

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

**WPO/471/2018
KALYAN BISWAS & ORS.
VS
KOLKATA MUNICIPAL CORPORATION & ORS.**

For the Petitioner : Mr. Raghunath Chakraborty,
Md. Apzal Ansariadvocates

For the KMC : Mr. Alak Kr. Ghosh,
Ms. T. Dasguptaadvocates

Reserved on : 23.02.2023

Judgment on : 02.03.2023

Hiranmay Bhattacharyya, J.:-

1. The order of the Joint Municipal Commissioner G & D Kolkata Municipal Corporation dated 19.01.2018 is under challenge in this writ petition. By the said order the prayer for permission sought for by the writ petitioners to transfer the demised flats was rejected.
2. The facts relevant for the purpose of deciding this writ petition in a nut shell are as follows- The Kolkata Municipal Corporation (for short "KMC") initiated a project for development of a residential complex at DL Khan Road, Kolkata on land owned by the KMC with a view to leasing out flats in the residential buildings to be constructed on such land on 99 years lease. The petitioner no. 1 was allotted a flat

being no. B-402 and a lease deed was executed by and between KMC as lessor and petitioner no. 1 as lessee on 24.06.10. The wife of the petitioner no. 1 namely Nilanjana Biswas since deceased acquired flat no. C-101 in the said project by way of transfer from one Ganesh Mundra. On 24.06.2010 a lease deed was executed by and between the KMC as lessor and Nilanjana Biswas as lessee in respect of the aforesaid flat being no. C-101. The petitioner no. 1 and his wife namely Nilanjana Biswas submitted a joint representation dated 02.03.2011 before the Commissioner, KMC praying for permission to transfer the flat nos. B-402 and C-101 in favour of intending purchasers. The request made by the writ petitioner no. 1 and his wife vide representation dated 02.03.2011 was rejected by the authorities of KMC vide order dated 20.01.2016. In the meantime, the wife of the petitioner no. 1 died on 07.08.2015 leaving behind her surviving her husband i.e., petitioner no. 1 and her son i.e., the petitioner no. 2 as her legal heirs and upon her death her interest in Flat No. C-101 devolved upon the writ petitioners. The said order dated 20.01.2016 was challenged by the petitioners in WP 419 of 2016 and a co-ordinate bench of this Court by a judgment and order dated 23.03.2017 after setting aside the order dated 20.01.2016 remanded the matter back for fresh consideration and decision by the Commissioner of KMC in the light of the observations made in the judgment by passing a reasoned order after giving an opportunity of hearing to the petitioners. KMC preferred an appeal being APO No. 377 of 2017 against the order dated 23.03.2017 passed in WP 419 of 2016. The Hon'ble Division Bench by an order dated 06.09.2017 was pleased to modify the judgment and order dated 23.03.2017 by observing that while considering the matter afresh the Commissioner of KMC or any other competent authority under him shall not be influenced in any manner by any observation

made by the learned Single Judge in the judgment and order dated 23.03.2017. The Hon'ble Division Bench directed that the matter shall be decided afresh, strictly in accordance with the law based on the directions as contained in the order of the Hon'ble Division Bench in APO 73 of 2015 dated 23.11.2015 after giving an adequate opportunity of hearing to the parties. Thereafter, the Joint Municipal Commissioner, KMC passed the order dated 19.01.2018 thereby rejecting the prayer of the petitioner for grant of permission as contained in the representation dated 02.03.2011 which is under challenge in this writ petition.

3. Mr. Chakraborty, learned advocate for the petitioner referred to Clause 26 of the lease deed and contended that the lessee has the absolute right to transfer the property and as per the said clause the lessee is only obliged to inform the KMC of his intention to transfer. The KMC, upon being informed of such intention, is obliged to grant permission in favour of the petitioners/ lessees to transfer the said flats. He further contended that the KMC exceeded its jurisdiction by travelling beyond the scope of Clause 26 of the lease deed by observing that the petitioners have failed to disclose their respective financial status. He concluded by submitting that Clause 26 do not authorise KMC to refuse the permission sought for by the lessee to transfer the property.
4. Per contra Mr. Ghosh learned Counsel appearing for the corporation seriously disputed the contentions raised by Mr. Chakraborty. He contended that the prayer made in the representation dated 02.03.2011 is vague. He further contended that Clause 26 of the lease deed prohibits assignment, subletting or transfer or otherwise disposing of any of the rights under the lease without prior written permission of the Municipal Commissioner. He submitted that

the KMC being the owner of the property has the right either to grant or refuse permission to transfer of the lease hold interest by way of assignment, subletting etc. He concluded by submitting that since the writ petitioners have failed to produce necessary documents in support of their claim for transfer, the Joint Municipal Commissioner had no other alternative but to reject the prayer seeking permission to transfer. He also submitted that the said order is a reasoned one and therefore, the same may not be interfered with by the writ court.

5. Heard the learned advocates for the parties and perused the materials placed.
6. The short question that falls for consideration in this writ petition is whether the petitioners being the lessee in respect of the flats leased out by the KMC have the absolute right to transfer their interest in the demised flats.
7. The writ petitioners have invoked Clause 26 of the lease deed in support of their claim for permission to transfer the flat nos. B-402 and C-101. As rightly pointed out by Mr. Ghosh learned advocate for KMC that the writ petitioners did not specify the mode of transfer of their rights under the lease. Be that as it may, since the writ petitioners have sought to invoke Clause 26 of the lease deed in support of their claim for permission, this Court shall now proceed to decide whether the petitioners have the absolute right to transfer their interest in the demised flats.
8. The rights of the parties qua the flats shall be governed by the Transfer of Property Act, 1882. Section 108 of the said Act, deals with the rights and liabilities of lessor and lessee. Clause (j) of Section 108 deals with the right of a lessee to transfer his interest in the property. It states that a lessee may transfer

absolutely or by way of mortgage or sublease the whole or any part of his interest in the property and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.

9. Therefore, Section 108(j) empowers the lessee to transfer absolutely or by way of mortgage or sublease the whole or any part of his interest in the property. Such statutory right is however, subject to mutual agreement between the lessor and the lessee as would be evident from the opening words of Section 108 which runs thus-

“In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased.”

10. It, therefore, follows that the provisions laid down under Section 108 shall apply only in the absence of a contract to the contrary. Such provisions are also subject to the local usage.
11. In the case on hand, the parties agreed to a covenant that the lessee may transfer his interest upon obtaining prior permission in writing from the lessor as would be evident from Clause 26 of the lease deed which runs thus-

“26. The Lessee shall not assign, sublet or transfer or otherwise dispose of any of the rights under lease without prior written permission of the Municipal Commissioner of the Kolkata Municipal Corporation.”

12. Clause 26 of the lease deed has the effect of curtailing the statutory right of the lessee to transfer absolutely or by way of mortgage or sublease the whole or any part in the interest of the property. The lessee, however, has the liberty in terms of the said clause to apply before the Municipal Commissioner of the KMC for permission to assign, sublet or transfer or otherwise dispose of any of the rights under lease. Therefore, the lessee can assign, sublet or transfer or otherwise dispose of any of the right under the lease only upon a prior written permission being granted to that effect by the Municipal Commissioner of the KMC.
13. The lessee after having agreed to such terms is bound by the same and cannot turn around and contend that the KMC has discriminated against the petitioner as the said authority did not impose such restriction on alienation in case of other lessees. It is well settled that the rights of the parties to a contract shall be governed by the terms and conditions of such contract. A stranger to a contract cannot take advantage of the terms and conditions of such instrument. Therefore, the writ petitioners cannot take advantage of a clause in a lease deed wherein he is not a party to such contract. That apart the petitioners have acquired interest by virtue of the lease deed and the covenants therein are also not under challenge in this writ petition. On the contrary, the petitioners claim that they have a right to transfer by virtue of Clause 26 of the lease deed.
14. It further appears from the lease deed that the parties agreed that if the lessee shall at any time fail or neglect to perform or observe any of the covenants, conditions or agreements which the lessee is required to perform or observe, it shall be lawful for the Municipal Commissioner to determine and cancel the lease. The said lease deed further provides that on the expiry

or sooner determination of the lease the lessee shall deliver peaceful and vacant possession of the demised flat within three months from the date of notice to be served upon the lessee by the Municipal Commissioner of the KMC failing which the said demised flat shall vest in the KMC and the KMC shall have the right of re-entry in the said demised flat.

15. After reading the lease deed as a whole this Court finds that the lease deed contains a provision that in case the lessee breaks an express condition, the lessor may re-enter. In other words, if the lessee acts in breach of the express provisions of the contract, the lease may be determined by forfeiture. Breach of express condition stipulated in the lease deed may ultimately lead to serious consequences of cancellation or determination of the lease.
16. If the argument of Mr. Chakraborty that the lessees/petitioners herein have a right to assign, sublet or transfer without obtaining any written permission from the KMC is accepted, then it would amount to amending, altering or modifying or rewriting the terms of a written contract which the Courts cannot do.
17. Therefore, this Court is not inclined to accept the submission of Mr. Chakraborty that the lessees are only obliged to inform the KMC of their intention to transfer and such transfer can be effected without any formal permission being granted by the KMC.
18. Clause 26 of the lease deed, in the considered view of this Court, therefore, cannot be read to mean that the KMC is obliged to grant permission to transfer only upon a prayer to such effect being made. The discretion is, however, left with the KMC either to grant or refuse such prayer as the KMC is the owner of the flats in question.

19. For the reasons as aforesaid this Court, therefore, holds that the KMC as per the terms and conditions contained in the lease deed is not obliged to mechanically allow the prayer for grant of permission to the lessee to transfer his lease hold interest and the petitioners being the lessees do not have the absolute right to transfer their interest in the demised flats and the same can only be effected upon prior permission in writing from the authority. The question is, therefore, answered in the negative.
20. The order of the Joint Municipal Commissioner dated 19.01.2018 was passed pursuant to an order passed by a Division Bench of this Court in APO NO. 377 of 2017. This Court shall now consider as to whether the directions passed by the Division Bench in the order dated 06.09.2017 has been strictly followed or not. The Hon'ble Division Bench in its order dated 06.09.2017 observed that the Commissioner of KMC or any other competent authority under him shall decide the matter afresh strictly in accordance with the law based on the directions contained in the order dated 23.11.2015 after giving the adequate opportunity of hearing to the parties. The said order dated 23.11.2015 was passed by another Hon'ble Division Bench in APO 73 of 2015 thereby directing the KMC to consider the prayer of the writ petitioner contained in the letter dated 02.03.2011 in accordance with the law and by passing a reasoned order.
21. This Court finds that the petitioners decided to transfer the demised flat nos. B-402 and C-101 as per the terms and conditions stipulated in Clause 26 of the lease deed and requested the Commissioner, KMC to allow them to transfer the flats in favour of the intending purchasers.
22. The authority of the KMC took note of the attempt made by the writ petitioner no. 1 and his wife to convert the lease hold

property to freehold property with the mala fide intention to sale out the flats at higher price. It was also recorded in the impugned order that the case of financial stringency made out in the written statement has not been established by the petitioners by disclosing relevant materials. The learned advocate for the petitioners could not controvert the factual findings recorded in the impugned order at the time of hearing of this writ petition.

23. The respondent authority after taking into consideration the case made out by the petitioners in the representation and the written statement recorded the findings of fact. It is well settled that the power of Judicial Review of the High Court is not meant for interfering with the factual findings of the authority unless the findings are based on no evidence or based on conjectures or surmises which is not the case here. High Court cannot reappreciate the materials on record and record its own findings on fact.
24. Upon going through the impugned order, this Court finds that the authority after taking into consideration the prayer of the writ petitioner contained in the representation dated 02.03.2011 as well as the written statement filed by them, passed an order rejecting the prayer for transfer. The authority passed the said order strictly following the directions of this Court. The authority also assigned cogent reasons in support of the ultimate conclusion for refusing to exercise its discretion in favour of the petitioner.
25. For all the reasons as aforesaid, this Court is of the considered view that the impugned order does not suffer from infirmity. WP No. 471 of 2018 accordingly stands dismissed without, however, any order as to costs.

26. Urgent photostat certified copy of this judgment be given to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)

(P.A.-Sanchita)