

APOT/303/2023
with
WPO/1085/2023
IA No: GA/1/2023
IA NO: GA/2/2023

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

BIJOLI BASAK
Vs.
KOLKATA MUNICIPAL CORPORATION & ORS.

BEFORE:

The Hon'ble JUSTICE ARIJIT BANERJEE

AND

The Hon'ble JUSTICE APURBA SINHA RAY

Date : SEPTEMBER 22, 2023.

Appearance:

Mr. Anirban Majumder, Advocate,

Mr. Somnat De, Advocate

For the appellant.

Mr. Srijan Nayak, Advocate

Ms. Rituparna Maitra, Advocate

....for KMC

Mr. Sayantan Bose, Advocate

Mr. Sarbajit Mukherjee, Advocate,

Ms. Ankita Choudhury, Advocate

Mr. Sattik Rout, Advocate,

...for private respondents.

The Court : This is an application for condonation of delay of 15 days in presenting the appeal.

We have heard learned Counsel for the parties. Causes shown being sufficient, we condone the delay. G.A. 1 of 2023 is allowed.

A judgement and order dated July 12, 2023 whereby the appellant's writ petition being WPO/1085/2023 was disposed of by a learned Single Judge of this Court, is under challenge in this appeal.

There was an earlier round of litigation between the parties which, according to us, is strictly not relevant any more. The grievance of the appellant/writ petitioner is that the private respondents have made unauthorised construction and have thereby closed or filled up the gap that originally existed between the building of the appellant and the building of the private respondents.

The learned Single Judge had called for a report from the Corporation. Such a report was filed on June 9, 2023. On June 9, 2023, the learned Judge directed the Corporation to file a further report specifically mentioning as to whether there was originally any gap in between the two premises prior to the impugned construction being made by the private respondents. It was further directed that the report shall mention as to whether or not any easementary right of the petitioner has been infringed in view of the new construction made by the private respondents and whether any opportunity of hearing was given to the petitioner prior to passing of the order of retention of the construction made by the private respondents.

A report dated June 28, 2023 was filed by the Executive Engineer (Building), Borough –IV and V. The report is to the following effect:

“Pursuant to the order of Hon’ble Justice Amrita Sinha dated 09/06/2023 a hearing has been done on dated 24/6/2023 at the chamber of EE.(C)/Bldg./Br-IV&V. During hearing respondents were present but

petitioner was not present. Previously a building sanction plan was issued u/R-3(2)(e) of KMC Building Rule 2009 and u/Sec-410 of KMC Act, 1980 vide No.-15/Br-IV/2021-22 dated 11/06/2021 along with circular-9 vide Sl.No.-08/Br-IV/2021-22 dated 11/06/2021. During constructional work a deviation was found and also this department served stop work notice u/Sec.401 of the K. M. C. Act, 1980 and subsequently D/Sketch plan was regularized by the Special Officer (Building), approved by the M. I. C.

There was no gap between the premises but there was an open space on the southern side of the premises. That space belongs to the ownership of the private respondent.

There is no easement right of the petitioner.”

Taking note of the report, the learned Judge disposed of the writ petition with the following observations and directions:

“A building sanctioned plan was issued under Rule 3(2) (e) of the Kolkata Municipal Corporation Building Rules, 2009 and notice under Section 401 of the Kolkata Municipal Corporation Act along with Circular-9 vide Sl.No. 08/Br-IV/2021-22 dated 11.06.2021 was issued. The deviation which was found at the time of inspection has been regularized.

Report mentions that there was no gap between the premises of the petitioner and that of the private respondent. There was an open space inside the premises. The private respondent is the owner of the said space.

Learned advocate representing the petitioner denies that any hearing was conducted on 24.06.2023. It has been submitted that the order of regularisation was passed without any opportunity of hearing to the petitioner. The petitioner was not aware of the order of

regularisation that has been passed. The petitioner is aggrieved by the order of the regularization.

Learned advocate representing the private respondent submits, upon instruction that, hearing was duly conducted by the respondent authority in compliance of the direction passed by this Court.

The order of regularisation has been placed before this Court by the learned advocate representing the Corporation.

The order of regularization being an appealable one, it will be open for the petitioner to approach the appropriate forum for remedy. It will also be open for the petitioner to seek condonation of delay in filing the appeal, if any.

Be it recorded that the petitioner was not formally served with a copy of the order of regularisation and the petitioner got the knowledge of the order of regularization after the same was placed before this Court by the learned Advocate representing the Corporation in the month of June, 2023.”

Being aggrieved, the writ petitioner has come up by way of this appeal.

Learned Advocate for the appellant/writ petitioner argued that no opportunity of hearing was granted to the appellant prior to passing of the order for retention of the impugned construction by the private respondents. He further submitted that although the report mentions that a hearing was held on June 24, 2023 pursuant to the order dated June 9, 2023, in fact no such hearing was given. No notice of any such hearing was served on the appellant.

Learned Advocate for the private respondents strongly disputes the submission made on behalf of the appellant. He categorically says, on instructions, that a meeting was held on June 24, 2023. The appellant chose not to attend the meeting.

Whether or not opportunity of hearing was given to the appellant before the retention order was passed is essentially a factual issue and is a disputed one in the present case. The writ Court is ill-equipped to decide such dispute. The learned Single Judge has observed that the order of retention is an appealable one. The present appellant can assail such order by way of a statutory appeal before the Municipal Building Tribunal.

We agree with the learned single Judge. An efficacious alternative remedy is available to the appellant. The Tribunal is much better equipped to decide the factual issues. The appellant would be at liberty to approach the Tribunal, if she is so advised, challenging the retention order in question, in accordance with law.

All points are left open for the Tribunal to decide, if so approached.

We are conscious that the statute prescribes 30 days' time period for preferring appeal under Section 400(3) of the KMC Act, 1980. However, since the appellant has been conducting the present litigation

in this Court, if so approached, the learned Tribunal is expected to take a lenient view of the matter and also extend the benefit under Section 14 of the Limitation Act to the appellant. It is desirable that the learned Tribunal decides the matter on merits.

We have not addressed the merits of the dispute at all.

Both the appeal and the application are 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.)

(APURBA SINHA RAY, J.)

dg/