
(1990) 05 CAL CK 0038
In the Calcutta High Court
Case No : Matter No. 160 of 1990

Debu Bhattacharjee

APPELLANT

Vs

Calcutta Municipal Corporation and others

RESPONDENT

Date of Decision : 18-05-1990

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 33, 34, 36, 36(1), 37

Citation : AIR 1990 Cal 390 : (1991) 1 CALLT 140

Hon'ble Judges : K.M. Yusuf, J

Bench : Single Bench

Advocate : Asoke Sen, Goutam Chakraborty and Swapan Dutta, for the Appellant; Sumit Panja, for the Respondent

Judgement

1. The case of the writ petitioner, in short, is that originally he was allotted Stall No. D(N)-13/1 covering about 4 sq. ft. of area in S. S. Hogg Market of the Calcutta Municipal Corporation. On representation the area was extended to 8 sq. ft., making the total of 12 sq. ft., and subsequently on further representation the remaining 47.69 sq. ft. of Stall No. D(N)-13 was allotted to the petitioner which included the entire Stall Nos. D(N)-13, 1 and D(N)-12 making a total area of 59.69 sq. ft. in two Stalls and the petitioner was allowed to carry on his business there. In or about December, 1985 a devastating fire occurred in the said S. S. Hogg Market destroying, greater part of Block D where your petitioner was carrying on his business. In January, 1986 the respondents published in the Calcutta Municipal Gazette their decision of rehabilitation of the owners of the Stalls which is produced in paragraph 4 of the petition. Pursuant to the said decision the petitioner was allotted two separate stalls being Nos. 10 and 61 under Shed No. 3 at the Temporary New Market in the Maidan and this allotment was in favour of the petitioner by reason of his occupation, possession and enjoyment of the destroyed Stalls Nos. D(N)/13/1 and 13. It is contended by the petitioner that after the construction of the New Complex of the S. S. Hogg Market, the petitioner is entitled to the stalls being Nos. D(N)-13/1 and 13 covering in total 59.69 sq. ft. against Stall No. D(N)-13, namely, 12 sq. ft.

against Stall No. D(N)-13/1 and 47.69 sq. ft. against Stall No. D(N)-13. It is stressed by the petitioner that on this basis the two temporary stalls were allotted in the Maidan.

2. The Annexure "A" to the writ petition is a communication dated 10th May, 1986 to the petitioner by the Superintendent of the S. S. Hogg Market regarding allotment of his space of D(N)-13 covering 47.69 sq. ft. It is stated in the said communication that the Member, Mayor-in-Council, as per his orders dated 7th May, 1986 and 10th May, 1986 has been pleased to pass the following orders:--

".... I would suggest that the remaining area of Stall No. D(N)-13 measuring 47.69 sq. ft. (curtailing 8 sq. ft. from the original area of Stall No. D(N)-13 as the said area of 8 sq. ft. has already been allotted to D(N)-13/1 as back extension by Dy. Commissioner (M) on 3-6-81) as per opinion of Asstt. Engineer (Civil) on 7-5-86 be allotted to the R. O. of Stall No. D(N)-13/1, S. S. Hogg Market subject to payment of charges as per new schedule and policy decision."

The Superintendent "in terms of the said orders of M.I.C." requested the petitioner to deposit in suspense account a sum of Rupees 29,145.87 without any prejudice and interest to the Corporation at an early date in order to enable this department to take further action in this matter. On that very date i.e. 10th May, 1986 the petitioner deposited a sum of Rupees "29,034.49 under receipt No. 2801 which is enclosed with the writ petition. The balance of unpaid amount was also deposited with the Corporation on that very date as per Receipt No. 2803. Thereafter the petitioner received as bolt from the blue a letter dated 16th February, 1990 from the Superintendent of the said S. S. Hogg Market which is quoted as follows:--

"With reference to this office letter No. H.M./ 38 dt. 10-5-86 this is to inform you that Hon"ble Mayor, Calcutta Municipal Corporation as per his order dt. 15-2-90 has been pleased to cancel the allotment of Stall No. D(N)-13 covering an area of 47.69 sq. ft. at S. S. Hogg Market and refund the money deposited by you in this regard in suspense account without any prejudice in supersession of earlier order of the authority in this regard.

Hence you are hereby requested to receive back the money deposited in this connection after observing all procedure in this regard."

This order of the Mayor dated 15th February, 1990 is under challenge.

3. Mr. Chakraborty, the learned Counsel appearing for the petitioner, submitted that the Member, Mayor-in-Council, passed the order in favour of the petitioner which was communicated to him on 10th May, 1986 stating that an area measuring 47.69 sq. ft. has been allotted to the petitioner from Stall No. D(N)-13 and he was directed to pay the amount which he immediately complied. After about four years all of a sudden the Mayor by his order of 15th February, 1990 has cancelled the order of the Mayor-in-Council at the back of the petitioner without giving any opportunity of hearing and without assigning any

reason whatsoever. It does not appear from the impugned letter of 16th February, 1990 as to on what basis the Mayor has taken this uncalled for decision in supersession of the earlier order of "the authority" i.e. the Mayor-in-Council. Mr. Chakraborty also questioned the power of the Mayor to cancel any order of the Member, Mayor-in-Council, in his individual capacity. He referred to Sections 8, 33 and 34 of the Calcutta Municipal Corporation Act, 1980 which deal with the Constitution of the Mayor-in-Council, Executive power of the Corporation to be exercised by Mayor-in-Council and the General powers of the Mayor, respectively. He also referred as well to Regulation 4(2) of the Calcutta Municipal Corporation (Transaction of Business of the Mayor-in-Council) Regulations, 1986. Mr. Chakraborty submitted that no where the Mayor has any authority to unilaterally act and cancel the decision of the Mayor-in-Council. Such act of the Mayor is bad, illegal and arbitrary and must be struck down.

4. Mr. Panja, the learned Counsel appearing for the respondents, submitted that the cancellation of the earlier order of the Mayor-in-Council dated 7th May, 1986 and 10th May, 1986 which was communicated to the petitioner by the Corporation's Memo dated 10th May, 1986 was actually not cancelled by the Mayor but it was, in fact, quashed by the Hon'ble Mr. Justice Shymal Kumar Sen in His Lordship's judgment dated 22nd July, 1988 in Matter No. 4692 of 1987 (Lalapatti Traders Association and ors. v. Calcutta Municipal Corporation and ors.). The Mayor has nothing to do with the cancellation but simply acted upon the order of this Hon'ble Court. He referred to several portions of the judgment of Mr. Justice Sen to bring home the point that His Lordship rejected the petitioner's contention (who was respondent No. 5 in the aforesaid writ petition) that he had any claim or right in respect of Stall No. D(N)-13 and he was really displaced. In the submission of Mr. Panja no right at all accrued to the petitioner in view of the Judgment of Mr. Justice Sen and as such the Mayor was within his right by simply endorsing the order of this Hon'ble Court which has already quashed the allotment in favour of the petitioner by coming to a definite finding. He referred to Section 543 (3) which relates to, inter alia, suspension and revocation etc. of licences and permissions. He also placed a decision dated 21st Sept. 1988. of the Municipal Commissioner in the matter of Lalapatti Traders Association in accordance with the direction of Mr. Justice Sen to pass a fresh decision in respect of Stall No. D(N)-13 and it was decided that no stall was to be allotted to the Lalapatti Traders Association but Stall No. D(N)-13 be allotted to a new party and the decision of the Commissioner be placed before the Mayor for consideration. Mr. Panja also cited two decisions, the first is reported in Bank of Bihar Ltd. Vs. Mahabir Lal and Others, and the second is also reported in State of U.P. and Another Vs. Raja Ram Jaiswal and Another, .

5. I have considered the facts of the case and the submissions advanced by the Seamed Counsels of both the sides. The decision revolves round the following points : (a) Under what provisions of law the Mayor exercised his power of cancellation of allotment of the Stall in question; (b) What were the materials before him for such cancellation; and (c) whether the Mayor applied his mind

before taking such decision. Section 8 of the Calcutta Municipal Corporation Act, 1980 deals with the constitution of the Mayor-in-Council and sub-section (4) of Section 8 provides that the manner of transaction of business of the Mayor-in-Council shall be such as may be determined by the Corporation by regulations. Section 33 deals with the Executive power of the Corporation to be exercised by Mayor-in-Council and sub-section (1) provides that the Executive power of the Corporation shall be exercised by the Mayor-in-Council subject to the provisions of the Act, Rules and Regulations, and subsection (2) provides that all Executive actions of the Mayor-in-Council shall be expressed to be taken in the name of the Corporation. In fact, Section 33 deals with powers and functions of the Mayor-in-Council. The general powers and functions of the Mayor is stated in Section 34 and sub-section (2) of the said Section empowers the Mayor to allocate among the Members of the Mayor-in-Council such business and in such manner as he thinks fit. In accordance to Section 34(2) the Mayor has already allocated the portfolio of Markets to a Member, Mayor-in-Council. Section 36 gives the Mayor to exercise power in anticipation of the Mayor-in-Council's approval and this power is to be applied strictly within subsection (1) of Section 36 which means "that the Mayor shall take action subject to the approval, sanction, consent or concurrence of the Mayor-in-Council, the Mayor-in-Council may authorise the Mayor in writing to take action in anticipation of such approval, sanction, consent or concurrence, subject to such conditions, if any, as may be specified by the Mayor-in-Council." Of course, Section 37 gives emergency power to the Mayor to the effect that "If the Mayor is satisfied that an emergency has arisen and is of the opinion that the immediate execution of any work or the doing of any act, which ordinarily requires the approval, sanction consent or concurrence of the Corporation or the Mayor-in-Council, is necessary for the maintenance of services or safety of the public or for the prevention of extensive damage to any property of the Corporation, he may direct the execution of such work or the doing of such act without such approval, sanction, consent or concurrence....." But he should have to report forthwith to the Corporation or to the Mayor-in-Council the action taken by him under this particular Section. Mr. Panja failed to satisfy me under what provision of the C.M.C. Act, 1980 the Mayor took the action by his order dated 15th February, 1990 which is under challenge. He is not covered for his action in question under Sections 36 and 37 of the Act and once he has exercised the power u/s 34(2) of the Act, he ceases to be an individual force and he is bound by Section 33 which clearly indicates that the Executive power of the Corporation shall be exercised by the Mayor-in-Council. Further under sub-section (4) of Section 8 of the Act the manner of transaction of business of the Mayor-in-Council shall be such as may be determined by the Corporation by regulations. In this connection the Calcutta Municipal Corporation (Transaction of Business of the Mayor-in-Council) Regulations, 1986 is essential to be referred to with particular reference to Part-I relating to the Allocation and Disposal of Business. The Reg. 4(2) is quoted as under :

"Action taken by a Member of the Mayor-in-Council in respect of the duties

allocated to him by the Mayor shall be deemed to have been taken in the name of the Mayor-in-Council."

From the aforesaid discussion on the point of law it is crystal clear that the Mayor of Calcutta Municipal Corporation has no right and / or authority under law to interfere in his individual capacity and exercise any power of cancellation of the allotment of any stall as he has done by his order dated 15th February, 1990.

6. The trump-card of Mr. Panja's argument is the Judgment delivered by the Hon'ble Mr. Justice Shymal Kumar Sen on 22nd July, 1988 in the case of Lalapatti Traders Association and ors. v. Corporation of Calcutta and ors. being Matter No. 4692 of 1987. Mr. Panja has made extraordinary emphasis on this judgment by stating that the Mayor, in fact, has not cancelled the allotment of the stall in question but the allotment of the stall in question was quashed by His Lordship and the Mayor has simply given effect to the order of this Hon'ble Court. Of course, the order of the Member, Mayor-in-Council dated 7th May, 1986 and 10th May, 1986, as quoted in Annexure "A" to the writ petition, has also been quoted by Mr. Justice Sen in His Lordship's Judgment and thereafter His Lordship says : "Devastating fire took place totally destroying the entire block, on May 10, 1986, respondent No. 5 was requested to deposit the amount of Rupees 29,145,87 in suspense account. Admittedly, therefore, the respondent No. 5 was requested to deposit the money on May 10, 1986 that is much after the fire took place. Therefore, at the material time when the said resolution to rehabilitate the shop owners of the original New Market, D Block was taken the respondent No. 5 was not in the picture at all so far as the Stall is concerned. Under such circumstances the respondent No. 5 has no right to be considered for a stall in the new constructed market. On the basis of the said deposit the allotment made in his favour appears to be absolutely arbitrary and irregular." And then the learned Judge says : "Moreover, the decision for rehabilitation published in the Calcutta Municipal Gazette dated 25th January, 1985 also shows that it is meant to rehabilitate the victims who had suffered because of the fire. Admittedly, the respondent No. 5 cannot claim that right in respect of Stall D-I3 and the petitioner was really displaced." It must be borne in mind that before Mr. Justice Sen the petitioner was the Lalapatti Traders Association and respondent No. 5 was Debu Bhattacharjee, who is the petitioner in the instant writ petition and the learned Judge merely made some observations in respect of respondent No. 5 which is so very clear, unequivocal and unambiguous from the ordering portion of the judgment which I quote as under:-

"It is recorded that I have not adjudicated on the question as to if the respondent No. 5 has any right vis-a-vis the Municipal Authorities and all questions relating thereto are left open."

Now, how Mr. Panja can say even with the least force that Mr. Justice Sen quashed the order passed by the Member, Mayor-in-Council, dated 7th May, 1986 and 10th May, 1986 as contained in Annexure "A" to the writ petition when the learned Judge himself categorically stated in the ordering portion that he had not

adjudicated on the rights of the petitioner (respondent No. 5 in that writ petition) in relating to the Municipal authorities and His Lordship further stated that all questions relating thereto are left open. It will be sheer waste of energy to argue that the order passed by the Member, Mayor-in-Council, as contained in Annexure "A" to the writ petition, was quashed by Mr. Justice Sen and His Lordship's judgment is effective as such so far this writ petition is concerned. Nothing has been quashed at all but an observation and/ or remark has been made by the learned Judge who at the sametime left for adjudication all the points between the petitioner and the Corporation absolutely open on merits. I totally disagree with the submission made by Mr. Panja.

7. The Corporation has produced the record and particularly the pages 58 to 63 of the record, are very material in deciding the case. Mr. Justice Sen while disposing of the writ petition directed the Corporation to take a fresh decision for the allotment of Stall No. D(N)-13 after giving a hearing to the Lalapatti Traders Association and not to effect the allotment till such decision is taken. The matter was heard by the Municipal Commissioner on 21st April, 1988 and he rejected the claim of the allotment of new stall to the said Association and recommended the allotment of Stall D(N)-13 to a new party for consideration by the Mayor. Here the allotment of the stall in question to a new party, as it has been referred to in the order by the Municipal Commissioner, should be the petitioner and the petitioner alone and none else because from page 59 of the record the opinion of the Chief Municipal Law Officer given in December 1988 must be quoted in full to foil the Corporation's game:--

"Lalapatti Traders Association has no claim as because the matter has been finally decided by the Municipal Commissioner as per direction of the Hon'ble High Court.

Authority may take an independent decision regarding the allotment to Sri D. Bhattacharyee."

It must be noted that the Chief Municipal Law Officer's opinion is right if read with the Certificate of Shifting of Stall to the Temporary Reallocation of Stall at Maidan Market's Stall No. 10 in Shed No. 3 in lieu of the old Stall No. D(N)-13 as appears from the xerox copy of the said certificate enclosed as Annexure "B" to the writ petition on page 30, and this document contains the signatures of the petitioner, the Market Superintendent and the Deputy Municipal Commissioner (Markets) dated 3rd April, 1987. The Chief Municipal Law Officer's note, in reality, pointedly refers to the orders dated 7th May, 1986 and 10th May, 1986 made in favour of the petitioner by the Member, Mayor-in-Council. In the light of the CMLO's opinion, in his note of 23rd December, 1988 the Superintendent referred to this Stall's allotment to the petitioner which was sanctioned by Member, Mayor-in-Council, and in respect of which the party had paid charges on 10th May, 1986, and he placed the matter before the authorities for consideration (page 60 of the record). Then appears on that very page an endorsement dated 24th December, 1989 by an officer to the effect "now it is

upto the authorities to take decision in the above matter in view of the opinion of CMLO at page 59" and also the note of DMC (Building & Comm) dated 27th December, 1988 to the Superintendent to put up a note to MMIC (Mkt.) through Municipal Commissioner for a decision, etc. Thereafter with regard to the same Stall D(N)-13 the Superintendent gives a note on 4th January, 1989 with reference to the above note of DMC(B) to the effect "Project dept. may kindly be requested to let us know whether any space has been kept reserved for the Stall or not. If kept, the quantum of area may pl. let known to us for further decision in the matter." The Superintendent, S. S. Hogg Market, by his note dated 15th February, 1989 sent the relevant file of the stall including file of Stall No. D(N)-13/1 to the P.A. to the Mayor, Then follows the order of the Mayor dated 2nd January, 1990 which he endorses to the Municipal Commissioner as under:--

"Proceed fresh allotment of Stall No. D-(New)-13 of S.S. Hogg through normal procedure."

On 4th January, 1990 the Municipal Commissioner forwarded the file to DMC (Mkt.) and on 9th January, 1990 it was sent to the Senior Superintendent (Market) and he endorsed it for compliance. On 6th February, 1990 the Senior Superintendent (Market) directed the Superintendent, S. S. Hogg Market to comply the direction of the Mayor dated 2nd January, 1990. Till this stage there is no indication that the fresh allotment of the stall in question is not meant for the petitioner. The hearing given to the Lalapatti Traders Association by the Municipal Commissioner on 21st April, 1988 and the decision thereon has been interpreted by the opinion of the Chief Municipal Law Officer as contained on page 59 of the record that by "a new party" is meant Sri D. Bhattacharjee and no one else. The endorsement of 2nd January, 1990 by the Mayor for fresh allotment of the said Stall through normal procedure in the light of the opinion of the Chief Municipal Law Officer and other notings of the Senior Officers of the Corporation means only the petitioner and no one else.

8. Now something strange happened which is noted on page 63 of the record and a note is submitted to the Municipal Commissioner through DMC (Mkt.) by the Superintendent, S. S. Hogg Market, which I quote in full as under :--

"Order of the Mayor dt. 2-1-90 at page 61 may kindly be seen.

In order to comply with the orders of Mayor dt. 2-1-90 firstly allotment of Stall No. D(N)-13, S. S. Hogg Market to Sri Debu Bhattacharyee may please be cancelled and the entire amount of Rs. 29,034,79 paid by Sri Debu Bhattacharyee in Suspense Account without any prejudice for a Stall No. D-13 may please be returned to the depositor."

And this note was approved by the Municipal Commissioner and sent both to the MMIC (Mkt.)/Mayor (vide page 63 of the record) and the Mayor put his seal of approval by putting his signature on 15th February, 1990 without" referring the same first to the Member, Mayor-in-Council (Markets). The question is : he did so under what authority?

9. The relevant notes as quoted hereinbefore are from the record of the Corporation. It is clear that the allotment through normal procedure of the stall in question to some one other than the petitioner was the brain child of the Mayor himself and not of the Member, Mayor-in-Council (Markets). Even after giving hearing to the Lalapatti Traders Association the Municipal Commissioner recommended allotment to a new party which was interpreted by the Chief Municipal Law Officer as a way out for the authority to take an independent decision regarding the allotment to Sri D. Bhattacharyee i.e. the petitioner and the further strange thing that happened is that the recommendation for the cancellation of the allotment of a Stall No. D(N)-13 was referred to both to the Member, Mayor-Council (Markets) and the Mayor but it was never placed before the Member, Mayor-in-Council concerned but directly before the Mayor who endorsed the decision. Nowhere it appears that the Mayor had any material before him to consider to cancel the allotment of the said stall to the petitioner or he did apply his mind at all upon the matter, rather he acted contrary to the opinion of the CMLO in an arbitrary manner. So far as the position of law is concerned I have discussed in detail hereinbefore that the Mayor in his individual capacity without referring the matter to the Mayor-in-Council cannot under any provision of the Calcutta Municipal Corporation Act or the Regulations cancel a decision taken by the Mayor-in-Council. Even if for argument sake it is accepted that the Mayor exercised his power of cancellation u/s 36 or Section 37 of the Act, then even the Corporation failed to produce a copy of paper of a document before the Court to substantiate on that count. Mr. Panja failed to show any provisions of law which gives such a power to the Mayor. Further, how the Corporation can go back from its own document i.e. the Certificate of Shifting of Stall (Annexure "B" to the writ petition) and cancel the allotment in a clandestine way.

10. The decision in the case of Bank of Bihar Ltd. Vs. Mahabir Lal and Others, has been cited by Mr. Panja to bring home the point that a statement of fact in a judgment cannot be challenged by a party except by consent of the other party and the remedy of an aggrieved party is only by way of review when both were parties to the judgment. I do not think any such situation arises here because after making an observation in judgment under reference the learned Judge himself left the facts open for adjudication and further stated as a precautionary measure that all questions relating to that particular party i.e. the petitioner vis-a-vis the Corporation are left open. The learned Counsel cited another decision in the case of State of U.P. and Another Vs. Raja Ram Jaiswal and Another, to establish his point that the writ jurisdiction of the High Court is not proper where any direction is given to grant licence and the High Court could not proceed to take over the functions of the licensing authority and direct the licensing authority by a mandamus to grant a licence. This decision too is off the mark because nowhere the petitioner prays for the grant of licence but simply prays to rescind, cancel and/or withdraw the impugned order of the Mayor dated 15th February, 1990 as communicated to him by the Superintendent's letter dated

16th February, 1990.

11. From the aforesaid discussion I have come to the definite conclusion that the Mayor of the Calcutta Municipal Corporation has no authority under the Calcutta Municipal Corporation Act, 1980 or the Calcutta Municipal Corporation (Transaction of Business of the Mayor-in-Council) Regulations, 1986 to revoke or cancel any decision taken by the Member, Mayor-in-Council, which is "deemed to have been taken in the name of the Mayor-in-Council" and his order of 15th February, 1990 in supersession of the order of the Member, Mayor-in-Council, in respect of Stall No. D(N)-13 covering an area of 47.69 sq. ft. in the S. S. Hogg Market is bad, illegal and without jurisdiction.

12. In that view of the matter the writ petition is allowed. The order of the Mayor of the Calcutta Municipal Corporation dated 15th February, 1990 is hereby quashed and as consequential relief the order dated 2nd January, 1990 passed by the Mayor also stands quashed. The respondents are directed to implement the orders dated 7th May, 1986 and 10th May, 1986 passed by the Mayor-in-Council within 31st July, 1990. The respondents shall pay cost assessed at 100 G. M.s to the petitioner.

13. All parties to act on the signed copy of the operative portion of this judgment.

14. Petition allowed.