

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
(ORIGINAL SIDE)**

Present:

The Hon'ble Justice Rai Chattopadhyay

WPO 165 of 2018

Sri Biswajit Santra

vs.

The Kolkata Municipal Corporation & Ors.

For the Petitioner

: Mr. Rajarshi Dutta,
: Mr. Shubradip Roy.

For the KMC

: Mr. Alak Kr. Ghosh,
: Mr. Arijit Dey.

For the Respondent Nos. 7 & 8

: Mr. Partha Sarathi Deb Barman,
: Mr. Raja Adhikary,
: Mr. Mrinal Das.

Heard on : 27/02/2024

Judgment on : 27/02/2024

Rai Chattopadhyay, J.

1. The writ petitioner is aggrieved that upon the free hold land owned by him, some other private person has encroached and put up placard/stone made slab, in order to use the piece of land as a children's park, subsequently to be built over there. The brief fact of the case leading to filing of the present writ petition may be narrated as herein below:-
2. Petitioner says that he is a co-owner with respect to the premises no. 38A, Jyotish Roy Road, P.S- Behala, Dist- South 24 Paragnas, which comprises within R.S. Dag No. 91, J.L No.10 in Mouza- Italghata. The

land is measured about 2 Cottahs and 8 Chittaks with a structure there on and passage for ingress and egress.

3. In support, the petitioner has relied on a deed of conveyance executed on April 23, 1992, between the vendors named therein, with the following four persons, namely, Indrajit Santra, Biswajit Santra, Ranjit Santra and Prosenjit Santra. Thus, he says that he has become the joint owner with respect to the premises no. 38A.
4. An incident of November 1, 2017, has been mentioned that the writ petitioner found some masons constructing, over the piece of land jointly owned by him with the other purchasers as named above. According to the writ petitioner respondent no. 8, who happens to be an acquaintance of respondent no. 7, was found to be in overall supervision of the construction work.
5. He says that the stone made slab installed over the said piece of land would read as follows:-

“With the financial assistance of Hon’ble Tarak Singh and collaboration of the Kolkata Municipal Corporation a gracious inauguration ceremony of a beautiful coloured Fountain at ‘Charubabur Jheel’ adjacent to Jyotish Roy Road area will be held on 19th November, 2017 Sunday at 7.00 P.M.”

6. A proceeding under Section 144, sub-section 2 of the Code of Criminal Procedure was initiated by the writ petitioner, before the Executive Magistrate at Alipur, in which, in compliance of the Magistrate’s orders the police has submitted a report of enquiry. The writ petitioner says that according to the said report respondent no. 8 has made statement that an amusement park is being built up with permission of the respondent no. 1/Kolkata Municipal Corporation at 38A/51, Jyotish Roy Road, Behala. According to the said police report new constructions and

installations of swings, slides, sitting spaces could be found at the bank of the water body situated in the said premises.

7. The writ petitioner has alleged about encroachment of the landed property owned by him with the other owners thereof and connivance of the respondent nos. 7 and 8 with respondent no. 1/Kolkata Municipal Corporation in order to illegally and unauthorisedly grabbing the said property for the purpose of construction of an amusement park for children. The writ petitioner is aggrieved against the respondent no. 1 in so far as that the respondent no. 1 without acquiring the concerned property from its owner, i.e, the writ petitioner, could not have colluded with the respondent nos. 7 and 8 for converting it for use by the general public. The respondent no. 1 is said to have no authority in granting permission for any type of construction to anybody over the said piece of land excepting the writ petitioner and its collusion with the respondent nos. 7 and 8 for alleged usage of the said piece of land is said to be illegal. The writ petitioner seeks an order, to set aside any such decision of the respondent no. 1 and delivery of unencumbered possession of the said land, by the respondent no. 1, to him.
8. He prays for the relief that the respondent no. 1 should revoke permission/sanction accorded to the respondent nos. 7 and 8 for using petitioner's land as a children's park, that the respondent no. 1 should not allow the respondent nos. 7 and 8 to undertake any type of construction over the said piece of land they being the outsider so far as the ownership of the land is concerned and any other appropriate relief.
9. Mr. Dutta, Ld. Advocate on behalf of the petitioner has firstly relied on the deed of conveyance as mentioned above. He says that by dint of the same the writ petitioner along with three other persons had purchased 2 cottahs and 8 Chittaks of land comprising within R.S. Dag No. 91, J.L

No.10 in Mouza- Italghata being premises no. 38A, Jyotish Roy Road, P.S- Behala. He says that subsequently the respondent no. 1/Kolkata Municipal Corporation, on its own have re-numbered the premises as 38A/51. All the four purchasers of the land including the writ petitioner were shown as the owners thereof, i.e, of the re-numbered premises. By referring to the receipts issued by the assessment collection department of the respondent no. 1, Mr. Dutta has submitted that the writ petitioner has been depositing the property tax for the said premises with the respondent no. 1. He says that unless and until the respondent no. 1/Kolkata Municipal Corporation had recognized the right and status of the writ petitioner to be the owner of premises no. 38A/51, it could not have raised bills for payment of tax as against the said writ petitioner. As to how the premises number changed subsequently from the date of purchase (since purchase deed mentioned the premises no. to be 38A), Mr. Dutta has stated that his client has sought information under the provisions of Right to Information Act, 2005, before respondent no. 1 vide application dated November 28, 2017, but has not been provided with any information relating to the same. A statutory appeal preferred by his client is now pending.

- 10.** On the factual premises as above Mr. Dutta has submitted that the respondent no. 1 cannot deny or dispute the right, title, interest of his client over the premises. As such according to him, it was only unlawful and result of gross arbitrariness on the part of the respondent no. 1, to grant permission to any other outsider/private person, for making construction or using the said piece of land in any manner whatsoever. He says that the impugned action on part of the respondent no. 1 has not only been illegal but also jeopardises the valuable right of the writ petitioner to his property, as guaranteed under the Constitution of India. Thus, he says that any construction over the said piece of land made in

collusion with the respondent no. 1, by the respondent nos. 7 and 8 should immediately be removed from there.

- 11.** The respondent no. 1 has contested in the case by filing written affidavit-in-opposition as well as supplementary affidavit. The case made out by the respondent no. 1 therein is that according to the government records, land comprised in R. S. Dag No. 91, J. L No. 10 is recorded as 'pukur'. Thus, it has denied the claim of the petitioner that the said Dag number would be comprised with land and a structure over there. Later, the respondent no. 1/Kolkata Municipal Corporation has further stated that the natural water body at the said Dag number was not being duly maintained by the owners thereof and thus the same would have been a threat for the hygiene and general public health of the locality. To redress the same and by invoking relevant provision of The West Bengal Inland Fisheries Act, 1993, the respondent no. 1 has taken up the responsibility of maintaining the said water body and worked towards the same. Street lights were installed in the surrounding area. In the supplementary affidavit, the respondent no. 1/Kolkata Municipal Corporation has claimed that the writ petitioner cannot claim absolute right title interest over the said piece of land in view of the fact that the same is now challenged by way of a title suit, having been filed before the appropriate Court. Thereafter it has stated that the Special Municipal Commissioner (G & D), Kolkata Municipal Corporation has passed an order, pursuant to a direction of this Court vide order dated October 9, 2020, in W.P.A No. 2854 of 2020, that the action of the competent authority, i.e, respondent no. 1, in exercise of Section 17A of The West Bengal Inland Fisheries Act, 1993, cannot be faulted in any manner whatsoever. Thus, according to the said respondent, the writ petition has become infructuous and the writ petitioner would not be entitled to any relief whatsoever.

12. Mr. Ghosh appearing for the respondent Corporation has outright denied the allegation of any collusion and connivance between Corporation and respondent nos. 7 and 8, as alleged. He says that the respondent no. 1 is in no way involved in the matter. He says that the respondent no. 1 has never taken any decision for upkeep or any construction over the said piece of land. He has further said that the respondent no. 1 has never sanctioned or allotted any money for any kind of masonry work to be done over the said piece of land. Though he has not overruled the possibility of somebody putting up the concrete slab over the said land, his specific contention as regards the same is that any construction if at all, is absolutely beyond knowledge of the respondent no. 1 and that the respondent no. 1 had no connection with any such construction if at all. For the rest he has left the matter at the discretion at the Court.

13. Respondent no. 7 has also contested in this case by filing affidavit-in-opposition and supplementary affidavit. Respondent no. 7 says that local people approached him with demand of making a water fountain at the water body situated in premises no. 38A. He has built the same, over there, at his own expenditure. So far as the said water body is concerned, according to respondent no. 7, the maintenance thereof has already been taken over by respondent no. 1 under the provisions of The West Bengal Inland Fisheries Act, 1993. By filing his supplementary affidavit respondent no. 7 has intended to replace his statement that *“I established the same at my own cost”*, with a separate sentence, that, *“it was established not at my instant. Accordingly the relevant portion of the para 5 in my affidavit be ignored.”*

14. He has further stated that the writ petitioner is no way connected with the water body in dispute. He says that vide memo dated August 3, 2022, the Deputy Chief Engineer (Civil) of respondent no. 1 has handed

over the possession of the said water body in favour of the original owners.

15. Both the said respondents have unequivocally presented their preliminary point of objection as regards the maintainability of the writ petition, in so far as, according to them the writ petitioner could not specifically establish his rights, any alleged infringement of right or any non-committal or violation of corresponding duty by the respondent authority. It is stated that the writ petitioner has relied on a deed which shows the writ petitioner to be the purchaser of land at premises no. 38A. However, the writ petitioner claims relief with respect to the premises no. 38A/51. As such, according to the said respondents, the writ petitioner's prayer is a non-specific one and not entertainable. It has submitted on behalf of both of the respondents as mentioned above that to pray for relief before the Court of equity, the writ petitioner has to specifically plead and prove sufferance of injustice and prejudice due to alleged illegal, arbitrary or unfair act of the concerned authority, for which the authority was otherwise responsible to discharge duties, in accordance with law. Thus, according to the said respondents the writ petition should be dismissed even at the threshold.

16. Mr. Dutta appearing for the writ petitioner has however strongly objected as to the prayer of the respondent no. 7, to change the statement, originally made in his affidavit-in-opposition. He says that the change as proposed if allowed by the Court would render the entire character and nature of the respondent's defence and the case also, to be changed. According to him this cannot be allowed, without appropriate prayer by the said respondent in accordance with law. He says that by way of filing an affidavit, the said respondents cannot be allowed to change his stance as per his own whims. He says that the proper course of action would have been preferring an amendment petition. But even then, to allow an

amendment the Court has to follow certain basic principles. On this he has relied on a judgment of the Hon'ble Supreme Court reported in **(1976) 4 SCC 320 (Modi Spg. & Wvg. Mills Co. Ltd. v. Ladha Ram & Co.,)**. Let the relevant portion be quoted herein below:-

“8. The High Court on revision affirmed the judgment of the trial court and said that by means of amendment the defendants wanted to introduce an entirely different case and if such amendments were permitted it would prejudice the other side.

9. The decision of the trial court is correct. The defendants cannot be allowed to change completely the case made in paras 25 and 26 of the written statement and substitute an entirely different and new case.”

17. The writ petitioner is amongst the four joint purchasers of the property being premises no. 38A, Jyotish Roy Road, P.S- Behala, Dist- South 24 Paragnas, R.S. Dag No. 91, J.L No.10 in Mouza- Italghata, vide deed of conveyance dated April 23, 1992. Since thereafter the petitioner is in possession of the land and has been remitting rents and taxes. The property tax being submitted by the writ petitioner is evident from the property tax receipt as annexed with the writ petition, which pertains to the year 2017, September 2017 to be precise. The premises no. is written as 38A/51, Jyotish Roy Road, over there, with respect to which the petitioner has submitted tax as shown. Evidently premises no. 38A/51 is either after remembering of premises no. 38A or after segregation of the landed property comprised within premises 38A. It is noticeable that the respondent no. 1 has not made any endeavour to bring on record sufficient material to show that premises Nos. 38A and 38A/51 has all along been two different and distinct premises. The writ petitioner claims ownership as regards property being 38A/51 which according to him is bifurcated only from the main property in premises no. 38A, Jyotish Roy Road, earlier purchased by him jointly with the

three others. In contravention, the respondent authority however has not been able to come before the Court with any sufficient material to show that the petitioner has no right title interest as regards premises no. 38A/51, Jyotish Roy Road, be it jointly or severally. A title suit is said to have been pending challenging petitioner's right to the same. Admittedly the same is yet to be determined. Accordingly at this juncture, this Court has no cogent or sufficient material to rely upon in order to negate petitioner's contention that the concerned land is being owned and possessed by him. More so, when the deed of conveyance dated April 23, 1992, is not disputed in this case. No material is there, not to believe the writ petitioner's version. Thus, the writ petition is found to be maintainable.

18. Allegation is that on the said piece of land the respondent nos. 7 and 8 have been constructing amusement park for children by installing amusement materials as well as the permanent structure to display placard. This fact is not particularly denied by either the respondent Kolkata Municipal Corporation or the respondent nos. 7 and 8. The Kolkata Municipal Corporation has taken up the stand that it had not authorised for any such construction over the particular piece of land. The stand of the respondent no. 7 is that on the request of the local people he has constructed a fountain in the midst of the water body situated within the premises, the management of which had been taken over by the authorities in exercise of power under Section 17A of the West Bengal Inland Fisheries Act, 1993, but later on handed over to its 'original owner'.

19. However, writ petitioner's grievance is not with respect to any water body. His specific grievance is that illegally and unauthorisedly respondent nos. 7 and 8 in collusion with respondent Kolkata Municipal Corporation has installed various amusement materials and permanent

placard within the property which is owned and possessed by him. This Court finds no cogent material not to infer the statement of the writ petitioner as true, in view of no specific objection having been raised by any of the respondents to the said plea. More so, this Court cannot ignore taking into consideration the pictorial representation of the current state of the concerned landed property, as enclosed in the writ petition.

20. As the owner of the landed property, either jointly or severally, the petitioner's rights to enjoy the same, free from all encumbrances, is protected by the Constitution of India. It is already discussed as to why the writ petitioner's claim of his ownership (either fully or partly) to the property recorded as premises no. 38A/51, cannot be ignored. On the contrary, the respondents could not have come up with sufficient material, to defend or even espouse any doubt regarding writ petitioner's claim to the said property. In these circumstance, the local body is the appropriate and duty bound authority, to protect unencumbered, either whole or joint right of the writ petitioner, over the said piece of land (i.e, 38A/51).

The petitioner is found to be entitled to relief in this case.

21. Therefore on consideration as above this Court finds it proper to dispose of the writ petition with the following directions:-

- (i) Writ petition no. W.P.O 165 of 2018 is allowed;
- (ii) The respondent Kolkata Municipal Corporation is directed to immediately cause an inspection at both the premises nos. 38A and 38A/51, Jyotish Roy Road, and ascertain installation of any material to construct an amusement park for the children along

with placard, in presence of the writ petitioner/ respondent nos. 7 and 8 and/or their representative respectively.

- (iii) Upon finding as above if any, the respondent Kolkata Municipal Corporation shall take immediate appropriate step/s for dislodging/dismantling any of such installation or placard from the said premises, in order to make the same free from all encumbrance as alleged.
- (iv) The entire exercise as above shall be concluded by the Kolkata Municipal Corporation within the period of four weeks from the date of communication of this order to its office.

22. The writ petition is this disposed of along with application pending, if any.

23. Urgent photostat certified copy of this judgment, if applied for, be given to its parties on usual undertaking.

(Rai Chattopadhyay, J.)