

D/L
Item No. 07
20.07.2023
KOLE

**MAT 1325 of 2023
With
IA No. CAN 1 of 2023**

**Bina Saha
-Vs.-
The Kolkata Municipal Corporation & Ors.**

*Mr. Arindam Banerjee,
Mr. S. Bala,*

...for the appellant.

*Mr. Barin Banerjee,
Mrs. S. Chakraborty,*

...for the KMC.

*Mr. Malay Kr. Das,
Mr. D. Raha,*

...for the respondent no. 5.

By consent of the parties, the appeal and the connected application are taken up for hearing together.

Affidavit of service filed in court today be kept with the records.

A judgment and order dated July 13, 2023, whereby the appellant's writ petition being WPA No. 16456 of 2023 was dismissed by a learned Single Judge of this Court, is under challenge in this appeal.

It appears from the records that a demolition order was passed by the Special Officer (Building) of Kolkata Municipal Corporation (in short 'KMC') on May 28, 2013, against the appellant/writ petitioner herein. The appellant assailed such demolition order by filing a statutory appeal before the Municipal Building Tribunal. The appeal was dismissed. Challenging such order of the Tribunal, the appellant approached a Single Judge of this court in the writ

jurisdiction. The writ petition was dismissed by an order dated June 8, 2018. The appellant herein challenged such dismissal order by way of an intra court appeal before the Division Bench. The Division Bench dismissed the appeal on October 3, 2018. The Special Leave Petition filed by the appellant against the aforesaid order of the Division Bench has been dismissed for non-compliance with certain procedural formalities.

A notice under Sections 544 and 546 of the KMC Act, 1980 was issued by the KMC on June 2, 2023, for executing the order of demolition that was passed in 2013. Challenging such notice, the appellant herein approached the learned Single Judge in the present round of litigation. The learned Judge dismissed the writ petition with the following observations:-

“The petitioner is aggrieved by the same. He tries to reopen the case all over again with the submission that the Special Officer who passed the order initially in the year 2013 did not have the jurisdiction to entertain or adjudicate the issue. Any order passed without jurisdiction is a nullity.

The learned advocate for the petitioner intends to rely on certain decisions passed by this Court in support of the aforesaid submission.

The Court is not inclined to entertain the submission made on behalf of the petitioner as it appears that the petitioner failed to obtain any order setting aside the demolition order passed by the Special Officer before three superior forums. If the issue is reopened all over again, there will be no end to the litigation. The order of demolition has been scrutinized by three judicial for a and found to be proper. The same has attained finality by now.

It is high time that the order of demolition passed way back in May 2013 be implemented.”

Being aggrieved, the writ petitioner has come up before us by way of this appeal.

Mr. Arindam Banerjee, learned Advocate, representing the appellant argued that the order of demolition that was passed on May 28, 2013, is a nullity. The Special Officer who passed the order was not an employee or officer of KMC. Hence, the Municipal Commissioner did not have the authority to delegate the relevant power to that person who is the respondent no. 4 in the present appeal. Since the Commissioner lacked the competence to delegate the relevant power to the said person, that person lacked inherent jurisdiction to pass the demolition order. In support of the proposition the Commissioner, under Section 48(3)(b) could delegate the power under Section 400(1) of the KMC Act, 1980, only to an officer or employee of KMC, at the relevant point of time i.e., 2013, Mr. Banerjee has relied upon the decision of a learned Single Judge of this Court in the case of **Susama Saha-vs.- Kolkata Municipal Corporation**, reported in **(2015) 5 CHN (Cal) 309**. The said judgment and order was rendered in an application under Article 227 of the Constitution of India. KMC filed a Special Leave Petition challenging such judgment and order but subsequently withdrew the same. Therefore, the said judgment holds fort.

Mr. Banerjee further submitted that the plea that an order is null and void can be set up by a person against whom such order is sought to be used or executed, at any stage and in any proceedings including collateral proceedings. He also argued that the principle of *res*

judicata does not apply where the earlier order or decree is a nullity. In support of this proposition, Mr. Banerjee, referred to a decision of the Hon'ble Apex Court in the case of **Sayyed Ali & Ors.-vs.-A. P. Wakf Board, Hyderabad & Ors.**, reported in **(1998) 2 SCC 642**.

Mr. Banerjee, learned Senior Counsel, representing KMC argued that the appeal should be dismissed as the writ petition was filed after an inordinate delay of almost ten years. He argued that in the earlier round of litigation, neither before the Learned Single Judge nor before the Division Bench the appellant urged the point of the demolition order being null and void. Today, the appellant should not be allowed to agitate such point.

Mr. Malay Kumar Das, learned Advocate, representing the private respondent at whose instance the demolition proceeding was initiated, submitted that the writ petition has been filed after unexplained inordinate delay. Further, the demolition order has been partly implemented. Presently, there is no scope for challenging such order on any ground whatsoever.

We have given our anxious consideration to the rival contentions of the parties. Section 48(3) of KMC Act reads as follows:-

“S. 48 (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

(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.”

On a bare reading of sub-section 3 of Section 48 of KMC Act, it would be clear that at the relevant point of time i.e., in the year 2013 the Municipal Commissioner could delegate his powers under Section 400(1) of the KMC Act only to other officers and employees of KMC. In the year 2015, an amendment was brought to Section 400 sub-section 1 of the 1980 Act which empowered the Municipal Commissioner to delegate his powers and functions under the first proviso and third proviso of the sub-section to Special Officers appointed by him with the approval of the State Government. However, such amendment is not relevant for our purpose as the same came only in 2015 and must be taken to be prospective in nature.

It is not in dispute that the respondent no. 4 herein, who acting as Special Officer (Building) passed the demolition order, was not an officer and employee of KMC. It must necessarily follow therefore that the Municipal Commissioner was incompetent in law to delegate his powers and functions under Sections 400 (1) of the KMC Act to that gentleman. As a corollary, it must indubitably follow that the respondent no. 4 did not have jurisdiction to pass any order under Section 400 (1) of the KMC Act. In our

opinion, this is a case of lack of inherent jurisdiction which is incurable. No amount of participation in the proceedings before such a person could confer jurisdiction on him.

We are in agreement with Mr. Banerjee, as we must be since it is the established law that a defence of an order being a nullity can be set up by a person against whom such order is sought to be enforced, at any stage, irrespective of the length of time that may have passed from the date of passing of the order, and in any proceedings including any collateral proceedings. This proposition of law is so well-established that it is completely superfluous to cite authorities in support thereof.

We have also noted the decision of the Hon'ble Apex Court in the case of **Sayyed Ali (supra)** which, *inter alia*, holds that there can be no question of application of the principle of *res judicata* if the earlier order is non-est in the eye of law. The principle of *res judicata* pre-supposes that there is in existence a prior decree or order which is valid in law. Something which is non-est, never existed. Hence, in the present case, the principle of *res judicata* will also not be attracted.

In view of the above discussion, we have no choice but to allow the appeal, set aside the order under appeal, and also set aside the demolition order dated May 28, 2013 since it is a nullity. Needless to say, KMC will be at liberty to proceed afresh against the impugned construction in accordance with law. Since KMC is of the view that the impugned construction is unauthorized and illegal, they should initiate fresh action at the earliest and carry on the

same to its logical conclusion in accordance with law, observing the principles of natural justice.

Since we have not called for affidavits, the allegations made in the stay application are deemed not to be admitted by the respondents.

The appeal and the connected application are, accordingly, disposed of.

Urgent photostat certified copy of this order be supplied to the parties, if applied for, as early as possible.

(Arijit Banerjee, J.)

(Apurba Sinha Ray, J.)