**(2009) 03 CAL CK 0030**

**Calcutta High Court**

**Case No:** M.A.T. No. 6 of 2009

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| Shri K.N. Suresh | APPELLANT |
| Vs | |
| The Lt. Governor and Others | RESPONDENT |

**Date of Decision:** March 31, 2009

**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Limitation Act, 1963 - Section 14, 5

**Hon'ble Judges:** Sanjib Banerjee, J; Amit Talukdar, J

**Bench:** Division Bench

**Advocate:** S. Ganguly and N.A. Khan, for the Appellant; Krishna Rao, H.R. Bahadur and Anjili Nag, for the Respondent

**Judgement**

Sanjib Banerjee, J.

The appeal is directed against an order disposing of a writ petition in which a decision rendered by the appellate authority under the Andaman and Nicobar Islands (Municipal) Regulation, 1994 had been assailed. The effect of the appellate order being set aside is that a direction for the demolition of a construction is revived.

2. The appellant purchased a piece of land measuring about 800 sq. ft. along with a double-storied house standing thereon from a person who had bought the property from the writ petitioner under a Deed of Sale of September 17,2001. It appears that the writ petitioner is the owner of a contiguous plot of land at Junglighat in the Port Blair Tehsil of the Andamans District. The writ petitioner complained to the Municipality in the year 2003 that the appellant herein had begun illegal construction on his plot of land. The Municipality issued a notice on October 29, 2003 charging the appellant with violation of the Municipal Building Bye-laws and acting in breach of Section 168(f) of the said 1994 Regulation. The specific violation complained was as follows:-

The RCC building being constructed by you without submission of any building plan or obtaining approval of any building plan from the Municipal Council and without leaving required, setback between building line and plot line.

3. The notice required the appellant to demolish the unauthorized construction, forbear from carrying out further work and show cause as to why the unauthorized construction should not be demolished.

4. The appellant responded by a writing of October 31, 2003, citing the following justifications:

1. Sir, I have purchased a piece of land with a portion of building from Mr. Suresh Kumar for which D. C. has already given approval Vide his letter No. under Case No. 466/99/DC dt. 11.5.2001.

2. Mr. Suresh Kumar has purchased the above said building from Mrs. P. Sarla Kumari W/O Shri S. R. S. Panicker, MUNICIPAL COUNCIL has already approved the building plan vide Approval No. 1258 dt. 2.8.1994.

3. The Kitchen portion and toilet portion of my building was also of wooden posts and got decayed and was in dangerous position. And the out side Planks also got decayed due to heavy rains. As timber is not available in the market I have repaired it with RCC columns and out side walls I have removed, the planks and put Hollow Blocks to protect the building from collapsing. I have not demolished my existing building and constructed a new RCC Building. My timber building still exists. So who ever reported, that I have constructed an RCC building is totally wrong and baseless.

5. A provisional order followed from the Municipal Council on December 4, 2003 in exercise of its authority u/s 168(f) of the said Regulation of 1994. The Council directed the appellant to demolish the unauthorized construction within 30 days from the date of receipt of the provisional order; or else, render the unauthorized construction liable for demolition by the Municipal Council at the appellant''s costs and expenses. The counts of violation levelled against the appellant were amplified by the Municipal Council:

1. The RCC building is being constructed without obtaining approval of any building plan from the Municipal Council.

2. The building is being constructed without leaving required setback between building line and plot line which is non-compound able offence.

3. The retaining wall made on the rear side is used as the wall of septic tank which may cause leakage/seepage of filthy water leading to an unhygienic situation to the building on the lower side.

6. The appellant furnished his reply on December 9, 2003 asserting the same grounds submitted by his previous letter and claiming that the appellant had left enough room by way of setback. The appellant insisted that the provisional order

issued by the Municipal Council was based on a false report. In short, the appellant contended that the appellant had merely bolstered the existing structure and had only attempted to refurbish the two-storied building already standing on the land.

7. The appellant did not demolish any construction that he had undertaken and the Municipal Council chose not to proceed with the demolition of its own accord. The writ petitioner brought W.P. No. 48 of 2007 before this Court, imploring that the Municipal council be goaded into action and carry out the demolition. Such previous writ petition was disposed of on March 2, 2007 with a direction on the Municipal Council to forthwith take steps in accordance with law after affording the appellant herein and the writ petitioner an opportunity of hearing.

8. On May 11, 2007, the Municipal Council, in exercise of powers conferred by Section 168(f) of the said Regulation of 1994, ordered the immediate demolition of the unauthorized construction. A date and time were set for the appellant to complete the demolition, tailing which the Municipal Council was to undertake the same.

9. It is not in dispute that u/s 187 of the said Regulation of 1994, an appeal lay from the order of May 11, 2007. The appellant, however, chose to write a letter on June 6, 2007 to the Deputy Commissioner who is the appellate authority. The appellant thereafter instituted W.P (AN) No. 165 of 2007 before this Court which was dismissed on July 20, 2001 but the appellant was left-free to prefer an appeal and such appeal, if filed, was directed to be considered in accordance with law upon notice to all parties to that writ petition. On the same day, the appellant filed an appeal in proper form before the Deputy Commissioner. It is the order of January 2, 2008 rendered on such appeal that was challenged in the writ petition which culminated in the judgment and order under appeal.

10. The learned Single Judge repelled the contention that the writ petitioner be left to pursue the alternative remedy of appeal on the ground that the Deputy Commissioner had acted without jurisdiction. The impugned order of January 20, 2009 noticed that the appeal was filed before the Deputy Commissioner only on July 20, 2007 which was beyond the period of limitation, but the Deputy Commissioner proceeded on the basis of the appeal being lodged upon the receipt at his office of the appellant''s letter of June 5, 2007. The learned Judge held that the letter dated June 5, 2007 could not be treated as an appeal, particularly as the appeal in proper form was only filed on July 20, 2007; and that such subsequently filed appeal could not have been entertained in the absence of an application for condonation of the delay in preferring the appeal. The impugned order found that the Deputy Commissioner had acted improperly and illegally in observing that the period spent by the appellant in course of W.P.(AN) No. 165 of 2007 was liable to be excluded in computing the period of limitation. The learned Judge observed that the plea of the appellant that he had submitted, ex post facto, a plan for sanction of the construction could not be countenanced as the construction had already been

completed. The judgment concluded that the filing of a petition praying for sanction of a plan for construction which had already been completed was impermissible as a construction without a sanctioned plan would always be unauthorized construction and such construction was invariably to be demolished. The impugned judgment found that the Municipal Council had attempted to regularize an illegal act committed by the appellant and that the Deputy Commissioner "indirectly provided support" in such regard.

11. Counsel for the appellant says that subsequent to the appellant''s receipt of the two orders of October 23, 2003 and December 4, 2003, the appellant had applied for approval of the building plan on April 26, 2004 which was modified and re-submitted on June 7, 2004. The appellant suggests that the Municipal Council had the authority to seek compensation in lieu of demolition and the Municipal Council gave no reasons in the order of May 11, 2007 as to why the benefit available under the second proviso to. Section 168 of the said Regulation of 1994 had not been accorded to the appellant. The appellant submits that the order of the Deputy Commissioner does not denude the Municipality of its authority in the matter but merely requires the Municipal Council to reconsider its decision. The appellant suggests that it is open to any appellate authority to set aside an order impugned and remand the matter to the original forum and in the Deputy Commissioner so doing, there was no error of jurisdiction which had been committed.

12. The writ petitioner says that the acts of the appellant complained of cannot be condoned and demolition is the only worthy prize befitting the appellant''s conduct. The writ petitioner refers to the Port Blair Municipal Council Building Bye-Laws of 1999 and says that only certain acts of transgression of the bye-laws are compoundable under bye-law 35.2. The writ petitioner cites bye-law 35.1 to claim that when there is a deviation from the prescribed limit relating to setback, the deviation cannot be condoned as it is specifically shown to be a "non-compoundable item".

13. The writ petitioner contends that by the order passed on the appellant''s petition on July 20, 2007, the issue as to whether the appellant''s conduct could be condoned was sealed against the appellant. In the first limb of the operative portion of the order of the learned Single Judge of, July 20, 2007 it was held as follows:

The order dated 4.12.2003 was passed, after the building was unauthorisedly constructed, by the petitioner on the ground, that the violation was not compoundable.

14. The writ petitioner insists that it is only such finding which has been reiterated in the impugned judgment and once it is appreciated that the violation complained of against the appellant could not be condoned, demolition was the only logical corollary. The writ petitioner suggests that upon no appeal having been preferred by this appellant from the order dated July 20, 2007, such finding has become final

and conclusive and cannot be reopened.

15. The obvious answer to such contention is that if both the construction was found to be unauthorized and such violation was held to be not compoundable, as the relevant part of the order of July 20, 2007 may suggest, the liberty to the appellant to proceed in appeal, nonetheless, was meaningless. Again, the order dated July 20, 2007 does not appear to take into account the second proviso to Section 168(f) of the said Regulation of 1994. Thirdly, even if the factual part of the finding is held to have concluded finally against the appellant, the legal finding may not visit the appellant with the harsh consequence that the writ petitioner is desirous of inflicting on him. Finally, the observation that the violation was non-compoundable was not a finding rendered by the learned Judge, it was merely a description of the nature of the order passed by the Municipal Council.

16. Section 168 of the said Regulation of 1994 needs that to be seen in its entirety.

168. If the erection or re-erection of a building is begun or continued-

(a) Without sanction as required, by sub-section (1) of Section 162, or

(b) Without notice as required by sub-section (2) of Section 162, or

(c) after sanction has been refused, or

(d) in contravention of the terms of any sanction granted, or

(e) after the sanction has lapsed, or

(f) any contravention of any bye-law made u/s 163 the Municipality may by notice to be delivered within a reasonable time require the building to be altered or demolished as it thinks necessary within a space of thirty days from the date of service of such notice:

Provided that no such notice shall issue in respect of the contravention of any bye-law the observance of which has been dispensed with under Section. 165:

Provided further that the Municipality may, instead of requiring the alteration or demolition of any such building accept by way of compensation such sum as it thinks reasonable ;

17. At first flush it appears that the opening word of Clause (f) should have been "in" rather then "any". It also seems that the remainder of what appears within Clause (f) after the words "under Section 163" would govern the five previous limbs of that section rather then apply exclusively to Clause (f) as the manner of presentation of the section would suggest.

18. But matters of form aside, the second proviso confers adequate authority to the Municipality to waive demolition and seek compensation in such sum as it may find reasonable. The Municipal Bye-laws have come in under authority of Section 163 of

the said Regulation of 1994. If the parent enactment confers authority on a delegate to make rules and bye-laws in respect of any specified matters, the bye-laws cannot contain any provision that would detract from the parent enactment. When the Municipality has been conferred authority by Section 168 of the said Regulation of 1994 to choose compensation in lieu of demolition, the bye-laws brought in place by the Municipality cannot take away such authority under the relevant proviso.

19. A somewhat muted argument has been put forth on behalf of the writ petitioner that in view of Section 162(1) of the said Regulation of 1994 prohibiting the erection or re-erection of any building without sanction of the Municipality, the Municipality would have no jurisdiction to condone such transgression under the relevant proviso appearing in Section 168. This is where the form of presentation of the section becomes relevant. If the entirety of what appears under Clause (f) is read to apply only to that clause, the five previous clauses lose all meaning. It is obvious that rest of the words of Clause (f) appearing after the words "under Section 163" govern all six limbs of that section. Consequently, the proviso applies to the entirety of the section rather then being restricted to merely Clause (f) thereof.

20. The use of the word "compoundable" in the relevant part of the order dated July 20, 2007 is an obvious reference to the municipal bye-laws where it is found. Section 168 (f) of the said Regulation of 1994 covers all cases of contravention of the bye-laws. Whether or not the bye-laws make certain acts of violation thereof compoundable and certain others non-compoundable, the second proviso to Section 168 permits the corporation to allow any construction made in breach of the bye-laws to stand, upon reasonable compensation being extracted from the offender.

21. A judgment or order of a Court that remains unchallenged is conclusive as to the subject matter of the lis between the parties to the action in which the order is made. This, in essence, is the principle of finality recognized in legal parlance as res judicata which is in furtherance of the public policy of arresting any concluded matter being re-agitated. The findings on facts rendered by a Court would ordinarily bind the parties thereto but erroneous findings on a legal provision would not affect the rights of the parties, particularly if the substance of the lis is permitted to be carried to another forum.

22. A statute of repose as it certainly is, the Limitation Act treats original actions and matters which arise out of an original action on separate footing. An appeal is a creature of statute and the right has to be exercised with the attendant conditions thereto. If a right of appeal is circumscribed by the time specified for the exercise thereof, the right cannot be asserted de hors the prescribed condition. If a provision conferring a right of appeal prescribes a period therefore, the appellant has to come within the window that has been opened up for him by statute. The statute may provide for the window to be shut beyond a specified time and if there is express provision that the appeal cannot be preferred after a particular date, the delay

beyond such period cannot be condoned. If, however, the appeal provision does not altogether shut out the would be appellant after the prescribed period, Section 5 of the Limitation Act would apply in a case as of the present nature.

23. The writ petitioner points out that the appellant did not apply before the Deputy Commissioner for condonation of the delay in preferring the appeal. The writ petitioner seeks to demonstrate that the Deputy Commissioner applied the underlying principle of Section 14 of the Limitation Act in enlarging the prescribed period rather than condoning the obvious delay. The writ petitioner says that surely this Court was not a forum that lacked jurisdiction to receive the appellant''s challenge to the order of demolition dated May 11, 2007, but this Court chose not to entertain the petition and left the appellant to his alternative remedy. The writ petitioner says that for the principle u/s 14 of the Limitation Act to apply, the twin conditions of the proceedings being pursued in a forum without jurisdiction and of the conduct being bona fide, have to be satisfied. The impugned order, in so far as it found that the Deputy Commissioner had acted in access of jurisdiction in receiving the appeal without any prayer for condonation of delay, is sought to be sustained by the writ petitioner on such reasoning.

24. Section 14 of the Limitation Act, 1963 applies to a suit or an original action and also to applications. The distinction in the Limitation Act between an original action and proceedings arising out of the parent action is that in case of the former, the chance to enforce a right is stultified; but in case of an appeal or application arising out of the original action, the period beyond the prescribed period may be condoned. Section 14 enlarges the prescribed period of limitation in applicable cases. It was not necessary for the Deputy Commissioner to apply the principle of Section 14 to stretch the period of limitation for the appeal. It was enough for the Deputy Commissioner to notice, however, that in view of the appellant having chosen to institute proceedings under Article 226 of the Constitution before this Court, the appellant had not preferred the appeal in appropriate form before July 20, 2007. Implicit in the reasoning given by the Deputy Commissioner is the substance on which sufficient cause, within the meaning of Section 5 of the Limitation Act, is founded. And, an application for condonation of delay can be orally made and received and the failure to make a formal written application does not touch upon the jurisdiction of the appellate authority to entertain a prayer in such regard informally made. In any event, the Deputy Commissioner deemed the letter of June 5, 2007 to be the appeal and the fact that the Deputy. Commissioner appreciated that it was in substance an appeal is a welcome whiff of departure from bureaucratic red-tapism and procedural tripping.

25. The Deputy Commissioner had the jurisdiction in law to receive the appeal and uphold or set aside the order or remand the matter to the original authority. There is no illegality in the decision-making process which is apparent, if the welcome informality of the procedure adopted is overlooked. In exercise of the power of

judicial review it is the decision-making process rather then the decision which is tested. The Deputy Commissioner''s order, in the circumstances, would scrape through, at the very least.

26. That is not to suggest that the appellant is absolved of all charges levelled against him. The appellant''s case will be considered by the Municipal Council in accordance with law, according him no greater reverence than would be to a similarly-placed ratepayer nor treating him any more harshly than is warranted in the circumstances.

27. The order of demolition of May 11, 2007 found the justification preferred by the appellant to be unconvincing. The Municipal Council may still find the explanation put forth by the appellant specious, but its order needs to spell out the reasons for its conclusion. It is the obligation to give reasons that the Municipal Council lost sight of in the order of May 11, 2007, weighed down as it was in the maze of "whereas" and "now, therefore" of an anachronistic form.

28. The judgment and order under appeal are set aside and the order of the Deputy Commissioner stands restored. The Municipal Council should make it convenient to render a reasoned order within 10 weeks from date upon affording both the appellant and the writ petitioner an opportunity of hearing.

29. The parties will pay and bear their own costs.

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

Amit Talukdar, J.

31. I agree.