
(2002) 09 CAL CK 0021

In the Calcutta High Court

Case No : G.A. No's. 1062, 1308, 2749 of 2000 and 862 of 2002 and W.P. No. 1187 of 1999

Licensed Building Surveyors Association and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 09-09-2002

Acts Referred:

Bengal General Clauses Act, 1899 — Section 24

Calcutta Municipal Corporation Act, 1980 — Section 404, 600, 600(3)

Calcutta Municipal Corporation Building Rules, 1990 — Rule 35(2), 54, 58, 64, 84

Citation : (2002) 4 CHN 659

Hon'ble Judges : Barin Ghosh, J

Bench : Single Bench

Judgement

Barm Ghosh, J.—On 19th April, 1999 the Government of West Bengal, Department of Municipal Affairs, Writers' Buildings, Calcutta, published a notification in the Extraordinary Official Gazette in exercise of the power conferred by Section 600 read with Section 404 of the Calcutta Municipal Corporation Act, 1980 (hereinafter referred to as "the Act") whereby certain amendments were effected to the Calcutta Municipal Corporation Building Rules, 1990 (hereinafter referred to as "the Original Rules"). In the present writ petition the validity of the said amendments has been challenged. The State as well as the Calcutta Municipal Corporation constituted by and under the Act have filed affidavits. The notice of the petition was served upon the learned Advocate General of the State. I have heard the learned Advocate General, the learned counsel for the petitioners, the learned counsel for the added respondent, the learned counsel for the State and also the learned counsel for the Corporation. I have also considered the pleadings.

2. Before I advert to the respective submissions of the parties, it would be fair on my part to refer to the relevant provisions of the Act. Section 404 of the Act empowers the State Government to make rules, amongst others, for the regulation or restriction of the use of sites for building and for regulation or

restriction of building. Section 600 of the Act is as follows:

"600. Power to make rules.--(1) The State Government may, after previous publication, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the matters, which under any provision of this Act are required to be prescribed or to be provided for by rules.

(3) All rules made under this Act shall be laid for not less than fourteen days before the State Legislature as soon as possible after they are made and the session in which they are so laid. Any modification of the said rules made by the State Legislature shall be published in the Official Gazette, and shall, unless some later date is appointed by the State Government, come into force on the date of such publication."

3. In terms of the provisions contained in Section 600 of the Act, the State Government made a previous publication. That was done by publication of a notification on 27th March, 1996 in the Extraordinary Official Gazette. By that notification an intention was expressed to effect certain alterations in Clause (8) of Rule 2 of the Original Rules. Similarly an intention was expressed to insert Clause (24A) after Clause (24) of Rule 2 of the Original Rules. There was also an intention to effect certain changes in Clause (34) of Rule 2 of the Original Rules. There was also an intention to insert Clause (47A) after Clause (47) in Rule 2 of the Original Rules. There was an intention to provide a proviso in Clause (e) of Sub-rule (2) of Rule 3 of the Original Rules. There was also an intention to effect certain changes in Sub-rules (10) and (14) of Rule 4 of the Original Rules. It was intended to insert Sub-rules (14A) and (14B) after Sub-rule (14) in Rule 4 of the Original Rules. There was a desire to alter Sub-rules (16) and (17) of Rule 4 of the Original Rules. There was a desire to alter to some extent Sub-rule (2) of Rule 7 of the Original Rules. There was also an intention to substitute Table 1 in Sub-rule (1) of Rule 8 of the Original Rules. There was also an intention to effect some changes in Sub-rule (3) of Rule 15 of the Original Rules. There was intention to change Sub-rule (3) of Rule 26 of the Original Rules. There was also an intention to omit Sub-rule (4) of Rule 27 of the Original Rules and to alter Sub-rule (7) of Rule 27 of the Original Rules. There was also an intention to insert Rule 27A after Rule 27 of the Original Rules. There was also intention to effect certain changes in Rule 29 of the Original Rules. Similarly there was also an intention to effect certain changes in Sub-rules (1) and (2) of Rule 35 of the Original Rules and to add a proviso to Sub-rule (2) thereof. There was an intention to insert certain words to the heading of Chapter VII of the Original Rules. There was an intention to effect certain changes in Rule 43 of the Original Rules. It was also intended that Rule 44 of the Original Rules should be substituted. It was also intended that Rule 45 of the Original Rules should be omitted. It was also intended that Rule 46 of the Original Rules shall be substituted. There was an intention to substitute Sub-rule (8) of Rule 47 and also to change to some extent Sub-rule (10) of Rule 47 of the Original Rules. There

was an intention to add Sub-rule (10A) to Rule 47 of the Original Rules. There was also an intention to add Rules 47A, 47B and 47C after Rule 47 of the Original Rules. There was an intention to change to some extent Clause (a) of Rule 49 of the Original Rules and to substitute the first proviso thereto and also to insert a new proviso after the second proviso. There was an intention to change to some extent the proviso to Sub-rule (1) of Rule 51 of the Original Rules and also to change Clause (b) thereof to some extent. There was also an intention to change Sub-rule (1a) of Rule 51 of the Original Rules and also to add two provisos thereto. Similar intention to change to some extent Sub-rule (2) of Rule 51 of the Original Rules was also expressed. Similarly there was an intention to change to some extent Rules 54 and 57 of the Original Rules. There was an intention to substitute Rule 58 of the Original Rules. There was intention to change to some extent Sub-rule (1) of Rule 59 and also Rule 60 of the Original Rules. There was an intention to insert a proviso to Rule 60 of the Original Rules. There was also an intention to substitute Table 3 in Rule 61 of the Original Rules. There was intention to change to some extent Sub-rule (2) of Rule 61 of the Original Rules and to add a proviso thereto. There was intention to insert Rule 61A after Rule 61 of the Original Rules. There was also intention to insert Sub-rule (2A) in Rule 62 of the Original Rules. There was an intention to substitute Table 5 in Sub-rule (1) of Rule 64 of the Original Rules. There was an intention to insert Sub-rule (3) in Rule 64 of the Original Rules. There was also an intention to change item No.2 in Table 6 of Sub-rule (1) of Rule 68 of the Original Rules and to omit proviso to Sub-rule (3) thereof. There was also an intention to change to some extent Sub-rule (2) of Rule 71A and to add a proviso to Sub-rule (4) of Rule 71A of the Original Rules. It was intended to omit Rules 71B and 71C of the Original Rules. It was intended that certain changes shall be effected to Sub-rules (2) and (3) of Rule 72 and to the proviso to Sub-rule (4) of Rule 72 of the Original Rules. There was an intention to insert Rule 88A after Rule 88 of the Original Rules. There was an intention to change to some extent Clause (d) of Sub-rule (2) of Rule 91 of the Original Rules. There was an intention to add a proviso to Sub-rule (4) of Rule 94 of the Original Rules. There was intention also to insert Clause (aa) after Clause (a) in Sub-rule (6) of Rule 95 of the Original Rules and to add a proviso to Clause (d) of Sub-rule (6) of Rule 95 of the Original Rules and to omit proviso to Clause (f) of Sub-rule (6) of Rule 95 of the Original Rules. It was intended to change to some extent Sub-rule (2) of Rule 98 of the Original Rules and to substitute Table 7 in Sub-rule (4) of Rule 98 of the Original Rules. It was also intended to add a proviso after Table 7. It was also intended to substitute Clause (b) of Rule 99 of the Original Rules. It was intended to change to some extent Rule 100 of the Original Rules. It was intended that two provisos should be added after the proviso to Clause (iv) of Rule 104 of the Original Rules. There was also an intention to change to some extent Rules 106 and 107 of the Original Rules. There was an intention to add Schedule XIA after Schedule XI. There was an intention to change to some extent item No. 2 of Schedule XII and to insert items No.3 and 4 to the said Schedule and also to renumber items No. 3,4, 5, 6 and 7 as items No.5, 6, 7, 8 and 9. There was an intention to change

the form of the Structural Stability Certificate to some extent and also to insert certain things therein. There was also an intention to change to some extent the form of Occupancy Certificate in Schedule XIII.

4. When, however, the impugned notification was published it transpired that many a provisions of the Original Rules have been changed, which had not been intended to be changed as was notified by publication of the notification on 27th March, 1996. It also appeared that while the notification dated 27th March, 1996 was published, an intention to effect milder changes was communicated but when the impugned notification was published it transpired that more stiffer changes have been effected. On 7th May, 1999 the Calcutta Municipal Corporation by a Circular notified that the amendment effected by the notification dated 19th April, 1999 shall take effect from 7th May, 1999.

5. The learned counsel for the petitioners submitted that the Rules, which have been amended for which no prior publication had been made notifying that there is an intention to change such rules, are bad. He also submitted that the rules, which had been made stiffer than those intended to be as communicated by the notification dated 27th March, 1997 are equally bad. He also contended that in any event the amendments have not been laid before the State Legislature as is required by reason of Sub-section (3) of Section 600 of the Act and accordingly amendments have not taken the force of law and accordingly the decision of the Corporation that the amendments effected by the notification dated 19th April, 1999 will take effect from 7th May, 1999 is bad.

6. The learned counsel appearing on behalf of the added respondents have challenged the validity of certain amendments effected to certain specified rules.

7. I shall first deal with the contentions of the writ petitioners and then the contentions of the added respondents. While dealing with the contentions of the writ petitioners I shall consider the last point first.

8. In support of the contention that inasmuch as the amendments to the rules have not been laid before the State Legislature, which fact has not been denied by the State Government and which is a requirement of Sub-section (3) of Section 600 of the Act, the same are of no effect, the learned counsel for the petitioners relied upon a judgment of the Supreme Court in Union of India etc. etc. Vs. National Hydroelectric Power Corpn. Ltd. and Others etc. etc., . In that case the question was whether the levy, being the subject matter of challenge before the Supreme Court, was valid under the Water (Prevention and Control of Pollution) Cess Act, 1977. The Act in question was promulgated with a view to levy and collect cess from the units, which were thought causing pollution. When the Act was promulgated it did not permit levy of cess on hydel power generating industry, as that was not included in Schedule I to the Act in question. Section 16 of the Act empowered the Central Government to add to Schedule I any industry by notification. It, however, provided that every such notification shall be laid before each House of Parliament, if it is setting, as soon as may be after the

issue of the notification, and if it is not sitting, within seven days of its reassembly and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder. The impugned notification was issued to include hydel power generating industry in Schedule I. The Supreme Court on admitted facts found that no resolution relating to the notification had been moved in Parliament and accordingly the question of the Parliament giving approval thereto did not arise. In such circumstances the Supreme Court observed as follows:

"It is not necessary for us to consider what is the effect of not moving the resolution within the time frame of 15 days as prescribed by Sub-section (2) as the present is not where there has been a delay in moving the resolution. There has been in fact a non-compliance with the said requirement. With resolution not having been moved at all, it cannot be held that there was a valid amendment of Schedule I to the Act. The High Court, in our opinion, was, therefore, right in coming to the conclusion that this levy and the purported realization of the cess was not in accordance with law ."

9. Relying upon this judgment, the learned counsel for the petitioners submitted that since admittedly the impugned amendments have not been placed before the State Legislature, the impugned amendments have no force of law and accordingly the decision of the Calcutta Municipal Corporation to implement the same with effect from 7th May, 1999 was unwarranted. At this juncture it must be kept in mind that the provision of the Statute considered by the Supreme Court, in the case referred to above, was substantially different from the provision of Statute with which we are concerned here. The Statute with which the Supreme Court was concerned in the judgment referred to above, specifically obliged the Central Government to seek approval of the Parliament to, the notification by a resolution. It further provided that if such approval is not granted, the notification shall have no effect at all. In the instant case there is no such requirement. The requirement is simply to place before the State Legislature the rules. When the rules are placed before the State Legislature, the State Legislature may or may not consider to touch the rules. If it touches the rules, then the rules, as touched, shall take effect. If it does not touch the rules at all, the rule will come into force on the date of publication thereof. There is no mandate, in the instant case, to have the approval of the State Legislature of the rules. In the instant case, as aforesaid, admittedly the rules have not been laid before the State Legislature. If the rules have not been laid before the State Legislature, can it be said that the rules are of no effect? The learned Advocate General of the State has cited a few judgments of the Supreme Court on this score. I shall hereinafter refer to the same.

10. In *Atlas Cycle Industries Limited and Milton Cycle Industries Limited Vs. State of Haryana and Others*, the question which cropped up was whether the notification, being the subject matter of dispute before the Supreme Court, fixing the maximum selling price of the commodities in question was void for not having been laid before both the Houses of Parliament. The Act, which made obligatory for laying the subject notification before both Houses of Parliament was the Essential Commodities Act, 1955. Sub-section (6) of Section 3 of the Act ordained that every order made under that section by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be after it is made. Admittedly the notification containing the order was not laid before both Houses of Parliament. The Supreme Court held that requirement of laying before both Houses of Parliament of any order under Sub-section (6) of Section 3 of the Act is only directory and not mandatory. The Supreme Court further held that the legislature never intended that non-compliance with the requirement of laying as envisaged by sub-section (6) of Section 3 of the Act would render the order void and consequentially non-laying of the notification fixing maximum selling price of various categories of iron and steel before both Houses of Parliament cannot result in nullification of the notification. The reason in support of the said conclusion as given by the Supreme Court is as follows:

"These three kinds of laying are described and dealt with in *Craies on Statute Law* (supra) as under:--

- (i) Laying without further procedure,
- (ii) Laying subject to negative resolution,
- (iii) Laying subject to affirmative resolution.

(i) Simple laying. The most obvious example is in Section 10(2) of the 1946 Act. In earlier days, before the idea of laying in draft had been introduced, there was a provision for laying rules etc., for a period during which time they were not in operation and could be thrown out without ever having come into operation (compare Merchant Shipping Act, 1894, Section 417; Inebriates Act, 1898, Section 21) but this is not used now.

(ii) Negative resolution. Instruments so laid have immediate operative effect but are subject to annulment within forty days without prejudice to a new instrument being made. The phraseology generally used is "subject to annulment in pursuance of a resolution of either House of Parliament." This is by far the commonest form of laying. It acts mostly as a deterrent and sometimes forces a Minister (in Sir Cecil Carr's phrase) to "buy off opposition" by proposing some modification.

(iii) Affirmative resolution. The phraseology here is normally "no order shall be made unless a draft has been laid before Parliament and has been approved by a resolution of each House of Parliament. Normally, no time limit is fixed for

obtaining approval---none is necessary because the Government will naturally take the earliest opportunity of bringing it up for approval--but Section 16(3) of the Housing (Financial and Miscellaneous Provisions) Act, 1946 did impose a limit of forty days. An old form (not much used nowadays) provided for an order to be made but not to become operative until a resolution of both Houses of Parliament had been obtained. This form was used in Section 10(4) of the Road Traffic Act, 1930 [or Road Traffic Act, 1960, Section 19(3).] The affirmative resolution procedure necessitates a debate in every case. This means that one object of delegation of legislation (viz. saving the time of Parliament) is to some extent defeated. The procedure therefore is sparingly used and is more or less reserved to cases where the order almost amounts to an Act, by effecting changes which approximate to true legislation (e.g. where the order is the meat of the matter, the enabling Act merely outlining the general purpose) or where the order replaces local Acts or provisional orders and, most important of all, where the spending, etc. of public money is affected."

11. Sub-section (3) of Section 600 of the Act, with which we are concerned here, merely provides that all rules made under the said Act shall be laid for not less than 14 days before the State Legislature as soon as possible after they are made and the session in which they are so laid. It does not provide that it shall be subject to the affirmative resolution by State Legislature. It also does not provide that it shall come into force upon the State Legislature approving the rules made under the Act. It says that it is subject to modification, which the State Legislature may in its wisdom think it necessary to provide but then that appears to be the recognized power of the Legislature who has delegated its legislative power to its nominated delegate. Even in the case of simple laying that power is retained by the Legislature, which has delegated its legislative power to a chosen delegate. In the event the delegator effects modification to the rules made, such modification will take effect upon fresh publication of such modification in the Official Gazette, as may be indicated therein, but not earlier than the publication itself. It is, therefore, clear that the rules take effect despite the same having not been laid before the State Legislature and accordingly the requirement of laying is not a condition precedent for making the rules effective, but a duty has been cast upon the delegated legislature to lay the same subsequent to the making of the rules. There is, thus, no prohibition of making of the rules without the approval of the State Legislature. In the circumstances I have no other option but to hold that Sub-section (3) of Section 600 of the Act falls within the second category, i.e., "negative laying" and accordingly the rules take effect the moment they are made upon publication, subject to the right of the legislature to modify the same.. In contrast the rule upon which the Supreme Court was concerned in *Union of India v. National Hydroelectric Power Corporation Ltd*, and *Ors.* fell in the third category since the object of laying was to obtain an affirmative resolution from each House of Parliament.

12. Similar was the decision of the Supreme Court in *The Quarry Owners Association Vs. The State of Bihar and Others*, , where the laying procedure of

rules and notifications made by the State Government under Sub-section (3) of Section 28 of the Mines and Minerals (Regulation and Development) Act was simple laying and in that context the Supreme Court observed:

"But we make it clear when a statute as under Sub-section (3) of Section 28 requires its placement, it is the obligation of the State Government to place such with this specific note before each Houses of Parliament. Even if it has not been done, the State shall now do place it before each houses of the State Legislature at the earliest the notification dated 28-9-1994 and will also do so in future while framing rules or issuing any notifications under the rules framed under Sub-section (1) of Section 15 of the Act."

13. In view of what has been discussed above, I have no other option but to reject the contention of the petitioners that the impugned amendments have not taken the force of law since the same have not been laid before the State Legislature. At the same time it having not been so laid, it is my duty to point out to the State Government that it is statutorily obliged to lay the same before the State Legislature and accordingly they should lay the same before the State Legislature as directed hereunder .

14. The first and the second contentions of the petitioners, I think, should be addressed concurrently. Before, however, doing so one must look at Section 24 of the Bengal General Clauses Act, 1899, which is as follows:

"24. Provisions applicable to making of rules or by-laws after previous publication.-- Where by any Bengal Act (or West Bengal Act) a power to make rules or by-laws is expressed to be given subject to the condition of the rules or by-laws being made after previous publication, then the following provisions shall apply, namely:--

(1) The authority having power to make the rules or by-laws shall, before making them, publish a draft of the proposed rules or by-laws for the information of persons likely to be affected thereby;

(2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Government concerned prescribes;

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(4) the authority having power to make the rules or by-laws, and, where the rules or by-laws are to be made with the sanction, approval or concurrence of another authority , that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules or by-laws from any person with respect to the draft before the date so specified;

(5) the publication in the Official Gazette of a rule or by-law purporting to have been made in exercise of a power to make rules or by-laws after previous

publication shall be conclusive proof that the rule or by-law has been duly made."

15. Since Section 600 of the Act empowers the State Government to make rules after previous publication, Section 24 of the Bengal General Clauses Act, 1899 squarely applies. That being the position the learned Advocate General fairly conceded that he would not support the rules made by the impugned notification which had not been intended to be changed as was notified by publication of the notification dated 27th March, 1996. In that view of the matter the first contention of the petitioners to the effect that the rules, which have been amended for which no prior publication had been made notifying that there is an intention to change such rules, are declared to be bad.

16. In relation to the contention of the petitioners that the rules had been made stiffer than those intended to be as communicated by the notification dated 27th March, 1997, the learned Advocate General as well as the learned counsel appearing on behalf of the respondent Corporation submitted that Sub-section (4) of Section 24 of the Bengal General Clauses Act, 1899 obliges the authority having power to make rules not only to consider any objection but also to take into account suggestions and accordingly it cannot be suggested that merely some of such rules, which were intended to be amended, had been made stiffer than what was communicated, the same should be deemed to be bad, is not acceptable. I have no hesitation to accept such submission. It was pointed by the learned Advocate General and the learned counsel appearing on behalf of the respondent Corporation and as the fact is that in so far as the petitioners are concerned, they had not indicated during the course of submissions that any rule has been made stiffer unwisely or that having regard to the purpose of the rules as made, the stiffer amendments were unwarranted.

17. During the course of argument the learned counsel appearing for the added respondents challenged the validity of certain specific amendments. During the course of hearing challenge was thrown to Rules 35(2), 54, 58, 64, 84 and 88. The challenge to Rule 54 was withdrawn upon it having been pointed out by the learned Advocate General that the petitioners were mistakenly proceeding on the basis that fourteen and half meters has been mentioned in Sub-rule (1) of Rule 54 of the Act while, in fact, the same should be read as thirteen and half meters, as has been done.

18. Rules 35(2) and 64 were attacked on the ground that a building meant for accommodating human being consisting of four floors including the ground floor cannot be constructed with the height of 11 meters if the garage and parking space is directed to be raised at least 15 centimeters above the level of the center of the nearest street in terms of amended Rule 84. Having regard to the fact that the amendment effected to Rule 84 was not notified in the previous publication and since the same was not supported by the learned Advocate General, the challenge to Rules 35(2) and 64 were dropped.

19. It is to be kept in mind that before the amendment, in terms of Rule 64 a

person could construct a building having a height of 11 meters if the width of the means of access was in between three and half to seven meters and upto eight meters if the access was in between 2.4 to 3.5 meters. In the proposed amendment it was proposed that the permissible height of the building shall be 8.5 meters if the access is between 3 to 5 meters and 11.5 meters if the access is between 5 to 8 meters. When the rules were ultimately amended, permissible height was retained at 11 meters when the access was in between 5 to 7 meters. The permissible height was raised to 9.5 meters when the access is within 3.5 meters to 5 meters and permissible height was reduced to 7 meters when the access is in between 3 to 3.5 meters. Thus, while the major benefit of the existing rule was retained, certain affection to some extent was made to buildings having access of lesser dimension, but to some extent benefits which have been given are larger than what was proposed. That such decision should not have been taken or in taking such decision the Government has acted in a manner unwarranted, was not urged. It was not urged that there are large number of building sites whose means of access is less than 3 meters. It was also not urged that building sites whose means of access are in between 3 to 3.5 meters can accommodate a suitable building having a height in excess of 7 meters. It was, however, urged that while in Sub-rule (2) of Rule 35 it was proposed that the Committee shall scrutinize every plan except the plan for residential or educational building erected or re-erected on a plot of land of 300 sq. meters or less provided the height does not exceed 11.5 meters was changed to 11 meters. The simple answer to that is in the original rules permissible height of the building was 11 meters when the width of means of access thereto was 3.5 meters to 7 meters and which was proposed to be raised to 11.5 meters if the width of means of access thereto was in between 5 to 8 meters, but ultimately it was decided that the permissible height of a building would remain 11 meters if the width of means of access thereto is in between 5 to 7 meters.

20. It was urged on behalf of the added respondents that the amendments proposed and effected to Rule 58 is bad for the same trends to deprive the owner of a plot of land proposing to erect a building thereon to the extent of 10.4 meters for his neighbours have already made constructions. It was submitted that before the amendment was effected a building exceeding 14.5 meters in height or a building having a basement could be constructed 1.8 meters away from the boundary of the land upon which such building has been constructed. It was submitted that if two such buildings have already been constructed on two sides of the site proposed to be constructed, the person proposing to construct would be required to keep 7 meters gap from each such building and would, therefore, be compelled to give up 3.4 meters on each side for the mandate is to keep 7 meters gap in between the two buildings instead of 1.8 meters from the boundary and accordingly he would loose 3.4 meters on each side for no just reason. It was submitted that if such a building is constructed upon sacrificing 3.4 meters extra on each side, the deprivation will continue inasmuch as if the buildings of the neighbours are demolished and thereupon re-constructed, they

would be able to re-construct at the same place at where the previous construction existed inasmuch as the 7 meters gap would continue. This submission appears to have been made without taking note of the existing Sub-rule (5) of Rule 57 as also the amendment proposed and effected. The Original Rules provided that the minimum side open space of a building exceeding 14.5 meters but not exceeding 18 meters in height shall not be less than 3 meters and 50 centimeters on either side. That was proposed to be altered and has been altered which provides that the minimum side open space of a building exceeding 14.5 meters and not exceeding 19 meters in height shall not be less than 4 meters. Therefore, by reason of the rules as were prevalent before the amendment was effected, no neighbour could construct a building exceeding 14.5 meters in height without leaving 3.5 meters of open space and now by reason of the amendment he cannot leave an open space of, less than 4 meters. It is true that if a person who has not constructed but his neighbours have already constructed such buildings before the original rules came into force, may be required to sacrifice 1.2 meters extra on each side for the neighbours have already constructed since he is required to keep an open space of 4 meters and also to keep a gap of 7 meters from the constructions made by the neighbours, while the neighbours by reason of the rules then prevalent have constructed upon leaving only 1.8 meters of open space, but then it was not urged before me that the gap so prescribed in between 2 buildings in Rule 58, which have been made, as appears for safety purpose, are irrational or unjust. Therefore, though such an owner of a site may be required to sacrifice extra 1.2 meters on each side for the neighbours have already constructed, such sacrifice would be for his benefit and the same is not designed to continue for ever to benefit the neighbours inasmuch the neighbours after demolishing their existing structures, when would reconstruct, would be required to give up 4 meters of open space. I would, therefore, not interfere with the said rule.

21. The learned counsel for the added respondents have rightly contended that Sub-rule (2) of Rule 88A is repugnant to Sub-rule (1) of Rule 88A. Rule 88A as stands upon amendment is as follows:

"88A. Lifts.-- Lifts shall conform to the following provisions and the provisions of The National Building Code of India:--

(i) at least one lift shall be provided in every building more than 14.5 m. in height. In the case of buildings more than 19m. high, at least two lifts shall be provided. In the case of a proposal to add one additional floor to an existing building having a lift, it will not be necessary to raise the existing lift to the additional floor, provided that in the case of an existing building with height of 14.5m or above, one additional floor may be permitted without insisting on a lift in the case of chawl like structures. The same concession may be allowed for buildings with apartment accommodation, provided the additional floor space is limited to 120 sq.m.;

(ii) in the case of buildings upto a height of 14.50 meters at least one lift and for

building more than 18.50 meters in height, at least two lifts shall be provided, which are approachable from each dwelling unit, except those situated on the ground and 1st floor without having to climb or to go down more than one floor.

(iii) (a) the number, type and capacity of lifts shall satisfy the requirements of Section 5 -Installation of Lifts and Escalators -National Building Code of India;

(b) at ground floor level, a grounding switch shall be provided to enable grounding the lift cars in an emergency;

(c) the lift machine room shall be separated and no other machinery shall be installed therein;

(d) the number of each floor shall be conspicuously painted in figures at least 15cm. large on the wall opposite the lift/lifts opening or on

other suitable surface so as to be distinctly visible from the lift cage; (e) in multi-storied and high rise residential buildings, one of the

lifts installed shall be a freight lift;"

22. Sub-rule (i) of Rule 88A requires at least one lift in a building having more than 14.5 meters in height. The said sub-rule also makes it clear that a building more than 19 meters in height requires at least two lifts. The said sub-rule further makes it clear that in a building more than 14.5 meters in height the access to the lift should be had without climbing down more than one floor. Sub-rule (ii) of Rule 88A, however, requires that every building upto a height of 14.5 meters requires one lift. That means even an one storied building would be required one lift. Then again it says that a building more than 18.5 meters in height would require two lifts whereas Sub-rule (i) of the said Rules says that requirement of two lifts is necessary when the building is more than 19 meters height. The learned Advocate General submitted that the real intention of Sub-rule (ii) was to clarify that one lift to be installed in a building having a height of more than 14.5 meters and two lifts to be installed in a building having a height of more than 19 meters shall be approachable from each dwelling unit of such building except those situate on the ground and the first floor without having to climb or to go down more than one floor but the way the said sub-rule has been framed, the said intention has not been conveyed. In those circumstances, I have no other option but to strike down the said sub-rule but having regarded to the fact that the object of making it mandatory to have lifts in high-rise buildings, it would not be proper on my part to shut my eyes to the ground reality that the said object was aimed at providing facility to the people using such high-rise buildings and accordingly if it is not made mandatory that without having to climb or go down more than one floor to use such lifts, the benefit of the lifts cannot be made available to the user of such high-rise buildings for in a ten-storied building the statutory mandate may be fulfilled by installing two lifts in between the ground and the third floors.

23. It is well settled that the legislative vacuum can be supplied by

administrative fiat and in absence thereof the same may be supplied by the judiciary until such time the legislature steps in. It is also well settled that when the intention is to give benefit to a class of persons but such intention cannot be fulfilled for a lacuna, it is obligatory to supply such lacuna so that the benefit intended reaches to the person or people to whom the same was intended to be reached. In those circumstances I think it is obligatory on my part to give appropriate direction, until such time the legislature or the delegated legislature takes appropriate steps in the matter, upon striking down Sub-rule (ii) of Rule 88A of the amended rules.

24. Before, however, giving appropriate directions on the foundations, as indicated above, it is my duty to point out that having regard to the decision of the Supreme Court in *Union of India and Others Vs. M/s. Ganesh Das Bhojraj*, the amended rules came into effect the moment the same was published in the Official Gazette and accordingly it was improper on the part of the respondent Corporation to give effect thereto from a later date, i.e., 7th May, 1999. It was unjust and incorrect on the part of the respondent Corporation to decide to process for sanction the plans submitted upto 6th May, 1999 under the un-amended rules and to process for sanction plans submitted on and from 7th May, 1999 in terms of the amended rules.

25. Two factual questions were raised. One was whether the State did apply its mind to the objections and suggestions that were received after the intention to amend was notified. In that view of the matter I called for the records and found that the Secretary of the concerned Department of the Government did ultimately applied his mind. It appears that a high power committee was. formed to consider all objections and suggestions. The Committee gave its recommendations. One of the recommendations was to permit the height of the buildings upto 11.5 meters. That was not accepted in view of the outline plan made by C.M.D.A. The second one was with regard to placing of the rule before the State Legislature. The learned counsel appearing for the State did report that the rules were not laid before the State Legislature inasmuch as immediately after the amendment was notified, on the instant application the Court passed an order staying operation of the rules and which order is still continuing.

26. For the reasons aforesaid the following amendments are quashed;--

- (i) Insertion of Clause (41A) in Rule 2.
- (ii) Amendment to Clause (j) of Sub-rule (2) of Rule 3.
- (iii) Amendment to Sub-rules (11), (13) and 15 of Rule 4.
- (iv) Insertion of Sub-rule (19) of Rule 4.
- (v) Amendment to Sub-rule (1) of Rule 7.
- (vi) Amendment in proviso to Clause (1) of Sub-rule (1) of Rule 7.
- (vii) Insertion of the words "as required by the Municipal Building Committee" in

Sub-rule (2) of Rule 7 and substitution of Clause (a) of Sub-rule (2) of Rule 7.

(viii) Amendment to Sub-rule (9) of Rule 15,

(ix) Amendment to Rule 21.

(x) Amendment to Rule 23.

(xi) Amendment to Sub-rule (2) of Rule 26.

(xii) Amendment to Sub-rule (2) of Rule 33.

(xiii) Amendment to Rule 37.

(xiv) Amendment to Rule 39.

(xv) Amendment to Sub-rule (2) of Rule 41.

(xvi) Item No. 19 of the impugned notification.

(xvii) Insertion of Rule 43A.

(xviii) Amendment to Clause (d) of Rule 50.

(xix) Amendment in Sub-rule (1) of Rule 53.

(xx) Amendment in Rule 60 but not the amendment to the proviso thereto as well as the proviso inserted after the proviso thereto.

(xxi) Amendment to Clause (f) of Sub-rule (3) of Rule 61. (xxii) Amendment to Table-4 of Sub-rule (1) of Rule 62. (xxiii) Amendment to Sub-rule (2) of Rule 84. (xxiv) Insertion of Sub-rule (ii) in the inserted Rule 88A. (xxv) Amendment to Clause (e) of Sub-rule (2) of Rule 91. (xxvi) Insertion of Clause (f) after Clause (e) in Rule 91.

(xxvii) Amendment in Sub-rule (4) of Rule 94 but not the proviso added thereto.

(xxviii) Amendment to Clause (d) of Sub-rule (6) of Rule 95 but not the proviso added thereto.

(xxix) Amendment in the proviso to Clause (iv) of Rule 104 but not the proviso added thereto.

(xxx) Substitution of Rule 114; and (xxxi) Amendment to Schedule IV.

27. Until the State Legislature or the delegated Legislature takes suitable steps, it shall be obligatory upon the respondent Corporation to ensure that access to the lift to be installed in a building exceeding 14.5 meters in height and access to the lifts to be installed in buildings exceeding 19 meters in height are accessible without having to climb or to go down more than one floor by the people dwelling such buildings except those who are dwelling in the ground and first floors of such buildings.

28. The State Government is directed to lay the rules before the State

Legislature as quickly as possible but not later than one month from today.

29. The interim order of stay of operation of the amended rules is vacated, and, accordingly, it is declared that from today the amended rules, which have survived and have not been quashed by this order, are enforceable.

30. Before parting I would request the think-tank of the State to take note of the fact that once upon a time the City was known as "City of Palaces". They were constructed on sprawling lands having access through narrow roads. Most of these palaces have now been demolished and the lands have been utilized to the fullest permissible extent to construct buildings to meet the need of population explosion. However, the roads remained almost the same. As a result the roads, which were fit to cater ten or fifteen horse driven carts and hundred or two hundred people at a time are now compelled to cater tens of thousands of cars and a lakh or two lakhs of people at a time. Unless something is done immediately the city may not remain habitable in the near future. As it comes to my mind one of the ways to increase the width of the roads in the present context is to compel a person to sacrifice the frontage of his land abating on the road while constructing a building on his land. He would have no objection to make such sacrifice if he can have the same F. A. R. despite such sacrifice and that is possible if he is permitted to raise the height of the building. That would entail wider roads, more space for sewerage and more air and light. Please consider this angle at the time of reconsidering the subject Rules in future.

31. The writ petition is accordingly disposed of.

32. There shall be no order as to costs.

33. Let urgent xeroxed certified copy of this judgment, if applied for, be handed over to the learned counsel for the parties on the usual undertaking.