Calcutta High Court
The Corporation Of Calcutta And ... vs Dhirendra Nath Sen And Ors. on 16 March, 1973
Equivalent citations: AIR 1973 Cal 506, 78 CWN 183
Author: S Mukharji
Bench: S P Mitra, S Mukharji
JUDGMENT Sabyasachi Mukharji, J.

1. This is an appeal arising out of an order of P.K. Banerjee, J., dated 21st of September, 1970. On the 5th of December, 1870, by a conveyance the Secretary of State of India in Council conveyed about 200 Bighas of land commonly known as Dhapa to the Justice of Peace for the town of Calcutta for conservancy of the City of Calcutta. In or about 1880 the said Dhapa Dumping Ground was thereafter leased out to Bhabanath Sen, the predecessor-in-interest of the Sens, the respondent to the present appeal, in consideration of the lessees agreeing to pay the rent partly in cash and partly by doing work of unloading refuse wagons at their own costs and expenses. Since thereafter the Sens and their predecessors-in-interest were holding a substantial portion of the said Dhapa land popularly known as "Dhapa Square Mile" as lessees under the Corporation of Calcutta. On the 29th of July, 1909, the lease was renewed for a further period of 22 years. Thereafter by a resolution the lease was extended upto 31st of December, 1930. Prior to 31st December, 1930 the District Survey and Settlement operations were undertaken in the area and the Assistant Settlement Officer held that the Sens were "Occupancy Raiyats" within the meaning of the Bengal Tenancy Act. After the expiry of lease notice to quit was served on the Sens. In 1933 Title Suit No. 70 of 1933 was instituted against the Sens in the First Court of the Sub Judge, 24-Parganas, Alipore, for ejectment and for arrears of rent, mesne profits and for a declaration that the decision of the Assistant Settlement Officer as to the status of the Sens as "Occupancy Raiyats" with regard to the said lands was erroneous and without jurisdiction. On the 17th of June, 1935 by a decree passed in the said suit, Sens were directed to make over khas possession of the lands in their possession and in the possession of the tenants. In August, 1935 Sens preferred an appeal to this High Court from the said decree and obtained stay of the operation of the said order. It appears that thereafter Sens approached the Corporation of Calcutta, for an amicable settlement of the pending appeal. Petition of compromise was filed in the said appeal embodying certain terms. Under the terms the status of the Sens as lessees was confirmed. On the 23rd March, 1936 a resolution was passed by the Corporation of Calcutta to settle all disputes on the terms and conditions set out therein. On the 1st of April, 1936, a fresh lease (service tenure lease) was entered into for a period of 30 years in consideration of the Sens agreeing to perform the service of unloading refuse wagons free of charge and also to pay cash rent in addition to the service as provided in the said agreement, commencing from 1st of April, 1936 between the Corporation of Calcutta and the Sens and their predecessors-in-interest with the option to the lessees to renew the lease for a further period of 20 years. Option mentioned in the said lease was stipulated to be exercised one year prior to the expiry of the lease. The said lease inter alia provided as follows:

"Provided also and these presents and upon the express condition that if the said yearly cash rents hereby reserved or any part thereof shall at any time be in arrear and unpaid for one calendar month after the same shall have become due (whether any formal or legal demand thereof, shall have been made or not) or if the lessees shall, at any time, fail or neglect to carry out the work of unloading

refuse and silt wagons in the manner and according to the terms and conditions hereinbefore provided except for reasons and cause beyond their control such as pestilence, epidemic or continued strike among labourers, riot, violence of mob, civil commotion, enemy action, air raid, earthquake, fire, flood or tempest or irresistible force of nature, or shall at any time fail or neglect to perform or observe any of the covenants conditions or agreements herein contained and on their own part to be performed and observed, or if the lessee while the said demised premises or any part thereof shall remain vested in that shall become subject to the insolvency law, or, make any arrangement or compromise with their creditors, or, permit any execution to be levied on the demised premises, or if the assigns of the lessees, being a company, shall enter into liquidation whether compulsory or voluntary, then and in such case it shall be lawful for the lessors or any person or persons duly authorised by them in that behalf to re-enter after the due notice and upon failure on the part of lessees to remove the cause or make good the breach, to the satisfaction of the lessors within a reasonable period, into or upon the demised premises or any part thereof."

Lease Deed, however, was executed on 17th April, 1962. On the 12th of June, 1936 decree was passed in the appeal mentioned hereinbefore by consent of parties in the terms and conditions in the petition for compromise which was treated as part of the decree.

2. On the 12th of February, 1954 the West Bengal Estates Acquisition Act, 1953 came into force. Thereafter notice was served by the State of West Bengal on the Corporation of Calcutta and the Sens alleging that the said Dhapa land had vested in the State of West Bengal under the said Act and as such all rents due from and payable by the occupiers of the land should be paid to the State of West Bengal. In 1959 this notice was challenged by the Sens and the Corporation of Calcutta in two separate applications under Article 226 of the Constitution, being C. R. Nos. 1027 and 1132 of 1959 in this High Court. Rules nisi and interim injunctions were issued restraining the Government and its officers from giving effect of the said notice until disposal of the said Writ petitions. On the 18th of June, 1960, during the pendency of the said proceedings the Governor of West Bengal promulgated the Ordinance No. VI of 1960 amending Section 6(1)(h) of the said West Bengal Estates Acquisition Act, 1953 by incorporating a proviso thereto. The effect of this proviso will require consideration in this appeal. After the enactment of the said Ordinance on 31st August, 1960, this Court by its judgment and order disposed of the said Writ Applications. The ordinance Was thereafter replaced by an Act. Sinha, J., (as his Lordship then was), in his judgment and order recorded the fact that it was admitted by counsel for the Government that regard being had to the Ordinance No. VI of 1960, he could not urge that the memorandum and/or notification could be given effect to. The learned Judge observed that the admitted position was that the lands had vested in Government but that the Corporation was entitled to retain the lands and had in fact retained the lands in accordance with the said Act and that the contractors or their sub-lessees continued to have their rights as before. On the 17th April, 1962 a formal Deed was executed between the parties which was with effect from 1st of April, 1936. On the 8th of February, 1965, the Sens claim to have exercised their option of renewal as contained in the said lease dated 17-4-1962, for a further period of 20 years and requested the Corporation of Calcutta to renew the said lease accordingly. On the 24th of March, 1965 a resolution of the Standing Town and Planning Improvement Committee of the Corporation of Calcutta was passed recommending grant of lease of further 400 bighas of land to the Sens. In May, 1965 the Corporation of Calcutta under the terms of the lease, granted further

400 bighas of land to the Sens on the same terms and conditions as set out in the said resolution. On 31st March, 1966 the lease expired. In April, 1966 the Sens paid rent for the additional 400 bighas of land under the said lease. The Corporation of Calcutta granted a receipt indicating that the said sum has been kept in suspense account. Between August, 1966 and September, 1967 there was correspondence between the Corporation of Calcutta and the Sens wherein the Corporation of Calcutta requested the Sens to give possession of 171 bighas of land within the said Dhapa Land, failing which the Corporation authorities would enter into the land for the purpose of dumping garbage. In December, 1967 the Sens again paid rent for about 400 bighas of land and the Corporation kept that amount in suspense account.

3. It is alleged that in May, 1969, one Sri Prasanta Kumar Sur, was elected the Mayor of the City of Calcutta. It was further alleged by the petitioners that the said Mayor was given a reception at Dhapa by the local people belonging to and/or being followers of the Communist Party of India (Marxist). Since July, 1969, it is further alleged by the petitioners, that the followers and/or supporters of the said political party had been forming themselves into unlawful assemblies in front of the Dhapa Katchari and had shouted provocative and filthy slogans and had threatened the Sens and their employees as also the tenants with dire consequences unless the Sens vacated the said Dhapa area. It is the case of the petitioners that since early November, 1969 the said persons and/or followers of the Communist Party of India (Marxist) prevented the employees of the Sens from collecting Dan, and Britti from the Fariahs. It is further alleged by the petitioners that Fariahs in the usual course came to the Dhapa katchari and suggested to the Sens that printed slips should be given to them in acknowledgment of receipt of such Dan and Britti. In December, 1969 the Sens caused slips to be printed and. directed their employees to hand-over the same against the payment of Dan and Britti to the Fariahs. The allegation of the petitioners is that since 1st of December, 1969 the followers and supporters of the said political party in furtherance of what the petitioners call unlawful conspiracy, daily looted and cut away the crops standing on the said lands and brought them in front of the Katchari and started selling them openly to the people and misappropriated the sale proceeds. On the 2nd December, 1969 the Corporation of Calcutta alleged that the Sens had failed and neglected to arrange for unloading of wagons filled with garbage which were alleged to have been sent by the Corporation of Calcutta to the said dumping ground. On the 7th of December, 1969 Sri Sur, as the Mayor of the Corporation of Calcutta, it is alleged, presided over a meeting organised by the C. P. I. (M) at Dhapa and made an inciting speech. On the 24th of December, 1969 the petitioners made an application under Article 226 of the Constitution of India. P.K. Banerji, J., issued a rule nisi whereby the respondents Police Officers in the said rule were directed to perform the statutory duties and other respondents were restrained from committing any of the criminal acts complained of in the said petition. It is alleged that on 24th of December, 1969 a cony of the order passed by this Court was duly communicated to the Corporation of Calcutta through the Sens' Attorney. On the. 25th of December, 1969 the petitioners state, that the order passed by P.K. Banerji, J. was duly published and printed in the daily issue of the Statesman. It is the case of the Corporation of Calcutta that it came to know of the aforesaid order of P.K. Banerji, J., on the 31st of December, 1969 from the letter written by the Sens' Solicitor. On the 2nd of January, 1970 the Corporation of Calcutta passed a resolution at 6-00 P. M. authorising the Commissioner of Calcutta to take immediate possession of the Dhapa land. The resolution is as follows : --"Resolved :

I. That all the lands which were previously demised in favour of M/s. D. N. Sen and others and occupied by them including the agents and servants and all persons claiming under them, and or held by them in terms of lease Deed dated 17th April, 1962 which expired on 31st March, 1966, be immediately taken possession of by the Commissioner on behalf of the Corporation of Calcutta under proviso to Clause (h) of Sub-section (1) of Section 6 of the West Bengal Estates Acquisition Act, 1953 (West Bengal Act 1 of 1954) for purposes of the Corporation namely maintenances of essential conservancy services of the city, improvement, modification and augmentation in the methods and arrangements for garbage and other waste disposal at Dhapa and utilisation of the Dhappa lands for its requirements.

II. The Commissioner be directed to issue notice forthwith on the persons concerned to deliver possession of the land noted above to the Corporation of Calcutta by 10 a.m. on 3rd January, 1970.

III. Resolved also that in the event of failure of those concerned to comply with the notice to deliver possession, the Commissioner is directed to take delivery of possession on behalf of the Corporation of Calcutta on 3rd January, 1970 or as immediately as possible thereafter."

Pursuant to the aforesaid resolution the Commissioner issued a notice to the Sens which is in the following terms:--

"Corporation of Calcutta I am to forward herewith for your information and compliance a copy of the resolution of the Corporation of Calcutta dated 2-1-1970. You may deliver possession accordingly at 10 a.m. on 3rd January, 1970 at the Office of the Municipal Railways at Dhappa to the Chief Valuer and Surveyor of Corporation of Calcutta on behalf of the Corporation of Calcutta. This may kindly be treated as Notice as desired in the resolution of the Corporation of Calcutta dated 2nd January, 1970."

It is the case of the petitioners that the said notice was hung up at about 10 p. m. in the night at the residence of the petitioners. On the 3rd January, 1970 at 9 a. m. an application was moved by the Sens under Article 226 of the Constitution of India before P.K. Banerji, J., whereupon his Lordship was pleased to issue a rule calling upon the Corporation and the other appellants to show cause and was pleased to issue an interim order of injunction restraining the appellants and each one of them and their servants and agents from taking possession of the said lands, known as "Dhappa Square Mile" and from acting on the basis of the said resolution dated 2nd of January, 1970. It is the case of the petitioner that the order was communicated to the appellants over phone and by Special Messenger round about 9-30 a.m.; on the other hand it is the case of the appellants that the Corporation of Calcutta took the possession of the said land excluding the Katchari House without the knowledge of the said order of injunction. On the 5th of January, 1970 an application was moved for contempt against the appellants and a rule has been issued and an ad interim order of injunction has also been made. The said application is still pending.

4. From the interim order in the application under Article 226 of the Constitution the Corporation of Calcutta preferred an appeal and on 9th January, 1970 the interim order passed by P.K. Banerji, J., was varied by the Appellate Court to the extent that the order would not prevent dumping garbage

in the area in which dumping of garbage had been actually done upto 4th of January, 1970. The application under Article 226 made by the Sens challenging the resolution of the 2nd of January, 1970 came up for hearing before P.K. Banerjee, J., and by a judgment delivered on the 21st September, 1970 the rule nisi has been made absolute and the resolution dated 2nd of January, 1970 has been quashed and set aside and it has been further observed that the Corporation of Calcutta was not entitled to take possession in the manner purported to be done and furthermore as the question whether the Corporation took possession was highly disputed, the learned Judge directed restoration of possession to the Sens. This is an appeal directed against the said order and judgment of P.K. Banerji, J., dated 21st September, 1970.

5. The point for consideration that arises in this appeal is whether the Corporation was entitled to pass the resolution dated 2nd of January, 1970 and take action in the manner done. The first question that has to be considered in this case is, whether proviso to Section 6(1)(h) of the West Bengal Estates' Acquisition Act 1953 applies to this case. It is the case of the Corporation of Calcutta that the aforesaid proviso applies and the action taken by the Corporation of Calcutta in passing the impugned resolution is sanctioned by the said provision. It was further contended that notice requiring the said land in terms of the said proviso had been given though under the Act no notice was necessary. It was further the case of the Corporation of Calcutta that in the aforesaid circumstances the Sens had no locus stand! to maintain this application under Article 226 of the Constitution. The petitioners have no right to the property in question. The case of the respondents Sens on the other hand is, that the proviso to Section 6(1)(h) of the West Bengal Estates Acquisition Act, 1953 does not apply to the service tenure lease held by the Sens and as such the action of the Corporation of Calcutta is not sanctioned by the said provision. It is further their case that in any event the Corporation of Calcutta was not entitled to take forcible possession, or possession without any recourse to a proper proceeding for possession in a proper Court. Section 6(1)(h) does not, according to the Sens, authorise the act of taking unilateral possession by the Corporation of Calcutta. In order to determine this controversy it is necessary to refer to the relevant provisions. According to the West Bengal Estate Acquisition Act, 1953, an 'intermediary' means a proprietor, tenure holder, under tenure holder or any other intermediary above a raiyat or a non-agricultural tenant and includes a service tenure holder and, in relation to mines and minerals, includes a lessee and a sub-lessee. It has also been provided in Sub-section (p) of Section 2 of the said Act that the expressions used in the West Bengal Estates Acquisition Act and not otherwise defined, have in relation to the areas to which the Bengal Tenancy Act applies the same meaning as in that Act, and in relation to other areas meaning as similar thereto as the existing law relating to land tenures applying to such areas, permits. Section 6(1)(h) is in the following terms:--

"6. Right of intermediary to retain certain lands-- (1) Notwithstanding anything contained in Sections 4 and 5, an intermediary shall, except in the cases mentioned in the proviso to Sub-section (2) but subject to the other provisions of that sub-section, be entitled to retain with effect from the date of vesting--

... ...
... ...

(h) Where the intermediary is a local authority, land held by such authority, notwithst

Provided that where any land which has been let out by any local authority is retained

In the instant case the Corporation of Calcutta is a local authority and it has retained the land in question. The question is whether the Sens are the persons, who can be said to have any "right of occupancy" in the said land. "Occupancy" is a term used in the Bengal Tenancy Act. Section 4(b) of the Bengal Tenancy Act, 1885 states that occupancy raiyats are those raiyats having right of occupancy in the land held by them and non-occupancy raiyats are those not having any such 'right of occupancy'. 'Occupancy rights' is an expression used in the Bengal Tenancy Act to define certain rights which were subsequently given to certain classes of raiyats. The question is whether the expression "the right of occupancy" used in the proviso to Section 6(1)(h) has been used to mean the persons like the Sens, who are service-tenure-holders in Calcutta. It has been contended on behalf of the Sens that the Statute has not used the expression "right of occupation", it has used the expression "right of occupancy". The same has specified meaning in relation to the Bengal Tenancy Act and according to that meaning the Sens are not covered. The expressions "occupancy" and "occupation" are words which derive their meaning from different acceptances of the verb occupy, the former being used to express the state of holding or possessing any object, the latter to express the act of taking possession of or keeping in possession. He, who is in occupancy of land has the right of occupation. The question is, when the statute uses the expressions "right of occupancy" and "delivery of possession" in the proviso to Section 6(1)(h) of the Act in what sense has the statute used these expressions? It has to be remembered that the proviso to Section 6(1)(h) was not originally in the Act. It was introduced by the amending Act of 1960. In the statement of objects and reasons of the Act introducing the proviso it has been stated that the said amendments were being introduced for removal of certain difficulties for expeditious preparation of the Compensation Roll and to remove certain difficulties in laying down a simplified procedure for the preparation of Compensation Roll and also to remove certain lacunae. It has to be remembered that at the time when the Ordinance was introduced first litigation was pending regarding notice to the Corporation of Calcutta for delivery of possession of the lands in question. The Corporation of Calcutta as well as the Sens had challenged the same. In Civil Rule No. 1132 of 1959 on 31st August, 1960 it was recorded that the undisputed position was that the lands had vested in the Government but the Corporation of Calcutta was entitled to retain the lands and in fact had retained the lands, and the contractors and their sub-lessees had continued to have their rights as before. This position was reiterated in view of the Ordinance VI of 1960 introducing the proviso to Section 6(1)(h). A good deal of argument was advanced on the question whether the Bengal Tenancy Act at all applies to the lands in question and whether if the Bengal Tenancy Act does not apply the right of occupancy referred to in proviso to Section 6(1)(h), covered the lands held by the Sens. It is not necessary for us to go into that question. It appears that the expression, 'right of occupancy' taken in its ordinary sense would mean the right of occupation and would cover the case of the lands held by the Sens. The expression 'right of occupation' would undoubtedly have been a happier expression to cover the

case of the Sens but the idea of 'right of occupation' would be included in the expression 'right of occupancy' if it is not construed in the technical sense of the Bengal Tenancy Act. P.K. Banerji, J., has not specifically determined the question whether the proviso to Section 6(1)(h) of the West Bengal Estates Acquisition Act, 1953 applies to this case or not His Lordship has held even if Section 6(1)(h) has application, that does not authorise the Corporation of Calcutta to take possession in the manner purported to be done and to deprive the Sens of their possession of the land. His Lordship has further referred to the decision in F. A. 69 of 1935 referred to hereinbefore in the Civil Appellate Jurisdiction of this Court wherein it was confirmed that the Sens were not the "occupancy raiyats." It is true that the Sens were not the "occupancy raiyats" in the sense of Bengal Tenancy Act in view of the decision in Suit No. FA 69 of 1935. But the proviso to Section 6(1)(h) was introduced later and the proviso does not use the expression 'occupancy raiyats'. It uses the expression 'right of occupancy'. In view of the legislative history of the provision in the background of the fact that it was a West Bengal Act in which the Corporation of Calcutta was one of the important local authorities and in view of the fact that the right of occupancy by its ordinary connotation would cover the cases of right of occupation of persons other than occupancy raiyats of the Bengal Tenancy Act, we are of the opinion that proviso to Section 6(1)(h) applies to the instant case and the Corporation of Calcutta was entitled to take recourse to the said proviso for the purpose of obtaining the possession of the lands if such lands were required for its own purpose.

6. The Corporation of Calcutta had given a notice. It was contended, the notice given was short. Undoubtedly it is true. The notice should have been given for a longer period. Counsel for the Corporation of Calcutta contended that the proviso did not contemplate giving of any notice or of any hearing before giving of the notice. So far as the contention of giving hearing is concerned, we are of the opinion that Counsel for the Corporation of Calcutta is right in his contention that no hearing is required; after all when the landlord seeks to recover the possession from a tenant in respect of property let out the law does not enjoin that the tenant should be heard before the issuance of the notice. It is also true that the section in specific terms does not require any notice as such. In this connection reliance was placed on Sub-section (2) of Section 10 of the West Bengal Estates Acquisition Act, which specifically requires written order to be served in the manner laid down therein. But it appears to us that the expression "when required by it" by the local authority used in the proviso contemplates that the land in question in order to be delivered under the said proviso should be required by the local authority for its purpose and that state of affairs cannot happen unless that requirement is made known. Therefore it appears to us though the section does not contemplate service of any formal notice in terms of the proviso but the scheme of the Act and the language used suggest that the requirement of the local authority for its own purpose should be made known to the persons who are required to deliver up their possession. An intimation or a notice therefore is necessary and that intimation and notice should also be a reasonable one. What is reasonable and proper, however, depends upon the facts and circumstances of each particular case. In the instant case in view of the history of correspondence between tho parties and in view of the fact that it is not the case of the Sens that had any longer period of notice been given to them they would have delivered up the possession and that there was difficulty in compliance With the notice because of shortness of the period, we do not think that we can hold that in the facts and circumstances, the notice given was short. We must however observe that tho notice should have given longer time for compliance. Some grievance was made of the fact that the resolution was

passed on a Friday at 6-00 p. m. in order to deprive the Sens of the opportunity of moving the Court before taking possession of the land by the Corporation of Calcutta. Some grievance was also made of the notice of agenda on which the resolution of the Corporation was passed. In view of the fact that Friday is the normal day for holding the Corporation Meetings and in view of the papers regarding agenda and the relevant provisions and the rules, and procedure of the Corporation of Calcutta placed before us we are of the opinion that there is no substance in this grievance of the Sens.

7. Arguments were advanced before us on behalf of the Sens contending that they had legal rights to be in occupation of the lands in question. It was urged that they were not 'occupancy raiyats' but were holding over under service tenure lease. It was contended that the lease was executed in 1966 after coming into operation of the West Bengal Estates Acquisition Act, 1953 and it had conferred new rights. Further it was contended that under the lease the petitioner had the right to exercise the option and the moment the option was exercised the lease automatically stood extended and the corporation was not entitled to take the action it has done. It was further contended that Section 53A of the Transfer of Property Act applied and the Sens were holding the land in part performance of the agreement to renew the lease and the Corporation had accepted rent, so the Corporation was not entitled to act in any manner denying the Sens the rights under the option. It was further contended that Section 116 of the Transfer of Property Act applied and reliance was placed on Satdal Basini Dasi v. Lalit Mohan Dey, . On behalf of the appellants it was submitted that the provisions of the Transfer of Property Act dad not apply to the land in question. It appears to us that in view of our finding that proviso to Section 6(1)(h) of the West Bengal Estates Acquisition Act, 1953, applies, these contentions cannot be accepted. If the proviso to Section 6(1)(h) applies, then it cannot be contended that there was any contract contrary to the provisions of the said statute. Furthermore it has been already held that the Corporation of Calcutta was an intermediary and had retained the land under the West Bengal Estates Acquisition Act, 1953 in the judgment D. N. Sinha, J., which is binding on the parties. It has to be remembered that the Corporation of Calcutta accepted payment of amounts after the exercise of the so called option for renewal without prejudice to its contentions and kept the amounts received in Suspense Account. In view of the proviso to Section 6(1)(h) of the West Bengal Estates Acquisition Act, 1953, the petitioner was not entitled to be in possession after the Corporation of Calcutta had required the land for its own purposes. There was some argument on the question whether the Transfer of Property Act applied to this case at all. We need not, however, enter into that controversy in the view we have taken.

8. The next argument, which is an important question, is whether even if the proviso to Section 6(1)(h) applies, the Corporation of Calcutta was entitled to take action in the manner done. If the Corporation of Calcutta, it was contended, wanted to take possession of the land, the Corporation of Calcutta should have taken recourse to the proper proceedings in Courts of law and not having done so, was not entitled to take unilateral action in the manner it has done. Before we consider this controversy, there is another aspect, which has to be considered, i. e., whether the Corporation of Calcutta has taken possession of the land forcibly by removing the occupation of the Sens or has taken possession on the surrender of the property. It was contended on behalf of the Sens that there was no surrender as the Sens had always expressed the desire and the intention to retain the possession so much so that they had asserted their right by having taken proceeding in the Court

and that they were forced to abandon some of the functions because of the activities of the supporters of the Communist Party (Marxist) which were instigated by the then Mayor of the Corporation of Calcutta. It is perhaps true that Sens had failed to perform certain of their obligations under the lease in respect of the garbages and clearing the wagons. It is also perhaps true that the said situation was created because of the then prevailing condition in that area which might have been generated by some sections of the supporters of the Mayor. But in view of the specific clause which dealt with the right of forfeiture of lease on the ground of the failure of the lessees to perform their obligations under the lease, but which also exonerated the lessees if such failure was due to civil commotion, riots or situation beyond their control, and in view of the facts and circumstances as revealed from the petition and the evidence and the correspondence annexed therewith, it appears to us that it could not be said that the Sens had failed to perform their obligations under the lease under the circumstances in which the lease could be forfeited. In any event the Corporation of Calcutta had not forfeited the lease in terms of the clause of the lease. The Corporation of Calcutta had purported to act in terms of the proviso to Section 6(1)(h) of the said Act. Therefore it is not necessary to enter into the controversy whether the Sens had failed to perform their obligations under the lease and the consequenses thereof. It further appears to us that having regard to the correspondence between the parties and the conduct of the Sens regarding the assertion of their right, it cannot be accepted that they had abandoned the lands in question or surrendered the land and the Corporation of Calcutta took possession of the same thereafter. It appears to us that factually the position seems to be that the Corporation of Calcutta and its officers have unilaterally taken the possession of the land without recourse to any Court of law. It is true that they might not have used force at the relevant time in taking possession because the Sens were absent at the time when the possession was actually taken. But that is wholly irrelevant.

9. There is another controversy whether the possession was taken at all. According to Sens, the possession had not been taken. There was also controversy whether the possession had been taken with the notice of injunction or without the notice of injunction. Regarding the controversy whether the possession was taken with the notice of injunction or not, we do not intend to decide that controversy, because that controversy is the subject-matter of the contempt proceedings, but inasmuch as P.K. Banerji, J., has proceeded and directed restoration of possession of land, we have to proceed on the basis that the possession had been taken. The question therefore that requires consideration is whether the possession taken by the Corporation unilaterally after the notice under proviso to Section 6(1)(h) had been given, without recourse to any proceeding in any Court is valid or justified and further whether in such case the dispossessed party has any legal right to maintain an application under Article 226 of the Constitution. In view of our finding that the proviso to Section 6(1)(h) applies, it must be held that the petitioner has no right to continue in possession and is bound to deliver up the possession. But the main contention on behalf of the Sens is that even if, they are not entitled to be in possession, they cannot be dispossessed without recourse to a proper proceeding in a Court of law. In this connection reliance was placed on several decisions, it would be necessary to refer to some of them.

10. In the case of Bishan Das v. State of Punjab, -- it was found that one, R, with the permission of the State on behalf of the joint family firm had built a Dharmashala, temple and shops on land belonging to the State and had managed the same during his lifetime. The Dharmashala was built

for the benefit of travelling public and the members of the public offered worship in the temple. After R's death, the petitioners, the other members of the joint family, continued the management but subsequently the petitioners were dispossessed of the property by an executive order passed by the S. D. O. in pursuance of directions given by the Deputy Commissioner and the management of the properties was placed in charge of the Municipal Committee. The petitioners filed a writ petition under Article 32 of the Constitution challenging the action of the Government. It was held that the petitioners could not be held to be trespassers in respect of the Dharmashala, temples and shops owned, nor could it be held that the Dharmashala, temple and shops belonged to the State, irrespective of the question whether trust created was of the public or private nature. A trustee even of a public trust could be removed only by a procedure known to law. He could not be removed by an executive fiat. A person who had bona fide put up constructions on land belonging to others with their permission would not be a trespasser, nor would the buildings so constructed vest in the owner of the land by the application of the maxim quicquid plantatur solo, solo cedit. Hence it was held that in respect of the dharmasala, temples and shops the state (trust?) had not acquired any rights whatsoever merely by reason of their being on the land belonging to the State. If the State thought that the construction should be removed or that the condition as to resumption of the land should be invoked, it Was open to the State to take appropriate legal action for the purpose, even if the State proceeded on the footing that the trust is a public trust, it should have taken appropriate legal action for removal of the trustee. It was well recognised that a suit under Section 92, Civil P. C., might be brought against persons in possession of the trust property even if they claimed adversely to the trust, that is, claimed to be owners of the property or against persons who denied validity of the trust. The State or its executive officers could not interfere with the rights of the others unless they could point to some specific rule of law which authorised their action. It was held that the executive action In that case was destructive of the basic principle of rule of law. It was further held that the respondents had in that case clearly violated the fundamental rights of the petitioners who were bona fide in possession by depriving them of the possession of the properties by executive orders and therefore the orders should be quashed and the respondents should be restrained from interfering with the petitioners in the management of those properties, It should be remembered that in the afore-said case there was no legal sanction for the action taken by the State. Here the respondents have acted in seeking delivery by virtue of legislative provision of the proviso to Section 6(1)(h) of the West Bengal Estates Acquisition Act, 1953. In the case before the Supreme Court the action was passed merely on the executive decision. There was neither any legislative provision sanctioning executive decision nor any authority of any judicial tribunal authorising the action. Furthermore in the case before the Supreme Court it was found that the structures of the buildings were not properties of the State and State had no right over the said structures of the dharmasala or the building. Tn the instant case the dispute relates to the land held by the Sens. If the proviso to Section 6(1)(h) of the West Bengal Estates Acquisition Act applies, then the Corporation of Calcutta undoubtedly has the right to recover the said land. It has further to be remembered that in this case the Katchari Buildings belonging to the Sens has not been taken possession of. The petitioners in the case before the Supreme Court were held to be in bona fide possession of their property and they could not be deprived of the property by executive order. In this case the Sens are not being sought to be deprived of their property by any executive order but the Corporation of Calcutta is acting in pursuance of the legislative sanction in terms of the proviso to Section 6(1)(h) of the said Act. From the aforesaid features, it appears to us, that the facts of the instant case are materially different from

the facts before the Supreme Court. The next case which requires consideration is the decision in the case of State of Orissa v. Ram Chandra. . There the Supreme Court observed that though the jurisdiction of the High Court under Article 226 was wide, the concluding words of the Article clearly indicated that before writ or an appropriate order could be issued in favour of a party, it should be established that the party had a right and the said right was being illegally invaded or threatened. The existence of a right was thus the foundation of a petition under Article 226. There the Supreme Court further found that property had been granted by the State on conditions which made the grant resumable, after resumption it was the grantee who moved the Court for appropriate relief, and that proceeded on the basis that the grantor State had reserved to itself the right to resume might seek to recover possession of the property without filing a suit. Where, therefore, in such a case the grantee moved the High Court under Article 226 for a writ against the State and the High Court came to the conclusion that the question of title could not be tried in the writ proceedings, it followed that no right could be postulated in favour of the grantee on the basis of which the writ could be issued in his favour under Article 226. In such a case the High Court was not justified in issuing a writ to protect the possession of the grantee, because the Supreme Court observed, mere possession of property, for however long a period might have been, would not clothe the possessor with any legal title if it was shown that the possession was under a grant from the State which was resumable. Such long possession might give the legal right to protect his possession against third parties, but as between the State and the grantee, possession of the grantee under a resumable grant could not be said to confer any right on the grantee which would justify a claim for a writ under Article 226 where the grant had been resumed. The next case which requires consideration is the decision in the case of Yeshwant Singh v. Jagdish Singh, AIR 1968 SC 620. There the Court was concerned with Quanoon Ryotwari Gwalior State Samvat, 1974. It was held there that after extinguishment of tenancy right under Section 82 Sub-section (3) landlord had no right to re-enter. He should approach Court for dispossession of tenant tinder Section 137 of the Act. Forcibly taking possession was therefore illegal. The Supreme Court referred to the decision of the Midnapore Zamindary Co. Ltd. v. Naresh Narayan Roy, 51 Ind App 293 = (AIR 1924 PC 144) where the Privy Council had observed "in India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court". The aforesaid decision of the Supreme Court was an appeal arising out of an application under Article 227 of the Constitution from a decision of the Board of Revenue. The Supreme Court was not concerned with the right to maintain an application under Article 226 of the Constitution. Reliance was also placed on the decision in the case of Mohanlal v. State of Punjab, 1970 Ren CJ 95 (SC), wherein the Supreme Court observed that under our jurisprudence, even an unauthorised occupant could only be evicted in the manner authorised by law. This was the essence of law. The aforesaid observation was made in an appeal arising out of an order by the High Court in an application under Article 226 of the Constitution in respect of the order of the Collector directing eviction of the appellants from the leased property under the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959, which had been declared ultra vires by the Supreme Court. The question was again considered by the Supreme Court in the decision in the case of State of Orissa v. R. C. Indra Kumar (P) Ltd., . There the Supreme Court observed that where the petitioner claimed that he was the assignee of the licensee and the renewal of the mining lease in his favour has been illegally cancelled it was his duty to prove that he had a legal right to continue in possession of the mines and that he had complied with every necessary thing for obtaining the renewal. Unless the legal right was established the High

Court exercising writ juris-diction could not grant him any relief.

11. The ratio of the aforesaid decisions seems to be that in order to be entitled to relief under Article 226 of the Constitution to prevent interference with his property the petitioner must establish a legal right to the property in question. If the petitioner asserts a right which prima facie establishes a legal right and which requires adjudication then the Court must enquire into that right and if that right is established then interference with that right in appropriate cases, subject to other conditions regarding Article 226 of the Constitution, should be prevented by appropriate orders. If, however, the petitioner's right is not established or is not found to be tenable then the petitioner is not entitled to any relief. In the instant case the Sens are asserting to be in possession of the land, the appellants are asserting their rights by virtue of the proviso to Section 6(1)(h) of the said Act. We have held that Sens have no right to be in possession of the land, after the notice had been given by the Corporation. But the question is whether even in such a case the Corporation of Calcutta was obliged to institute proceedings for recovery of possession on the failure of the Sens to comply with the notice under Section 6(1)(h) proviso of the Act. As the Sens have no right to remain in possession of the land after the notice had been given under the proviso to Section 6(1)(h) of the said Act and in view of the fact that land in question originally belonged to the appellants and had been given to the predecessors in interest of the Sens upon certain terms and conditions, which in view of the proviso to the aforesaid section, do not give the Sens any right to remain in possession, the Sens are not entitled to any relief under Article 226 of the Constitution. Reliance may be placed on the observations of the Supreme Court in the case of . Furthermore, it appears to us that where the State or the local authorities by executive fiat without the sanction of the law or the authority of any judicial authority interferes with the right or possession of a person, such interference will be prevented by appropriate order under Article 226 of the Constitution but where a local authority or State or a statutory body interferes with the possession, in assertion of its property rights and dispossesses a person of his possession in which he has no right to be in possession under the law, even without any of the processes of the Court of law, such a person is not entitled to any relief under Article 226 of the Constitution to be put in possession; he may be entitled to other reliefs in other proceedings. We are not concerned with that. P.K. Banerji, J., has relied on the observations of the Supreme Court in the case of Virendra Singh v. State of Uttar Pradesh, . But the said observations were made in the context of different set of facts. There it was found by the Supreme Court that the absolute maufi grants of lands made by the Rulers of erstwhile States of Chakari and Saviola which were independent States under the paramountcy of the British Crown before the integration of the States into the United States of Vindhya Pradesh and their subsequent accession to the Indian Dominion could not be revoked as an act of the State by the State of Uttar Pradesh in consultation with the Government of India after coming into force of the Constitution of India. The Supreme Court observed that it was not concerned with the question whether the State would have rights to set aside the grants in the ordinary Courts or whether it could deprive the petitioners of these properties by legislative process. In the aforesaid context the Court directed possession to be restored to the petitioners.

12. Some argument was advanced on the question whether the instigation of the unlawful activities on the part of the supporters of the political party to which the Mayor belonged at the relevant time had led to the situation in which at the time of the occupation, the corporation found Sens were

absent from the land. If, what the Sens alleged is true, then undoubtedly that was unlawful. But the propriety or the legality of the action of the supporters of the Mayor is not at issue in this application. The political party or supporters of the Mayor and the Cor-portion of Calcutta are different entities in the eye of law. The problems connected with such activities by political parties and supporters of those controlling governmental and local bodies have to be tackled. But in this application we are concerned with the legality of the action of the Corporation and its officers.

13. It was argued that possession in this case was taken with notice of injunction issued by P.K. Banerji, J. and such possession was null and void; the Corporation of Calcutta, however has asserted that the possession was taken without the notice of the order of P.K. Banerji, J. It is an admitted position today, that possession is with the Corporation of Calcutta. P.K. Banerji, J., has directed restoration of possession and the Appellate Court passed interim orders pending hearing of the appeal on the basis that possession is with the Corporation of Calcutta. We have not decided the question whether possession was taken with notice of order of injunction. That is subject-matter of contempt application. If there has been any violation of the order of P.K. Banerji, J., that will be dealt with in accordance with law. But in the view we have taken and in view of our conclusion that the petitioners have no right to be in possession of the property the petitioners are not entitled to any relief under Article 226 of the Constitution.

14. In the aforesaid view of the matter this appeal is allowed and the order and judgment of P.K. Banerji, J., dated 21st September, 1970, are hereby set aside and the application by the petitioners, the Sens, under Article 226 of the Constitution, is dis-

missed. In the facts and circumstances of the case the parties will pay and bear their own costs.

Sankar Prasad Mitra, C.J.

15. I agree.