

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT/246/2023
WITH
WPO/1474/2022
IA NO:GA/1/2023
GA/2/2023, GA/3/2023

GAYATRI SAHA AND ANR.
VS
THE KOLKATA MUNICIPAL CORPORATION AND ORS.

BEFORE:

The Hon'ble JUSTICE ARIJIT BANERJEE

AND

The Hon'ble JUSTICE PRASENJIT BISWAS

Date : December 5, 2023.

*Mr. Raghunath Chakraborty, Adv.
...for the Appellants.*

*Mr. Alak Kumar Ghosh, Adv.
Mr. Dwijadas Chakraborty, Adv.
...for the KMC*

*Mr. Nirmalya Dasgupta, Adv.
Mr. Chanchal Kumar Dutta, Adv.
Ms. Krishna Mullick, Adv.
...for respondent No.6*

*Ms. Tuli Sinha, Adv.
..for State*

THE COURT:

RE : GA/1/2023

This is an application for condonation of delay of 208 days in presenting the appeal.

We find from the petition that two grounds have been pleaded for the delay in preferring the appeal. Firstly, the appellant no.1 is about 72 years old suffering from various ailments. Secondly, due to financial crunch of the appellants, the appeal could not be preferred earlier.

Mr. Dasgupta, learned advocate appearing for the respondent no.6, strongly opposes the prayer for condonation of delay. He relies on the decision of the Hon'ble Supreme Court in the case of *Ajay Dabra vs. Pyare Ram and Others*, reported at 2023 SCC OnLine SC 92, in support of his contention that delay in preferring appeal due to alleged financial hardship, ought not to be condoned since financial crunch is not a sufficient explanation for the delay.

We have considered the decision of the Hon'ble Supreme Court. In the facts of that case the Hon'ble Court held that it was not a case that the appellant was not capable of purchasing the court fee. The appellant paid the court fee ultimately, though belatedly. In the facts and circumstances of that case the Hon'ble Court held that the reasons assigned for the delay in filing the appeal could not be valid reasons for condonation of delay since the appellant could have filed the appeal with deficit court fee. Accordingly, the Hon'ble Supreme Court upheld the order of the High Court dismissing the condonation application.

In the present case, there is an additional factor of old age of the appellant no.1. Taking a lenient view, we are inclined to condone the delay of 208 days and we do so.

G.A.No.1 of 2023 is disposed of.

APOT/246/2023, GA/2/2023 & GA/3/2023

By consent of the parties, the appeal and the connected applications are taken up together for hearing.

This appeal is directed against a judgement and order dated March 16, 2022, passed by a learned Judge of this Court in the appellants' writ petition being WPO/1474/2022.

The appellants claim to be owners of a property situated at 17 Fakir Chand Mitra Street, Kolkata – 700009. On the complaint of the appellants, a demolition case was initiated in respect of a building raised by the respondent no.6 herein on a plot of land adjacent to the property of the appellants. The complaint was to the effect that the construction made by the respondent no.6 was not backed by any sanctioned plan of Kolkata Municipal Corporation (in short, "KMC"). The demolition case was registered as DC No.22-D/IV/21-22.

The demolition case culminated in an order of the Special Officer (Building) directing the respondent no.6 to demolish the construction

raised over and above the fourth floor which was found to be unauthorised.

The present appellants participated in the demolition proceedings. There, they alleged that the construction was raised by the respondent no.6 in such a manner that the building of the appellants has been damaged. Accordingly, they requested the Special Officer (Building) for an order directing the respondent no.6 herein to repair the damaged portion of the appellants' building or for payment of compensation. The Special Officer (Building) did not pass such order. Accordingly, the appellants approached the learned Single Judge in the present round of litigation.

Before the learned Single Judge the appellants/writ petitioners contended that even if the Special Officer (Building) did not direct payment of compensation to the writ petitioners, the Indemnity Bond filed by the respondent no.6 for grant of building sanction by KMC, provided an indemnity clause which should be enforced by KMC. The said clause reads as under:

“AND WHEREAS I/We undertake that all precautionary measures shall be undertaken by me/us and no excavation shall be carried out beyond the boundaries of the plot and any damage occurring during the execution of the works or due to excavation made at site to the municipal

services or public utility services or properties/other third person's properties shall be made good by me/us."

On behalf of KMC it was submitted that the Special Officer (Building) did not have the authority to decide whether there has been any damage to the appellants' property or not. It was further submitted that the writ petitioners should have approached KMC at the time when the construction was continuing and not after six months from the date when the order of demolition was passed.

The learned Judge disposed of the writ petition (although the factum of disposal, it seems, is inadvertently not recorded) with the following observations and directions :

"There is substance in Mr. Ghosh's submission, inasmuch as, when a construction was completed sometime ago, it would be difficult to ascertain the damage. In any event, this Court under writ jurisdiction cannot pass any order as prayed for in the writ petition. The petitioners may approach the Executive Engineer (Civil)/Building Department, Borough-V with their grievances. If such approach is made, the authority shall pass a reasoned order and dispose of the representation, so filed in accordance with law upon hearing the petitioner as also the respondent No.6. The reasoned order shall be communicated to the parties, within three months from the date of receipt of the representation.

Report of the police authority is taken on record."

Being aggrieved, the writ petitioners have come up by way of this appeal.

We have heard learned counsel for the parties at length. Mr. Dasgupta, learned advocate appearing for the respondent no.6, says that the writ petitioners approached the learned Single Judge with uncleaned hands and by making misrepresentation of facts. The writ petitioner no.1, who is the first appellant before us, had transferred her share in the property to and in favour of one of her daughters in the year 2021. Therefore, the first appellant could not have described herself as the owner or even co-owner of the property, which is alleged to have been damaged by the building activities of the respondent no.6.

Mr. Chakraborty, learned advocate appearing for the appellants/writ petitioners, says that the daughter of the first appellant in whose favour the first appellant transferred her share in the property is the writ petitioner no.2 and the second appellant. Therefore, there was no material misrepresentation or material suppression or any intention on the part of the writ petitioners to mislead the Court.

We leave it open for the respondent no.6 to urge this point before the appropriate forum in an appropriate proceeding.

We do not find any infirmity in the order under appeal. The only request made by Mr. Chakraborty is that instead of the Executive Engineer (Civil)/Building Department, Borough-IV, the Municipal Commissioner may consider the appellants' representation. We do not find such suggestion to be objectionable.

Accordingly, we modify the order under appeal only to the extent that the appellants may make a representation to the Municipal Commissioner which will be disposed of in accordance with law by a reasoned order by the Municipal Commissioner or any officer authorised by him excepting Executive Engineer, within a period of three months from the date of receipt of the representation as indicated by the learned Single Judge.

We have not gone into the merits of the case.

The appeal and the connected applications (GA/2/2023 & GA/3/2023) are disposed of.

The writ petition being **WPO/1474/2022** shall be treated to be disposed of.

Since we have not called for affidavits, the allegations made in the application are deemed not to have been admitted by the respondents.

(ARIJIT BANERJEE, J.)

(PRASENJIT BISWAS, J.)

sm