108 CWN 113

Calcutta High Court

Case No: Writ Petition No. 9658 (W) of 2002

Smt. Kamala Bala Paul	APPELLANT
Vs	
The Municipal commissioner, C.M.C. and Others	RESPONDENT

Date of Decision: Sept. 8, 2003

Acts Referred:

- Calcutta Municipal Corporation Act, 1980 - Section 2(5), 400(1), 400(3), 402
- Civil Procedure Code, 1908 (CPC) - Order 47 Rule 1
- Constitution of India, 1950 - Article 226

Citation: 108 CWN 113

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Advocate: Alok Ghosh and Pritibhusan Chakraborty, for the Appellant;Indranath Mukherjee and Smritikana Mukherjee, for the Respondent

Final Decision: Dismissed

Judgement

Amitava Lala, J.

This writ petition has been made by the petitioner for the purpose of obtaining an appropriate order setting aside the order dated 2nd July, 2002 passed by the Tribunal under the Calcutta Municipal Corporation Act. 1980 in B.T. Case No. 46 of 1995 and incidental reliefs in connection therewith. Previously a writ petition was filed by the respondent no. 5 herein being W. P. No. 1620(W) of 2001 whereunder the original order of the Tribunal in appeal was challenged by any of the private respondents. Such appeal was protected u/s 400(3) of the Calcutta Municipal Corporation Act, 1980 against an order passed by the concerned Special Officer dated 16th March, 1995 in demolition case no. 21-D of 1994-95 in respect of premises no. 18B, Sambhu Babu Lane, Calcutta-700014. The Appellate Tribunal held that the concerned Special Officer was pleased to direct retention of the impugned unauthorized structure on payment of usual

fees and charges etc. The appellant took the plea that the order is not speaking about the temporary structure. Therefore, the question of retention does not arise. The respondent contended that the tarpaulin shelter is excluded from the definition of the building. The Corporation supported the order. The Appellate Tribunal observed that as per Section 2(5) of the Act tarpaulin shelter is excluded from the definition of building. The case is for the unauthorized construction of tarpaulin shelter. Therefore, as it is excluded from the definition of building there is no question of retention of temporary structure. It is clear that the petitioner herein being respondent therein by making such construction violated Rule 54 as no front space is left. He also infringed Rule 56 as no back space is also left. u/s 402 of the Act the respondent therein can obtain licence for the temporary structure. But no such permission has been obtained. On the other hand, it is seen from the report submitted by the appropriate authority dated 16th June, 1993 that the public utility service such as drainage, sanitary, water supply system etc. were affected by the alleged construction. Moreover, due to haphazard construction the structure appears to be unsafe and may collapse at any moment causing health hazards and casualties to the inmates and public. Thereafter, Appellate Tribunal inferred that in the proceeding u/s 400(1) of the Act such order for retention of temporary structure which is not included in the definition of the building cannot be given. Therefore, the order passed by the Special Officer should not be supported. In the circumstances, the order passed by the Special Officer is liable to be set aside. Surprisingly, thereafter the appeal was recorded as dismissed. Respondent no. 5 herein being writ petitioner therein contended before the Court that the operative part and the inference of such appellate authority are militating with each other. Therefore, an appropriate order is needed to be passed by the Writ Court in respect of such order. However, upon hearing the writ petitioner, the Calcutta Municipal Corporation and the private respondents who were present at that time this Court was pleased to hold that the order suffers from infirmity. Therefore, without going into the merit the Tribunal was directed to review the order on the basis of the formal application by the party concerned. Such order of review by the appellate Tribunal in disposing of the appropriate application is under challenge herein. In the order impugned the Tribunal held that it is correct to say that the order suffers from contradictory inference apparent in the record. Therefore, the appeal was treated to be allowed in the place and instead of recording dismissal of the same. The moot point of the petitioner is that the private respondent not being a party to the original order cannot have any right to make the application for revision of review before the appellate authority. He relied upon a judgment reported in Pujya Sindhi Panchayat Vs. Prof. C.L. Mishra and Others, . A Division Bench of Rajasthan High Court held that by the general principles of law, a person not being a party to the original proceeding cannot ordinarily have a" legal grievance against the decree or order and consequently cannot apply for review of the decree or order under Order 47 Rule 1 of the Code of Civil Procedure. Therefore, without going into further discussion it can be said that there cannot be an absolute bar for a third party to go before a forum and challenge the same if such situation arises. In the instant case, the respondent no. 5, who was writ petitioner on the earlier occasion categorically stated that he is a resident of adjacent premises along with many others. The Respondent no. 4

lodged complaint in 1993. Various residents of the neighbouring buildings lodged complaints in 1993. The respondent no. 5 also made complaint in 1994. A proceeding was drawn up on the basis of the complaint of respondent no. 4 but neither any proceeding was drawn up in the name of respondent no. 5 nor he was made co-complainant in respect of the case. But this cannot be said that no complaint was made by the petitioner nor it can be said that he is not an affected party. All the complaints were made against the illegal or unauthorized structure of making temporary structure by one of the purported tenants Sri Goutam Pal who is carrying business of electrical decoration and repair under the name "Paul Electric" upon obtaining trade licence. An application for cancellation of licence was also made by the petitioner. Hence all are parties to a common cause. Therefore, when the case is not similar to any suit or proceeding in between two private parties on the basis of their rival contentions can it be said that the private respondent herein is neither an unaffected party nor inclined to get any order. Moreover, in the presence of said Sri Goutam Pal an order was passed in favour of the respondent no. 5. petitioner therein, for the purpose of review on the basis of the apparent mistake in the order. No appeal was preferred from such order passed by the Writ Court. The review application was proceeded before the Tribunal and the order impugned was passed. Therefore, by now, the private respondent is not only an affected party but the necessary party for the purpose of determination of the issue. Further the Writ Court neither interfered with the merit of the matter in the earlier occasion nor inclined to do so in this writ petition. Both are arising out of technicalities of the order passed by the Appellate Tribunal. The Appellate Tribunal accepted the point and corrected the mistake. It has not altered the position which was inferred by the erstwhile Tribunal. The only recording is that appeal which was recorded as dismissed now corrected as "allowed". Even if such correction is not made, the petitioner herein cannot get any relief on the basis of the order of the Tribunal which was existing prior to filing of the erstwhile writ petition. Therefore, the petitioner cannot be said to be adversely affected for such correction necessitated by the Tribunal and as such in merit such ratio of the judgment as aforesaid i.e Pujya Sindhi Panchayat Vs. Prof. C.L. Mishra and Others, cannot help the petitioner.

2. Learned Counsel appearing for the respondent no. 5 cited various judgments in support of his contentions. By showing paragraph 84 of State of Punjab (Now Haryana) and Others Vs. Amar Singh and Another, he said that such three Judges Bench of the Supreme Court following (1894)2 Ch. 410. In re-Securities Insurance Company held that a person who is not a party to a decree or order may. with the leave of the Court, prefer an appeal from such decree or order if he is either bound by the order or is aggrieved by it or is prejudicially affected by it. As a rule, leave to appeal will not be refused to a person who might have been made a party. Again he relied upon paragraph 3 of Smt. Jatan Kumar Golcha Vs. Golcha Properties (P) Ltd., , (In Liquidation) where also the three Judges Bench held that it would be a travesty of justice if a party is driven to file a suit which would involve long and cumbersome procedure when an order has been made directly affecting the party and redress can be had by filing an appeal which is permitted

by law. It is well-settled that a person who is not a party to the suit may prefer an appeal with the leave of the Appellate Court and such leave should be granted if he would be prejudicially affected by the judgment. He further cited paragraphs 15 and 16 of United Commercial Bank Vs. Hanuman Synthetics Ltd. and Others, whereunder the Division Bench of this Court followed the ratio of one of the referred judgments of the Supreme Court. There, it was held that the Supreme Court was not restricted in the Act but well-settled law of the land. In allowing an appeal. Court held that the same cannot be dismissed in limine as not maintainable. In the five Judges Bench judgment reported in Shivdeo Singh and Others Vs. State of Punjab and Others, Supreme Court held that there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in even/ Court of plenary jurisdiction to prevent the miscarriage of justice or to correct grave and palpablenors committed by it.

3. However, on this issue I have lo clarify that Court adhered to the application of the respondent no. 5 being an aggrieved party and for the purpose of correcting grave and palpable errors committed by the Tribunal passed an order.

4. In S. Govinda Menon Vs. K. Madhavan Nair and Others, I find the Division Bench of the Kerala High Court held that when a person aggrieved by the order made, the writ petition for obtaining a leave to appeal from an order passed by the particular Act, it should be granted to him though he was not a party to the writ petition.

5. Therefore, the ratio of the judgment is whether the private respondent was aggrieved or not. How far he is aggrieved or how much he is aggrieved that is the subject matter of merit be adjudged by the appropriate forum. But within the four comers of the Act it can he seen that such party is aggrieved or might be aggrieved and opportunity should be given to him for preferring an appeal or making review etc. whereunder he or she feels aggrieved.

6. In The Goa Foundation and another Vs. The Conservator of Forests and others, at paragraph 26 he accepted the locus of the petitioner in the nature of a dispute i.e. public interest litigation. Lastly. I find in Ramesh Dwarkadas Mehra Vs. Indravati Dwarkadas Mehra, Baldev Singh Vs. Surinder Mohan Sharma and Others, whereunder three Judges Bench of this Court has given a sound and appropriate reasoning to come to a conclusion in respect of such type of dispute. The ratio is whether the appeal will be maintainable by a person being party or not Is dependent upon the nature of dispute meaning thereby whether the same will be affected in rem or in personem.

7. Therefore, in coming to conclusion, when I see that the nature of dispute is in respect of illegal construction or temporary construction without any permission or with permission of construction by the tarpaulin sheets which may or may not be demolished and cause disturbances to the neighbourhood people and the petitioner in the earlier writ petition who is respondent no. 5 herein is admittedly a resident nearer to such premises he cannot said to be not affected by any order of the Tribunal be it made at the instance

of all the neighbourhood people or one of such people. It definitely affects the people who are residing in the area and thereby it has an applicability in rem. Thus, the locus standi of such petitioner/respondent no. 5 herein cannot be challenged. Moreover, the respondent no. 5 herein who made the earlier writ petition as well as the tenants have been made party respondents along with the State. The earlier order was passed in presence of the tenant against whom the allegation is made for wrongdoing. He has not been made party herein. That apart, the petitioner cannot he said to be alone to the dispute as available from the brief description of the facts. On the other hand, the order impugned does not alter the merit of the order. Only technical part i.e. appeal allowed" was incorporated in the place and instead of appeal dismissed" to avoid the conflict in between the inference and the operative part. Therefore, neither any mistake has been caused by bringing such fact by the respondent no. 5 before this Court nor there is any mistake in passing such order by the Tribunal.

8. Thus, the writ petition cannot be sustained. Hence, the same Is dismissed. However, no order is passed as to costs. Corporation will be at liberty to take appropriate steps as expeditiously as possible. Let ah urgent Xeroxed certified copy of this judgment, if applied for, be given to the Learned Advocates for the parties within two weeks from the date of putting the requisites.