents of the petitioner no.1, under whose possession the said structures have been all along. It is further submitted that the purported report dated October 14, 2015 submitted by Mr. S.K. Dhar, the Land Manager of KoPT was not filed in terms of the order dated October 13, 2015 passed by the co-ordinate Bench. It did not mention the total floor space of the premises nor identified the party in possession of the entire

constructed area. It was not reflected in the report that the possession of M/s. Shree Venkatesh Films (P) Ltd. as licensee of L.M.J. was in law the possession of L.M.J., which pertains to 5417.595 Sq. Mtrs. area. The possession with regard to the rest of the plot comprised of about 8040.202 Sq. Mtrs. was not disclosed. Some vacant sheds shown as “F” and “G” in the plan annexed to the report were previously used by M/s. Magic Moments. However, the L.M.J. was in possession of the said sheds at the relevant juncture. Several other structures shown as “K”, “O” and “R”, although in possession of the petitioner no.1, containing old files, scrap materials, etc., was not indicated to be so.

- 18.** The Learned Senior Advocate for the petitioners places reliance on an objection taken to such report by way of exception affidavit and submits that several documents, including trade licence of L.M.J. Constructions, provisional fire NOC in favour of the L.M.J., agreement dated March 14, 2003 between Avery and L.M.J., work order issued by L.M.J. for constructing underground water reservoir at the premises, receipts and bills issued by the security agency for providing security guards at the premises were entirely overlooked in the report.
- 19.** In fact, the main gate of the subject premises was under lock and key and the keys were lying with the security agencies employed by L.M.J., who opened the same by removing padlock on instruction of the deponent of the exception affidavit.
- 20.** Most of the files of the L.M.J. Constructions and its group companies are lying at the subject premises which were shown to the Land Manager who failed to record the same in the impugned report. Photographs and

almirahs and boxes containing such records were made a part of the exception affidavit. It is submitted that the said exception affidavit remains uncontroverted by the KoPT.

21. Although it was alleged in the refusal order impugned in the writ petition that Avery, the erstwhile lessee, was still in existence, such existence of Avery in the said premises was not reflected from any material whatsoever. The purported report dated October 14, 2015 did not mention the existence of Avery in the premises.
22. It is argued that the mention of existence of the original/recorded lessee in the Notice published by the KoPT in September, 2014 has to be read in the context of the premises-in-question. It does not and cannot mean that the original/recorded lessee would otherwise cease to be in existence altogether.
23. The learned Senior Advocate for the petitioners submits that the petitioners, having acted on the basis of the representations made by the KoPT-Authorities, have an independent cause of action on the basis of the *promissory estoppel*, for which no case of detriment has to be proved otherwise. In support of such submissions, the learned Senior Advocate cites (1979) 2 SCC 409 [*M/s. Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and others*] and (2016) 6 SCC 766 [*Manuelsons Hotels Private Limited Vs. State of Kerala and others*].
24. From the letter dated September 17, 2015 written by the advocate of Shree Venkatesh Films (P) Ltd. (annexed at page 133 of the writ petition) it would appear that Shree Venkatesh Films was in possession of 69,000 Sq. Foot and the rest of the premises was occupied by others. However, the said

letter, relied on by the KoPT, clearly admitted that such 69,000 Sq. Foot area was temporarily licensed to Shree Vekatesh Films and that the entire premises was protected by various security agencies deputed by L.M.J. Admittedly Magic Moments was not in possession of any part of the premises.

- 25.** Since Avery had transferred its rights to the land and the structure to L.M.J *vide* agreement dated March 14, 2003, under which Shree Venkatesh Films and Magic Moments were temporary licensees for a period, the petitioner no.1 comes within the purview of “sitting occupant” as envisaged in the Notice of September, 2014 issued by the KoPT.
- 26.** Inasmuch as the KoPT has placed reliance on the Order dated October 15, 2015 passed in the writ petitions regarding apparent non-production of any evidence recording presence of L.M.J. in the premises against which no appeal had been preferred, the said order was an interim order passed in the writ petitions and it cannot be contended that the same attained finality.
- 27.** The petitioners have produced several documents to show their possession in respect of the premises and have also asserted their possession in the exception affidavit to the report filed by Mr. S.K. Dhar.
- 28.** The next argument of the KoPT, which is sought to be controverted by the petitioners, is that the agreement between Avery and the petitioner no.1 was executed after termination of Avery’s tenancy and initiation of the eviction proceedings before the Estate Officer. In such context, the learned Senior Advocate for the petitioners argues that the notification of September, 2014 does not provide that the sitting occupant had to enter

into the particular KoPT-property during subsistence of the tenancy. The petitioner no.1 had entered into the disputed property on the basis of the agreement dated March 14, 2003 with Avery but without any approval of KoPT. As such, the petitioner no.1 could not be termed as a rank outsider or encroacher, who has been excluded by the Notice. As on the date of rejection of its application, the KoPT had taken wrongful possession of the premises during pendency of the first writ petition filed by the petitioner being WP No.22363(W) of 2015 upon having obtained an adjournment on September 7, 2015 from the co-ordinate Bench by misrepresentation. As such, the KoPT cannot argue that the petitioner no.1 was not in possession on the date of rejection of the application, thus precluding the petitioner from being a sitting occupant for the purpose of the Notice of 2014.

- 29.** The contention of the KoPT that the petitioner no.1 has not altered its position on the basis of the Notice issued by the KoPT is not tenable in the eye of law, it is argued, as held by the judgments of the Supreme Court cited by petitioners.
- 30.** As such, the petitioners seek a writ of mandamus quashing the communication dated September 16, 2015 whereby the petitioners' application for availing the benefit of the September, 2014 Notice was rejected. It is prayed that the representation/application of the petitioner no.1 dated December 30, 2014 be considered afresh on merits in terms of the Notice of September, 2014 published by the KoPT. The petitioners have also sought for other ancillary reliefs.
- 31.** The learned Senior Advocate appearing on behalf of the KoPT, on the other hand, submits that the petitioner was not a sitting occupant as on the date

of the application (December 30, 2014) inasmuch as the petitioners' case is that on April 01, 2013, the petitioner inducted M/s. Venkatesh Films (P) Ltd. and M/s. Magic Moments Motion Pictures Pvt. Ltd. as licensees under it. It has not been pleaded by the petitioner that such licensees have vacated the premises, handing over possession to the petitioner. Rather, in the order dated November 23, 2015, a co-ordinate Bench of this Court recorded that possession was delivered to the respondents by Venkatesh Films.

- 32.** Again, Venkatesh Films, by an advocate's letter dated September 17, 2015, informed the Estate Manager, KoPT as well as the writ petitioner no.1 that it was occupying 50,000 Sq. Feet and 19,000 Sq. Feet and Magic Moments was occupying 18,000 Sq. Feet, that is, the entire premises and Avery India Limited was having a two-storied building at the premises.
- 33.** Such letter is annexed at pages 133 and 134 of the writ petition.
- 34.** It is next argued by the KoPT that there was no contemporaneous objection to such contention of the Venkatesh Films by the writ petitioner.
- 35.** It was noticed by the co-ordinate Bench in the order dated October 15, 2015 that Venkatesh Films was found in occupation of the premises (69,000 Sq. Feet) at the time of taking over possession of the premises. It was further recorded that the writ petitioner could not produce any evidence regarding its presence in the premises and the objection of the writ petitioner in regard to its contention was overruled by the Court. No appeal has been carried from such finding, it is argued, and the same has attained finality.

- 36.** It is next argued by the KoPT that the exception filed by the petitioner to the Inspection Report dated October 14, 2015 is also without substance. With regard to the exception, it is argued, it clearly appears that the petitioner was aware of the eviction proceedings at the time of entering into the agreement with Avery India Limited.
- 37.** In paragraph 01 of the writ petition, it is claimed that the petitioner is engaged in letting out landed properties on rent, whereas the Trade License annexed to the exception shows that the petitioner is a dealer in “non-food items, electrical goods”.
- 38.** Thirdly, a fire broke out at the premises in 2013 and the Director of Fire Prevention Unit, Government of West Bengal issued a letter on November 29, 2013 to the petitioner recommending fire safety measures in respect of a studio found at the premises. Hence, the premises were used by the Venkatesh Films (P) Ltd. and Magic Moments, who are engaged in film production. Thus, the exception taken out by the writ petitioner is of no substance, it is contended, particularly since the inspection report was accepted by this Court.
- 39.** The agreement between Avery India Limited and the writ petitioner was executed on March 14, 2003, that is, after termination of Avery India Limited’s tenancy by the respondent no.1 and after the initiation of the eviction proceeding before the Estate Officer. Therefore, the writ petitioner did not acquire any right in law to possess the premises.
- 40.** The notice of September, 2014, it is submitted, is not applicable to the writ petitioner for several reasons.

41. The original/recorded lessee did not cease to exist, which was a necessary pre-requisite for applicability of the notice.
42. The order of eviction has to be executed by taking symbolic/paper possession from the original/recorded tenant/licensee. The physical possession was initially taken from Avery India Limited on September 13, 2015 but on the same day, Venkatesh Films broke open the padlock and illegally repossessed the premises. Finally, under the direction of this Court, the respondent no.1 regained possession on November 16, 2015, as recorded in the order dated November 23, 2015.
43. That apart, a person in possession cannot come within the expression “sitting occupant” when admittedly the writ petitioner parted with possession to Venkatesh Films (P) Limited and Magic Moments. There is no dispute regarding such parting of possession, since there is no document on record to show that the writ petitioner got back possession from M/s. Venkatesh Films or M/s. Magic Moments.
44. Respondent no.1 got possession on November 16, 2015 from M/s. Venkatesh Films. Parties agreed on November 23, 2015 that Venkatesh Films and Magic Moments had delivered possession on November 16, 2015 to the KoPT. Hence, there is no dispute that the writ petitioner was not in possession.
45. Referring to the judgments cited by the petitioners, learned counsel appearing for the respondents argues that *M/s. Motilal Padampat Sugar Mills Co. Ltd. (supra)* is on the applicability of principles of *promissory estoppel*. The said principle, it was held, applies where there is a clear and unequivocal promise to create legal relationship and on the basis of such

promise, one has altered his position to his detriment, where the principle is invoked to prevent injustice by enforcement of the promise.

46. In the present case, however, there is no clear and unequivocal promise made by the respondent no.1/KoPT in the notice dated September, 2014. Even assuming some promise was made, the petitioner did not alter its position to its detriment. Hence, the said judgment does not apply to the present case.
47. On similar grounds, *Manuelsons Hotels Private Limited (supra)* is also not applicable to the present case.
48. Thus, it is submitted that the writ petition ought to be dismissed by this Court.
49. Upon a consideration of the submissions of parties and the materials on record, it is evident that the most relevant document is the Notice of September, 2014 published by the KoPT.
50. Certain preconditions are to be satisfied by a sitting occupant to get the first right of refusal under the purview of the said notice, which are as follows:
 - (i) It entered the property on the basis of certain arrangement with the recorded tenant/licensee.
 - (ii) It did not have approval of KoPT but is not a rank outsider or encroacher in respect of the property as on January 2, 2014.
 - (iii) It files the application complete in all respect along with requisite documents within six months from the date of publication of the notice.
 - (iv) The original/recorded lessee/licensee ceases to exist.

- (v) A decree/order for eviction from a competent court of law/Estate Officer has been obtained.
- (vi) The said decree/order for eviction has been/will have to be executed by taking over symbolic/paper possession from original/recorded tenant/licensee Or KoPT takes paper possession of the land/structure under any mutual arrangement, before allotment.
- (vii) In case of more than one sitting occupant, lease/license in respect of areas occupied by respective sitting occupants will be processed for willing occupants only, on recovery of dues on pro-rata area basis, provided each space has separate access.

51. Let us now examine whether all the above criteria have been fulfilled in the present case by the petitioner.

52. Insofar as the first ground is concerned, the petitioner had entered into the property on the basis of a certain arrangement with Avery. However, the question which arises is whether Avery itself was a recorded tenant/licensee at the relevant juncture, when the petitioner came into possession. It is to be noted that the lease agreement with the present petitioner was entered into by Avery on March 14, 2003. However, the lease granted by the KoPT in favour of Avery had already expired by then and an eviction proceeding had been initiated against Avery by the KoPT on September 18, 2000. Hence, as on March 14, 2000, that is, the entry point of the petitioner, Avery was merely a tenant by sufferance. However, in Indian law, a tenant by sufferance is not on a much better footing than a trespasser. At best, in the Indian perspective, a 'tenancy by sufferance' is a juridical fiction and offers protection to such a "tenant" till eviction is

obtained by due process of law. Between the expiry of Avery's lease and passing of the eviction order on March 7, 2011, thus, Avery was merely one notch higher in legal status than a rank trespasser. Thus, it was somewhere between a rank outsider or encroacher, but not a "recorded tenant/licensee". As such, it cannot be said that the very first criterion of the Notice is fulfilled.

- 53.** The peculiarity of the present case is that the second condition, however, is fulfilled inasmuch as the petitioner could not be said to be a rank outsider or encroacher at the relevant juncture, that is, on January 2, 2014, since it had already been inducted in the premises and in occupation thereof.
- 54.** The third condition was fulfilled since the petitioner filed an application and no objection has been taken by the respondents with regard to the said application having been incomplete or filed beyond time.
- 55.** The fourth condition, again, raises questions. The argument of the petitioner is that "ceases to exist" has to be read vis-à-vis the property itself, that is, in the event the recorded tenant/licensee is no longer on the property, by whatever reason, the said clause ought to apply. On the other hand, the respondents argue that the expression "ceases to exist" has to be read as unqualified, meaning that the original recorded tenant/licensee does not exist anymore. If a juristic person, the same has ceased to exist and if a biological being, has died.
- 56.** Taking the said phrase in the perspective and context of the notice itself, the second interpretation, that is, of the respondents, appears to be more plausible and logical. This is because otherwise, there might be an overlapping between the first and the second conditions. If the petitioner's

interpretation is lent to the phrase-in-question, “ceases to exist” would coincide with the termination of arrangement between the KoPT and the original tenant/licensee. Moreover, it might very well happen that, during subsistence of an existing juridical relation between the occupant and the KoPT, a company in possession is wound up or a juristic person closes down. To distinguish between such situation and an expiry of the tenure of the agreement simpliciter, the second interpretation would have to be lent to the expression under query. Thus, the fourth condition has also not been satisfied in the present case.

- 57.** The fifth and sixth conditions have been fulfilled, since the KoPT has obtained an order of eviction and had to take possession by taking symbolic possession as Avery was physically not occupying the property but only its buildings were still lying there.
- 58.** The seventh point, that is, pro-rata allocation of the property between several agreeable occupants, obviously, would be redundant and premature to consider at this stage.
- 59.** The cloud sought to be cast by the respondents on the possession of the petitioner is primarily on the basis of the report filed by the Land Manager of the KoPT, who himself acted as the Estate Officer passing the eviction order against Avery and, as such, is not free from doubt, since the estate officer himself could not be a judge of his own cause. Such identity between the officers had not been pointed out to the concerned coordinate Bench and recorded before the same while passing the order of appointment. Moreover, there has been no formal acceptance by the court of the said report filed by the Land Manager; rather, an elaborate exception filed

against the same by the petitioner is on record. Hence, the petitioner's plea could not be turned down on such score alone. In fact, it would be rather beyond the scope of the writ court to enter into the merits of the question of possession upon detailed assessment of evidence and examination of witnesses.

60. However, in view of the first and fourth conditions, as discussed above, having not been satisfied, the petitioner's application for taking benefit of the September, 2014 Notice of the KoPT was rightly refused by the KoPT.
61. The petitioner has cited two judgments of the Supreme Court, being (1979) 2 SCC 409 [*M/s. Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and others*] and (2016) 6 SCC 766 [*Manuelsons Hotels Private Limited Vs. State of Kerala and others*] on the argument of *Promissory Estoppel*.
62. However, in the present case, the basic foundation of *Promissory Estoppel* are not satisfied. Neither there is any "unconscionable departure" by the KoPT from its notice of September, 2014, nor did the petitioner act upon the representation made thereby. The petitioner had already entered the premises in 2003, much before the issuance of the notice. Thus, such act of the petitioner was not pursuant to the notice. That apart, there was no 'departure' from the notice at all, as discussed above. Hence, the ratio of the said judgments do not apply at all in the present context.
63. In such circumstances, there is no scope of interference in the present writ petition. Accordingly, WPA 25193 of 2015, along with IA No. CAN 1 of 2021 and CAN2 of 2022, are dismissed on contest.

- 64. There will be no order as to costs.
- 65. Urgent certified copies, if applied for, be issued to the applicants subject to compliance of due formalities.

(**Sabyasachi Bhattacharyya, J.**)