

S/L 4
15.12.2023
Court. No. 29
Suwayan

CO 1089 of 2008

**Sri Nemai Naskar
Vs.
Sri Pradip Acharya & Ors.**

*Mr. Sourav Sen
Ms. Sumitra Das
Ms. Adrisnata Chakraborty*

...for the petitioner.

Mr. Tapan Kumar Mitra

...for the respondent No. 2.

*Mr. Alok Ghosh
Mr. Fazlul Hoque*

...for the KMC.

1. The petitioner, the private opposite party No 2 and the opposite party Nos. 3 to 5, i.e., Kolkata Municipal Corporation and its officials are represented by their respective learned Advocates.
2. On consent of all the parties the instant revisional application is taken up for hearing.
3. In this revisional application the order dated 16.07.2007 as passed in B.T. Appeal No. 70 of 2006 by the Municipal Tribunal, Kolkata Municipal Corporation affirming the order dated 20.06.2006 as passed by the Special Officer (Building), Kolkata Municipal Corporation in Demolition Case No. 10-D/2005-06, Branch – XV has been impugned.
4. In course of his argument, Mr. Sen, learned Advocate for the petitioner at the very outset draws attention of this Court to the reported decision of *Susama*

Saha vs. Kolkata Municipal Corporation reported in (2015) 5 CHN 309. It is argued by Mr. Sen that a similar such matter was raised before a co-ordinate Bench of this Court where the co-ordinate Bench found that the Municipal Commissioner cannot delegate his powers and functions under Section 400(1) of the unamended Kolkata Municipal Corporation Act, 1980. It is further submitted by Mr. Sen that in the order dated 03.02.2017 as passed in this case the same view was taken by Hon'ble Justice Chattopadhyay, as he then was. It is, thus, submitted that the instant revisional application may be disposed of in the light of the decision passed in the reported decision of *Susama Saha (Supra)*

5. It is further submitted by Mr. Sen that though challenging the said judgment of said *Susama Saha* a SLP was filed before the Hon'ble Apex Court of India but subsequently the same was not pressed and thereafter a review application has been filed before a co-ordinate Bench but the same has not yet been disposed of.

6. In course of their argument learned Advocate for the private opposite party No. 2 submits before this Court the considering the long pendency of the instant revisional application an appropriate order may be passed in the light of the judgment as passed in the reported decision of *Susama Saha (Supra)*.

7. Learned Advocate for the Kolkata Municipal Corporation, however, leaves the matter for consideration of this Court.

8. For effective adjudication of the instant revisional application some portions of the reported decision of Susama Saha are required to be looked into and the same is reproduced in verbatim hereunder:-

“A short but interesting point is raised in this Revisional Application touching the competence and/or powers of the Special Officer (Building) to discharge the statutory duty and function of the Municipal Commissioner vested under Section 400(1) of the Kolkata Municipal Corporation Act, 1980 as delegatee. An action has been taken against the Petitioner under Section 400(1) of the said Act alleging that they have illegally and unauthorizedly undertaken the construction work in violation of the different provisions of the said Act and the Rules framed thereunder. The Special Officer (Building) is acting as a delegatee to the Municipal Commissioner and hearing the proceeding and passing orders for demolition in the event such construction violates any of these statutory provisions. Such order is amenable to be challenged before the building Tribunal by way of an appeal and against the Appellate Order further challenge can be made before the High Court under Article 227 of the Constitution of India. This is how the matter has come up before this Court and a point is raised at the behest of the Petitioner on the validity of the powers exercised by the Municipal Commissioner under Section 48 of the said Act.

S.48. Delegation of powers and functions-(1)
The Corporation 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 or 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

(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.

23. According to Section 48 of the Act it appears that the Municipal Commissioner can delegate any of his powers and functions including the powers and functions conferred

under Sub-section 1 of Section 400 but such delegation can only be made to any other officer or employee of the Corporation. The officer must be a validly appointed officer and by included in the establishment of the Corporation before the Municipal Commissioner delegates the powers and functions. Since the post of the Special Officer is not recognized either in the Act or in the Regulation the person appointed on such post cannot be brought within the ambit of the officer or an employee of the Corporation. This Court, therefore, holds that the order of Municipal Commissioner to delegate his powers and functions under Sub-section 1 of Section 400 of the code is bad, illegal and contrary to the provisions contained under Section 48 of the Act.

26. *The De-Facto 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 De-Facto Doctrine is introduced is 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 persons exercising the duties of an office without being unlawful officer as held in pulin Behari Das v. King Emperor reported in 16 CWN 1105.*

29. *Even in case of Gokaraju (Supra) the Apex Court in express words excludes the operation of the De-Facto Doctrine to a case where the constitution of the post itself is*

under challenge. This Court, therefore, does not find that the aforesaid decision can render any help to the Corporation and shall save the actions taken by the Special Officer (Building).

30. This Court, therefore, finds that the order impugned cannot be sustained in the eye of law and is hereby quashed and set aside. It is open to the Municipal Commissioner to initiate a proceeding de novo strictly in terms of the provisions of the Act.”

9. On perusal of the aforesaid judgment more specifically the relevant provisions which have quoted above it appears to this Court that admittedly in view of the provisions of the unamended Act of Kolkata Municipal Corporation Act, 1980 the Special Officer is not the competent authority for passing a direction for demolition of the alleged unauthorised construction over the property in question since the delegatory power which he claimed to have been received from the Municipal Commissioner is found to be bad, illegal and contrary to the provision of Section 48 of the Act as held in the case of *Susama Saha*.

10. As a result the instant revisional application is allowed on contest. Consequently, the impugned order dated 16.07.2007 as passed in B.T. Appeal No. 70 of 2006 as passed by Municipal Tribunal, Kolkata Municipal Corporation as well as the order of Demolition dated 20.06.2006 as passed by Special Officer (Building), Kolkata Municipal Corporation in demolition Case No. 10-D/2005-06, Branch – XV are set aside.

11. Before parting with the instant case this Court categorically holds that this Court has not gone into the merits of the order passed by the Municipal Tribunal as well as the Special Officer and, therefore, the question as to whether the petitioner before this Court has made any illegal construction or not over premises No. Z-3/429, Jeliapara Road, Kolkata – 700044 is kept open.

12. In view of such, it is also open to the Municipal Commissioner and/or any of his daelegatee to initiate a proceeding *de novo* strictly in terms of the provisions of the amended Kolkata Municipal Corporation Act, 1980. This Court also makes it clear that this order would not act as a *res judicata* in the further action of the Municipal Commissioner and/or its delegates, if there be any.

13. In the event the Municipal Commissioner and/or its delegatee proposes to initiate a *de novo* proceeding against the present petitioner the same is to be commenced within a month from the date of communication of this order and the same is to be disposed of in accordance with law within three months also from the date of communication of this order. It is further made clear that the time limits as fixed by this Court are mandatory.

14. With the aforementioned observation the instant revisional application being CO 1089 of 2008 is disposed of.

15. With the disposal of the instant revisional application all pending interim applications are disposed of.

16. Parties to act on the server copies of this order.
17. Urgent photostat certified copies of this order, if applied for, be supplied to the parties upon compliance with all the necessary formalities.

(Partha Sarathi Sen, J.)