

29.01.2021

Item No. 1

Crt. No. 11

b.r.

MAT 315 of 2019
with
IA No. CAN 6 of 2020 (Old No. CAN 2721 of 2020)

Sri Amar Kumar Ghosh
-vs-
Baranagar Municipality service
Through its Chairman & Ors.
With
WPA 6576 of 2018
Sudip Mukherjee & Anr.
Vs.
Baranagar Municipality & Ors.

Mr. Joydip Banerjee
Mr. Agniv Sinha
Mr. Sabyasachi Chatterjee
Mr. Akashdeep Mukherjee

..... for the appellant.

Mr. Ranajit Chatterjee
Mr. Arijit De
..... For the Respondents/Baranagar Municipality.

Mr. Amitesh Banerjee
Mr. Suddhadev Adak
..... For the State.

Mr. Sourabh Guhathakurata
..... for the Respondent Nos. 9 and 10.

In Re: **CAN 6 of 2020 (Old CAN 2721 of 2020).**

This is an application for recalling the order dated February 10, 2020. By the said order the applications seeking leave to appeal being CAN 2370 of 2019 and the application for condonation of delay being CAN 2371 of 2019 were dismissed for default.

After hearing the learned Advocates for the respective parties and upon considering the averments made in the

said application, we are of the view that the appellants were prevented by sufficient cause from appearing when the matter was called on for hearing and consequently dismissed for default.

In view thereof, the order dated February 10, 2020 is recalled. In consequence thereof, the application being CAN 2371 of 2019 and CAN 2370 of 2019 are restored to their original files and number and are taken up for immediate consideration.

The petitioners have filed the application being CAN 2370 of 2019 praying for leave to file the appeal being MAT 315 of 2019. Since there was a delay in preferring the appeal, an application for condonation of delay being CAN 2371 of 2019 was filed.

The petitioner/appellant claims to be an heir of one Sunil Kumar Ghosh since deceased. The writ petitioners impleaded Sunil Kumar Ghosh as a party Respondent No.6 in the writ petition being W.P. No.6576(W) of 2018. The petitioners obtained an order on such writ petition against a dead person.

The appellant preferred the instant appeal along with an application for leave to appeal on the ground that Sunil Kumar Ghosh was already dead at the time of filing of the writ petition and an order was obtained behind the back of the present appellant. The appellant claims to have been affected by the order impugned and as such prays for leave to prefer the instant appeal.

After hearing learned Advocates of the respective parties and upon considering the averments made in the application for condonation of delay being CAN 2371 of 2019, we are of the view that the appellant herein was prevented by sufficient cause for not preferring the instant appeal within the prescribed period of limitation. Accordingly, the delay in preferring the instant appeal is condoned. Considering the nature of the order impugned, we also of the view that the petitioner herein has reasons to be aggrieved against the order passed in the writ petition out of which the instant appeal arises. Accordingly, leave is granted to the petitioner to prefer the instant appeal. Department is directed to formally register the instant appeal. The appeal is taken up for immediate consideration as the same can be decided on a point of law.

The writ petitioners prayed for a mandamus alleging that Sunil Kumar Ghosh was illegally filling up the water body.

Upon going through the averments in the writ petition it appears to us that the entire allegation in the writ petition was directed against one Sunil Kumar Ghosh. It is not in dispute that Sunil Kumar Ghosh was already dead at the time of filing of the writ petition.

When the writ petition was moved, an order was passed on August 1, 2018 calling for a report from the concerned Block Land and Land Reforms Officer. A direction was also passed upon the Municipality not to permit any

construction of any nature on the plots of land until further orders.

The writ petitioners thereafter took out an application being CPAN 753 of 2018 complaining violation of the aforesaid order dated August 1, 2018.

The contempt application and the writ petition was taken up for consideration and the Hon'ble Single Judge by an order dated December 4, 2018 directed the Municipal Authorities to conclude the proceeding initiated by them under Section 218 of the West Bengal Municipal Act, 1993 as expeditiously as possible and preferably within a period of twelve weeks from the date of the order. By the said order the competent authority under the Inland Fisheries Act, 1984 was directed to initiate appropriate proceedings for the purpose of restoration of the water body.

The learned Advocate appearing for the appellant submits that the said order dated December 4, 2018 is a nullity as the same was passed against a dead person, namely, Sunil Kumar Ghosh.

Mr. Guhathakurata, learned Advocate appearing for the writ petitioners/Respondent Nos. 9 and 10 in the instant appeal submits that the order dated December 4, 2018 was not passed against a dead person as, according to him, no direction was passed against a dead person but only the Municipal Authorities were directed to conclude the proceeding already initiated by them under Section 218 of the Act of 1993. He submits that the Municipal Authority is

under a statutory obligation to see that no unauthorised construction is carried on or made within the limits of that Municipality.

Mr. Chatterjee, learned Advocate for the Municipality submits that no direction was passed against a dead person and the Municipal Authority was only directed to proceed in accordance with law. He further submits that in case the appellant is aggrieved against any of the action taken by the Municipality, it is always open to the appellant to approach the Municipality and take all necessary steps in this regard.

Mr. Banerjee, learned Senior Standing Counsel for the State, in his usual fairness submits that he cannot support the order passed against a dead person. He contended that such an order is a nullity in the eye of law. He further submits that any steps taken pursuant to such an order cannot also be sustained in the eye of law.

We have heard the learned Advocates of the respective parties and perused the materials on record. It appears from the averments made in the writ petition and the order dated December 4, 2018 that the petitioners have complained that the private respondent in the writ petition, i.e. Sunil Kumar Ghosh (who was already dead at the time of filing of the writ petition) is guilty of making construction on a water body. On such facts, direction was passed upon the competent authority under the Inland Fisheries Act, 1984 to initiate appropriate proceeding for the purpose of restoration of the water body concerned. A direction was also passed upon the

Municipal Authorities to conclude the proceeding initiated by them under Section 218 of the West Bengal Municipal Act, 1993 within a specified time limit. It is now well settled that an order passed against a dead person is a nullity.

We cannot accept the submission of the learned Advocate for the writ petitioners/respondent Nos. 9 and 10 as well as the learned Advocate for the Municipality that the order impugned do not affect the rights of the appellant herein. Sunil Kumar Ghosh was already dead at the time of filing of the writ petition. Allegation was made against Sunil Kumar Ghosh in the writ petition. The order impugned was passed behind the back of the person against whom a complaint was made for alleged construction on a water body.

In an adversarial litigation, a person against whom an allegation is directed has to be given an opportunity to defend himself. The order impugned herein was passed on a *prima facie* satisfaction that the property is a water body without giving any opportunity to the heir of Sunil Kumar Ghosh to defend. Thus we are of the view that the order impugned affects the rights of the appellant herein.

Now it is to be seen as to whether the writ petitioner impleaded a dead person as a party respondent intentionally or unknowingly.

It appears from the record that in an earlier proceeding being WP No. 30300(W) of 2014 filed by the present writ petitioners, Sunil Kumar Ghosh was also

impleaded as Respondent No.5 in the said writ petition. It further appears from the record that the present appellant herein, namely, Amar Kumar Ghosh was duly substituted in place and stead of Sunil Kumar Ghosh, since deceased in that writ petition on February 19, 2015. The writ petitioners herein was thus well aware of the factum of death of the said Sunil Kumar Ghosh. But in order to obtain an unfair advantage, the writ petitioners herein impleaded a dead person as a party respondent in the instant writ petition and obtained an order from this Court by totally suppressing the fact that Sunil Kumar Ghosh had already died prior to the filing of the writ petition. Such writ petition was thus not maintainable in the eye of law and no order could have been passed thereon. The writ petitioner cannot be allowed to mislead the Court and roam around freely. The writ petitioners should be adequately penalised for the same as we are of the view that the writ petitioner intentionally and deliberately impleaded a dead person as a party respondent in the writ petition.

Since we have already observed that the order passed against a dead person is a nullity, the order dated December 4, 2018 is set aside and quashed.

The appellant herein was unnecessarily dragged to this Court by the writ petitioners/Respondent Nos. 9 and 10 herein. The appellants herein should be compensated adequately by the Respondent Nos. 9 and 10 herein. We, accordingly, direct the respondent Nos. 9 and 10 herein to

pay a sum of Rs.25,000/- (Rupees twenty five thousand only) to the appellant herein on account of litigation cost within a period of a month from this date.

For the reasons as aforesaid, **MAT 315 of 2019** stands **allowed**.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent photostat certified copy, if applied for, be supplied to the parties in compliance with all necessary formalities.

(Hiranmay Bhattacharyya, J.)

(Subrata Talukdar,J.)