

(2011) 12 CAL CK 0028
In the Calcutta High Court

Case No : M.A.T. No. 956 of 2010 and C.A.N. No. 8091 of 2011

State of West Bengal and Others

APPELLANT

Vs

Biswanath Bhattacharya and Others

RESPONDENT

Date of Decision : 01-12-2011

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2012) 1 CALLT 386 : (2012) 5 CHN 308

Hon'ble Judges : Pratap Kumar Ray, J;Md. Abadul Ghani, J

Bench : Division Bench

Advocate : Amal Baran Chatterjee and Mr. Swapan Kumar Chatterjee, for the Appellant; Arunabha Ghosh and Mr. Kartik Kumar Roy for the Respondent No. 1, for the Respondent

Judgement

1. The Judgment of the Court was as follows:

Re: C.A.N. No. 8090 of 2011 (Section 5)

Let supplementary affidavit as filed today be kept with the record.

Heard learned Advocates appearing for the parties.

2. Assailing the judgment and order dated 7th December, 2004 passed in C.R. No. 10839 (W) of 1981, this writ application has been filed.

3. The impugned order reads such:

7.12.2004. - By this writ application, the petitioner has challenged the Government communication dated 12th March, 1981 whereby allotment of a plot of land in favour of the petitioner at Block DD in Sector-I of the Salt Lake Township was cancelled. Rule was issued and It was duly served. None has come forward to file Affidavit-in-opposition.

I have gone through the petition and I have heard Mr. Chatterjee. It appears to me that the petitioner was initially allotted the aforesaid plot of land by the order

of the appropriate authority. In terms of the said allotment the petitioner has paid 50% premium and even the petitioner was intimated about allotment of the plot and the petitioner identified and also expressed his choice about the plot. Everything was done and then the petitioner was waiting for further intimation for payment of the balance amount of premium. Instead of receiving such positive intimation, the petitioner has received the aforesaid impugned communication. I am of the view that the respondent Government cannot resale from its contract since after the petitioner having acted upon and performed his part, the respondent Government should have performed its part by passing necessary order of allotment accepting the balance amount of premium. Moreover, it appears from the impugned communication that this order of cancellation is bad in law as this should not have been done without giving a chance of hearing to the petitioner. Since valuable right was accreted in favor of the petitioner by way of allotment and such right has been taken away without giving any hearing, therefore on that score also the impugned communication is not sustainable in law.

I, accordingly, set aside the impugned communication. Therefore, I direct the Government to execute the necessary lease deed upon petitioner's paying the balance premium of Rs. 80,000/- (Rupees Eighty thousand) along with other interest at the rate of 18% to be calculated from the date of filing of the writ petition. Such payment shall be made and/or be tendered within four weeks from the date of communication of this order. On such payment being made, necessary lease deed shall be executed. In default of executing the lease deed, the learned Registrar General shall nominate the appropriate Officer not below the rank of Additional Registrar to execute the lease on behalf of the Government in favour of the petitioner.

The writ petition is allowed and consequently the Rule is made absolute. ...

4. It appears that an ex parte order was passed making the Rule absolute. This appeal has been preferred by State of West Bengal assailing the said order. In connection with the appeal, an application u/s 5 of the Limitation Act has been filed. Admittedly, there was a delay for 2380 days, a long delay. To explain the delay, contention made in paragraphs 4, 5 and 6 of the application u/s 5 of the Limitation Act, where from it appears that there was a change of department in Government level and the issue to file appeal was under process. A detailed discussion of events regarding decision to challenge the impugned order in appeal has been stated in paragraph 6. The process started from the year 2008, after receiving the certified copy of the order. A supplementary affidavit has been filed as per direction of Court in connection with the application u/s 5 of the Limitation Act disclosing the documents regarding factual issue of the case. The writ application was moved by the respondent/writ petitioner assailing the excommunicated order canceling proposal for allotment of plot in Salt Lake Township. By the letter dated 13.3.1981 appellant refused to revive the order of cancellation. It appears from the documents annexed that on 13th May 1972, in

terms of the "application of the present writ petitioner, an intimation was given that a plot measuring 16 cottas more or less in the Salt Lake Township may be demised to him on lease subject to terms and conditions as stipulated thereof. Under Clause (II) of the said letter it stipulates that 50% of salami should be paid within 60 days or within the extended time as to be allowed and rest 50% amount of salami should be deposited in one installment from the date of issue of letter of Intimation that the land was ready for delivery of possession. The concerned Clause (II) reads such:

(II) Fifty percent of the salami will have to be paid within 60 (sixty) days from the date hereof or such extended time as the Government may allow on satisfactory grounds being made out by deposit in the Reserve Bank of India, Calcutta by a chalan (in duplicate) in T. R. Form No. 7 after getting the chalan endorsed by the Executive Engineer, Salt Lakes Construction Division of 9. Brabourne Road, Calcutta-1. The balance amount of the salami will have to be paid within two months from the date of issue of letter intimating that the land is ready for delivery of possession. The entire amount of the salami may however be deposited in one installment within 60 (sixty) days from the date hereof or within such extended period as may be agreed to by the Government for such payment. The original receipted chalan should be made over to the said Executive Engineer and an acknowledgement receipt for the same obtained from him. No interest shall be payable on the salami so paid.

5. There is no annexe in the supplementary affidavit that any letter of intimation was given identifying the plot but it appears that a letter was given identifying the block wherein a plot measuring 16 Cottahs was allotted. The block mentioned as DD-Block Sector-I Salt Lake Township. From the letter dated 4th May, 1973 annexed as Annexe "D" in the writ application, it appears that the writ petitioner was requested to appear to specify his choice of plot in the concerned Block-DD. A condition stipulated in that letter that failing to turn up, a suitable plot would be earmarked for the writ petitioner. It is the contention of present appellants/ State that writ petitioner did not appear. No communication has been annexed at the present moment in the supplementary affidavit about letter of any intimation earmarking the particular plot number as was allotted to the petitioner. It is the contention of learned Advocate for appellants that writ petitioner was allotted other two plots.

6. However, having regard to the fact that an ex parte order was passed by learned Trial Judge without hearing the State of West Bengal and without considering any affidavits as no affidavit was filed by the State, we are of the view that when the appellant/State has come up with supplementary affidavit annexing many documents, it requires adjudication by Appeal Court to consider the issue about the scope of judicial review of the impugned decision as well as legality and validity of the order impugned in the writ application whereby concerned department refused to revive the order canceling the allotment decision.

7. Hence, prima facie there is a merit for adjudication of the issue by us. Since there is a prima facie merit for adjudication and there was an ex parte order, we are of the view that section 5 application should be allowed to decide the issue on merit. It is a settled legal position of law now that a litigant should not be ousted from the Court of Law on technical ground of limitation but if there is prima-facie merit for adjudication, delay should be condoned. Reliance is placed to the judgments passed in the cases State of Nagaland Vs. Lipok AO and Others, Ram Nath Sao @ Ram Nath Sahu and Others Vs. Gobardhan Sao and Others, and State of Haryana Vs. Chandra Mani and others, , a judgment of 3-Judges" Bench. In Chandramoni (supra), the Apex Court held that a pragmatic approach should be applied and not pedantic approach. While considering the condonation of delay, it has been held further that when the State Government is a litigant seeking condonation of delay, the approach should be pragmatic and there is no need of explaining every day's delay. In the case reported in AIR 1991 SC 90, the Apex Court condoned delay of nineteen years having regard to prima facie merit of the case. On sufficiency of cause it has been explained by Apex Court that it is not limited to the period of time but based on logic of averment on delay. Reliance may be placed to the judgment passed in the case Hemant Bhimappa Gadivaddar vs. State of Karnataka, 2000 (9) SCC 732 and Chandramoni (supra) wherein concept of Limitation Act was discussed in detail to hold that approach of Court should be pragmatic.

8. In the instant case, an ex parte order was passed against the State of West Bengal and Rule was made absolute by the impugned order and having regard to the correspondence and the communications as annexed in the supplementary affidavit and in the writ application, we are of the view that a prima facie case made out for our consideration in appeal.

9. Having regard to the aforesaid findings and discussions, we are satisfied to condone delay, being satisfied with sufficiency of reason and prima facie adjudicatory merit. Delay accordingly stands condoned. Application u/s 5 of the Limitation Act is allowed.

10. However, to balance the situation, a token cost of Rs. 100/- is imposed to the State/appellant which to be paid to the respondents.

11. The appeal is now in order.

12. Registry is directed to make necessary endorsement to that effect.

13. Stay application is taken up for hearing in view of urgency of the matter as a contempt proceeding is pending before the learned Trial Judge.

14. Having regard to our aforesaid findings as there is a prima facie merit for adjudication of the issue, there will be an interim order of stay of the impugned judgment and order dated 7th December, 2004 passed in C.R. No. 10839 (W) of 1981 for a period of six weeks after Christmas vacation.

15. Let there be an affidavit-in-opposition of the stay application by one week

after Christmas vacation, reply, if any by two weeks thereafter and the matter will appear in the list four weeks after Christmas vacation for hearing as fixed item.

16. Since appellant was not heard when impugned judgment was delivered and no affidavit was filed answering the writ application, the appellant is at liberty to file affidavit-in-opposition of the writ application within one week after Christmas vacation, reply thereto, if any, by two weeks thereafter. As the writ petitioner is appearing, the appeal is ready for hearing.

17. Service of notice of appeal and other formalities stand dispensed with. Let informal paper book be filed by annexing all documents, namely, writ application, respective affidavits as to be filed as per order of Court, stay application and its respective affidavits as to be filed.

Stay application and appeal both to be heard analogously.

Pratap Kumar Ray, J.

Md. Abdul Ghani, J.