

(1997) 04 CAL CK 0016
In the Calcutta High Court
Case No : Writ Petition No. 2505 of 1996

Ashoka Restaurant and Bar and Another	APPELLANT
Vs	
General Manager, Metro Railways and Others	RESPONDENT

Date of Decision : 08-04-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1998 Cal 90

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Advocate : S. Pal and B. Sen, for the Appellant; Anindy Mitra, Dipak Basu and Milir Chakraborty, for the Respondent

Final Decision : Dismissed

Judgement

Satyabrata Sinha, J.—The petitioners who are owners of a restaurant known as "Ashoka Restaurant & Bar" and carry on business at 3B, Jawaharlal Nehru Road, Calcutta have filed this application, inter alia, for issuance of a writ of or in the nature of Mandamus directing the respondents to pull down any portion of the parties and from making any construction of any nature whatsoever in front of the said shop.

2. The basic fact of the matter is not in dispute.

3. The Union of India, Ministry of Railways, is required to construct a Sub-way under the Jawaharlal Nahru Road, in front of Metro Cinema Hall for the purpose of running Metro Railway in the town of Calcutta. The petitioners contend that the said Sub-way constructed on the foot path in front of their shop will clearly ruin the business of the petitioners.

4. Keeping in view the grievances raised in this writ application a short affidavit was directed to be affirmed on behalf of the respondents as to whether there exists any feasibility of diverting the said Sub-way.

5. In the affidavit-in-opposition, filed on behalf of the respondents it is stated that the said Sub-way is being constructed in larger public interest and the Hon"ble Supreme Court in C. A. No. 8294 of 1983 by an order dated 19th September, 1983 observed that the Metro Railway Construction work must proceed unhampered.

6. It is admitted that for the purpose of construction of the said Sub-way a meeting was held in connection with dispersal arrangement at Esplanade Station on 20-3-1996 in the Chamber of Chief Engineer/Metro Railway, Calcutta wherein Shri A.K. Ganguli, Chief Engineer, Metro Railway, Calcutta, Shri Mangu Singh, Dty. Chief Engineer (North-I), Metro Railway, Calcutta, Shri A.K. Bandopadhyay, PTTE, Transport Dept. Govt. of West Bengal, Shri S. N. Chatterjee, Additional Director-in-charge, Planning, CMDA, Shri S. Ramakrishnan, Joint CP, Traffic, Calcutta Police, Shri Surajit Kar Purkayastha, DC, Traffic, Calcutta Police, Sri K. A. Rahim, AC (I), Traffic, Calcutta Police and Sri S. Roy Dty. CE (Drainage), Calcutta Municipal Corporation were present wherein a detailed discussion took place on the aforementioned subject. A drawing No. MRC/W/U-S&D/1-95 showing the dispersal arrangements was also approved by all of the said authorities representing various departments and present in the said meeting.

7. In the said meeting, the Officers representing Calcutta Police, PTTE, CMC and CMDA insisted that the said Sub-way was essential from pedestrian point of view.

8. During pendency of the writ petition, an inspection of the documents including the drawing aforementioned was directed to be given to the petitioner, Pursuant to the decision taken in the aforementioned meeting, the constructions of subway started. The petitioners, however, issued three letters dated 20-9-1986, 25-10-1986 and 26-10-1986 for re-construction of the Sub-way station on the foot path in front of their restaurant, inter alia, on the ground that they will lose customers if the said Sub-way is constructed. According to them there is a place in between Metro Cinema and Moti Sil Street, commonly known as Metro Gali which was a suitable place for construction of the structures for the said purposes. However, the respondents in their feasibility report stated :--

"The location of dispersal in front of 3-B, J.L. Nehru Road near Moti Shel Street was jointly decided by Govt. of W. B., CMDA, CMC and Jt. C. P. Traffic looking into utmost facility which can be rendered to the public since it is at the junction of Moti Shel Street and J. L. Nehru Road.

Accordingly, diversion of existing trunk brick sewer line (which is 350m long) has been completed along with connection to Moti Shel sewer line. The locations where subway will cross this diverted sewer has been provided with R. C. C. box with reduced height (due to restricted vertical clearance available). The part of subway at this location has already been constructed and any change in location at this stage will require reconstruction of diverted sewer line. This will again require diversion of the present diverted sewer line since flow through trunk sewer line cannot be disrupted even for an hour.

The take of point of the subway from mezzanine floor of Esplanade Station has already been fixed and no change in the location of this opening is possible at this stage without closure of Esplanade station due to water level being about 5 m above mezzanine floor level and any effort in making hold in the diaphragm wall at some other locations may cause flooding of the Esplanade Station.

The dispersal is very close (3.5 m away) to structures on the Eastern side of J. L. Nehru Road, If subway is extended (which is possible only along the existing dispersal and 3.5 m away from structures) it may cause severe damage to adjacent structures on account of deep cutting involved and due to presence of other utility services like water supply main pipe line, sewer line etc., the leakage from which may lead to heady horizontal forces. Metro Rly. have very bad experience of collapse of a number of buildings along the tunnel due to bursting of water mains, sewer lines, etc. even though the adjacent buildings were as far as 15 to 17 m wherein adequate precautions were taken in the form of strengthening of diaphragm wall.

Bored piles along the outer periphery of the proposed dispersal to a varying depth depending upon extent of excavation required, has already been completed. Any change in the location of dispersal will render these bored piles completely redundant since they are meant for a specific depth and no excavation beyond the grip length of these bored piles can be carried out without endangering the safety of bored piles and adjacent buildings and structures.

From the foregoing paras, it is clear that the work of construction of this dispersal near Moti Shel Street is in advance stage and any change in location at this stage is technically not feasible."

9. A petition for amendment of writ petition was, thereafter, filed wherein it was contended that if the said constructions are allowed to be carried out, petitioner would be inconvenienced; inasmuch as, its air conditioning machine cannot be taken out from the shop premises for repairs. It was, further, alleged that the possibility of fire hazard cannot be ruled out and in that view of the matter the Director of West Bengal Fire Services and the Collector of West Bengal Fire Service Department were sought to be impleaded as parties in the writ petition. For the said purpose an application for amendment of the writ petition had also been filed on behalf of the petitioner. An affidavit-in-reply has also been filed wherewith a purported reported of one Shri A.K. Dey had been annexed.

10. Mr. S. Pal, the learned counsel appearing on behalf of the petitioner, inter alia, submitted that the foot path belongs to Calcutta Municipal Corporation and it is not known as to whether the land has been acquired or not. It has further been stated that for the purpose of said construction, no sanction had been obtained and, thus, there is violation of Rules 99 and 100 of Chapter XV of the Building Rules framed by Calcutta Municipal Corporation. As regard the approved plan, it has been submitted that the number of the plan also does not tally with the number thereof as stated in the Affidavit-in-Opposition.

11. The learned counsel contends that from the report of Shri A.K. Dey annexed to the Affidavit- in-Reply it would appear that there is a possibility of a little diversion in the said Sub-way as a result of which the petitioners shall not suffer any injury. It has been submitted that the underground tunnel work is not complete one, thus, even no\|v there is scope for diversion thereof, Mr, Pal has also drawn my attention to the fact that the statements made in paragraphs 7 and 14 of the Affidavit-in-Reply having not been denied, the same should be deemed to be admitted.

12. Mr. A. 4Mitra, the learned Additional Solicitor General, on the other hand, submits that the Metro Railway is a public utility concern and, thus, this court should not interfere with the decision taken by the authorities in exercise of its power under Article 226 of the Constitution of India, According to the learned counsel, the dispersal arrangements had been taken in the meeting which had been attended by all concerned including the representatives of the Calcutta Municipal Corporation. The learned counsel submits that it is not correct to contend that the plan produced before this court does not tally with the plan referred to in the minutes of the meeting.

13. The first question what arises for consideration is as to whether the application for amendment should be allowed.

14. In the said application for amendment two contentions have been raised i.e. (1) to the effect that air conditioning machine cannot be taken out by Blue Stars Limited; and (2) that possibility of fire hazard cannot be ruled out. By reason of an interim order passed by this Court, the respondents were directed not to demolish the portico in front of the shop of the petitioners by an order dated 10-12-1996. The said application for amendment of writ petition appears to have filed by way of afterthought; inasmuch as, the questions raised therein, if at all correct could have been taken in the main writ application itself. The said application evidently has been filed to delay the proceedings and no substantial question had been raised therein.

15. The report of Shri A.K. Dey has been filed as a rejoinder to the report of the Executive Engineer which has been annexed to the affidavit-in-opposition itself. The writ petition was moved on December, 1996 after the underground work was already completed. By reason of an order dated 10-12-96 the court also gave permission to the respondents to complete the underground work if any.

16. It is now well known that this court in exercise of its power of judicial review is not concerned with the merit of the decision but is concerned with the decision making process. No infirmity in the decision making process on the part of the respondents has been pointed out.

17. The minutes of meeting annexed to the affidavit-in-opposition clearly show that the representatives of the concerned departments were present and in fact the representative of the Calcutta Municipal Corporation had expressed his anxiety to the effect that the subway he constructed at an early date, keeping in

view the interest of the pedestrians. For the purpose of construction of the said Sub-way, the main sewerage pipe had been shifted. The petitioners' right to carry on business is not affected by the said constructions. The only apprehension is that they may not be able to put its sign board properly so as to attract more customers. The apprehension is not based on any factual foundation.

18. Furthermore, it is now well known that the court is reluctant to exercise its jurisdiction whereby public interest may suffer.

19. So far as the alleged discrepancy in the plan is concerned, from a perusal of the original plan it appears that plan no. being MRC/W/STN/ 2-96 was given at the initial stage but after the same had been approved the drawing no. TSM-2 (SHT 2 of 2) was put in. From the said plan it appears that the necessary preparatory work including survey of cross section of road referred to in the drawing No. CS-2 at Lenin Sarani-Jawaharlal Nehru Road crossing was done by various agencies.

20. It has not been pointed out by the petitioner that there has been any departure or deviation from the plan annexed to the Affidavit-in-Opposition and the original plan submitted before this court.

21. This court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot go into the question as to whether it is feasible to shift the Sub-way or not as the same is a disputed one. In such matters, this court must exercise judicial restraint inasmuch as any judicial interference in a case of this nature may lead to a colossal loss to public exchequer apart from inconvenience to the public authorities. Private inconvenience in such matter is of no moment. It is well settled legal proposition that the private interest would always yield place to the public interests. Reference in this connection may be made in *Vasantkumar Radhakisan Vora Vs. The Board of Trustees of the Port of Bombay*, .

22. In *Suku Mahto and Another Vs. State of Bihar and Others* a Division Bench of which I was a member held :--

"24. This Court, it is now well settled, while exercising its jurisdiction under Article 226 of the Constitution of India may refuse to exercise its jurisdiction in a given case.

23. In *Joy Bharat Transport Company v. Central Coalfields Ltd.* reported in 1988 B.L.T. 192 I had held:--

"It is now well known that this Court does not interfere within a given case only because it would be lawful to do so. The High Court in exercise of its writ jurisdiction under Articles 226 and 227 of the Constitution of India may refuse to issue writ in the event it is found that substantial justice has been done to the parties or in larger interest it would not be prudent to issue a writ. It is also known that the right of an individual sometimes has not to give way to the right of the public at large. Under Article 226 of the Constitution of India, a High Court may refuse to exercise its jurisdiction in favour of a party who has not

approached the Court with clean hands."

24. In that case reliance was placed upon the decision of the Supreme Court in the case of *Municipal Board, Pratabgarh and Another Vs. Mahendra Singh Chawla and Others*, , wherein it has been held as follows (at page 1495 of AIR):--

"6. What are the options before us, obviously as a logical corollary to our finding we have to interfere with the judgment of the High Court because the view taken by it is not in conformity with the law. It is at this stage that Mr. Sanghi, learned counsel for the respondent invited us to consider the humanitarian aspect of the matter. The submission is that the jurisdiction of this court under Article 136 of the Constitution is discretionary and therefore this Court is not bound to tilt at every approach found not in consonance or confirmity with law but the interference may have a deleterious effect on the parties involved in the dispute. Laws cannot be interpreted and enforced divorced from their effect on human beings for whom the laws are meant. Undoubtedly rule of law must prevail but as is often said rule of law must run akin to rules of life. And life of law is not logic but experience"".

(Underlining is mine for emphasis)

25. A Division Bench of the Allahabad High Court in Civil Misc. Writ Petition No. 12626 of 1987 in almost similar situation refused to grant relief to the petitioner thereof stating the law thus :--

"Furthermore, the present is not a fit case where under Article 226 of the Constitution any relief could be granted. It has been stated in the counter-affidavit that Rs. 5000000/- would be suffered per day by the National Thermal Power Corporation Limited if the eucalyptus trees belonging to the petitioner are not cut and line is not laid, as is planned by respondent No. 2. As a result, the counter-affidavit further says, the supply of electricity to Lucknow, Moradabad and other districts would be hampered. As against the interest of the public at large the interest of the petitioner cannot be given any consideration. The petitioner had been asked by the letter dated 2-7-1987 by the respondent 3 to be present at the time of cutting of the trees on July 15-16, 1987, so that woods may be removed by him. This can still be done. In our opinion, the present is not a case fit for granting of any of the reliefs prayed for".

25-26. In *Ramniklal N. Bhutta and another Vs. State of Maharashtra and others*, the Apex Court while dealing with a Land Acquisition Matter clearly held that the courts have to weigh the public interest vis-a-vis the private interest while exercising the power under Article 226 of the Constitution of India.

27. It further held (at page 1285 of AIR scw):

"It may even be open to the High Court to direct, in case it finds finally that the acquisition was vitiate on account of non-compliance with some legal requirement that the persons interested shall be entitled to a particular amount of damages to be awarded as a lump sum or calculated at a certain percentage

of compensation payable. There are many ways of affording appropriate relief and redressing a wrong; quashing the acquisition proceedings is not the only mode of redress. To wit, it is ultimately a matter of balancing the competing interest. Beyond this, it is neither possible nor advisable to say".

28. So far as alleged violation of Rules 99 and 100 of the Building Rules framed by the Calcutta Municipal Corporation is concerned, the same deal with the fire protection and exit requirements. No objection has been taken by the Calcutta Municipal Corporation as regard the alleged non observance of the said rules. In the fact as noticed hereinbefore the competent authorised officer of Calcutta Municipal Corporation himself was present in the meeting. It is not for the petitioner, in the facts of this case to question that the said plan on the ground that construction has not been sanctioned particularly in view of the fact that neither any such ground has been taken nor the Calcutta Municipal Corporation has been impleaded as a party in the writ application.

29. For the aforementioned reasons the application for amendment as well as the writ petition are dismissed with costs. Counsels fees assessed at 200 G.Ms.

30. The respondents shall, however, allow the petitioners to put a Neon Sign Board on the new structures which are going to be constructed on the Subway, if the same is permissible in law.

31. It is stated by Mr. Dipak Basu that the structure in front of the petitioner Restaurant cannot be demolished overnight inasmuch as the permission of the Calcutta Municipal Corporation has to be obtained therefore.