GAHC010048172024

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Civil)/748/2024

SANJAY MADANI AND 6 ORS
S/O LATE KHEMCHAND SINDHI,
RESIDENT OF FLAT NO. 505, GOLDEN RESIDENCY, CHATRIBARI,
GUWAHATI 08

2: SRI RAJESH LUNAWAT
S/O LATE LUNKARAM LUNAWAT

RESIDENT OF FLAT NO. 502
GOLDEN RESIDENCY
CHATRIBARI
GUWAHATI 08

3: SMTI DEEPIKA JAIN
W/O SRI RAJESH LUNAWAT

RESIDENT OF FLAT NO. 502
GOLDEN RESIDENCY
CHATRIBARI
GUWAHATI 08

4: ON THE DEATH OF MADUSUSAN BAHETI
HIS LEGEL HEIRS
SMTI SANTOSH BAHETI

WIFE
RESIDENT OF FLAT NO. 504
GOLDEN RESIDENCY
CHATRIBARI
GUWAHATI 08

5: MASTER PIYUSH BAHETI
SON.
REP. BY HIS MOTHER AS NATURAL GUARDIAN

RESIDENT OF FLAT NO. 504
GOLDEN RESIDENCY
CHATRIBARI
GUWAHATI 08

6: SRI SAGAR SANCHETI
S/O LATE VIJAY SINGH SANCHETI

RESIDENT OF FLAT NO. 501
GOLDEN RESIDENCY
CHATRIBARI
GUWAHATI 08

7: SRI BIMAL BIHANI
S/O LATE FATEH CHAND BEHANI

RESIDENT OF FLAT NO. 503
GOLDEN RESIDENCY
CHATRIBARI
GUWAHATI 08

8: SMTI RITU BIHANI
W/O SRI BIMAL BIHANI

RESIDENT OF FLAT NO. 503
GOLDEN RESIDENCY
CHATRIBARI
GUWAHATI 0

VERSUS

THE GUWAHATI METROPOLITAN DEVELOPMENT AUTHORITY AND 4 ORS
REPRESENTED BY ITS CHIEF EXECUTIVE OFFICER

2:THE TOWN PLANNER
GMDA

3:THE CHIEF EXECUTIVE OFFICER
GMDA
RES. 1
2 AND 3 ARE HAVING ITS OFFICE AT STATFED BUILDING
BHANGAGARH
GUWAHATI 05

4:SMTI SANJUKTA BORGOHAIN
W/O SRI UTPAL BORGOHAIN

RESIDENT OF CHATRIBARI
BILPAR
OLD FIRE BRIGADE LANE
GUWAHATI 08

5:SRI SHYAM SUNDAR SIPANI @ SHYAM SIPANI
S/O SHREE CHAND SIPANI

RESIDENT OF KUMARPARR
GUWAHATI 01 ASSAM CARRYING ON BUSINESS IN THE NAME AND STYLE OF HIS PROPRIETARY CONCERN M/S SHYAMJI CONSTRUCTION FROM ITS OFFICE SITUATED AT PARMESHWWARI BUILDING
4TH FLOOR
CHATRIBARI
GUWAHATI

Advocate for the Petitioner : MR. S P ROY

Advocate for the Respondent : SC, G M D A

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

ORDER

06.03.2024

This is an application under Order XLI Rule 3-A of the Code of Civil Procedure, 1908 (for short, 'the Code') read with Section 151 of the Code as well as Section 5 of the Limitation Act, 1963 for condoning the delay of 830 days in preferring the accompanying Second Appeal against the judgment and decree dated 04.09.2019 passed in Title Appeal No.113/2013 by the learned Civil Judge (Senior Division) No.3 Kamrup (M), Guwahati.

2. From a perusal of the said application, it reveals at paragraph 4 that the petitioners/appellants had engaged Shri N.N. Jha and his juniors as their

advocate for preparing and conducting the said Title Appeal No.113/2013 and neither the said learned counsel for the petitioners/appellants nor the builder (the respondent No.5) informed the petitioners/appellants about the dismissal of the Title Appeal No.113/2013 and as such, the petitioners/appellants had no knowledge and information regarding the dismissal of the Title Appeal No.113/2013. It was further mentioned that it was only on 15.02.2024, that the petitioners/appellants came to know about the dismissal of the said appeal when they received a letter from the Chief Executive Officer, GMDA stating that the GMDA is going to demolish the fifth floor of the building 'Golden Residency' in pursuance to the order dated 04.09.2019 passed in the Title Appeal No. 113/2013 and the petitioners/appellants were directed to vacate their flats within 21 days from the date of receipt of the said letter. It is further the case of the petitioners that they had thereupon obtained the certified copy of the judgment and decree dated 04.09.2019 passed in T.A. No.113/2013 on 17.02.2024 and the same was supplied on 22.02.2024. It was, therefore, stated that in view of the order passed by the Supreme Court in Miscellaneous Application No.21/2022 arising out of Suo Moto Civil Writ Petition (Civil) No.3/2020, the period from 23.03.2020 till 28.02.2022 has to be excluded while computing the period of limitation. Further to that in paragraph 8, it was mentioned that after obtaining the required certified copy and the documents, the petitioners/appellants engaged Shri S.P. Roy, Advocate, on 24.04.2024 and the learned counsel thereafter drafted the memo of appeal, stay petition and condonation petition from 25.02.2024 and finished on 01.03.2024 and as such, there was a delay of 1640 days in filing the connected appeal. It was also stated that after excluding 90 days of limitation period as well as 715 days in terms of the order passed by the Supreme Court in Miscellaneous Application

No.21/2022, the actual delay is 830 days.

3. This Court has duly heard Mr. S.P. Roy, the learned counsel appearing on behalf of the petitioners. Also heard Mr. S Bora, the learned counsel appearing on behalf of the respondents in the GMDA.

4. Mr. S.P. Roy, the learned counsel submitted that it was due to fault of the counsels representing the petitioners in Title Appeal No. 113/2013, that the petitioners had no knowledge about passing the judgment and decree on 04/09/2019 as the said counsels did not inform the petitioners. Further, he submitted that the petitioners have good grounds of Appeal for which pending notice of the condonation application, the judgment and decree dated 04/09/2019 be stayed.

5. Mr. S Bora, the learned counsel for the GMDA submitted that the said application on the face of it contains incorrect and misleading details and as such the delay ought not to be condoned. Further to that, the learned counsel appearing on behalf of the respondent GMDA submits that the issue involved in the instant proceedings is squarely settled by the judgment of the Division Bench of this Court in *Priyanka Estates International Pvt. Ltd. & Ors. Vs. State of Assam & Ors.* reported in (*2007) 1 GauLR 473,* as well as the judgment and order of the Supreme Court whereby the said judgment of the learned Division Bench of this Court in Priyanka Estates International Pvt. Ltd. (supra) was affirmed i.e. in the case of Priyanka Estates International Pvt. Ltd. & Ors. Vs. the State of Assam & Ors. reported in (2010) 2 SCC 27. It is therefore the

submission of the learned counsel for the respondents that even on merits, the appeal has no legs to stand.

6. This Court, while hearing the application for condonation of the delay had also the occasion of perusing the contents of the Memo of appeal and it shocks and surprises this Court in the manner in which the petitioners in order to mislead this court had made false statements on oath in the said application, *inasmuch as*, it was mentioned in paragraph 4 of the said application that Shri N.N. Jha and his juniors were only engaged as advocates for preparing and conducting the Title Appeal No.113/2013 and these counsels did not inform about the dismissal of the said appeal on 04.09.2019. Whereas, a perusal of the Memo of Appeal in Title Appeal No.113/2013 enclosed as Annexure-6 to the Memo of the Second Appeal clearly shows that the said Memo of Appeal was certified by Mr. S.P. Roy, the learned counsel who now represents the petitioners. The above stand taken in the application for condonation of delay, on the face of it, therefore, appears to be a false stand taken by blaming the counsels whose names appeared in the decree of the 1st Appellate court. Further to that, it is completely unbelievable that the petitioners who were parties to the Title Appeal No.113/2013 were not aware of the said proceedings or for the purpose the dismissal of the said Title Appeal vide judgment and decree dated 04.09.2019 when it is the practice followed as per the Civil Rules and Orders framed by the Gauhati High Court that the judgments ready to be delivered are notified in the cause list. There is no allegations that it was not notified in the cause list. Further, the delivery of the judgment was duly notified in the e-Court services.

7. This Court further to ascertain whether the counsel representing the

petitioners herein had at anytime previously disengaged himself from the 1st Appeal proceedings put a pointed query to the said counsel. To the said query, Mr. S.P. Roy, the learned counsel had no answer. Infact during the hearing, this Court perused the case details in the e-Court services pertaining to Title Appeal No. 113/2013, and to the astonishment of this court, the name of Mr. S.P. Roy, Advocate was shown as the counsel for the petitioners who were the appellant therein.

8. Therefore from the above facts, it would be clear that the petitioners have in order to get away with their negligence in not challenging the impugned judgment and decree dated 04/09/2019 have not only falsely blamed the lawyers whose name appeared in the judgment and decree but for the purpose of misleading this court only mentioned that Mr. N.N. Jha Advocate and his associates were engaged. On the other hand, it was clear from the memo of First Appeal that it was certified by Mr. S.P. Roy, Advocate who is presently the counsel of the petitioners herein. It is also seen from the contents of the Application that Mr. S.P. Roy, Advocate had drafted the said Application seeking condonation of delay alongwith the Memo of Second Appeal and the Interlocutory Application. This Court feels it relevant to observe that if that statement in the condonation application, if is true than the said lawyer is equally responsible for misleading this Court.

9. This Court also takes note of the fact that date of delivery of the judgment was not only notified in the cause list maintained in terms of Rule 10 of the Civil Rules and Orders framed by the Gauhati High Court but was also available in the e-Court Services, Assam. The Explanation put forth by the petitioners that

the counsels did not inform, clearly shows that either the petitioners did not care about the litigation or were totally negligent, not to speak of being false and misleading, as it is apparent from the observations made in Paragraphs hereinabove.

10. The grounds/causes so shown therefore do not inspire the confidence of this Court to condone the delay of 830 days in preferring the accompanying Second Appeal.

11. This Court further finds it very pertinent to take note of that at the time of taking up the application for condonation of delay, the learned counsel appearing on behalf of the petitioners submitted that the demolition proceeding should be stayed pending disposal of the condonation application and admission of the second appeal on substantial questions of law. Under such circumstances, this Court also had the occasion of going through the contents of the Memo of Second Appeal and its enclosures, although the same was not necessary for the purpose of deciding the Condonation Application. This Court finds it very relevant at this stage to take note of that the permission which was given to the builder i.e. one Shyam Sundar Sipani @ Shyam Sipani who was the original plaintiff was for Ground Floor upto the 4th floor vide permission dated 06.10.2004. Within two days, thereafter, on 08.10.2004, an application was filed for extension of the 5th Floor which was submitted before the GMC authorities on 11.10.2004. The said application which was for grant of permission for the 5th floor, admittedly, was not accorded. However, it has been the case of the plaintiff that it was a case of a deemed permission, if the permission was not

granted within a period of 60 days from the date of submission of the application. The entire edifice of the said case of the plaintiff in the suit was on the basis of a reading of Sections 327 and 328 of the Gauhati Municipal Corporation Act, 1971 (for short, the Act of 1971).

12. This Court had duly perused the said provisions of the Act of 1971 and from a perusal thereof it reveals that there is no mention, whatsoever, that not granting a permission within a period of 60 days from the date of the application can be construed to be a deemed permission for construction. Under such circumstances, the construction which was made for the 5th floor was on the face of it illegal and unsanctioned. Be that as it may, the builder, who was the plaintiff has sold off the flats on the 5th floor to the petitioners herein. This Court finds it very relevant to take note of the judgment of the learned Division Bench of this Court in the case of *Priyanka Estates International Pvt. Ltd. (supra)* wherein the learned Division Bench of this Court had dealt with the provisions of Sections 327 and 328 of the Act of 1971 and also the provisions of Sections 87 and 88 of the Gauhati Metropolitan Development Authority Act, 1985 (for short, the Act of 1985). In the said judgment, more particularly, at paragraph 47, it was opined that Section 327 of the Act of 1971 stipulates that no person can erect or re-erect, without the written permission from the authority. Section 328 of the said Act of 1971 provides for issuance of a notice by the person who intends to erect or re-erect the building enclosing therewith the ground plan, elevation and section of the building as well as the specification of the work. The learned Division Bench had also taken note of bye-law No.5 of the building bye-laws which also requires that such notice under Section 328 shall be accompanied by the site plan and the building plan

and conforming to the requirements of Sections 327 and 328 of the Act of 1971, in triplicate, on blue or white print and a copy of the plan is to be retained by the authority after issue of permission and other two copies to be retained by the applicant. It was, therefore, opined that what is to be approved is the site plan as well as the building plan submitted by the applicant for construction. Unless such building plan is approved, no construction can be made by the person.

13. This Court also finds it very relevant to deal with the submission of Mr. SP Roy, the learned counsel appearing on behalf of the petitioners wherein he submitted that irrespective of issuance of notice to the builder, each occupier has to be issued notice. This aspect of the matter has also been taken care of by the learned Division Bench of this Court in the case of *Priyanka Estates International Pvt. Ltd.* (supra) wherein in paragraph 52, it was categorically observed that the requirement of issuance of notice under Section 88 of the Act of 1985 cannot be stretched to such an extent that when the building has been constructed by the builder even after issuance of a stop construction notice and during the pendency of the writ petition challenging such notice, the occupier of such building to whom it is sold, is required to be issued with a notice before passing an order under Section 88 of the Act of 1985. Paragraph 52 of the said judgment being relevant is reproduced hereunder:

> "*52. The contention of the builder-petitioners that the notices are required to be issued to the occupiers also, asthe building has already been completed by virtue of the interim order passed by this court in W.P.(C) No.5018 of 2002, cannot also be accepted as the builder was asked by the GMC authority to stop construction vide notice dated 31.7.2002, which has been challenged by the petitioner-builder in the said W.P.(C)*

No.5018 of 2002. During pendency of the said writ petition if any construction is made by the petitioners/builder and sold it to anybody that would be at the risk and peril of the builder-petitioners as well as the occupier. Therefore, even if the interim order dated 20.9.2002 remain valid for 10 days, the builder-petitioners by taking advantage of such order cannot make any construction during pendency of the writ petition challenging the stop construction notice and if he chooses to do so, it is at his own risk. The requirement of issuance of notice under Section 88 of the 1985 Act cannot be stretched to such an extent that when the building has been constructed by the builder even after issuance of the stop construction notice and during the pendency of the writ petition challenging such notice, the occupier of such building to whom it is sold, is required to be issued with a notice before passing any order under Section 88 of the 1985 Act. In the instant case in fact one of the occupier of the building is a petitioner in W.P.(C) No. 2747 of 2006 and, therefore, it can be presumed that the occupiers of the building, if any, know about the pendency of the proceeding relating to the building. No construction could have been made under the guise of the interim order passed by this court. Occupiers, if any, obviously came into picture only after the initial notices were issued directing the builders to stop construction. They have purchased the apartments with their eyes wide open as regards the controversial nature of the construction of the building by the petitioner-builders. They have willy-nilly became parties to the illegalities brazenly committed by the petitioner-builders. They cannot be permitted to plead their ignorance in the matter.

The principles of natural justice are not rigid but flexible in their nature and constantly require situational modification. Our understanding of principles of natural justice now must be modified to take into account the disastrous consequence that follows from their routine application in isolation of the realities. At any rate they cannot offer any better explanation and set up a different case other than the one before us at the instance of the builders, which we have considered in detail. What is sauce for goose is sauce for gander. We accordingly reject the submissions made by the learned senior counsel in this regard."

14. In the present facts it would be seen that on 06/10/2004, the permission was only given for Ground to Fourth floor. On 11/10/2004, the builder submitted application for the 5th floor. On 11/12/2004, the builder presumed that he had the deemed permission to construct the 5th floor. Further prior to 01/04/2005, the 5th floor was completed. In the month of May, 2005 the petitioners herein were assessed by the GMC in respect to their holdings in the 5th floor. On 17/06/2005, the building was inspected and on 13/08/2005 the notice was issued under Section 337 of the Act of 1971. Thereafter a suit was filed being Title Suit No. 185/2005 against the GMC against the Notice seeking declaration and permanent injunction. The said suit on the face of it was not maintainable in view of Section 341 of the Act of 1971.

15. The present suit which was filed was against actions of the GMDA whereby even prior to the assessment of the holdings by GMC, on 28/04/2005 a notice was issued to stop construction and produce the documents for permission within 7 days. This was followed by another notice dated 31/05/2005 asking again to produce the NOC. Pursuant to submission of reply by the Builder, personal hearing was given. Thereafter on 27/11/2005 an order dated 22/11/2005 was served for demolition of the 5th floor. This resulted in filing of the suit being Title Suit No. 246/2005 by the Builder i.e. the Respondent No.5 herein. The said suit on the face of it was not maintainable in view of Section 95 & 101 of the Act of 1985. However, on account of the said suit and the Appeal filed there against the judgment and decree in the suit, the petitioners alongwith the Respondent no.5 collusively was able to delay the demolition of the illegal construction. This Court further finds it relevant to observe that from

the Memo of First Appeal it is apparent that the petitioners claim that they paid the advance on October 2004. In other words on that very date, there was no permission for construction of the 5th Floor. Further to that all the petitioners purchased their flats after the filing of Title Suit No. 246/2005.

16. The above facts therefore would show that the petitioners knew about purchasing the flats on the 5th Floor without there being permission. In the opinion of this court, when the petitioners knew everything and with opened eyes purchased the flats, the petitioner cannot be allowed to say that they should also be issued notice under Section 88 of the Act of 1985 in as much as on the date the notice under Section 88 of the Act of 1985, the petitioners had no right in respect to the flats in question.

17. This Court further finds it relevant to take note of the judgment of the Supreme Court in the case of *Priyanka Estates International Pvt. Ltd. & Ors vs. State of Assam* reported in (2010) 2 SCC 27 [hereinafter referred as *Priyanka Estates International Pvt. Ltd. (II)]* wherein the Supreme Court while affirming the judgment of the learned Division Bench has also observed at paragraph 50 that if the constructions are in absolute violation of the sanctioned or approved plans and are not likely to fall in the category of compoundable items, then the necessary consequence is to order its demolition and seal of approval for such illegal activities is not required to be given by this Court. In paragraph 55 of the said judgment, the Supreme Court further observed that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with a

firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. The Supreme Court further observed that such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multi-storeyed buildings. To some extent, both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the Builder. In the said case, the Supreme Court, however, did not exercise the power under Article 142 of the Constitution, but granted liberty to those flats owners whose flats are ultimately going to be demolished, to exhaust the remedy that may be available to them in accordance with law against the builder. Paragraphs 50, 55 to 62 being relevant are reproduced hereinunder:

> *50. It is not necessary to deal with the aforesaid judgments of this Court in greater detail as the consistent ratio decidendi of this Court is that if the constructions are in absolute violation of sanctioned or approved plans and are not likely to fall in the category of compoundable items, then the necessary consequence is toorder its demolition and seal of approval for such illegal activities is not required to be given by this Court.*
>
> *55. It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multi-storeyed buildings. To some*

extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the Builder.

56. Even though on earlier occasions also, under similar circumstances, there have been judgments of this Court which should have been a pointer to all the builders that raising unauthorised construction never pays and is against the interest of society at large, but, no heed to it has been given by the builders. Rules, regulations and bye-laws are made by Corporation or by Development Authorities, taking in view the larger public interest of the society and it is a bounden duty of the citizens to obey and follow such rules which are made for their benefit. If unauthorised constructions are allowed to stand or given a seal of approval by court then it is bound to affect the public at large. An individual has a right, including a fundamental right, within a reasonable limit, it inroads the public rights leading to public inconvenience, therefore, it is to be curtailed to that extent.

57. The jurisdiction and power of courts to indemnify a citizen for injuries suffered due to such unauthorized or illegal construction having been erected by builder/colonizer is required to be compensated by them. An ordinary citizen or a common man is hardly equipped to match the might and power of the builders.

58. In the case in hand, it is noted that number of occupiers were put in possession of the respective flats bythe builder/developer constructed unauthorisedly in violation of the laws. Thus, looking to the matter from all angles it cannot be disputed that ultimately the flat owners are going to be the greater sufferers rather than builder who has already pocketed the price of the flat.

59. It is a sound policy to punish the wrong-doer and it is in that spirit that the courts have moulded the reliefs of granting compensation to the victims in exercise of the powers conferred on it. In doing so, thecourts are required to take into account not only the interest of the petitioners and the respondents but also the interest of public as a whole with a view that public bodies or officials or builders do not act unlawfully and do perform their duties properly.

60. In the case in hand, admittedly, at no point of time Appellant No.1- M/s. Priyanka Estates International Pvt. Ltd. was able to show to its prospective purchasers the Occupancy Certificate or Completion Certificate issued by the authorities concerned. The same could not even be shown to us and without it, Appellant No.1could not have embarked into sale of flats as it was mandatorily required.

61. The instant case is not a case of breach of contract. It is a clear case of breach of the obligation undertaken to erect the building in accordance with building regulations and failure to truthfully inform the warranty of title and other allied circumstances.

62. Even though at the first instance, we thought of invoking this Court's jurisdiction conferred under Article142 of the Constitution of India so as to do complete justice between the parties and to direct awarding of reasonable/suitable compensation/interest to the flat owners, whose flats are ultimately going to be demolished, but, with a very heart, we have restrained ourselves from doing so, for variety of reasons and on account of various disputed questions that may be posed in the matter. However, we grant liberty to those, whose flats are ultimately going to be demolished, to exhaust the remedy that may be available to them in accordance with law.

18. The above analysis would also clearly show that the substantial questions of law which were urged to be involved in accompanying appeal also do not arise taking into account the settled position of law. Under such circumstances, this Court taking into account the above facts and more particularly the conduct of the petitioners which apparently were negligent is not inclined to condone the delay. Consequently, the instant application for condonation of delay stands dismissed.

19. This Court further taking into account that the application seeking

condonation of delay contains statements which on the face of it appears to be false and misleading is of the opinion that merely dismissing the application without costs would send a wrong signal to the litigants to that effect that they can file any application before a Court of law making false and misleading statements and go unpunished. Under such circumstances, this Court imposes costs upon the petitioners to the tune of Rs.50,000/- to be deposited by the petitioners before the Registry of this Court within two weeks from today.

20. In terms of the above observations and directions, the condonation Application stands rejected.

JUDGE

Comparing Assistant