

(2024) 04 CAL CK 0003
In the Calcutta High Court
Case No : C.O. No. 300 Of 2018

M/S Kanak Land Development & Credit Co. Pvt. Ltd.

APPELLANT

Vs

K.M.C. & Ors.

RESPONDENT

Date of Decision : 02-04-2024

Acts Referred:

Constitution Of India, 1950 — Article 227

Kolkata Municipal Corporation Act, 1980 — Section 48(3), 400(1), 400(1)(c), 400(3), 401

Citation : (2024) 04 CAL CK 0003

Hon'ble Judges : Ajoy Kumar Mukherjee, J

Bench : Single Bench

Advocate : Partha Pratim Roy, Debaki Nandan Maiti, Pankaj Agarwal, Akshita Singh, Chayan Gupta, Rittick Chowdhury, Shohom Sanyal, Alok Kumar Ghosh, Subhrangsu Panda, Rajesh Kumar Gupta

Final Decision : Disposed Of

Judgement

Ajoy Kumar Mukherjee, J

1. The petitioner herein contended that he is the owner of showrooms on the ground floor and front basement of the building at 5, Camac Street Kolkata by purchasing the same through a registered deed dated 12th December, 1981. Petitioner's further contention is that the Mezzanine floor which alleged to have unauthorizedly constructed by the petitioner was actually in existence since 1982 and the petitioner purchased the space along with the said mezzanine floor. At the time of construction the builder constructed a big loft with a store-case meant for use as a store room and for use of internal works. The said loft/mezzanine floor thus exists even at the time of construction of the building. The Municipal Corporation allowed to retain the said mezzanine floor in all the show rooms constructed in front of the said building.

2. However some of the flat owners of the said building complained before the competent authority of the Kolkata Municipal Corporation (hereinafter called as

KMC) that there exists an unauthorized construction in the form of the said mezzanine floor and prayed for initiation of appropriate proceeding under section 400(1) and section 401 of the KMC Act 1980 and also prayed for demolition of the said mezzanine floor. Pursuant to said complaint the competent authority of KMC initiated a proceeding being D/Case No. 72-D/B-VII/2005-2006. The competent authority of the KMC appointed a Special Officer to investigate the matter in terms of the provisions of the KMC Act. The Special Officer (Building) of the KMC by an order dated 31st July, 2008 and 17th October, 2008 in the aforesaid demolition proceeding ordered that the person responsible shall demolish the unauthorized construction of mezzanine floor within 30 days from the date of communication of the order and in default the KMC Authority shall demolish the same and the cost of such demolition shall be recovered from the person responsible. It was further ordered by the Special Officer that the person responsible shall be allowed to retain the unauthorized construction as marked in red colour in D-sketch subject to payment of retention charges under section 400 (1) (C) of KMC Building Rules, 1990.

3. Being aggrieved by the aforesaid orders passed by the Special Officer in aforesaid demolition case, petitioner herein had preferred an appeal before the learned Municipal Building Tribunal, KMC being BT Appeal No. 77 of 2008 in terms of section 400(3) of the KMC Act 1980. The petitioner further submits that an application was made before the Municipal Building Tribunal in connection with the said appeal for production of the building sanction plan in respect of the suit premises but by an order dated 5th January, 2010 the Tribunal was pleased to dismiss the said application.

4. Being aggrieved by that order an Application under Article 227 being C.O. 580 of 2010 was preferred before this Court and by an order dated 15th July, 2011 this Court disposed of the said Application, directing KMC to produce the sanctioned plan within two weeks from the date of the communication of the order.

5. Since the KMC did not submit the sanctioned building plan before the Tribunal, another application being C.O. 508 of 2012 was preferred before this Court and during the hearing of the said application, KMC apprised the court that in spite of best efforts, building sanctioned plan could not be traced. By an order dated 4th March, 2012, this court disposed of said C.O. 508 of 2012, directing the Tribunal to dispose of the aforesaid appeal within a period of three months from the date of the communication of the order on the basis of materials placed before it.

6. Challenging the jurisdiction of the special officer to deal with demolition case under section 400(1) of the KMC Act 1980, argument was advanced before the Tribunal and upon hearing the rival contentions of the parties the Tribunal was pleased to remand the matter to the Special Officer (Building) for recording appropriate evidence and to decide whether present Special Officer (Building) was an employee or an officer of the KMC at the relevant time of passing the

impugned order and whether the said Special Officer has been lawfully delegated with the power of Municipal Commissioner to deal with the matter under section 400(1) of the KMC Act 1980 at the relevant time of passing the impugned order dated 31.07.2008.

7. Being aggrieved by the said order Respondent no. 4, 5 and 6 preferred an Application before this court being C.O. 1882 of 2017. Said application was disposed of by this Court, requesting the Building Tribunal to decide aforesaid BT Appeal no. 77 of 2008 without undue delay, preferably within a period of six month from the date of the receipt of the order. Meanwhile the petitioner paid the abovementioned retention charges in terms of the order of Special Officer (Building).

8. Said appeal being BT Appeal no. 77 of 2008 was heard and ultimately disposed of by the said Tribunal by an order dated 11th October, 2017 thereby dismissed the appeal observing that the special officer (building) had the jurisdiction to pass the impugned order under section 400(1) of the KMC Act, 1980.

9. Being aggrieved by that order the petitioner herein contended that the Building Tribunal in exercise of its jurisdiction acted illegally and with material irregularity by rejecting the Appeal filed by the petitioner. Tribunal has passed the order mechanically and without proper application of judicial mind. Tribunal failed to appreciate that no one was present on behalf of the Respondent/ authorities to present the case and allegations made by Respondent no.1 and the same cannot be proved in absence of Respondent no.1. The Tribunal failed to consider that he ought to have come to a specific finding as to whether Special Officer (Building) had the jurisdiction to entertain, hear or decide the subject of demolition case under section 400(1) of the Act. It has been specifically argued on behalf of the petitioners that Tribunal below failed to consider that by the order dated 18th July, 2017 this High Court, had specifically directed to decide the issue as to the jurisdiction of Special Officer (Building), which cast an obligation upon the Tribunal to come to a specific finding and decision on whether the Special Officer (Building) had the jurisdiction to entertain, hear or decide the demolition case under section 400 (1) of the Act.

10. It was further argued that in fact the Tribunal acted illegally in refusing to decide the jurisdiction of the Special Officer (Building) on the perceived ground that the petitioners were prevented by the principle of approbation and reprobation to raise the point of inherent lack of jurisdiction of Special Officer (Building), since such enquiry has become barred. Tribunal ought to have considered even if the petitioner were debarred from raising the point of jurisdiction of the Special Officer, Tribunal below was still under an obligation to decide the issue of jurisdiction of the Special Officer which was pressed before it during the final hearing of the Appeal, in terms of the order passed by this High Court on 18th July, 2007. Learned Tribunal was of the erroneous view that since petitioner has made deposit of retention charge, it would amount to acceptance

of the order of the Special Officer (Building). 11. He also argued that the Tribunal further acted illegally by making a finding that the petitioners had only challenged the order of demolition as mentioned in part-"A" portion of the impugned order dated 31st July, 2008 and did not challenge the entire impugned order, when nowhere in the memorandum of appeal petitioner had indicated that their challenge was restricted only to part-A of the impugned order and not the rest. The Tribunal was absolutely false in finding that the appellants are debarred from challenging the jurisdiction of the Special Officer (Building) as they have complied with portion of the impugned order, without considering that deposit of the alleged retention charges was without prejudice to their rights and contentions, during the pendency of the appeal, upon an application made to that effect.

12. He further contended that in fact the ultimate observation of the Tribunal below that special officer had jurisdiction is totally unreasoned speculative and self- contradictory. Accordingly petitioner has prayed for setting aside the order impugned.

13. It is submitted on behalf of the opposite party that the petitioner purchased the suit property by a registered deed on 1st December, 1981 but it has been alleged in this Application that mezzanine floor has been in existence since 1982 and the petitioner has alleged to have purchased the space along with the mezzanine floor. If the deed was registered on 1st December, 1981 there was no scope to purchase the mezzanine floor along with the space which came into existence according to the petitioner in the year 1982. Moreover, if there is any order allowing retention of the mezzanine floor and the petitioner has accepted the said order, there may not be any scope to dispute the unauthorized construction of the mezzanine floor. The petitioner duly accepted the retention portion of the order and as such he cannot challenge the jurisdiction of the Special Officer (Building) for passing the other portion of the order, which deals with demolition. The Tribunal below rightly arrived at the finding that the principle of approbate and reprobate are attracted in the present case. Accordingly they have prayed for dismissal of the present Application.

14. I have considered submissions made by both the parties.

15. The only question involved in the present context is whether the Special Officer (Building) had any authority to pass the order impugned in the demolition case no. 72-D/B/VII 2005-2006 and whether the Tribunal below was correct in upholding the order on the ground that there has been part compliance of the order of the Special Officer (Building) dated 31st July, 2008 and the petitioners have waived their right and now they cannot question the jurisdiction of the Special Officer.

16. In view of section 48 (3) of the KMC Act read with un-amended section 400 (1) of the Act, it is clear that when the order was passed on 31st July, 2008, the Municipal Commissioner could delegate his power under section 400 (1) of the

KMC Act only to other officer and employees of KMC. In the year 2015 an amendment was brought to section 400 (1) of the Act which empowered the Municipal Commissioner to delegate his power and functions under the 1st proviso and 3rd proviso of the sub-section to special officer appointed by him with the approval of State Government. It is the case of the petitioner that the Special Officer who passed the order was appointed in 2008 and that too as a contractual employee under the re-appointment scheme till the age of 65 years.

17. Since the issue involved in the present case relates to lack of inherent jurisdiction, it is settled law that such question can be raised at any stage of the proceeding. Supreme Court in *Hindustan Zinc Ltd Vs. Ajmer Bidyut Bitaran Ltd.* reported in (2019) 17 SCC 82 held 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 judice*, and that its judgment and decree would be nullities."

18. Admittedly, the authority who passed the impugned demolition order as well as retention order on payment of retention charges, is not an employee or officer of KMC and as such is not the authority whom such power can be delegated. Since such office is not legally appointed and as such the actions/decisions and the orders passed by him is void and cannot be saved under the *defacto* doctrine.

19. It was held by this court in *Sushma Saha Vs. The Kolkata Municipal Corporation* reported in 2015 SCC Online Cal 6198 that 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 interest 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 Court expressed it's anxiety observing in paragraph 27 as follows:-

"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 2023:CHC-AS:44951 10 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."

20. In the said judgment the co-ordinate Bench did not place reliance upon Gokaraju Rangaraju Vs. State of Andhra Pradesh reported in (1981) 3 SCC 132 as even in the said case the apex court in express words has excluded 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 accordingly the order was set aside.

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

22. In view of above, I have no other option but to conclude that the order passed by the Special Officer (Building) on 31st July, 2008 is a nullity and accordingly his entire order is hereby set aside.

23. 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 at the earliest before the competent authority and to carry on the same to its logical conclusion in accordance with law, without being influenced by any of observations made in the earlier proceeding as well as in the present proceeding.

24. In the event of initiating any such proceeding the authority shall dispose of the prayer, preferably within a period of 12 weeks from the date of the initiation of the proceeding.

25. C.O. 300 of 2018 is accordingly disposed of.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.