

(2010) 10 CAL CK 0017

In the Calcutta High Court

Case No : G.A. No. 1115 of 2010, A.P.O. No. 174 of 2010 and W.P. No. 822 of 2007

Biswajit Nandi

APPELLANT

Vs

Dilip Kumar Deb

RESPONDENT

Date of Decision : 05-10-2010

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 400, 400(3), 415(1)
Limitation Act, 1963 — Section 5

Citation : (2011) 2 CHN 5

Hon'ble Judges : Pratap Kumar Ray, J; Harish Tandon, J

Bench : Division Bench

Advocate : A.K. Bhattacharya, Subrata Ghosh and S. Gangopadhyay, for the Appellant; Pramit Ray and Sourav K. Mukherjee for the Respondent No. 1, Alok Ghosh, Swapan Kr. Debnath and Debanghsu Mondal for K.M.C, Biswarupa Mitra and Ashim Chatterjee for the State, for the Respondent

Final Decision : Allowed

Judgement

1. Heard the learned Advocates appearing for the parties.
2. Assailing a portion of the judgment and order dated 10th March, 2010 passed in W.P. No. 822 of 2007 this appeal has been preferred.
3. The portion of the impugned order reads such:

In that view of the matter I give a final opportunity to the private Respondent to demolish the unauthorized structure as mentioned in the order of the Special Officer (Building) dated 28th March, 2008 within a period of 48 hours from the date of service of a copy of this order failing which the writ Petitioner will immediately notify the Kolkata Municipal Corporation who upon such notification will effect such demolition within a period of two weeks from the date of the said notification. On the requisition of the Kolkata Municipal Corporation the local police authorities the Respondent No. 3 will render prompt assistance so that the

order is carried out within the time specified therein,

4. The writ application was filed by the Respondent No. 1 praying the following reliefs:

a) Compliance Rule 26 be dispenses with:

b) Declaration that the impugned structure on the second floor of the said premises being Premises No. 9, Latu Babu Lane, Kolkata-700 006 is illegal, unauthorized and liable to be demolished.

c) A writ of and/or writs in the nature of mandamus do issue commanding the Respondents and each of their men and/or agents and/or servants to do the following:

i) To take necessary steps to demolish the impugned structure on the second floor in respect of premises No. 9, Latu Babu Lane, Kolkata-700006 in terms of the order dated 22nd April, 1997;

ii) The Respondent No. 4 and/or each of their men and/or agents and/or servants be restrained from doing any construction without the approval of the Kolkata Municipal Corporation in respect of any portion of premises No. 9, Latu Babu Lane, Kolkata-700006;

d) A writ of and/or in the nature of prohibition do issue prohibiting the Respondent No. 4 and/or each of their men and/or agents and/or servants from making further construction in respect of any portion of the said premises being premises No. 9, Latu Babu Lane, Kolkata-700006;

e) A writ of and/or in the nature of certiorari commanding the Respondents to transmit all records pertaining to the instant case to this Hon"ble Court so that conscionable justice may be rendered to your Petitioner;

f) Rule Nisi in terms of prayers hereinabove ;

g) Injunction restraining the Respondent No. 4 and/or each of their men and/or agents and/or servants from making any further construction in respect of any portion of the said premises being premises No. 9, Latu Babu Lane, Kolkata-700006 in any manner whatsoever;

h) Ad interim orders in terms of prayers hereinabove;

i) Cost and incident of this application be borne by the Respondents;

j) Such further and/or order or orders be passed and/or direction be given as this Hon"ble Court may deem fit and proper;

5. In course of hearing a supplementary affidavit was filed bringing notice of the Court that further unauthorised construction was made over the roof of the 1st floor by fixing the steel post attached with steel truss. In the rejoinder of the said supplementary affidavit a point was taken by the present Appellant that it was

not at all any permanent construction but temporary in nature for the purpose of celebrating Annapurna Puja Festival by changing the bamboo pole to the steel post. In course of hearing of that issue production of record of the Corporation was made. Learned Trial Judge on the basis of subsequent application and records of Corporation passed an order impugned before us directing to demolish the construction. So far as the alleged unauthorised construction of 1st floor which at the present moment is the subject matter of appeal pending before the Building Tribunal. It is the case of the Appellant before us that by a supplementary affidavit without amendment of the writ application, the issue about alleged further construction by fixing steel post with steel truss, ought not to have been the subject matter of challenge before the learned Trial Judge in the writ application and as such the order of the learned Trial Judge on that issue is not legally sustainable. It is further contended that even if for arguendo, it is assumed that said construction was made unauthorisedly and order of demolition as passed by authority was justified, still then, the Appellant has a statutory right under K.M.C. Act to prefer an appeal against such order of demolition before the Building Tribunal, but due to the order passed by the learned Trial Judge directing to demolish said alleged unauthorised construction, the right of the Appellant to prefer an appeal against the decision of dismissal practically has been taken away.

6. It is further contended that during pendency of the hearing of this appeal, already a statutory appeal has been filed before the Appellate Tribunal setup by the Kolkata Municipal Corporation Act, 1980, assailing the order of demolition.

7. Present mandamus appeal has been opposed by the writ Petitioner/Respondent by contending inter alia that the learned Trial Judge was justified to consider the subsequent event for adjudication while disposing of the writ application. It is further contended that the statutory appeal as has been filed before the Appellate Tribunal is not maintainable due to the reason that by this way the Appellant has opened two parallel forums, one the present mandamus appeal against the order passed by the learned Trial Judge in writ proceeding and another a statutory appeal assailing the order of demolition passed by the Hearing Officer of the Kolkata Municipal Corporation which has been confirmed by the learned Trial Judge by the impugned order.

8. So far as the supplementary affidavit on subsequent event, it appears that in the original writ application alleged fixing of steel post with steel truss, was not at all pleaded with prayer seeking order of demolition. On the basis of the contention raised before the learned Trial Judge by filing respective affidavits now we have to deal with the questions whether further action of the Appellant by alleged fixing of steel post with steel truss, would be considered as a subsequent event for adjudication by the learned Trial Judge during pendency of hearing of the writ application wherein only challenge was made about the illegal construction on 2nd floor. It is settled legal position of law that subsequent event always must be related with and on touching the issue raised in the original

application and it must have some relevancy or impact with reference to the first It's as raised wherein the application for taking judicial notice of subsequent event is being filed. Reliance is placed to the judgment Seshambal (dead) through L.Rs. Vs. Chelur Corporation Chelur Building and Others, The relevant paragraphs 18 to 25 of the judgment read such:

18. That proposition of law is, in our view, fairly settled by the decisions of this Court in Pasupufeti Venkateswarlu case. Krishna Iyer, J. (as His Lordship then was) has in his concurring judgment lucidly summed up legal position in the following words:

4. ...If a fact, arising after the lis has come to Court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the Tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice - subject, or course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the Trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed.

19. To the same effect is the decision of this Court in Om Prakash Gupta case where the Court declared that although the ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit yet the Court has power to mould the relief in case the following three conditions are satisfied:

11. ...(i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted;

(ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties ; and

(iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise.

20. In Hasmat Rai case this Court observed that:

14. ...If the tenant is in a position to show that the need or requirement no more exists because of subsequent events, it would be open to him to point out such events and the Court including the Appellate Court has to examine, evaluate and

adjudicate the same.

21. To the same effect is the decision of this Court in *Baba Kashmath Bhinge* case where relying upon the decision in *Hasmat Rai* case this Court held that in a case of bona fide requirement it is necessary to establish that the landlord needs the premises and the need subsists till a decree is passed in his favour. In a case where such need is available at the time of the filing of the petition but becomes extinct by the time the matter attains finality in appeal for revision no decree will be justified. For that purpose the Court should take all the subsequent events into consideration and mould the relief accordingly.

22. The following passage provides a complete answer to the question raised before us:

2. Equally it is settled by this Court in series of judgments and a reference in this behalf would be sufficient by citing *Hasmat Rai v. Raghunath Prasad* that in a case of bona fide requirement, it is always necessary, till the decree of eviction is passed that the landlord should satisfy that the need is bona fide and the need subsists. In a case where the need is available at the time of filing of the petition, but at the time of granting decree it may not continue to subsist, in that event, the decree for eviction could not be made. Similarly pending appeal or" revision or writ petition, the need may become more acute. The Court, should take into account all the subsequent events to mould the relief. The High Court may not be justified in omitting to consider this aspect of the matter but that does not render the judgment illegal for the subsequent discussion we are going to make.

23. Reference may also be made to *Ramesh Kumar v. Kesho Ram* where *Venkatachaliah, J.* (As His Lordship then was) expressed a similar view in the following words:

6. The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the Court is not precluded from taking a "cautious cognizance" of the subsequent changes of fact and law to mould the relief.

24. Similarly, in *Maganlal* case all that this Court held was that if the litigation keeps extending and number of developments sprouting up during the long interregnum, the Court should adopt a pragmatic approach in the matter and determine whether or not the development pending finalisation of the litigation is such as would completely non-suit the party concerned. This decision is, in our view, no authority for this proposition that subsequent developments having material impact on the rights and obligations of the parties can be ignored by a Court simply because such rights and obligations have to be determined by reference to the date on which the litigation was instituted.

25. The decision of this Court in *Kedar Nath Agrwal v. Dhanraji Devi* has reiterated the legal position after a detailed review of the case law on the subject. That was also a case where two applicants seeking eviction of the tenant had passed away during the pendency of the eviction petition and the question was whether the three married daughters left behind by the couple could continue with the same. This Court observed:

31. In view of the settled legal position as also the decisions in *Pasupuleti Venketeswarlu* and *Hasmat Rai*, in our opinion, the High Court was in error in not considering the subsequent event of death of both the applicants. In our view, it was power as well as the duty of the High Court to consider the fact of death of the applicants during the pendency of the writ petition. Since it was the case of the tenant that all the three daughters got married and were staying with their in-laws obviously, he said fact was relevant and material.

9. Having regard to the judgment as quoted above it appears that subsequent event must not be within the field of new cause of action, and must be in the field of continuation of some act relating to the earlier cause of action or having some nexus with earlier cause of action. From the pleading of the writ application it appears that subject matter of challenge in the writ application was unauthorised construction of 2nd floor and order seeking implementation of order of demolition passed by Hearing Officer of Corporation. The subsequent event not related at all with reference to the said alleged construction of the 2nd floor and its demolition order which is now pending before the Building Tribunal for adjudication and learned Trial Judge having regard to such, as passed an order on the main prayer made in the writ application about said illegal construction of 2nd floor by holding that as same is subject matter of statutory appeal, no writ of mandamus could be issued in the line as prayed for. So far as alleged construction made during pendency of hearing of that writ in the nature by fixing some steel posts with steel truss, surely could not be considered as continuation of cause of action with reference to alleged unauthorised construction of 2nd floor which is now before Appellate Tribunal for decision.

10. Having regard to the aforesaid legal proposition we are of the view that the alleged fixing of steel posts with steel truss, could not be considered as a subsequent event for adjudication in present writ application in the angle as has been considered by the Apex Court. It is settled law that without amendment of writ application by bringing new cause of action as subject matter of challenge, no order could be passed by the Court.

11. Besides the aforesaid legal question involved about entertain ability of any issue by any application in the guise of subsequent event, it appears from the impugned order as already quoted that the learned Trial Judge even did not consider the report of Enquiry Officer who passed an order of demolition to satisfy the adjudicatory contour of judicial review that in fact there was breach of building rules and regulation. There is no finding to the effect in the impugned order in appeal. In absence of any reasoning or finding that the alleged

construction was an unauthorised construction on breach of the building ruled and regulations, we are of the view that impugned order is not legally sustainable. It is settled legal proposition of the law that every order must be with the reason so that a litigant may understand the application of the law on the factual matrix thereof, to agitate the issue for appropriate remedy to higher forum. In the instant case it appears that there is no such finding by the learned Trial Judge to that effect as to why the order of demolition to be carried out forthwith by the owner and failing to do it by Corporation. The records of the Corporation has been produced before us wherefrom it appears that only a notice was issued u/s 400 of KMC Act by the Hearing Officer asking the present Appellant to show cause as to why the appropriate decision should not be reached and along with notice a pressy was served wherefrom it appears that violation alleged by the Corporation was not with reference to any specific building regulation but only the Rules 109 and 110 which relates to structural stability and material used. The Rules 109 and 110 read such:

109. Structural design.-The structural design of foundation, masonry timber, plain concrete, reinforced concrete, pre-stressed concrete and structural steel shall be in accordance with the provisions of-

Loads, Concrete, Foundations, Steel, Wood, Masonary, of the Latest edition of the National Building Code of India.

110. Quality of materials and workmanship.-All materials and workmanship shall be of good quality conforming generally to the accepted standards of the Public Works Departments of the Government of West Bengal or Indian Standard Specifications as included in Part v. on Building Materials and Part VII on Construction Practices and Safety, of the latest edition of the National Building Code of India.

12. Order of demolition as passed is assailable before the appellate authority prescribed under the statute namely, the Kolkata Municipal Corporation Act, 1980. Since the learned Trial Judge already has passed an order directing the Appellant to demolish and in the event of failure to demolish it by the Appellant, direction was given to the Corporation to demolish, the right of appeal u/s 400 Sub-section (3) practically has been made nugatory. It is settled law that the Court of Law will not deprive any person to exercise his statutory right as stipulated in the statute when somebody suffers an order of demolition u/s 400 of the Kolkata Municipal Corporation Act, 1980, an appeal is maintainable under Sub-section (3) of the said Act. The relevant portion of Sub-section (3) of Section 400 reads such:

(3) Any person aggrieved by an order of the Municipal Commissioner made under Sub-section (1) may, within thirty days from the date of the order, prefer an appeal against the order to the Municipal Building Tribunal appointed u/s 415.

13. In view of order directing demolition straightway, the Appellant has been deprived of preferring any appeal under Sub-section (3) aforesaid. Such course

as has been followed by the learned Trial Judge is not legally permissible as it is nothing but putting a restriction and embargo of preferring any statutory appeal under said Sub-section (3) of Section 400. Right to appeal, if is provided in a statute, comes within the domain of substantive right to the party concerned and substantive right cannot be taken away by any Court of Law. If any embargo is placed or imposed by any Court of Law putting obstruction to exercise substantive right that will be nothing but stepping in the shoes of the legislatures. This is otherwise a deprivation to the aggrieved person concerned relating to his protection by preferring an appeal.

14. On perusal of records and considering the grounds for demolition as well as the report of the Hearing Officer when we intended to test the legality and validity of the order of demolition or otherwise when we intended to find out whether there are sufficient material to pass decision of demolition or not, Mr. Ghosh, learned Advocate appearing for the Municipal Corporation submitted before us that the order of demolition, its legality and validity and justification may be considered by the Building Tribunal, appellate authority and that could be subject matter of statutory appeal which has already been filed by the present Appellant. Considering that submission, accordingly we are not dealing with point of legality, validity and justification of said demolition order and we are keeping the point open for decision by the said Building Tribunal in accordance with law.

15. Having regard to those legal proposition as discussed, we are of the view that the order of the learned Trial Judge impugned before us is not legally sustainable. The impugned order accordingly stands set aside and quashed. The appeal is allowed to that extent. Stay application is disposed of with the aforesaid findings.

16. Learned Advocate for the Respondent/writ Petitioner however has prayed before us that a direction directing the Municipal Building Tribunal to dispose of the pending appeal as has been filed by the Appellant assailing the order of demolition of 28th March, 2008 namely the alleged fixing of steel posts with steel truss over the roof of first floor, expeditiously may be passed by this Court.

17. Having regard to the prayer made it is expected that the said Tribunal should dispose of the appeal and the application filed u/s 5 of Limitation Act, as early as possible. Parties shall be at liberty to mention it before the said Tribunal for expeditious disposal of the application and appeal.

18. Records as produced be returned to the learned Advocate for the Kolkata Municipal Corporation.