

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3166 OF 2012

Municipal Corporation of Gr. Mumbai... Petitioner.

Versus

Pankaj Arora (Secretary) & Ors. ... Respondents.

Mr. Balkrishna Joshi a/w Mr. H.C.Pimple, for the Petitioner

Ms. A.A.Mane,, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J

DATE : 16th SEPTEMBER 2015

P.C.:

Rule. Rule made returnable forthwith with consent of the parties.

2. The petitioner herein is the Municipal Corporation of Greater Mumbai. The petitioner being aggrieved by the order passed by the learned Metropolitan Magistrate, 39th Court, Vile Parle, Mumbai, in C.C. No.23/Misc./2011 dated 9.9.2011, has approached this Court seeking the relief of quashing and setting aside the

impugned order and a direction to the Metropolitan Magistrate to condone the delay in filing the complaint (if any) and issue process.

3. The background in which the present Writ Petition is filed is as follows :-

(a) The Municipal Corporation had issued a notice under Section 354 of the Mumbai Municipal Corporation Act, 1888 (the said Act) to the present respondent No.1 and others calling upon them to carry out structural repairs of the said building within one month from the date of issue of notice i.e. prior to 1.3.2011. Upon noticing that earlier directions were not followed, the second notice was issued on 22.2.2011.

(b) The officer of the Municipal Corporation had visited the premises and had found that the work was not carried out and therefore the petitioner herein filed a complaint in the Court of Metropolitan Magistrate, 39th Court, Vile Parle (West). Since there was non-compliance of the notice till 8.3.2011, the petitioner had

come to a conclusion that the respondents had committed an offence punishable under Section 475A(1)(a) of the said Act. The learned Magistrate upon perusing the complaint, had passed an order on 2.8.2011 directing that the complaint be registered as Misc. Application. Notice was issued to the accused. Along with the complaint, the petitioner had filed an application seeking condonation of delay.

4. On 9.9.2011, the learned Magistrate had passed an order as follows :-

“Perused the delay condonation application. There is delay of near about 2 months to file this complaint. There is no sufficient explanation for the delay along with affidavit. It is only stated that delay was caused because of monsoon work and other works.

Hence, this complaint is not maintainable. I reject this application, and dismiss the complaint. All the accused Nos. 1 to 3 are discharged for the offence punishable under Section 354 read with Section 475A(1)(a) of the M.M.C. Act. The complaint is disposed of. Proceedings closed.”

5. Being aggrieved by the said order, the petitioner herein filed Criminal Application No. 1330 of 2011 in this Court seeking leave to appeal against the order passed by the learned Metropolitan Magistrate. By an order dated 5.12.2011, this Court (Coram: M.L.Tahaliyani, J.) has dismissed the said application holding that :

“there is no provision for condonation of delay in filing the complaint under the M.M.C. Act.”

“It is to be noted that u/s. 468 of Cr.P.C. there is bar on taking cognizance of offence by the Court after lapse of the period of limitation mentioned in the said section. Section 473 gives discretion to the Court to condone the delay whereas u/s 514 of MMC Act, the limitation is provided for filing of complaint in the Court of Magistrate.” “If the complaint is not made before the concerned Magistrate, within the time prescribed by Section 514 the same is required to be returned to the complainant. It therefore follows that in such a case, the Magistrate will have no occasion to pass an order of discharge or acquittal. As such, in my view, the order passed by the learned Magistrate for discharging the accused does not amount to acquittal. In fact, it amounts to return of the complaint to the complainant. As such, no appeal can lie against such order. The application is, therefore, dismissed with liberty to the applicant to file appropriate proceedings including an

application under Section 482 of Cr.P.C. They are advised to do so.”

6. The learned counsel for the petitioner vehemently submits that since the Hon'ble Court had granted, liberty to file a writ petition, the petitioner has filed the present Writ Petition in the year 2012. It is pertinent to note that initially this Writ Petition was circulated before the Hon'ble Division Bench and subsequently it was moved before the Single Judge.

7. On 26.6.2013, the matter had come up before this Court (Coram: Sadhana S.Jadhav, J.) and the matter was adjourned to 10.7.2013 at the request of the learned counsel for the B.M.C. On 10.7.2013 also the matter was adjourned at the request of the learned counsel for the petitioner and the matter remained pending. On 11.11.2013, this Court (Coram: A.R.Joshi, J.) issued notice to the respondents.

8. On 27.3.2014, this Court (Coram: Sadhana S.Jadhav, J.) had again taken up the matter for hearing and on that day, the

learned counsel appearing for the Society i.e. respondent No.3 had submitted that in December 2013, the Society has filed a report informing that the repair work has commenced but the Corporation has stayed the said repair work. He has challenged the stoppage of work by the Corporation by filing a suit for injunction before the Dindoshi Court. The matter was adjourned from time to time.

9. On 11.4.2014, the original complainant who had moved an application for issuing notice under Section 354 had sought liberty to file Intervention Application which was registered as Criminal Application No.167 of 2014. The complainant was allowed to intervene. The matter has been pending since then.

10. Today, when the matter came up for hearing, this Court had made a query and had called upon the learned counsel for the petitioner to substantiate the maintainability of this petition and also to substantiate as to how this Court on the second occasion can interfere with the same impugned order in a Writ Petition after the application seeking leave to appeal is dismissed by the same Forum.

The learned counsel for the petitioner submits that non-compliance of the first notice issued to the respondent is by itself an offence and non-compliance is a continuing offence and therefore there is no question of limitation. The learned counsel submits in fact an application seeking leave to appeal was maintainable as the accused were discharged but only because the Court granted him liberty to file Writ Petition he has filed Writ Petition. The learned counsel for the petitioner further submits that since it is a continuing offence, there is no question of limitation nor recourse to Section 468 of Cr.P.C. is warranted.

11. This Court cannot sit in appeal over the order passed by the predecessor Bench dismissing the application seeking leave to appeal. The order dated 5.12.2011 passed by Hon'ble Justice M.L.Tahaliyani has attained finality since it was not challenged before the Hon'ble Apex Court. The present writ petition is filed on 27.8.2012 i.e. practically more than 8 months of passing of the order by Hon'ble Justice Tahaliyani.

12. It is true that Hon'ble Justice Tahaliyani had granted liberty to file the Writ Petition. However, "liberty to file" is a phraseology without a valid sanction of any statute or any specific precedent. It is the liberty granted to the petitioner to probe the possibility of seeking the relief by an alternative remedy. The said liberty does not give right to a litigant fresh/anew to agitate the same issue/order which has attained finality. The liberty may confer a right to the petitioner to file a petition, but it does not confer jurisdiction upon the Court to probe into the correctness or the validity of the order under challenge. Review of a judgment cannot be had on this liberty. Hence, this Court is of the opinion that only because liberty is granted does not mean that the subsequent proceeding is maintainable in the eyes of law or that it calls upon the successor Court to hold subsequent petition maintainable or pass an order setting aside the order passed by the Court granting liberty. The successor Court is not bound to hold the proceeding maintainable.

13. In view of the aforesaid observations, this Court is of the opinion that the present Writ Petition is not maintainable and it deserves to be dismissed in limine. Rule is discharged.

(SMT. SADHANA S. JADHAV,J)

CERTIFICATE

**Certified to be true and correct copy of the original signed
Judgment/order.**