

(2023) 02 CAL CK 0016

In the Calcutta High Court

Case No : M.A.T. No. 1862 Of 2022, I.A. No. CAN/1, 2/2022

Kajal Majumdar

APPELLANT

Vs

Sk. Mansur Ali & Ors.

RESPONDENT

Date of Decision : 03-02-2023

Acts Referred:

Constitution Of India, 1950 — Article 136

Calcutta Corporation Tribunal (Conduct of Business) Rules, 1965 — Rule 1, 2, 9, 10(1), 10(2), 12(4)

Code of Civil Procedure, 1908 — Order 47 Rule 7, Order 9 Rule 13

Citation : (2023) 02 CAL CK 0016

Hon'ble Judges : Arijit Banerjee, J; Apurba Sinha Ray, J

Bench : Division Bench

Advocate : Arindam Banerjee, Arpita Saha, Tapas Dutta, Mritunjoy Halder, Achintya Kr. Banerjee, Debangshu Mondal

Final Decision : Disposed Of

Judgement

Arijit Banerjee, J

1. This appeal is directed against a judgment and order dated September 22, 2022, whereby an application for recall of an order dated June 21, 2022, being CAN 1 of 2022, was dismissed. The judgment and order dated June 21, 2022, was passed by the learned Single Judge disposing of WPA 2978 of 2020 by directing implementation of a demolition order.

2. The material facts of the case are that on a complaint received from the present writ petitioner who is a neighbour of the appellant herein, to the effect that the appellant has made unauthorised construction, a demolition case was initiated by the Special Officer (Building), Kolkata Municipal Corporation (KMC). The Special Officer (Building) passed a final order, after hearing all the parties, allowing the appellant herein to retain the impugned construction upon payment of certain charges.

3. The writ petitioner herein carried such order in appeal before the Municipal Building Tribunal being B.T Appeal No. 68 of 2014. The Tribunal reversed the order of the Special Officer (Building) and passed an order dated December 9, 2022, directing demolition of the construction put up by the appellant herein.

4. Alleging non-implementation of the order of demolition, the present writ petitioner approached the learned Single Judge by filing W.P.A 2978 of 2020. By a judgment and order dated June 21, 2022, the learned Judge disposed of the writ petition by directing the Commissioner of 'KMC'- "to immediately takes steps for implementation of the order passed by the Municipal Building Tribunal on December 9, 2019, at the earliest, positively within the period of 3 months from the date of communication of a copy of this order." The present appellant was a party respondent but was not represented on the day when the writ petition was disposed of.

5. It appears that on the strength of the said order dated June 6, 2022, people from KMC went to demolish the impugned construction put up by the appellant. The appellant contending that only thereupon the appellant came to know of the order dated June 6, 2022, as also the demolition order passed by the Municipal Building Tribunal, the appellant filed an appeal being M.A.T 1342 of 2022 along with a stay application and an application for condonation of delay of 27 days in filing the appeal.

6. It was submitted before a Co-ordinate Bench that the appellant had engaged a lawyer to contest the writ petition and she was all throughout under the impression that her interest was being protected by her advocate. From time to time, she enquired from her advocate as regards the status of the case and she was assured that the case has not yet been heard. Suddenly people from KMC visited her house to demolish the same. She has been informed that her advocate passed away in May, 2022, and hence, her case went un-represented before the learned Single Judge.

7. Upon hearing the parties the Co-ordinate Bench by a judgment and order dated August 25, 2022, disposed of the appeal and the connected applications with the following observations:-

"We are not inclined to go into the merits of the case. The appellant may approach the learned Single Judge with an appropriate application explaining her absence on the day the impugned order was passed. If such an application is made, the learned Judge is requested to decide the same in accordance with law.

Only to grant a breathing space to the appellant, let the demolition not be carried out for a fortnight from date."

8. Pursuant to the liberty granted by the Division Bench, the appellant herein approached the learned Single Judge with an application for recall of the order dated June 21, 2022. By the impugned judgment and order dated September 22, 2022, such recalling application was dismissed. The learned Judge recorded in

the order that the entire writ petition was heard on merits once again. Having heard the parties the learned Judge dismissed the recalling application with the following observations:-

"It appears from the order passed by the Municipal Building Tribunal that the private respondent Kajol Majumder was served with the summons. She initially appeared but thereafter chose not to contest the proceeding. The Tribunal passed order on 21st December, 2019.

The petitioner in the present writ petition sought for implementation of the same. The Court merely directed the Corporation to implement the said order.

The Court is of the opinion that the Special Officer (Building) whose order was carried in appeal is not a necessary party required for adjudication of the dispute in the present writ petition. The order passed by the Special Officer (Building) had already been examined and scrutinised by the Tribunal and necessary order has been passed.

If any person aggrieved by the order passed by the Tribunal chooses not to prefer any appeal or to challenge the same before a superior forum then the said order is liable to be implemented. The conduct of the applicant/private respondent in entering appearance before the Tribunal at the initial stage and thereafter not proceeding with the same implies that the private respondent took the matter very casually and failed to appreciate the consequence of her non-appearance.

The technical objection raised by the private respondent with regard to the manner in which the respondent no.2 has been described is also not accepted by the Court.

The order passed by the Tribunal not being challenged before any competent forum has attained finality and ought to be implemented by the respondent authority.

As regards the prayer made in the writ petition, it is for the ends of justice, that the same may be modified.

The Court has passed order for implementation of the order passed by the Tribunal. The order passed by this Court on 21st June, 2022 is accordingly not required to be interfered with."

9. Being aggrieved the private respondent in the writ petition is before us by way of this appeal.

10. Appearing for the appellant, Mr. Arindam Banerjee, learned Advocate, submitted that the Tribunal disposed of the appeal by passing demolition order against the appellant herein, without serving notice of appeal on the appellant herein. He submitted, with reference to the records of B.T. Appeal No. 68 of 2014, which we had called for, that at the initial stage, when the application for condonation of delay and the stay application were heard by the tribunal, the

appellant herein had been notified. The appellant herein participated in such proceedings. The appellant participated till the stage when the stay application was allowed on August 25, 2017. Thereafter, no notice was served on the appellant herein communicating any date of hearing of the appeal. It appears from the records that by an order dated September 2, 2019, the Tribunal fixed November 18, 2019, as the date for further order. On the adjourned date, suddenly hearing of the appeal was taken up and the complainant's/appellant's submission was recorded. On the next day i.e., November 19, 2019 the, hearing was concluded after hearing representative of KMC. The matter was fixed for judgment on December 9, 2019. On that date the Tribunal passed its judgment recording that the appellant herein who was the respondent no. 6 in the appeal before the Tribunal, did not appear before the Tribunal for a long time.

11. Mr. Banerjee referred to Rules 10 (1) and (2) of Calcutta Corporation Tribunal (Conduct of Business) Rules 1965, which read as follows:-

"(1) Unless an appeal be dismissed for any reason referred to in rule 9, the President shall call for the relevant record from the Commissioner and notice of the appeal shall be issued to all respondents fixing a date for their appearance.

(2) After service of notice on the respondents and receipt of the record from the Commissioner, the President shall fix a date for hearing the appeal."

12. Mr. Banerjee submitted that the principles of natural justice have been completely violated in the present case by the Tribunal vitiating the judgment and order passed by the Tribunal on December 9, 2019. Such judgment and order is null and void and non-est in the eye of law. The learned Single Judge by the order dated June 21, 2022, could not have directed implementation of the Tribunal's order since the same was a nullity. Consequently, the learned Judge ought to have allowed the recalling application and erred in dismissing the recalling application by the judgment and order impugned in this appeal.

13. Appearing for KMC, Mr. Achintya Banerjee, learned Advocate, submitted that the conduct of the appellant disentitles her to any equitable relief. She voluntarily stayed away from the proceedings before the Tribunal.

She had due notice of the hearings before the Tribunal and participated therein. After the stage of the stay application being allowed by the tribunal, the appellant herein absented herself in such proceedings. It was her duty to find out when the appeal was fixed for hearing and contest the appeal.

After having served notice of the interlocutory proceedings on the appellant, the Tribunal did not have any further obligation to serve on her notice intimating the date of hearing of the appeal. In any event, the appellant herein did not take recourse to the remedy provided by Rule 12(4) of the 1965 Rules which reads as follows:-

"(4) (a) If the appellant appears and the respondent does not appear when the appeal is called on for hearing, the Tribunal shall, after hearing the appellant,

proceed to dispose of the appeal.

(b) Where an appeal is heard in the absence of the respondent and judgment is pronounced against the respondent, he may apply for re-hearing the appeal and if he satisfies the Tribunal that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Tribunal shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit.”

14. Mr. Banerjee submitted that the appellant thought that the demolition order of the Tribunal will never be implemented. Hence the appellant merrily sat tight without taking any step for assailing the Tribunal’s order. Mr. Banerjee prayed for dismissal of the appeal.

15. Appearing for the writ petitioner, who was the complainant and appellant before the tribunal, Mr. Datta, learned Advocate, submitted that the appeal is not maintainable. Relying on the decisions of the Hon’ble Supreme Court in the case of DSR Steel (private) limited v. State of Rajasthan & Ors., reported at (2012) 6 SCC 782 and in the case of Bussa Overseas & Properties Private Limited & Anr. v. Union of India & Anr., reported at (2016) 4 SCC 696, Mr. Datta submitted that since the appellant has not challenged the order dated June 21, 2022, which still subsists, this appeal is not maintainable. He relied on the observations in paragraph 25.3 of the reported judgment in the case of DSR Steel (private) limited v. State of Rajasthan & Ors. (supra) which reads as follows:-

“25.3 The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or Court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.”

16. He also relied on the observations in paragraphs 15, 19, 28 and 29 of the reported judgment in the case of Bussa Overseas & Properties Private Limited & Anr. v. Union of India & Anr.(supra):-

“15. In Shanker Motiram Nale, a two-Judge Bench has opined that an appeal against the order rejecting the application for review of a judgment and decree passed by the learned Single Judge is not appealable as appeal is not against the basic judgment. To arrive at the said conclusion, the Court has referred to Order 47 Rule 7 of the Code of Civil Procedure, 1908 that bars an appeal against the order of the Court rejecting the review.

19. In Vinod Kapoor, it has been held thus:-(SCC pp. 382-83, paras 11-12)

"11. Moreover, on the High Court rejecting the application for review of the appellant, the order rejecting the application for review is not appealable by virtue of the principle in Order 47 Rule 7 CPC. In Shanker Motiram Nale v. Shiolalsing Gannusing Rajput, Suseel Finance & Leasing Co. v. M. Lata and M.N. Haider v. Kendriya Vidyalaya Sangathan cited by the learned Counsel for Respondent 8, this Court has consistently held that an appeal by way of special leave petition under Article 136 of the Constitution is not maintainable against the order rejecting an application for review in view of the provisions of Order 47 Rule 7 CPC.

12. There is nothing in the decisions cited by the appellant to show that this Court has taken a view different from the view taken in Abhishek Malviya v. Welfare Commr. with regard to maintainability of an appeal by way of special leave under Article 136 of the Constitution against an order of the High Court after an earlier special leave petition against the same order had been withdrawn without any liberty to file a fresh special leave petition. Similarly, there is nothing in the decisions cited by the appellant to show that this Court has taken a view that against the order of the High Court rejecting an application for review, an appeal by way of special leave under Article 136 of the Constitution is maintainable."

28. The aforequoted passage in Mahendra Saree Emporium (2) case has to be appositely understood. The three-Judge Bench has held that any legislation subordinate to the Constitution cannot whittle down or take away the jurisdiction and powers conferred on the constitutional courts of the country. The decisions which we have referred to earlier deal about the maintainability of the challenge to the order of review when the main order is not assailed. The real test is even if the order passed in review is set aside, the order that is not challenged cannot be set aside. The decision in Eastern Coalfields Ltd. as has been rightly opined in Ripa Sarma case, has been rendered in ignorance of the earlier judgments of co-equal strength. That apart, we are inclined to agree with the view in Ripa Sarma wherein it has been observed that the submission with regard to the merger of the main order with the order in review has been merely noticed in Eastern Coalfields Ltd. and not accepted.

29. Needless to state that when the prayer for review is dismissed, there can be no merger. If the order passed in review recalls the main order and a different order is passed, definitely the main order does not exist. In that event, there is no need to challenge the main order, for it is the order in review that affects the aggrieved party."

17. On merits Mr. Datta adopted the submission made on behalf of KMC. He also prayed for dismissal of the appeal.

18. We have heard learned Counsels for the parties at length. In our view the appeal can be decided on a short point of law.

19. The admitted facts are that the writ petitioner herein lodged a complaint of the appellant herein having made unauthorised construction. A demolition case was initiated on the basis of such complaint. The Special Officer (Building), upon hearing the concerned parties allowed the appellant herein to retain the alleged unauthorised construction on certain terms. The writ petitioner herein appealed against such order before the Municipal Building Tribunal. The appeal was accompanied by an application for condonation of delay and an application for stay of operation of the order of the Special Officer (Building).

20. We called for the records of the appeal from the Tribunal. The records show that the appellant herein participated through her lawyer at the hearing of the application for condonation of delay and also at the hearing of the stay application. Both the said applications were allowed by the Tribunal.

21. Admittedly no further notice was served by the Tribunal or the appellant before it being the present writ petitioner, on the present appellant prior to the Tribunal taking up the appeal for hearing. We are unable to accept the submission of learned Advocate for KMC that since the appellant had participated at the interlocutory stage, i.e., at the hearing of the application for condonation of delay and at the hearing of the stay application, there was no obligation on either the Tribunal or the appellant before it to serve any further notice of hearing of the appeal on the appellant herein. Rules 1 and 2 of the 1965 Rules clearly contemplate that where an appeal is not dismissed for any reason referred to in Rule 9, the President of the Tribunal shall call for the relevant records from the Commissioner of the Corporation and after service of notice on the respondents intimating a date for their appearance and after receipt of the records from the Commissioner, the President shall fix a date for hearing the appeal.

22. In our considered view it cannot be contended that just because the appellant herein appeared before the Tribunal at the interlocutory stage, she was not entitled to receive notice of hearing of the appeal. Hearing of an application for condonation of delay or hearing of an interlocutory application for stay of the impugned order is entirely different from hearing of the appeal on merits. None of the respondents have been able to demonstrate before us with reference to the records of the case that notice of hearing of the appeal was served on the appellants herein. It is clear that the appeal was heard and decided without serving notice of appeal on the appellant herein.

23. The appellant herein was, therefore, denied an opportunity of hearing by the Tribunal before deciding the appeal. This would be a flagrant breach of audi alteram partem – one of the two original limbs of the principles of natural justice – meaning thereby that an opportunity of hearing must be granted by an authority to a person who is likely to be affected by any order that the authority may pass. The basic idea is that nobody can be condemned unheard. If an allegation is made against a person, on the basis of which an authority – whether judicial, quasi-judicial or executive – proposes to pass an order or take action

which may have adverse consequences for that person, then, prior to passing such order or taking any action, the authority must afford a reasonable opportunity of hearing to that person so that he gets a chance to refute the allegation or otherwise deal with the same. This salutary principle has become deeply embedded in our justice dispensation system and indeed in the legal system all over the world. Legal justice cannot be achieved without observing the principles of natural justice.

24. It is now well settled that an order passed in breach of the principles of natural justice is null and void and non-est in the eye of law. It has no effect in law. The party aggrieved by such an order can challenge it at any stage, even at the stage of execution, and even in a collateral proceeding. In the present case, we have no doubt in our mind, that the order of the Tribunal is a nullity being violative of the principles of natural justice. That order was put in execution by the complainant by filing the present writ petition. The learned Judge directed implementation of the Tribunal's order of demolition passed against the present appellant in her absence. When demolition was sought to be effected by the KMC people, the appellant came to know of the demolition order of the Tribunal. She preferred an appeal against the learned Single Judge's order directing execution of the demolition order. A Co-ordinate Bench did not interfere since although the appellant was a party to the writ petition, she had chosen not to appear before the learned Single Judge. The Co-ordinate Bench disposed of the appeal by granting liberty to the appellant to approach the learned Single Judge with an appropriate application. The appellant did so. The learned Judge recorded that Her Lordship was hearing out the writ petition afresh. The learned Judge finally concluded that there was no reason to recall the order dated June 21, 2022, whereby the Tribunal's demolition order had been directed to be implemented. The learned Judge was of the view that the appellant voluntarily stayed away from the hearing of the appeal before the Tribunal.

25. We are unable to agree with the learned Single Judge. No notice of appeal having been served on the appellant herein as required by Rules 1 and 2 of the 1965 Rules, it cannot be said that the appellant's absence at the hearing of the appeal before the Tribunal was intentional. We have already indicated our view that the Tribunal's order is a nullity. The learned Judge failed to appreciate this aspect of the matter and consequently erred in not recalling the order dated June 21, 2022, whereby the Tribunal's demolition order had been directed to be implemented.

26. Learned Advocate representing KMC submitted that there was an alternative remedy available to the appellant by way of approaching the Tribunal for recall of its order under Rule 12(4) of the 1965 Rules, and therefore, this appeal should not be entertained. This argument does not impress us. Firstly, the appellant herein is not the writ petitioner. Secondly, the appellant has been able to persuade us that she was completely in the dark regarding the hearing of the appeal before the Tribunal and the final order of the Tribunal directing demolition

of the construction put up by her. She came to know of the order only when pursuant to the order impugned in this appeal the KMC people went to demolish the impugned construction in terms of the Tribunal's order. The appellant did not act unreasonably in assailing the order of the learned Single Judge. She was however sent back to the learned Single Judge by the Division Bench. Her recalling application was dismissed. Hence this appeal. In the facts and circumstances of the case, we do not think that the appellant has acted unreasonably in approaching this Court directly in emergent situation without taking recourse to Rule 12(4) of the 1965 Rules.

27. The point urged on behalf of the writ petitioner that the appellant, not having assailed the parent order dated June 21, 2022, cannot maintain this appeal also does not find favour with us. Pursuant to liberty granted by a Coordinate Bench, the appellant approached the learned Single Judge with an application for recall of the order dated June 21, 2022. Such application was dismissed. It was perfectly in order for the appellant to assail such dismissal order before us. If we allow this appeal, which we propose to do, the same will amount to allowing the appellant's application for recall of the learned Single Judge's order dated June 21, 2022. Hence no separate appeal against such order need be filed.

28. The two judgments relied upon by learned Advocate for the writ petitioner, in our considered view, have no manner of application to the facts of the present case. Both the judgments deal with a situation where an application for review of an order has been rejected. The said decisions discuss as to when there will be a merger of the original order with the order passed on the review application. In the facts of the present case, we are not concerned with any review application. The application that was dismissed by the learned Single Judge was one in the nature of an application under Order 9 Rule 13 of the Code of Civil Procedure which reads as follows:-

"13. Setting aside decree ex parte against defendant.- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was pass for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.]

[Explanation.- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]”

29. The learned Single Judge, on such application, reheard the writ petition and came to the conclusion that there was no reason to alter or recall the earlier order dated June 21, 2022. In fact, the learned Judge affirmed her Ladyship’s earlier order on merits. The learned Judge could have reheard the writ petition only on the basis that the earlier order dated June 21, 2022, stood recalled and the writ petition was being heard afresh. Upon rehearing, the learned Judge passed the same order as Her Ladyship did on June 21, 2022, holding that there was no warrant to interfere with the order dated June 21, 2022. In our considered opinion there was no legal requirement for the appellant to file an appeal also against the order dated June 21, 2022.

30. In view of the aforesaid this appeal is allowed. The judgment and order under appeal is set aside. We declare the demolition order passed by the Municipal Building Tribunal on December 9, 2022, to be a nullity. Consequently the order dated June 21, 2022, passed by the learned Single Judge in the writ petition becomes ineffective.

31. The Tribunal shall now hear the appeal being BT Appeal No. 68 of 2018 afresh after serving due notice of appeal on all the parties and shall decide the appeal as expeditiously as possible and positively within 6 months from the date of a copy of this order being placed before the Tribunal by the parties hereto. We clarify that we have not gone into the merits of the case. It will be entirely up to the Tribunal to take a fresh decision upon hearing all parties as to whether or not the order of the Special Officer (Building) assailed before the Tribunal, can be sustained.

32. The appeal and the connected applications are accordingly disposed of.

33. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.