

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side**

Present :- Hon'ble Justice Amrita Sinha

WPO 102 of 2023

Joydeep Mondal

Vs.

The Kolkata Municipal Corporation & Ors.

For the writ petitioners	:-	Mr. Suvadeep Sen, Adv.
For the KMC	:-	Mr. Alak Kr. Ghosh, Adv. Mr. Swapan Kumar Debnath, Adv.
For the respondent no. 9	:-	Mr. Supratim Bhattacharjee, Adv. Mr. Kaunish Chakraborty, Adv.
Hearing concluded on	:-	21.04.2023
Judgment on	:-	02.05.2023

Amrita Sinha, J.:-

The order passed by the learned Municipal Building Tribunal, Kolkata Municipal Corporation on 31st August, 2022 in BT Appeal No. 102 of 2022 in not admitting the petitioner's appeal on the ground of delay is impugned in the present writ petition.

Bare facts of the case sans unnecessary details are as follows:

The petitioner lodged a complaint alleging unauthorized construction against the private respondent at premises no. 1582, Anandapur Road, Madurdaha, East Kolkata Township within jurisdiction of Kolkata Municipal Corporation ('KMC' for short).

The petitioner claims that KMC sanctioned building plan for construction of G+3 storied building at the subject premises. Petitioner, a non resident Indian, is the owner of two self contained residential flats along with two car parking spaces at the said premises. His family members reside there.

Sometime in September/October 2013 the petitioner came to learn that unauthorized construction of additional one and half floor on the roof top of the building at the subject premises was being constructed. He lodged complaint before the authorities. As no response was received by him, he made repeated reminders to KMC to take steps for demolition of the unauthorized construction. Before any steps were taken by the authorities, illegal construction was complete.

Later on in the year 2017-18 the petitioner came to learn that a demolition proceeding against such unauthorised construction was initiated and the Deputy Chief Engineer (Building)/ South considered and disposed of the demolition case in connection with the said premises and the person responsible for making such construction was allowed to retain the unauthorized construction subject to compliance of certain formalities.

The said officer recorded in the order dated 31st January, 2014 that the illegality was noticed during departmental inspection. There was no complaint from the neighbourhood and none ventilated any grievance for construction of building. Accordingly, the prayer for retention of the unauthorized construction stood allowed subject to the conditions mentioned therein.

Being aggrieved by the order of the Special Officer the petitioner preferred a writ petition before this Court being WP No. 16846 (W) of 2017. The Court after noticing that the order for retention is an appealable one, was pleased to dispose of the writ petition by order dated 22nd June, 2018 by granting liberty to the petitioner to prefer appeal within a fortnight and the appellate authority was requested to consider such appeal to be within the period of limitation for preferring the appeal. The Court directed the appellate authority to dispose of the appeal in accordance with law.

Being aggrieved by the order passed by the learned single judge, the petitioner filed a review petition before the learned single judge being RVW No. 100 of 2018. The said review petition was dismissed by the Court on 31st August, 2018.

Challenging the order passed in review the petitioner preferred an appeal before the Hon'ble Division Bench of this Court being MAT 1261 of 2018, CAN 1207 of 2019, RVW 100 of 2018 arising out of WP 16846 (W) of 2017. The aforesaid appeal stood dismissed by the Court on 2nd July, 2019.

After dismissal of the appeal the petitioner preferred the statutory appeal against the order of demolition passed by the Special Officer (Building) on 31st January, 2014 being BT Appeal No. 102 of 2022. The statutory appeal was not admitted by the building Tribunal on the ground of delay and the appeal stood disposed of by order dated 31st August, 2022.

The petitioner is aggrieved by the same and has challenged the same in the present writ petition.

It has been submitted that there has been no intentional and wilful delay or laches on the part of the petitioner in pursuing his rights. The petitioner is fighting for his rights from 2013. As the petitioner is a non resident Indian it is not possible for him to keep daily touch with his learned advocates who are residing here. The petitioner has full faith on the learned advocates engaged by him and he acted upon the advice given by his advocates.

The pandemic was another reason for delay in preferring the statutory appeal. Because of restriction of movement during the pandemic it became difficult for the petitioner to attend Court for filing the appeal.

It has been contended that the structure complained of is absolutely unauthorized and is liable to be demolished. The genuine grievance of the petitioner and the relief sought for by him ought not to be brushed aside on technical grounds. The petitioner should be permitted to pursue his remedy and the issue ought to be decided on merits.

The petitioner relies upon various decisions in support of his aforesaid submission. ***Dipak Kumar Mukherjee vs. Kolkata Municipal Corporation & Ors.*** reported in **(2013) 5 SCC 336** has been relied upon in support of the

submission that a person who erects any structure or executes any work is not entitled to deviate from the sanction plan. Any departure made during execution of the work or any time thereafter without sanction shall be deemed to be in contravention of the Act and the Rules and shall be dealt with accordingly.

Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors. reported in **(1987) 2 SCC 107** has been relied upon in support of the submission that a liberal approach ought to be taken while deciding the issue of delay for causing substantial justice to parties.

N. Balakrishnan vs. M. Krishnamurthy reported in **(1998) 7 SCC 123** has been relied upon in support of the submission that the primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that the parties do not resort to dilatory tactics, but seek remedy promptly.

East Coast Ispat Private Limited vs. Railway Supply Corporation Private Limited reported in **2022 SCC Online Cal 2531** has been relied upon in support of the contention that special consideration should be made of the situation caused by the outbreak of covid pandemic. If litigation is delayed, a liberal view ought to be taken for the delay during the covid period.

Sebastian Chokkattu vs. Industrial Development Bank of India reported in **2006 SCC Online Ker 106** has been relied upon in support of the submission that the appellant being a non resident Indian relied upon his advocate and it cannot be said that the appellant was not being vigilant in prosecuting the appeal.

Prayer has been made for condoning the delay in preferring the statutory appeal and deciding the matter on merits.

Learned advocate representing the Kolkata Municipal Corporation opposes the prayer of the petitioner. It has been submitted that the petitioner ought to have approached the appellate forum within the time as specified by the Court. If the petitioner for any reason whatsoever failed to approach the appellate forum within

the time fixed by the Court, then the petitioner ought to have approached this Court praying for extension of time to approach the appellate forum.

No explanation has been forwarded by the petitioner for not approaching the appellate forum within the time schedule allowed by the Court. The Tribunal acted in accordance with the direction passed by this Court and there was no other option left for the Tribunal but to reject the case of the petitioner.

Learned advocate representing the private respondent submits that as the petitioner is a non resident Indian, accordingly, he executed a power of attorney in favour of his brother who stays at the subject premises. It was the duty of the power of attorney holder to proceed with the matter with due diligence and not delay in approaching the forum within due time.

It has been submitted that the private respondent has already demolished the unauthorized portion at the top floor of the subject premises. The Special Officer (Building) permitted retention and there is no reason to interfere with the same. The respondents pray for dismissal of the writ petition.

I have heard and considered the rival submissions made on behalf of all the parties.

It appears that the petitioner initially raised the issue of unauthorized construction in 2013. He addressed repeated representations to KMC seeking demolition of the unauthorized construction. He approached this Court by filing writ petition in the year 2017, but in the meantime the Special Officer (Building), in the year 2014, concluded the demolition proceeding, allegedly initiated *suo motu* under Section 400 of the KMC Act, 1980 and permitted the person responsible to retain the construction made subject to the conditions mentioned in the order.

Any order passed under Section 400 is appealable before the appellate forum. The appeal is to be filed within a period of thirty days from the date of the order. The petitioner instead of approaching the appellate forum filed writ petition before this court challenging the retention order. For the same reason, the writ court disposed

of the writ petition by granting liberty to the petitioner to prefer appeal before the appellate authority.

The Court after noticing that the time limit for preferring appeal expired gave liberty to the petitioner to file the same within a fortnight from the date of the order and if the same is filed within the aforesaid time limit, then the appellate authority was requested to consider such appeal treating the same to be filed within the period of limitation. The same implies that the Court condoned the delay in preferring the appeal provided the same is filed within a fortnight from 26th June, 2018. The petitioner ought to have approached the appellate court within the stipulated time and availed the opportunity granted by the High Court.

The petitioner was, however, advised to prefer review of the order dated 22nd June, 2018. The said application for review was rightly dismissed by order dated 31st August, 2018, but by that time the leeway granted by the court to prefer appeal stood lapsed.

The petitioner claims that he was advised to prefer an appeal from the order passed in the review petition. The said appeal also stood dismissed on 2nd July, 2019. The petitioner ought to have sought for extension of time before the Hon'ble Division Bench to prefer the appeal before the appellate forum, but it appears that the same was not prayed for. The petitioner ultimately preferred appeal before the Municipal Building Tribunal on 7th June, 2022, but the time limit prescribed by the Court for preferring appeal long expired. The Tribunal on perusing the order passed by this Court refused to admit the appeal and hence, the present writ petition has been filed.

Learned advocate for the petitioner tries to impress the Court by submitting that the order of retention passed by the Special Officer is bad in law and on facts and, as such, the same is liable to be set aside irrespective of the fact that there has been delay in approaching the appellate authority. The delay that has been caused is absolutely unintentional and beyond the control of the petitioner. Mere technicalities ought not to stand in the way of proper dispensation of justice.

The Special Officer recorded that there was no complaint from any neighbour with regard to the construction in question. Admittedly, the petitioner raised objection against such unauthorized construction but for some reason or the other the objection of the petitioner was overlooked. Noticing that there was no objection against such unauthorized construction and that the construction was not hampering the interest of anybody, the prayer of the person responsible seeking retention of the impugned unauthorized structure stood allowed, however, subject to payment of necessary retention charges.

There may have been genuine reasons for the petitioner to be aggrieved by the order of retention passed by the Special Officer and, as such, the petitioner ought to have approached the appellate forum on time. Even though the petitioner got the opportunity to prefer the appeal before the appellate forum within the extended period of limitation, but it appears that the petitioner failed to avail the said opportunity and in fact, lost the opportunity to approach the appellate forum.

The petitioner, possibly, on wrong advice delayed in approaching the appellate authority and tried to pursue remedy before the constitutional court. As the statute prescribes an appellate forum, accordingly, a party aggrieved by the order passed by the authority ought to have availed the said remedy rather than file one after another petition before the High Court. By this way the petitioner not only lost the scope to prefer appeal but also lost valuable time and money which is irreplaceable.

The petitioner would argue that a litigant ought not to suffer for the erroneous advice of the advocate. True it is, but the intervening events stand in the way to grant relief in favour of the petitioner by applying such principle.

The demolition proceeding culminated in an order of retention. The order of retention was conditional subject to fulfilment of certain conditions. The persons responsible have already complied with the condition set forth in the retention order. The unauthorised room in the top floor of the subject structure has also been demolished during the course of the instant writ petition.

Due to passage of considerable period of time i.e., more than nine long years, valuable right has accrued in favour of the persons who sought for retention. There may be person(s) who is/are enjoying the said portion which has been permitted to be retained for close to a decade. Admitting the appeal at this stage will put the settled position to jeopardy.

Will it not be improper to reopen the issue all over again when the matter was put to rest so many years ago? Law prescribes a period of limitation only to reach a proceeding to its logical conclusion. A proceeding cannot be permitted to continue for years together. Litigation has to end somewhere. A litigant ought not to wait for eternity to know the fate of a legal proceeding and at the same time a litigant who obtains an order from the court is entitled to reap the benefits of the same.

The ratio laid down in *Dipak Kumar Mukherjee (supra)* is well settled but in the instant case the private respondents were able to get the unauthorised construction regularised from the competent authority long back. Once the unauthorised portion is permitted to be retained the same cannot be treated as an unauthorised one. The facts taken into consideration at the time of regularising the unauthorised construction may not be proper or correct but it was for the petitioner to point out the discrepancy in facts at the proper time. Had the petitioner been genuinely aggrieved by the order of retention then prompt steps ought to have been taken to challenge the same. The order of retention passed in the year 2014 was challenged for the first time in 2018, that too, not before the statutory forum. The opportunity provided by the court by condoning the delay and extending the period of limitation by taking the liberal approach principle as in *Collector, Land Acquisition, Anantnag (supra)* should have been taken advantage of.

The plea that the petitioner is a non resident Indian as in *East Coast Ispat (supra)* cannot come to the aid of the petitioner in the instant case as the petitioner already executed power of attorney in favour of his brother who stays at the subject premises. On execution of the power of attorney it is the duty of the attorney holder

to deal with the legal proceeding in a proper manner and not delay the same to such extent that seeking remedy becomes impossible.

Pandemic as in Sebastian Chokkattu (supra) can certainly not be a ground in this case to condone the delay. Reopening the issue at such a delayed point of time will not only cause prejudice to the private respondents but will be sheer injustice to them. Extending substantial justice to the petitioner as in N. Balakrishnan (supra) should not result in causing injustice to somebody else.

Once time limit has been framed by the court, it is the duty of the litigant to act within the said time frame. If for any reason the timeline fixed by the court cannot be adhered to, then it is the duty of the litigant to seek extension of time for acting in accordance with the said order. Till the time limit is extended by the court, then any act done beyond the fixed time frame becomes barred by the principle of limitation. Admitting the appeal filed beyond the extended time period would be acting contrary to the order passed by this court.

The delay may be because of incorrect legal advice and may not be intentional or deliberate but the said erroneous delay is fatal in the facts and circumstances of the instant case. There is hardly any scope to put the clock back for revisiting the issue all over again. The chapter of illegal construction has to be taken as closed.

The Tribunal rightly refused to admit the appeal. The court does not find any reason to interfere with the order passed by the building tribunal.

No relief can be granted to the petitioner. Writ petition stands dismissed.

There shall, however, be no order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)