

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**C.O. 4420 of 2015
Dr. Amar Krishna Ray & Anr.
Vs
Abhoy Auddy & Anr.**

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| For the petitioners | : | Mr. Sandip Kumar De Mr. Aniruddha Poddar Mr. Amit Chowdhury |
| For the opposite Party No. 1 | : | Mr. Ratul Das Mr. Shoham Sanyal |
| For the Respondent KMC | : | Mr. Alok Kumar Ghosh Mr. Swapan Kumar Debnath |
| Heard on | : | 06.10.2023 |
| Judgment on | : | 18.10.2023 |

Ajoy Kumar Mukherjee, J.

1. The present application has been preferred by the petitioner challenging three orders, being order 72 dated 19th June 2015, order no. 73 dated 30th June 2015 and order no 74 dated 16th September 2015, passed by the chairman, Municipal Building Tribunal, Kolkata, in B.T. Appeal No. 7 of 2008.

2. Petitioners contended that the petitioners are the owner of premises no. 90A and 90C, Ananda Palit Road, by virtue of purchase through registered deed of conveyance. The opposite party no. 1 herein is the owner

of premises no. 90B Anand Palit Road, and it is alleged that the opposite party no. 1 herein has made unauthorised construction in the said premises being premises no 90 B. It is further contended on behalf of the petitioners that the said premises and the premises belonged to the petitioners, were partitioned in the year 1933 and according to the partition plan the said premises no. 90B having an area of 1 cottah 3 chittak of land, is butted and bounded as per schedule of the partition plan. The present opposite party no. 1 became owner of the said premises No. 90B by way of a deed of conveyance dated 5th March, 2003.

3. Petitioners alleged that the opposite party no. 1 herein sometimes in August 2004 started constructing in an unauthorized manner in the said premises no. 90B by changing the shape, size and character of the said premises and also demolished the partition wall in order to enlarge his area of occupation beyond his entitlement and thereby has caused damage to the petitioner's premises no. 90A and 90C to a great extent. Said opposite party no. 1 also blocked the common passage in the western side of the said premises.

4. The Municipal authorities started proceedings on the basis of complaint lodged by the petitioner herein against the opposite party no. 1 being D/ Case no. 35-D / 2004-05. Upon hearing the parties, the Special Officer (Building) allowed the opposite party no. 1 to retain the unauthorized construction on payment of regularization fee and other formalities by an order dated 12 June, 2006.

5. The petitioner herein moved a writ petition before this Court challenging the order dated 12th July, 2006 and ultimately this Court

disposed the said writ application giving liberty to file statutory appeal before the concerned Municipal Building Tribunal. The petitioners accordingly filed aforesaid appeal being B.T. No. 7 of 2008. During pendency of the appeal petitioners had filed two applications one for supply of digital map and another for recalling the order dated 2nd September 2014. By the impugned order no. 72 dated 19th June, 2015 the application for supply of digital map stood rejected and by order no. 73 dated 30th June, 2015 the application for considering some points regarding local inspection was also rejected. Since the petitioners sought time before the Tribunal, as they were preparing to challenge aforesaid order no. 72 and 73, the Tribunal imposed cost on the petitioners for seeking adjournment by the aforesaid impugned order no. 74 dated 16 September, 2015.

6. Being aggrieved by the aforesaid orders petitioners have urged the following points before this court:-

- (a)** Appeal arises from an order passed by the Special Court (Building) Kolkata Municipal corporation (hereinafter called as KMC), who does not have jurisdiction to entertain any complain on account of unauthorized construction
- (b)** The petitioners are entitled to get copy of the digital map
- (c)** Two issues raised by the petitioners in the review/modification application filed before the Municipal Building Tribunal has not been considered and
- (d)** Imposition of cost arbitrarily by the authority

7. Mr. Sandip Kumer Dey learned Counsel appearing on behalf of the petitioner submits that both the acts of unauthorized construction and

regularization thereof, against payment of money are illegal and without jurisdiction and as such the opposite party no. 1 and the KMC has to be on the same boat for shielding the said mischief.

8. He further contended that on 12th July, 2006 the Special Officer (Building) KMC regularized the unauthorized construction on payment of charges although by this time the law has been settled that this special officer (Building) of the KMC did not have any jurisdiction at all to take up and/or hear the matter pertaining to the proceedings under section 400(1) of the KMC Act, 1980 as he was not the officer and/or employee of the KMC prior to the Amendment of section 400, in 2015. As such the Municipal Commissioner could not delegate his power to the Special Officer (Building) of the KMC under section 48 of the KMC Act of 1980. Accordingly the order passed by the Special Officer (building) of the KMC on 12th July, 2006 is nullity and suffers from inherent lack of jurisdiction. He further contended that the question of *coram non judice* could be taken at any stage of the proceeding even at the stage of the prosecution in a collateral proceeding.

9. Mr. Dey for the petitioners further contended that the present application being a proceeding under Article 227 of the constitution of India has the jurisdiction to decide whether the special officer was without jurisdiction to pass the order dated 12th July, 2006. In this context petitioner relied upon a judgment passed by a Co-ordinate Bench of this Court in ***Susama Saha Vs. The Kolkata Municipal Corporation*** reported in **2015 (5) CHN 309** and another judgment passed by a Division Bench of this court relying Susoma Saha's judgment in ***Bina Saha Vs. The Kolkata Municipal Corporation and others*** (Mat 1325 of 2023).

10. Furthermore in support of petitioners contention that the question of *coram non judice* could be raised at any stage of a proceeding, petitioners have relied upon Apex Court Judgment in ***Hindustan Zinc Limited Vs. Ajmer Vidyut Vitran Nigam Limited*** reported in **(2019) 17 SCC 82**.

11. Mr. Ratul Das Learned Counsel appearing on behalf of the opposite party no. 1 submits that the instant application is not maintainable on account of the applications arising out of interlocutory orders. There has been no final adjudication in appeal on any of the issues in relation to the applications. He further contended that on bare perusal of the order, it would appear that the order has been passed by proper application of mind and considering all the submissions made on behalf of the petitioners. Merely on account of refusal to grant reliefs in terms of the prayers made by the petitioner, there cannot be invocation of the supervisory jurisdiction under Article 227 of the Constitution of India.

12. Mr. Das further argued that the complaint petition was lodged by the petitioner herein before the KMC and on the basis of said complaint the special officer had carried on inspection and ultimately passed the order dated 12 July, 2006. The petitioner cannot raise the issue regarding jurisdiction of the Special Officer (Building) before whom the original proceeding had culminated. The petitioner never raised the issue of jurisdiction earlier before appropriate forum even he has not averred the point of jurisdiction of Special Officer (Building) in the present Revisional Application and as such submissions is contrary to the provisions of section 21(2) of the Code of Civil Procedure. In this context he relied upon judgment reported in **2017 SCC Online Cal 6717 (*Sri Nikhil Chandra da Vs.***

Asansol Municipal Corporation and others). He further argued that petitioner's aforesaid contention is also barred by the principles of waiver, acquiescence.

13. Mr. Alope Kumar Ghosh learned counsel appearing on behalf of the opposite party no. 2/KMC submits that the petitioners having participated in the entire proceeding, it is not open to the petitioners to turn around at this stage and the question of jurisdiction of the special officer building cannot be raised at this belated stage. He contended that the defacto doctrine is very much applicable in the present context and in support of his contention he has relied upon following judgments.

- (i) *Amalesh Adok and another Vs. KMC and others, WP No. 824 of 2014.***
- (ii) *Md. Ayub and another Vs. the Municipal Commissioner and KMC and others, C.O. 3722 of 2015 of this court.***
- (iii) In RE: Dilip Ranjan Chatterjee, 1992(1) CHN page 210.**
- (iv) *Union of India and others V s. S. Srinivasan, 2012 7 SCC 683.***

14. Accordingly Mr. Ghosh further contended that there has to be a finality for proceedings and the petitioner cannot be permitted to come up at her own whims whenever and wherever convenient to suit the purpose of the petitioners after having taken a chance before all possible forums. In this context he also relied upon the judgment of co-ordinate Bench of this Court in ***Mrs. Sarada Devi Vs. The Municipal Commissioner (KMC) C.O. 1541 of 2018.*** Mr. Ghosh further submitted that digital map can be supplied to the petitioner on compliance of necessary formalities laid down by KMC.

15. I have considered submissions made by the parties.

16. Section 48 of the KMC Act reads as follows:-

48. Delegation of powers and functions.- (1) *The Corporations may by resolution delegate, subject to such conditions as may be specified in the resolution, any of its powers or functions to the Mayor-in-Council.*

(2) The Mayor-in-Council may by order delegate, subject to such conditions as may be specified in the order, any of its powers or functions to the Mayor or to the Municipal Commissioner.

(3) Subject to such standing orders as may be made by the Mayor-in-Council in this behalf,—

(a) the Mayor may by order delegate, subject to such conditions as may be specified in the order, any of his powers or functions to the Deputy Mayor or the Municipal Commissioner;

(b) the Municipal Commissioner may by order delegate, subject to such conditions as may be specified in the order, any of his powers or functions [, including the powers of functions under section 397, Sub-section (1) of section 400 and sub-section (1) of section 411,] to any other officer or any employee of the Corporation; and

(c) any officer of the Corporation other than the Municipal Commissioner may by order delegate, subject to such conditions as may be specified in the order, any of his powers or functions to any other officer subordinate to him.

(4) Notwithstanding anything contained in this section, the Mayor-in-Council, the Mayor, the Municipal Commissioner, or the other officer referred to in clause (c) of sub-section (3), shall not delegate—

(a) any of its or his powers or functions delegated to it or him under this section, or

(b) such of its or his powers or functions as may be prescribed.

17. In view of aforesaid provisions read with unamended Section 400 (1) it is clear that in the year 2006 , the Municipal Commissioner could delegate his power under section 400(1) of the KMC Act only to other officers and employees of KMC. However, in 2015 an amendment was brought to section 400(1) which empowered the Municipal Commissioner to delegate his powers and functions under the first proviso and the 3rd proviso of the sub-section to special officer appointed by him with the approval of the State Government.

18. It is not in dispute that at the relevant point of time i.e. in the year of 2006 when the order of regularization of unauthorized construction was

passed, special officer (building) was not an officer or employee of KMC and Municipal Commissioner was not empowered under the law prevalent at that point of time to delegate his power and function under section 401(1) read with section 48 of the KMC Act to the Special Officer (Building). If that be so then the question automatically comes whether the Special Officer (Building) had any jurisdiction to regularize unauthorized construction against the payment of money under the provisions of section 401(1) of the KMC Act. Since this is a case of lack of inherent jurisdiction such question can very well be raised at any stage of the proceeding. In ***Hindustan Zinc Limited Vs. Ajmer Vidyut Vitran Limited***, reported in (2019) 17 SCC 82 supreme Court has specifically held at paragraph 17 as follows:-

“17. We are of the view that it is settled law that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and also in collateral proceedings. This was held by this Court in Kiran Singh v. Chaman Paswan [Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 : AIR 1954 SC 340] as follows : (SCR p. 121 : AIR p. 342, para 6)

“6. ... It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non iudice, and that its judgment and decree would be nullities.”

19. In such view of the matter the points raised by the opposite parties that the petitioner had not taken the issue of jurisdiction earlier or that he cannot be permitted to take the issue of jurisdiction at the belated stage has got no substance as the question strikes at the very authority of the Special Officer (Building) to pass such order and as such defect is not curable in nature.

20. The Special Officer (Building) who passed the order dated 12th July, 2006 for regularization of the unauthorized construction against payment of money was admittedly not an employee or officer of KMC. Accordingly the Municipal Commissioner did not have authority to delegate the relevant power to that Special Officer, since the Municipal Commissioner lacked the competence to delegate the relevant power to the said special officer under the law prevailing at that point of point.

21. A co-ordinate bench of this Court in ***Susama Saha Vs. The Kolkata Municipal corporation***, reported in **2015 SCC Online Cal 6198** in a similar context held after considering the defacto doctrine that the defacto doctrine has its applicability where there exists an office but the person who is appointed to hold such office is not legally appointed and the actions/decisions and the orders passed by him before the declaration of his appointment as void is saved under such doctrine. The defacto doctrine is introduced in the legal parlance as a matter of policy and necessity to protect the interest of the public and the individual where those interests were involved in the official acts of a person exercising the duties of an office without being unlawful officer as held in ***Pulin Bihari Das Vs. Kind Emperor*** reported in 16 **CWN 1105**. In the said judgment the Court also expressed it's anxiety by observing in paragraph 27:-

“27. I am afraid whether such doctrine can be extended even to a case where the post is non-existent and have been created without an authority of law and the person appointed on such post discharges the functions and duties in such capacity. The aforesaid observations get strengthen from the observation of the Apex Court in case of Pushpadevi M. Jatia v. M.L. Wadhawan reported in (1987) 3 SCC 367 wherein it is held-

“21. We are unable to accept the submission of the learned counsel for another reason. Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as validity of his acts are

concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. The official acts of such persons are recognised as valid under the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. In Gokaraju Rangaraju case, Chinnappa Reddy, J. explained that this doctrine was engrafted as a matter of policy and necessity to protect the interest of the public. He quoted the following passage from the judgment of Sir Ashutosh Mukherjee, J. in Pulin Behari Das v. King Emperor at p. 574:

The substance of the matter is that the de facto doctrine was introduced into the law as a matter of policy and necessity, to protect the interest of the public and the individual where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. The doctrine in fact is necessary to maintain the supremacy of the law and the preserve peace and order in the community at large.

The learned Judge also relied upon the following passage from the judgment of P. Govindan Nair, J. in P.S. Menon v. State of Kerala at p. 170:

This doctrine was engrafted as a matter of policy and necessity to protect the interest of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. But although these officers are not officers de jure they are by virtue of the particular circumstances, officers, in fact, whose acts, public policy requires should be considered valid.”

22. In the said judgment the co-ordinate bench did not place reliance upon **Goka Raju Ranga Raju Vs. State of Andhra Pradesh** reported in **(1981) 3 SCC 132** as even in the said case the Apex Court in express words excludes the operation of the defacto doctrine to a case where the constitution of the post itself is under challenge and came to a conclusion that the order impugned is not sustainable and quashed and set aside the said order. I am also informed by the petitioner that special leave petition was filed before the Hon'ble Supreme Court of India against the decision of **Susama Saha (supra)** but the same was dismissed by the Apex court. The KMC thereafter field a Review Application but they did not proceed with the said Review Application.

23. Following the said judgment a Division Bench of this court is **Bina Sah Vs. The Kolkata Municipal Corporation, Mat 1325 of 2023** also came to a same finding and set aside the order allowing the appeal.

24. So far as the question raised regarding the jurisdiction of this court under article 227 of the constitution of India to decide said issue, reliance can be placed upon **Jai Sing and others Vs. Municipal corporation of Delhi and another** reported in **(2010) 9 SCC 385** wherein it was held in paragraph 42 as follows:-

“42. Undoubtedly, the High Court has the power to reach injustice whenever, wherever found. The scope and ambit of Article 227 of the Constitution of India had been discussed in Estralla Rubber v. Dass Estate (P) Ltd. [(2001) 8 SCC 97] wherein it was observed as follows: (SCC pp. 101-02, para 6)

“6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.”

25. The judgment relied by the opposite party no.2 in **Amalesh Adak (supra)** is factually different with the present case as in the said case appeal was decided finally but in the present case Appeal is pending. Moreover such observation which was passed much earlier is against the observation passed in **Hindustan Zinc Case (supra)**. Said judgment was passed prior to the amendment of 2016 and as such is not applicable. **Md. Ayub's case (supra)** was decided by a co-ordinate Bench of this court but the observation made in paragraph 17 of the judgment runs contrary to the Three Judges

Bench decision of the Hon'ble Apex Court in the case of **Hindustan Zinc Case(supra)** and as such is not applicable. **Dilip Ranjan Chatterjee case (supra)** is also not applicable in the present case as it was passed in 1991 before the Rule was framed. **Sarada Devi Case (supra)** relates to a review application and the judgment passed in **Union of India and others (supra)** is not applicable in the present case, in view of the observation made in paragraph 51 of the said judgment, and also in view of reasons discussed above.

26. In view of aforesaid discussion I have no other option but to conclude that the order passed by the special officer (building) on 12th July, 2006 is a nullity and accordingly it is set aside. However this order will not preclude KMC to proceed afresh against the impugned construction in accordance with law. Since KMC is of the view that the impugned construction is unauthorized they should initiate fresh action earliest before the competent authority and to carry on the same to its logical conclusion in accordance with law.

27. C.O. **4420 of 2015** is accordingly disposed of

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)