

(1990) 07 CAL CK 0016
In the Calcutta High Court
Case No : C.O. No. 7120 (W) of 1989

Licensed Building Surveyors Association APPELLANT
Vs
Calcutta Municipal Corporation RESPONDENT

Date of Decision : 10-07-1990

Acts Referred:

Bengal General Clauses Act, 1899 — Section 25
Calcutta Municipal Act, 1951 — Section 378, 378(1), 378(3), 378(4), 379
Calcutta Municipal Corporation Act, 1980 — Section 414, 414(4), 635(2)

Citation : AIR 1991 Cal 247 : (1991) 1 CALLT 258

Hon'ble Judges : Shymal Kumar Sen, J

Bench : Single Bench

Advocate : Mukul Prokash Banerjee and Ashis Roy, for the Appellant; Alok Chakraborty and Fazlul Haque, for the Respondent

Judgement

1. The Licensed Building Surveyors Association, the petitioner No. 1 is a registered society and the members of the said society are the Licensed Building Surveyors within the erstwhile South Suburban Municipality. The members of the petitioner No. 1 are Building Surveyors by profession. They run the business as such Building Surveyors by drawing building plans and supervising construction work of different buildings of different classes holding requisite licence from the authorities concerned. The petitioners Nos. 2 to 25 are members of the society out of total of 65 members of the said society. At all material times the members of the society had been granted licences as Building Surveyors for the construction, of building under the South Suburban Municipality and they had been engaged in their said business in the area covered under the South Suburban Municipality. By the Calcutta Municipal Corporation (Amendment) Act, 1983 the said South Suburban Municipality along with several other municipalities were amalgamated into the limits of the Calcutta Municipal Corporation and as such the total area of South Suburban Municipality were added with the territorial area in the Schedule I to the Calcutta Municipal Corporation Act, 1983 (hereinafter referred to as the said Act). The members of

the petitioner No. 1 were duly recognised by the Calcutta Municipal Corporation as Licensed Building Surveyors and their licences had been duly renewed from time to time up to 31st March, 1989 and the plans in respect of the proposed construction of buildings submitted by the said members of the petitioner No. 1 as Licensed Building Surveyors were also approved and sanctions were accorded. In other words there was no impediment to the functioning of the said members of the petitioner No. 1 as Licensed Building Surveyors up to March, 1989. However, since April, 1989 the petitioners Nos. 2 to 5 and the other members of the petitioner No. 1 have not been granted licence and the Calcutta Municipal Corporation has refused to accept renewal of licence fees from the members of the petitioner No. 1 including the petitioners Nos 1 to 25 although the said fees were duly tendered with the municipal authorities. Petitioners being aggrieved moved this Court under the constitutional writ jurisdiction. At the hearing of the said writ application the learned Advocate for the Calcutta Municipal Corporation submitted that the Administrator, Calcutta Municipal Corporation by an order dated 30th September, 1977 in terms of S. 378(4) of the Calcutta Municipal Act, 1951 as amended in 1977 framed certain rules prescribing therein certain qualifications required to be fulfilled for obtaining the licence. As Licensed Building Surveyors including those of the three added units which have been amalgamated with the Calcutta Corporation now require appropriate classification. Many of such Licensed Building Surveyors of the said three units do not come under the purview of any such classification on the basis of their qualification and experience. Many of Such Licensed Building Surveyors, however, may enroll their names in Category 2 if they so desire and renew their licences on payment of prescribed fees and continue further practice provided the said licensees must have a technically qualified engineer not below Civil Engineer attached to them and the name of the technically qualified engineer with his consent letter must be attached to such application. An affidavit was affirmed on 15th September, 1989 by one Dwiendra Nath Pal, Law Officer of the Calcutta Municipal Corporation being the affidavit-in-opposition to the said application. Paragraph 3 and different sub-paragraphs of the said affidavit are set out hereinbelow:

"3. Before I deal with the allegations made in the writ application I state the relevant facts relating to the subject-matter of the said writ proceeding as follows:

(a) The Calcutta Municipal Corporation (Amendment) Act came into force with effect from 20th February, 1989 and the Building Bye-laws of Bengal Municipal Act, 1932 as prevailing in the three added units stood abolished and the same tantamounts to application of Building Bye-Laws of Schedule XVI of the Calcutta Municipal (Amendment) Act, 1977 in respect of whole of Calcutta Municipal Corporation area having 141 Wards.

(b) As per provision of Rule 50 of the said Schedule XVI employment of Licensed Building Architect is a pre-condition for according sanction of building plans. I

state that there is a group of Licensed Building Surveyors enrolled in the three added units to the Calcutta Municipal Corporation area, whose licenses stood expired on and from March 31, 1989 and further renewal is required if they so desire. These group of licence-holders possess different qualifications both technical and non-technical of different standards,

(c) Presently in the city proper having 1 to 100 Wards the practising Licensed Building Architects (hereafter referred to as "L.B.A.") and Licensed Building Surveyors (hereinafter referred to as "L.B.S.") are of five classes, namely, L.B.A. Class A, B and C and L.B.S. Class I and II. These classifications are based on different technical and non-technical qualification and experience as prescribed.

(d) Under the circumstances L.B.S. of three units which have been subsequently added to Calcutta Municipal Corporation area require appropriate classification and renewal, of their licences on payment of necessary fees according to classification. It was, therefore, proposed that the classification should be made according to the qualification and experience as prevailing in case of five categories as mentioned above and as prevailing in the 100 Wards in the City proper at present.

(e) A good number of practising L.B.S. of the said three units do not come under the purview of any class as mentioned above in consideration of their qualification and experiences. In those cases also liberty was given to those L.B.S. to enroll their names in the category of L.B.S. Class II, if they so desire, and to renew their licence on payment of prescribed fees and to continue further practice provided the said licensees must have a technically qualified engineer not below Licensed Civil Engineer attached to them and the name of the technically qualified engineer with his consent letter must be attached to the application for renewal of the licence.

(f) The aforesaid procedure was duly considered and approved by the appropriate authority making it clear that experiences are required to be taken into consideration at the time of fixing the category."

2. On 14th May, 1990 an order was passed by this Court to the following effect:

"The Commissioner, Calcutta Municipal Corporation will file an affidavit disclosing since when the three Municipalities i.e. Garden Reach Municipality, Jadavpur Municipality and South, Suburban Municipality have been amalgamated with the Calcutta Municipal Corporation and now have been granted licenses or got renewal of their licences by or from the Calcutta Municipal Corporation. In 1989 what was the specific order by which they propose to change the conditions of renewal of such licences. Such affidavit is to be filed by 4-6-1990. In the event such an affidavit is filed, a copy of the same is to be supplied to the writ petitioners and the writ petitioners are also at liberty to file a reply of the said affidavit within 11th June, 1990.

Let the matter appear in the list as part-heard matter.

The writ petitioners will be entitled to carry on their work on the basis of their old licences.

Let a plain copy of this order signed by an officer of this Court be given to the learned Advocates appearing for the parties."

3. In terms of the said order an affidavit was affirmed by Lala Rajkishore Prosad, the Commissioner, Calcutta Municipal Corporation affirmed on 6th June, 1990. Paragraph 4 of the said affidavit of Lala Rajkishore Prosad is set out hereinbelow:

"4. Before I deal with the allegations made in the said supplementary affidavit in opposition I state certain material facts in terms of the order dated May 14, 1990 passed by His Lordship the Hon"ble Mr. Justice Shyamal Kumar Sen in the present proceeding.

(a) I state that under the provisions of the Calcutta Municipal Corporation Act, 1980 the areas within the three Municipalities, namely, South Suburban Municipality Garden Reach Municipality and Jadhavpur Municipality have been brought within the area of the Calcutta Municipal Corporation with effect from January 4, 1984.

(b) I state that the Licensed Building Surveyors who were being issued licences by their respective aforementioned three Municipalities, were granted renewal of licence after the implementation of the Calcutta Municipal Corporation Act, 1980 in view of the provisions of S. 635(2)(g) of the Calcutta Municipal Corporation Act, 1980 which provided that notwithstanding anything contained elsewhere in the said Act, all matters relating to the sanction of building plans and to the insecure and unauthorised constructions in the erstwhile Municipal areas of Jadavpur, South Suburban and Garden Reach Municipalities shall continue to be governed by the provisions of the Bengal Municipal Act, 1932 as were in force in those areas before coming into force of the Calcutta Municipal Corporation (Amendment) Act, 1983 until corresponding Building Rules are framed under the said Act. Only upon implementation of the Calcutta Municipal Corporation (Amendment) Act, 1988 on and from February 20, 1989 under the order of the Governor, of West Bengal, the Cl. (g) of sub-sec. (2) of S. 635 was omitted and accordingly the provisions of Bengal Municipal Act could not be any further made applicable in the matters relating to sanction of building plans as aforesaid.

(c) It may be stated that so long the provision of Bengal Municipal Act was applicable as aforesaid for all matters relating to sanction of building plans and to the insecure and unauthorised constructions for the new areas of the said three Municipalities, Calcutta Municipal Corporation continued with the renewal of the licences of the Licensed Building Surveyors who were already holding licences issued under the Bengal Municipal Act, 1932. Such arrangement was made upon due consideration of the matter and I crave leave to produce, refer to and rely upon the appropriate orders passed relating to the said matter at the time of hearing.

(d) In the aforesaid circumstances, after the said S. 635(2)(g) of the 1980 Act was omitted, the Calcutta Municipal Corporation authorities considered the entire matter and a decision was taken as would appear from the note dated April 28, 1989 by the City Architect, Calcutta Municipal Corporation which was duly approved by the Municipal Commissioner Calcutta Municipal Corporation as also the Member, Mayor-in-Council of the Calcutta Municipal Corporation. Copy of the said note sheet with the endorsement and/or approval as aforesaid is annexed hereto and marked with the letter "A". Accordingly an appropriate Notification was issued under the signature of the Municipal Commissioner, Calcutta Municipal Corporation dated April 4, 1989 and a true copy thereof is annexed hereto and marked with the letter "B".

4. It has been contended on behalf of the Calcutta Municipal Corporation that in terms of S. 378(4) of Calcutta Municipal Act, 1951 as amended in 1977 the rules for issuance of licence to the Licensed Building Surveyors would be framed under the said sub-sec. (4) of S. 378 under the order of the Administrator who was entitled to act on behalf of the Corporation under the provisions of the Calcutta Municipal Act, 1951 and in the year 1977 the said Administrator was appropriate authority for the purpose. It has also been submitted that after S. 635(2)(g) was omitted in the year 1989 the Bengal Municipal Act, 1932 is no longer applicable in case of Licensed Building Surveyors of the said three added areas and as such the rules made applicable for all licensed Building Surveyors working under Calcutta Corporation also became applicable to the said Surveyors of the three added units and there is no mala fide in the matter of applying the said rules which have been made applicable in uniform manner upon all Building Surveyors. S. 378 of the Calcutta Municipal Act as originally stood before amendment did not provide for any qualification for Licensed Building Surveyors. The said S.378 as originally stood is set out hereinbelow:

"378. (1) The Commissioner may from time to time, in accordance with such rules as may be made by the Corporation, grant to any person he thinks fit a licence to act as a licensed building surveyor for the purposes of this Chapter.

(2) The Corporation may prescribe the qualifications to be required of persons to whom licences may be granted under sub-sec. (1) in respect of the several classes of buildings.

(3) Every such licence shall be for a renewable period of three years."

5. By amendment made in 1977 the said S. 378 stands as follows:

"378. Licensing of Building Surveyors.--(1) The Commissioner may from time to time, in accordance with such rules as may be made by the Corporation grant to any architect he thinks fit a licence to act as a licensed building architect for the purpose of this Chapter.

(2) The Corporation may prescribe the qualifications to be required of persons to whom licences may be granted under sub-sec. (1) in respect of the several

classes of buildings.

(3) Every such licence shall be for a renewable period of three years.

(4)(i) Notwithstanding anything contained in this section the Commissioner may from time to time, in accordance with such rules as may be made by the Corporation, grant to any person he thinks fit a licence to act as a licensed building surveyor and the Commissioner may accept plan, elevation or section, submitted in respect of a building not exceeding thirteen and a half metres in height with any application for permission to erect a new building when it bears the signature of a licensed building surveyor.

(ii) Provisions of this section and of S. 379 or S. 380 shall mutatis mutandis apply in the case of a licensed building surveyor."

6. It has been contended on behalf of the petitioner that in the amendment provision has been made for Architects and their qualification has also been prescribed. No qualification has, however, been prescribed in the said section so far as Licensed Building Surveyors are concerned even after the said amendment has been incorporated. Only the scope of their work has been restricted and they will be entitled to work in respect of building up to a certain height for measurement. Before 1977 under the original Act, 1951 there was no provision for architect under 1980 Act the corresponding provision will be found in S. 414 which is set out hereinbelow:

"414.-- (1) The Municipal Commissioner may, from time to time and in accordance with such rules regarding qualifications of architect in respect of several classes of buildings as may be licensed, grant licence to any architect to act as a Licensed Building Architect for the purpose of this Chapter.

(2) Every such licence shall be renewed every three years.

(3) The Mayor-in-Council may, from time to time, prescribed scale of fee for Licensed Building Architects in respect of any class of buildings to be made applicable in the absence of any written contract to the contrary.

(4) Notwithstanding anything contained in this section, the Municipal Commissioner may from time to time and in accordance with such rules regarding qualifications of Building Surveyors in respect of several classes of buildings as may be prescribed, grant licence to any person to act as Licensed Building Surveyors and the Municipal Commissioner may accept plan, elevation of section, sub milled in respect of a building not exceeding thirteen and a half metres in Height with any, ng application for permission to erect a new build when it bears the signature of a Licensed Building Surveyors."

7. It appears that under S. 414 the Municipal Commissioner has been empowered to grant licence to any Architect to act as Licensed Building Architect in respect of several classes of buildings on the basis of rules regarding qualifications that may be made from time to time. It appears that such licence

is renewable every three years and the power has been granted to Mayor-in-Council to prescribe scale of fees. The sub-sec. (4) of the said S. 414, however, provides that it would be open to the Commissioner to grant licence to any person to act as a Licensed Building Surveyors and the Municipal Commissioner may accept plan, elevation of section submitted in respect of a building not exceeding thirteen and half metres in height with any application for permission to erect a new building when it bears the signature of a Licensed Building Surveyors in accordance with such rules regarding qualification of Building Surveyors as may be prescribed. It is admitted position that no such rules have been prescribed by Calcutta Municipal Corporation under the Act of 1980. It is the specific case of Calcutta Municipal Corporation that the Licensed Building Surveyors of the three added municipalities were permitted to carry on their work and their licences were granted and renewed up to March, 1989 on the basis of the provisions contained in Bengal Municipal Act, 1932 since under S. 635(2)(g) of the Act of 1980 provisions contained in Bengal Municipal Act, 1932 were continued to be made applicable to them. By the Calcutta Municipal Act, 1988 which came into force on 20th February, 1989 the said S. 635(2)(g) was omitted and, therefore, the provisions contained in Bengal Municipal Act cannot apply and the Building Surveyors of the said added municipalities are to be governed in the same manner as other Licensed Building Surveyors working under the Calcutta Municipal Corporation. In the supplementary affidavit filed by Lala Rajkishore Prosad, the Municipal Commissioner affirmed on 6th June, 1990 the said position has been made clear. A note dated April 28, 1989 by the said Architect the Calcutta Municipal Corporation duly approved by the Municipal Commissioner, Calcutta Municipal Corporation as also Member, Mayor-in-Council of the Calcutta Municipal Corporation has been annexed to the said affidavit.

8. It has been submitted on behalf of the Calcutta Municipal Corporation that rules have been framed in terms of S. 378(4) of the 1951 Act as amended in 1977 prescribing different classes of surveyors and their qualifications. Since after deletion of S. 635(2)(g) provisions relating to Bengal Municipal Act, 1932 no longer applies, the said rules classifying different classes of Licensed Building Surveyors on the basis of their qualifications should also apply to the Building Surveyors of three added municipalities. It has been argued on behalf of the Calcutta Municipal Corporation that since no rules have been framed under the Act of 1980 the rules framed under S.378(4) will apply under the provisions of the General Clauses Act. It was urged on behalf of the petitioners on the other hand that the rules referred to in S. 378(4) does not confer any power on the Commissioner to make rules prescribing qualifications. The said sub-section (4) only authorises the Commissioner to make rules for the purpose of grant of licence. According to the learned Advocate for the petitioners S. 527 of the Calcutta Municipal Act, 1951 provides Corporation with power to make bye-laws and under S. 527(13) such bye-laws may be made prescribing the qualifications to be; required from, and regulating the appointment, suspension and dismissal of licensed Plumbers and Building Surveyors. Therefore, the qualification for the

Building Surveyors" under the Act can be prescribed only by framing bye-laws. Section 539 provides for condition precedent to the making of bye-laws. Under S. 530 of the Act of 1980 it has been provided that the power to make bye-laws under this Act is subject to the condition of the bye-laws being made after previous publication and to the following other conditions, namely, draft of the bye-laws shall be published in the official gazette and local newspapers and several other conditions have been prescribed. It has been contended that no Such bye-laws have been framed regulating qualifications for appointment of Licensed, Building Surveyors and as such rules alleged to have been framed prescribing qualifications of the Licensed Building Surveyors cannot have any validity.

9. I have considered the respective submissions of the parties. On proper construction of both the Ss. 378(4) of the 1951 Act is amended in 1977 as also S. 527(13) of the Act of 1951 it appears to me that whereas the said S. 378(4) authorises the Commissioner, Calcutta Municipal Corporation to make rules for the purpose of granting licence to act as Licensed Building Surveyors and the Commissioner may accept plan elevation of section submitted in respect of buildings with certain height with any application for permission to erect a new building when it bears the signature of a Licensed Building Surveyors and that under Ss. 378 and 378(1)(a) and (3) refers to the licence that may be issued or granted to the Architects for the purpose of acting as an Architect in respect of several classes of buildings. In other classes of buildings the Licensed Building Surveyors may act on the basis of licence that may be granted and rules may be framed for that purpose by the Municipal Commissioner. Therefore, the provision under 3.378(4) relates to the grant of licence to the Building Surveyors for the purpose of sanction of building plans that may be submitted by such Building Surveyors. Under S. 527(3) on the contrary the Corporation has been authorised to make bye-laws prescribing qualifications for the appointment, suspension and dismissal of Licensed Building Surveyors. The said S.527(13) refers to appointment, suspension and dismissal of Licensed Building Surveyors. The word appointment of Licensed Building Surveyors means in my opinion an appointment which may be issued to a Licensed Building Surveyors that is to say a Building Surveyor who has already got licence under S. 378(4). For example, for the purpose of its own construction or supervision of construction works relating to the Corporation, it may appoint Licensed Building. Surveyors and may prescribe qualifications by framing bye-laws as contemplated under S. 527 Therefore, in my opinion there is no restriction if the Municipal Commissioner makes rules for the purpose of grant of licence for submission of building plans of the Calcutta Corporation in terms of S. 378(4) and for that purpose prescribes qualifications in the rules on the basis of which such licence may be granted. The contention of the learned Advocate for the petitioner that the Municipal. Commissioner has no power for that purpose cannot be accepted. The question, therefore, arises whether such rule can be made applicable in respect of Licensed Building Surveyors of the other added municipalities. It is on record that their

licences were granted and renewed in terms of the said provision of Bengal Municipal Act, 1932 as was applicable to them but since after the coming into force of the 1988 amendment the S. 635(2)(g) has been deleted the other provisions of the Act, viz, the rules prescribing qualifications for grant of licence or sanction plans have been made applicable to the Building Surveyors of the said added municipalities. In this connection reference may be made to S. 25 of the General Clauses Act which provides as follows:

"25 -- Where any enactment is, after the commencement of this Act repealed and re-enacted by a Bengal Act (or West Bengal Act) with or without modification then unless it is otherwise expressly provided any (appointment), order, scheme, rule, bye-law, notification or form (made or) issued under the repealed enactment shall, so far as it is not inconsistent with the provisions re-enacted, continue in force and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any (appointment), order, scheme, rule, bye-law, notification or form (made or) issued under the provisions so re-enacted."

10. It does not appear to me that the rules already made classifying the classes of licensed Building Surveyors and prescribing their qualifications for the purpose is inconsistent with the provisions for making rules under the Act of 1980 and as such the said rules continue in force and are deemed to have been issued under the provisions so re-enacted until it is superseded by fresh rule. There is no doubt that by virtue of such amalgamation of the said municipalities with the Calcutta Municipal Corporation the said Surveyor will be entitled to act throughout Calcutta also. It is not their case that they will restrict their activities within particular area. Under such circumstances it is fit and proper that the same rules should be made applicable to any person who intends to act within the municipal area of Calcutta as licensed Building Surveyor otherwise the same would amount to discrimination. The petitioners really claim that they have a right to be favoured by the authorities which cannot be allowed. Accordingly in my opinion the petitioners cannot claim that they have right to be granted licences without having the qualifications required as prescribed by the Calcutta Municipal Corporation.

11. Accordingly this writ application fails and is dismissed. There will be no order as to costs.

12. Status quo as directed by the order dated May 14, 1990 will continue for a period of four weeks from date. In that view of the matter the Stay as prayed for is refused.

13. If an application for a duly authenticated Xerox copy of the judgment is made to the Registrar, Appellate Side, by the learned Advocates on record for the parties or any of them, such copy shall be delivered to them/him on the payment of requisite charges provided an application is also simultaneously made for a certified copy and an undertaking is given that delivery of the certified copy will

be taken on deposit of requisites when available. The Xerox copy to be supplied as expeditiously as possible.

14. Petition dismissed.