

(1990) 01 CAL CK 0016

In the Calcutta High Court

Case No : C.O. No's. 177711 (W) and 17712 of 1998 and 4763 (W) to 4772 of 1989 and etc.

Maula Bux and etc.

APPELLANT

Vs

State of West Bengal and others etc.

RESPONDENT

Date of Decision : 19-01-1990

Acts Referred:

Administrative Service (Appointment by Promotion) Regulations, 1955 — Regulation 5
Calcutta Municipal (Amendment) Act, 1951 — Section 247
Calcutta Municipal Act, 1923 — Section 3(7)
Calcutta Municipal Act, 1951 — Section 237, 245, 251, 382, 5(28)
Calcutta Municipal Corporation Act, 1980 — Section 2(32), 2(5), 23D, 28, 29
Calcutta Municipal Rules, 1951 — Rule 5(4)
Constitution of India, 1950 — Article 13(2), 14, 16, 166, 19(1)
Foreign Exchange Regulation Act, 1947 — Section 23, 23(1)

Citation : AIR 1990 Cal 318 : (1990) 1 CALLT 174 : (1990) 1 CHN 233 : 94 CWN 650

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

Bench : Single Bench

Advocate : B.C. Dutt, Syed Ataunnabi, M. Hossain, Ajay Nath Ray, Subrata Mukherjee, A.N. Roy, S.K. Muhuri, Priyabata Mukherjee, Mrs. Shukla Hazari, C.N. Mukherjee II, Suresh Ch. Manna and K.D. Ghosh, J.N. Halder, P.K. Roy and Barin Banerjee, for the Appellant;

Judgement

1. This bunch of 21 writ applications is taken up for hearing analogously as they deal with two important questions : whether sub-section (S) of S.400 of the Calcutta Municipal Corporation Act, 1980 is ultra vires the Constitution of India and particularly violative of Arts. 14, 21 and 300A of the Constitution? And whether S. 400(8) of the Act is violative of Ss. 29 and 33 of the said Act?

2. Mr. Bankim Dutt, the learned Counsel appearing for some of the petitioners, has advanced strenuous arguments to bring home his contention that Sec. 400(8) of the Calcutta Municipal Corporation Act is ultra vires of Constitution as well as of Certain sections of the Calcutta Municipal Corporation Act, 1980. He

took the Court through various Sections of the Calcutta Municipal Corporation Act, 1980 beginning with S. 2(5) which defines "building". The building was defined in Sec. 3(7) of the Calcutta Municipal Act, 1923 and according to the submission of Mr. Dutt the definition of building is substantially the same as in S. 5(6) of the Calcutta Municipal Act, 1951. Section 2(32) of the C.M.C. Act, 1980 defines "a dwelling house" as a masonry building constructed, used or adopted to be used wholly or principally for human habitation. A similar definition of dwelling house was given in S. 5(28) of the Calcutta Municipal Act, 1951. The Calcutta Municipal Act, 1923 did not define dwelling house but in S. 2(23) of the said Act domestic house includes a dwelling house.

3. Thereafter Mr. Dutt passed on to Chapter II of the C.M.C. Act, 1980 wherein he pointed out to Sec. 3 of the Act which lays down different Municipal authorities, i.e. (a) the Corporation; (b) the Mayor-in-Council; and (c) the Mayor; and then to Section 4 which provides for the establishment of a Corporation charged with the Municipal Government of Calcutta. Section 5 of the said Act lays down the constitution of the Corporation and Sec. 8 lays down the constitution of the Mayor-in-Council and the manner of transactions of business therein. Then on to Chapter IV of the Act wherein Sec. 29 lays down the functions of the Corporation with a special reference to clause (k) which includes the control of building operations and securing or removal of dangerous buildings and places. According to Mr. Dutt Sec. 33 of the said Act lays down the executive power of the Corporation to be exercised by Mayor-in-Council and such powers are limited to the executive powers of the Corporation which should be exercised subject to the provisions of the said Act and the Rules and Regulations thereunder. To emphasise on the word "executive" he referred to Arts. 50 and 166 of the Constitution as well as EarlJowitt's Dictionary of English Law (1950) and Webster's New 20th Century Dictionary. He submitted that the authority concerned is given a right to determine question affecting the rights of the parties, the function is judicial in the ease of Judiciary and quasi-judicial in the case of Administrative authority. He further referred to Sec. 39 which defines power and function of the Municipal Commissioner and its sub-section (b) gives power to the Commissioner to assign the duties and to supervise and control acts and proceedings, of all officers and employees of the Corporation, subject to the supervision and control of the Mayor. Section 48 of the Act provides for delegation of powers by the Corporation to the Mayor-in-Council and delegation of the power of the Mayor-in-Council to the Mayor or the Commissioner.

4. Mr. Dutt then dealt with the main Chapter XXII which deals with building and then right to Sec. 392 of the Act of 1980 which provides for prohibition of building without sanction. According to this Section the previous sanction of the Municipal Commissioner is necessary to erect or commence to erect any building or execute any work of the nature specified in Sec. 390 and previous sanction must be in accordance with the provisions of this Chapter and the Rules and Regulations under this Act in relation to such erection of building or work. The Section 392 corresponds to S. 382 of Calcutta Municipal Act, 1951. Then Mr. Dutt

came to the crux of the problem and submitted that S. 400(1) of the Calcutta Municipal Act, 1980 which relates to order of demolition and stoppage of buildings and works in certain cases and appeals therefrom has to be read with S. 401 of the said Act. Before an order of demolition is made, notice of such unauthorised work has to be given under Sec. 401 of the said Act and if required steps have to be taken for stoppage of work, and thereafter steps under subsection (1) of S. 400 is to be taken; the proviso of this sub-section enjoins issuance of a notice and reasonable opportunity to the person affected to be heard and then the order of demolition is to be issued. Thereafter the second proviso of sub-section (I) of S. 400 and sub-section (3) gives power to appeal. As such S. 400(1) with the two provisos and S. 400(3) read with S. 401 of the Act is consonant to the principles of natural justice. The impugned sub-section (8) of S.400 of the C.M.C. Act, 1980 gives power to the Mayor-in-Council to act in a manner different from S.400(1) notwithstanding the other provisions of the said Act which prima facie violates the principles of natural justice as enacted in first proviso of S. 400(1). The subsection (8) of S. 400 provides that Mayor-in-Council must form "opinion" that "immediate action is called for". According to Mr. Dutt this sub-section requires that the Mayor must look into the circumstances of the case and the facts brought before him by the Department. But the opinion is formed ex parte without giving any opportunity of hearing to the person concerned and no rule or guideline is prescribed or followed as to under which circumstances "immediate action" would be justified. In the submission of Mr. Dutt every unauthorised construction does not necessarily require "immediate action"; the circumstances must justify "immediate action". He submitted that the case of dangerous building is covered by Section 411 of the Act and sub-section (4) of Section 411 gives ample power to the Municipal Commissioner to act without notice. Section 411(4) corresponds to Schedule XVII, R. 5(4)(a) of the Calcutta Municipal Act, 1951. This rule was upheld as valid on the grounds of public interest and for public safety and the safety of the inmates of building in various decisions of the Supreme Court and the High Court. According to him, in the face of. S.411(4) of the C.M.C. Act, 1980 there was no ground to apply S. 400(8) of the said Act. But the principle is not attracted in the case of S. 400(8) and the vires and validity of sub-section (8) of S.400 can very well be under challenge. He submitted that in the old Bengal Municipal Act and in the Bihar and Orissa Municipal Act, 1922 or any other Municipal Act previously there was no such demolition clause. He cited Cross's Principle of Local Government Law (1959) where the author says that the Court ought not be slow to condemn bye-laws as unreasonable. While laying down the text of the validity of bye-laws etc. the author says that they must set down adequate information as to the duties of those who are to obey and they must be reasonable. He also quoted from Dillon's Municipal Corporation (5th Edition), Volume-I, where the author says that the classification must be just and reasonable and not arbitrary and illusionary and the provisions of Statute roust be germane to the classification adopted.

5. Mr. Dutt has squarely dealt with the provisions of S.400(1) to 400(3) read with S.401 which provides for demolition of an unauthorised construction after giving appropriate notice and opportunity of hearing to person affected. Whereas S.400(8) is the only provision which empowers the Mayor-in-Council to order the demolition of an unauthorised construction forthwith without any notice. So the position stands that S. 400(8) gives good-bye to Ss. 518, 527, 584 and 610 of the Act of 1980.

6. Mr. Dutt summarised his argument with the following submissions :-- First, the provision of sub-section (8) of S.400 of the C.M.C. Act, 1980 has been introduced for the first time (with the similar provision in the Howrah Municipal Act, 1980) and this new sub-section has no counter-part in any Municipal Act in India, England or the United States of America. Second, the Corporation and the Mayor-in-Council are Municipal Authorities having separate functions of their own under S.3 of the C.M.C. Act, 1980. Under sub-section (8) of S. 800 the Mayor-in-Council is empowered to decide questions of facts necessary for the determination of the question involved in order to pass a judicial or quasi-judicial order for demolition of property to the prejudice of the right of the person affected and as such it was submitted on the basis of AIR 1962 SC 1621 that if a statute is ultra vires, an inferior tribunal cannot with regard to the colateral facts give itself a jurisdiction which it would not otherwise possess. Third, Ss. 28 to 30 of the Act of 1980 lay down the powers and functions of the Corporation. By Sec. 28 the Municipal Government of Calcutta shall vest in the Corporation, Sec. 29 lays down the obligatory functions of the Corporation which includes, inter alia, sub-section (k) and the power of demolition of building in certain "cases may be exercised under S. 29 whereas S. 33 of the said Act empowers the Mayor-in-Council to exercise executive power of the Corporation subject to the provisions of the Act and the Rules and Regulations and all such executive action shall be taken in the name of the Corporation. The power of demolition without notice is a judicial or quasi-judicial act and such a power is not exercisable by the Mayor-in-Council under Chapter IV of the said Act. There is a distinction between administrative or executive and judicial or quasi-judicial act and an executive or administrative act is procedural in nature and such an act is not intended to affect or prejudice any right to property or right to substantial character. An executive authority may when duly authorised perform judicial or quasi-judicial functions but it cannot do so when the Statute expressly limits a jurisdiction of the authority to merely "executive acts" and Sec. 33 of the Act very much lays down the limitation to the powers of the Mayor-in-Council and as such the judicial or quasi-judicial function of demolition cannot be brought within the powers of the Mayor-in-Council under S. 33 of the said Act. Fourth, the provision of sub-section (8) of S. 400 of the Act of 1980 is more onerous and arbitrary and is a procedure which is in direct conflict with other provisions of the said Act right from Ss. 400(1) to (3) and 401, 411, 518, 527, 584 and 629, in all of which a notice and an opportunity of hearing are imperative. Fifth, the provisions of Ss. 400(1) and (3) and 411 on the one hand and S. 400(8) on the other are in

apparent conflict as the Sections themselves clearly show. By insert-ing the word "Notwithstanding" the Legislature provides a double "jeopardy" which means to curve down the obligatory function of the Corporation under Sec. 29 of the Act and extends the power to the Mayor-in-Council under Sec. 33 of the Act in contravention to Chapter IV and thus make Section 400(8) ultra vires the provisions of the said Act by giving a power to the Mayor-in-Council which it cannot exercise under S. 33. Sixth, under sub-section (8) of S. 400 the Mayor-in-Council is to form an "opinion" but on what material the "the opinion" is to be formed. The said sub-section does not provide that before forming an opinion the Mayor-in-Council must be satisfied as to the unauthorised nature of the construction; he need not consult any officer or look into the records; he has no obligation to issue a notice to the person affecting to give an opportunity to him to shbw whether he has any material to place whether the construction is authorised or unauthorised. The aforesaid ingredients made sub-section (8) of S. 400 of the said Act violative of Article 14 of the Constitution. Seventh, differential treatment is meted out in the said Act to person in the same situation who are processed under Ss. 401 and 400(1) to (3) whereas others of the very same category are victims of S. 400(8). This difference in treatment of persons of the same category in two different ways are quite uncalled for and is unreasonable and violative of the basic principles laid down in. the Constitution. Eighth, the words "immediate action is called for" are vague and uncertain because the same nature of construction falls within S. 400(1) to (3) and also the same nature of construction comes within 5.400(8). No basis for such immediate action" has been given. One and the same kind of wrongful act cannot be divided into two groups for two types of actions.

7. CD Mr. Dutt further submitted that Section 400(8) of the C.M.C. Act, 1980 though not affecting a fundamental right to property is certainly violative of the right to property conferred under Art. 300A and also violative of Arts. 14, 19(I) (g) and 21 of the Constitution. The constitutional provision of Section 400(8) suffers from the vice of denial of natural justice to citizens which is of considerable importance and the Directive Principles of State Policy must be given due importance in creating a welfare State based on a socialistic and democratic pattern. He submitted that Art. 14 of the Constitution is almost synonymous with the "equal protection clause" in American Constitution. It means the right to equal treatment in similar circumstances both in matters of privileges and liabilities and the intention is that there should be no discrimination between one person and another when similarly placed. Article 14 provides that the action of the authorities must not be arbitrary, irrational or discriminatory and the differentia distinguishing persons grouped together must be reasonable and based on classification. But in the instant case the persons affected by S. 400(8) are the same persons affected by S.400(1) and (3) and S.401; here the procedure to deal with them are totally different. Obviously 5.400(8) infringes the right to property. This right originally given under Art. 19(I) (f) was taken away as a fundamental right but is not completely abolished and

the right to property exists under Art. 300A of the Constitution. And one's property cannot be demolished without authority of law whether authorised or unauthorised; and such authority of law must be valid constitutionally. Mr. Dutt further submitted that S. 400(8) in effect deprives one of his right to life or the means of living as without a living a human being is not expected to live and directly hits Art. 21 of the Constitution.

8. Mr. Dutt submitted that sub-sec. (8) of S. 400 of the C.M.C. Act, 1980 violates the principle of natural justice because a judicial or quasi-judicial authority or even an administrative authority must give notice and an opportunity of hearing against whom action is proposed and such authority should not act with bias of pre-determined policy and must give reasons for his decision. The plea that because of emergency there is no necessity to follow the principle of natural justice does not apply in S. 400(8). Simply the words "immediate action" does not mean that they exclude the application of the principle of natural justice. While referring to the doctrine of ultra vires in England, Mr. Dutt submitted that the doctrine of ultra vires is not available in England in respect of statute passed by the Parliament, for, the modern view of ultra vires goes to the extent of application of the doctrine not to the party exercising powers but to the source of powers exercised and therefore it was held under the Common Law that any invasion of private rights is ultra vires of the Common Law. The English Law would not be of any use -in regard to Parliamentary Legislation in deciding with the question of ultra vires but in the matter of colonial legislation it has been held that it might be declared ultra vires when the statute goes beyond its purposes and objects and exercise powers not provided to itself or its delegation. According to Mr. Dutt, in American Jurisprudence the doctrine of ultra vires in relation to powers conferred upon the Municipal Corporation rests upon the right of eminent domain by grant of legislature, social duties and obligations are paramount to individual rights and interests. Private rights must yield when they come in conflict with the public necessity for the general good. The 14th Amendment to the Constitution of the United States ordains that no State shall make or enforce any law which shall deprive any person of life, liberty or property without the due process of law. He submitted that the doctrine of ultra vires is applicable to the laws enacted in India as both the Parliament and the State Legislatures are controlled by Article 246 of the Constitution. A law which violates fundamental rights or other constitutional rights is ultra vires if inconsistent with the provisions of the Constitution and in the instant case S. 400(8) is inconsistent with the provisions of Articles 14, 21 and 300A. Mr. Dutt strongly contended that as Sections 400(8) and 400(1) to (3), 401 and 411 of the C.M.C. Act, 1980 are not only mutually inconsistent but by no process of reasoning it is possible to give them a harmonious construction to other provisions in the Statute and as such the impugned provisions of S. 400(8) cannot be upheld even on the principle of harmonious construction and must be struck down.

9. During the course of his argument Mr. Dutt cited a number of decisions, some

of them are stated as under:-- Manick Lal Singh Vs. Gouri Shankar Shah, ; C.V. Subrahmanyam Sastry and Others Vs. Joint Registrar of Co-operative Societies, State of Andhra Pradesh, Hyderabad and Others, ; Ajoy Kumar Ghose Vs. Corporation of Calcutta and Others, ; Nani Gopal Biswas Vs. The Municipality of Howrah, ; Bangshidhar Bysack v. Corporation of Calcutta, reported in (1964) 68 Ca! WN 1172; Siddhartha Bhattacharjee Vs. Municipal Corporation of Calcutta and Others, ; Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, ; The Lord Krishna Sugar Mills Ltd. and Another Vs. The Union of India and Another, ; Krus,e v. Johnson, reported in (1898) 2 QB 91; Powell v. May, reported in (1946) 1 All ER 444 : S.M. Nawab Ariff Vs. Corporation of Calcutta and Others, ; Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, ; State of Maharashtra Vs. Chandrabhan Tale, ; Francis Coralie Mullin Vs. Administrator, Union Territory of Delhi and Others, ; Swadeshi Cotton Mills Vs. Union of India (UOI), ; Prabhakaran Nair and Others Vs. State of Tamil Nadu and Others, ; Corbett v. South-Eastern & Chatham Railway Companies" Managing Committee, reported in (1906) 2 Ch 12; Smt. Ujjam Bai Vs. State of Uttar Pradesh, ; Ameerunnissa Begum and Others Vs. Mahboob Begum and Others, ; and Corporation of Calcutta and Another Vs. Satdeo Sarma, . I shall discuss some of the aforesaid decisions afterwards.

10. Mr. Syed Ataunnabi appearing for a number of petitioners, while adopting the argument of Mr. Dutt, placed various Sections of Chapter XXII of the Calcutta Municipal Act, 1980 on "Buildings", and then pointed out Groups A, B, C and D relating to "Procedure", "General Powers", "Licensed Building Architects" and "Municipal Building Tribunals". He submitted that as S. 400 of the Act is grouped under the sub-heading "Procedure" it indicates that the intention of the Legislature was to lay down only the procedure. According to him, this Section does not give any substantial power to the Corporation to demolishing any building which is erected or being erected contrary to the provisions of the Act and in the absence of any substantial power the Corporation authorities cannot act by taking recourse only to the procedure. Mr. Ataunnabi further argued that even if Sec. 400 gives power to the C.M.C, to take recourse to demolishing any building erected or being erected in contravention of the provisions of the law then even sub-section (8) of S.400 is ultra vires being violative of Art. 14 of the Constitution for the reason that S. 400(8) of the said Act is not a law providing for acquisition of estates within the meaning of Art. 31A nor it is specified in the 9th Schedule nor it is meant to give effect to any Directive Principle of State Policy within the meaning of Art. 31C of the Constitution and as such it is open to judicial scrutiny under Art. 13(2) of the Constitution. According to the learned Advocate there is great discrepancy in sub-section (1) and subsection (8) of S. 400 of the Act, while the first provides for giving prior notice and an opportunity to the person affected of being heard and also the right "to appeal from the order, the second one takes away this important right only on the plea that the power under sub-section (1) is to be exercised by the Municipal Commissioner while the power under sub-section (8) is to be exercised by the Mayor-in-Council,

but this does not make any difference at all. The two provisions of the same Section differentiates between one group of people and different actions are prescribed for the one and the same offence committed by the same group of people in two different sets. No rational reason has been given for two sets of actions for the same group of persons who are guilty of one and the same act, that is, unauthorised construction. The law does not give any rational reason as to why different persons committing one and the same act should be treated differentially. The very object of Art. 14 of the Constitution is to give persons uniform treatment by law and the two different actions in Sec. 400 of the Act for one set of person in two different ways clearly violates Art. 14 of the Constitution. Mr. Ataunnabi strongly relied upon the decision in the case of the Deputy Commissioner and Collector, Kamrup and Others Vs. Durga Nath Sarma,

11. The argument advanced by Mr. Dutt, was, in general, adopted by all the learned Advocates appearing for the petitioners.

12. Mr. Roy, the learned Counsel appearing for the Calcutta Municipal-Corporation, submitted that a statutory provision, more oppressive than the other but covering the same field, would not per se be tainted with the vice of discrimination but it will be only so if and when there is an intelligible differentia between the two provisions. He submitted that : (i) the sub-section (1) of S. 400 of the C.M.C. Act, 1980 deals with an ordinary situation and sub-section (8) of the said Section is designed to cover an emergency situation calling for an immediate action; (ii) the authority to exercise power under sub-section (1) is the Municipal Commissioner whereas the authority under subsection (8) is the higher body i.e. Mayor-in-Council; (iii) the emergency power under sub-section (8) is to be exercised only in the event the Mayor-in-Council is of the opinion that immediate action is called for and the Mayor-in-Council is to form its opinion obviously on objective satisfaction relating to the gravity of the matter; (iv) the reasons prompting the Mayor-in-Council to take immediate action should be recorded in writing but such reasons need not be immediately known to the person affected as this is not of material consequence because when the matter is challenged in a Court on an action being taken, the Court is entitled to call for the records and examine the validity and bona fide of the reasons; and (v) there is enough protection to the Corporation authorities and officers under Sec. 587 of the Act.

13. Mr. Roy further contended that a mere possibility of an improper exercise of statutory power in a case would not by itself render the statute or its provision bad or invalid. There are several legislations where apart from imposition of fine a discretion is left with the concerned adjudicating authority in exercising its power to inflict punishment within a certain range. As, for example, "imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both" as in the case of Contempt of Courts Act, 1971. In this connection he cited the decision in M/s.Rayala Corporation (P.) Ltd. v. The Director of Enforcement, New Delhi, reported in AIR

1970 SC494. This case relates to the Foreign Exchange Regulation Act, 1947 and in particular Mr. Roy referred to S. 23(1) of the Act which provides for two sets of punishment under Cls. (a) and (b). Clause (a) empowers a penalty not exceeding three times the value of the foreign exchange or five thousand rupees and Cl. (b) provides for conviction by a Court punishable with imprisonment for a term extending to two years with fine or with both. He also referred to S. 23D of the said Act. He submitted that the statutory provision providing for two different and distinctive kinds of punishment for the same act of offence under the Foreign Exchange Regulation Act, 1947 (since repealed) was upheld.

14. Mr. Roy submitted that the vires of S. 400(8) of the Act of 1980 was considered by Mr. Justice Suhas Chandra Sen in the case of Aftab Ahmed v. Calcutta Municipal Corporation and by Order dated 9th December, 1987 His Lordship held that the provision is not inherently ultra vires, he submitted that the ordinary powers vested in the Corporation authority having failed to curb (curb?) the tremendous growth of unauthorised constructions in Calcutta, of which judicial notice must be taken because of its notoriety it was considered fit to vest the Corporation authority with some emergency powers. He said that there is instance that in spite of the Order of the Hon"ble Supreme Court demolishing of totally unauthorised buildings could not be carried out. He heavily relied upon the case of Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, with particular reference to paragraphs 11 and 12 thereof. Concluding his argument Mr. Roy stressed that in view of the principles laid in the aforesaid case by the Supreme Court it was essential that considering the condition prevailing in the City of Calcutta legislation ought to have been made justifying the grant and exercise of an emergency power for demolishing of unauthorised construction. It is to be seen that while action has been taken under S. 400(1) of the Act to stop the work the person responsible carried out unauthorised construction regardless of such notice. The learned Counsel also submitted that importation of Art. 21 of the Constitution does not appear appropriate in the instant case. There cannot be any right of residence in defiance of the Corporation regulatory measures and, in any way, the emergency power of demolition under sub-section (8) of S. 400 is to be exercised before the constructio'n takes the shape of residence. In the aforesaid circumstances he submitted that S. 400(8) of the C.M.C. Act, 1980 is intra vires.

15. Mr. Halder, the learned Advocate appearing for the State of West Bengal, submitted that S. 400(8) of the C.M.C. Act, 1980 was enacted by the State Legislature and the power for such legislation is traceable to Entry No. 5 read with Entry No. 1 of the List II (State List). He submitted that in spite of the provisions contained in S. 400(1) of the Act, S. 400(8) had to be brought into the statute book because of the notorious fact of large scale unauthorised constructions and/ or continuance of dangerous old buildings endangering the lives of the inmates and neighbours which require immediate action. As the procedure provided in S. 400(1) is time consuming and not effective in many cases, the Legislature had to vest the power for demolition of building with the

Mayor-in-Council under sub-section (8) of S. 400 which is a separate and different authority than the authority namely Municipal Commissioner as provided in S.400(1). He contended that the Mayor-in-Council takes an objective view as distinguished from subjective satisfaction and after consideration of all information received from the Municipal Commissioner as well as from any other source or body and after verification on the spot inspection by the Councilor of the Ward concerned, Borough Committee Chairman, any Member of the Mayor-in-Council and if necessary by expert opinion from any outside agency the Mayor-in-Council deliberates over each case of such unauthorised or dangerous building and takes a decision by recording reasons in the resolution of the Mayor-in-Council. He further submitted that the power vested by S. 400(8) of the Act may be exercised without any notice and or hearing to the persons to be affected and such an act will be perfectly legal and valid and not opposed to the rule of law or violative of the Constitution merely on the ground of non-observance of the principle of audi alteram partem. In this connection he cited the decisions in Union of India and Another Vs. Tulsiram Patel and Others, ; Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, ; and R.S. Dass Ors. Vs. Union of India (UOI) and Others, . While concluding his argument Mr. Halder submitted that the act does not contain any guideline as to the methodology of exercising powers under S. 400(8) and rules having also not been made out by the State Government touching this. Section. This Court may direct the State Government to make appropriate rules for implementing S. 400(8) and till such rules are framed by the State Government this Court in exercise of its power of judicial review may issue guidelines as to the method of exercise of power under S.400(8) by the Mayor-in-Council for the interim period. At the end the learned Advocate emphasised that S. 400(8) of the C.M.C. Act, 1980 is intra vires of the Constitution.

16. No Affidavit-in-Opposition was filed by any of the Respondents nor any record was produced.

17. I have considered the points submitted by Mr. Dun on S. 400(8) of the Calcutta Municipal Corporation Act, 1980. He has in his argument covered a large field of law to bring home the point that sub-sec. (8) of S.400 of the Act is ultra vires the Constitution. According to S. 33 the executive power of the Corporation shall be exercised by the Mayor-in-Council and the word "Executive" is defined in the Dictionary of English Law by Jowitt and Webster's New 20th Century Dictionary. Under S. 39 the Municipal Commissioner is made the principal executive officer of the Corporation subject to the provision and control of Mayor, and all officers and employees of the Corporation are subordinate to the Municipal Commissioner. A plain reading relates to the delegation of powers and functions to the Mayor-in-Council but the powers and functions to the Mayor-in-Council but the power under S.400(8) is not a delegated power to the Mayor-in-Council but a power given by the C.M.C. Act, 1980 itself and it cannot be termed as executive power but quasi-judicial. The concept of quasi-judicial act implies that the act is not wholly judicial; it describes only a duty cast on the executive

body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive power Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, In the case of C. V. Subrahmanyarn Sastry v. Joint Registrar of Co-operative Societies, State of Andhra Pradesh High Court held that in order the determination must affect the rights and liabilities of subjects, which is arrived at after consideration of facts and circumstances by a competent authority although such authority may not be a Court in the regular sense of the term. His Lordship referred to the following observation of Gajendragadakar, J. in The Engineering Mazdoor Sabha Representing Workmen Employed Under the Hind Cycles Ltd. and Another Vs. The Hind Cycles Ltd., Bombay, :-- "the question where an act is a judicial or a quasi-judicial, or a purely executive act depends on the terms of the particular statute and on the nature, scope of effect of the particular powers in exercise of which they may be done. Where an authority is required to act judicially either by the express provision of the statute under which it acts, or by necessary implication of the said statute, the decision of such an authority generally amounts to quasi-judicial decision. Where however the executive or administrative bodies are not required to act judicially and are competent to deal with the issues referred to them administratively, their conclusions cannot be treated as quasi-judicial conclusions". His Lordship of the Andhra Pradesh High Court relied upon the decisions in Reg (Jhon M's) Evoy v. Wein Corporation reported in (1878) 2 LR Ir 371 and Frome United Breweries Company v. Bath Justices reported in (1926) AC 586.

18. A comparative study of Ss. 390(2) and 392 of the Act makes it clear that occupancy classification is defined under sub-sec. (2) of S. 390 and S. 392 makes obligatory upon a person to obtain the previous sanction of the Municipal Commissioner to erect or commence to erect or execute any work as specified in S. 390. A comparative study of S. 400(1) to (7) and S. 400(8) will lead to the clear distinction that the two sets of aforesaid provisions stand on separate footing altogether. Unauthorised construction covers S. 400(1) to (7), 411 and 413 whereas S. 400(8) is for immediate action and demolition stand on a totally different pedestal. It is seen that in Ss. 400(1) to (7), 411 and 413 the process of demolition of unauthorised construction is totally based on the principle of natural justice whereas the provision under sub-sec.(8) of S.400 is not only arbitrary but contrary to the principle of natural justice for more than one reason. No material on the basis of which opinion is made by the Mayor-in-Council is required to be disclosed to the party affected and involves the legal right of a citizen. Property right is one of the most important right of a citizen under Art. 300A of the Constitution which runs as follows :--

"No person shall be deprived of his property save by authority of law."

Though Art. 19(1)(f) has been repealed by the Constitution (44th Amendment) Act, 1978 this does not mean that without authority of law one can demolish or destruct the property of an individual without applying the very basic principle of

natural justice.

19. It will be worthy to reproduce in full the S. 400 including the controversial sub-sec. (8) of the CMC. Act, 1980 which runs as follows :--

"400 : Order of demolition and stoppage of buildings and works in certain cases and appeal.

(1) Where the erection of any building or the execution of any work has been commenced, or is being carried on, or has been completed without or contrary to the sanction referred to in S. 396 or in contravention of any of the provisions of this Act or the rules and the regulations made thereunder, the Municipal Commissioner may, in addition to any other action that may be taken under this Act, make an order directing that such erection or work shall be demolished by the person at whose instance the erection or the work has been commenced or is being carried on or has been completed within such period, not being less than five days and more than fifteen days from the date on which a copy of the order of demolition with a brief statement of the reasons therefore has been delivered to such person, as may be specified in the order :

Provided that no order of demolition shall be made unless such person has been given, by means of a notice served in such manner as the Municipal Commissioner may think fit, a reasonable opportunity of showing cause why such order shall not be made :

Provided further that where the erection or the execution has not been completed, the Municipal Commissioner may by the same order or by a separate order, whether made at the time of the issue of the notice under the first proviso or at any other time, direct such person to stop the erection or the execution until the expiry of the period within which an appeal against the order of demolition, if made, may be preferred under sub-sec. (3).

Explanation-- In this chapter, "the person at whose instance" shall mean the owner, occupier or any other person who causes the erection of any building or execution of any work to be done, including alterations or additions if any, or does it by himself.

(2) The Municipal Commissioner may make an order under sub-sec. (1) notwithstanding the fact that the assessment of such building has been made for the levy of the consolidated rate on lands and buildings.

(3) Any person aggrieved by an order of the Municipal Commissioner made under sub-sec. (1) may, within thirty days from the date of the order prefer an appeal against the order to the Municipal Building Tribunal appointed under S. 415.

(4) Where an appeal is preferred under sub-sec. (3) against an order made under sub-sec. (1), the Municipal Building Tribunal may stay the enforcement of the order on such terms, if any, and for such period, as it may think fit :

Provided that where the erection of any building or the execution of any work has

not been completed at the time of the order made under sub-sec. (1), no order, staying the enforcement of the order made under that sub-section shall be made by the Municipal Building Tribunal unless a surety, sufficient in the opinion of the said Tribunal, has been given by the appellant for not proceeding with such erection or work pending the disposal of the appeal.

(5) Save as provided in this section, no Court shall entertain any suit, application or other proceeding for injunction or other relief against the Municipal Commissioner to restrain him from taking any action or making any order in pursuance of the provisions of this section. -

(6) Every order made by the Municipal Building Tribunal on appeal and, subject to such order, the order made by the Municipal Commissioner under sub-sec. (1) shall be final and conclusive.

(7) Where no appeal has been preferred against an order made by the Municipal Commissioner under sub-sec. (1) or where an order under that sub-section has been confirmed on appeal, whether with or without modification, the person against whom the order has been made shall comply with the order within the period specified therein, or as the case may be, within the period, if any, filed by the Municipal Building Tribunal on appeal and on the failure of such person to comply with the order within such period, the Municipal Commissioner may himself cause the building or the work to which the order relates to be demolished and the expenses of such demolition shall be recoverable from such person as an arrear of tax under this Act.

(8) Notwithstanding anything contained in this Chapter, if the Mayor-in-Council is of the opinion that immediate action is called for in relation to a building or a work being carried on in contravention of the provisions of this Act, it may, for reasons to be recorded in writing cause such building or work to be demolished forthwith."

Section 400(1) to (7) deals with demolition and stoppage of work of building but those provisions are very much justified as they give the party affected notice, show cause opportunity, decision by the Municipal Commissioner and the right to appeal before the Municipal Building Tribunal appointed under S. 415. But in sub-sec. (8) of S, 400, as said earlier, two different standards have been set up by the same section for the one and the same class of persons committing the same nature of act. In this connection a reference may be made to a Special Bench decision of Calcutta High Court in S.M. Nawab Ariff Vs. Corporation of Calcutta and Others, relating to recovery of consolidated rates under Ss.237, 245 and 251 of the Calcutta Municipal Act, 1951. In the aforesaid sections two modes of recovery of tax, one by distraint and another by suit, was enacted and no classification was indicated of defaulters and as such discrimination was inherent in the Statute. Their Lordships held by majority decision that the Act of 1951 has not laid down any principle or policy for the guidance of the exercise of discretion by the Municipal Authorities, namely, the Commissioner and the Corporation, in

the matter of selection or classification of defaulter in deciding whether any particular defaulter should be proceeded against by way of suit under S. 251 or by the other modes under Ss. 237 and 245 and thus the discrimination was inherent in the Act itself. Their Lordships further observed that where out of the two different laws to which the same person or same class of persons are subjected one law is more burdensome than the other, the law which is burdensome would be struck down as discriminatory and void. The Special Bench relied on *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, ; *Suraj Mall Moha and Co. Vs. A.V. Visvanatha Sastri and Another*, and *Shree Meenakshi Mills Ltd., Madurai Vs. Sri A.V. Visvanatha Sastri and Another*, .

20. In the case of *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, the Supreme Court held that Statute may direct its provisions against one individual person or thing or to several individual persons or things but if no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge; then in such a case the Court will strike down the law as an instance of naked discrimination and relied upon *Ameerunnissa Begum and Others Vs. Mahboob Begum and Others*, and *Ram Prasad Narayan Sahi and Another Vs. The State of Bihar and Others*, The Act of 1980 under S. 527 empowers the Municipal Commissioner to order demolition of building upon notice and S. 584 empowers the Municipal Magistrate to impose fine and also demolish such work and the imposition of punishment is specifically provided under S. 610(b) as indicated in Schedule VI with the imposition of penalty of Rs. 1,000/-and a fine of Rs. 100/-daily. Even the demolition of building in the Hastings area has been dealt with differently in S. 629 of the Act. In *Bangshidhar Bysack and Others Vs. Corporation of Calcutta and Others*, Sinha, J. dealt with R. 5(4) of Schedule XVII under the Calcutta Municipal Act, 1951 relating to the most dilapidated buildings requiring immediate demolition and held that in arriving to the conclusion that the building requires immediate demolition and to accept its unworthiness the certificate of the City Architect is of prime importance. Under the English Law it is accepted as conclusive. Whether we should accept it as conclusive or not, it is of the highest evidentiary value. His Lordship then referred to his own decision in the case of *Ajoy Kumar Ghose Vs. Corporation of Calcutta and Others*, wherein it was held that in writ jurisdiction the Court can always determine whether public officials have been kept within their statutory limits.

21. The principle of reasonableness or unreasonableness is dealt with fully in the leading case of *Kruse v. Johnson* (1898-2 QB 91) (supra). In this decision Lord Russell, C.J., expressed his views thus : "But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable man, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires"....." According to Lord Russell it is

in this sense, and in this sense only, that the question of unreasonableness can properly be regarded. C.A. Cross in the Principles of Local Government Law points out that the local authority may require the owner to pull down or alter work carried out in contravention of the bye-laws. If the notice is ignored the authority may, at any time within 12 months of completion, pull down or remove or alter the work, charging the cost to the persons on whom the notice was served.

22. From the above discussion I find that S. 400(8) of the C.M.C. Act, 1980 is quite against the principle of natural justice. Different provisions for one and the same act and for one and the same group of persons have been hauled together. Under one Section i.e., S. 400, to be more precise sub-secs. (1) and (3) point to a particular method of action for demolition of building and stoppage of construction work for a group of persons and sub-sec. (8) of the same Section prescribes just a reverse standard for that very act for the same group of persons. This differential treatment for the same offence to the same group of persons in two different ways cannot stand as valid and lawful in the eye of law after the promulgation of the Constitution of India. The Supreme Court in dealing with a case of Francis Coralie Mullin v. The Administrator, Union Territory of Delhi (AIR 1981 SC 746) (supra) under the COFEPOSA Act dealt with Arts. 14 and 21 of the Constitution and commented that the expression personal liberty occurring in Art. 21 is of widest amplitude. Their Lordships further held that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head, etc. In relation to Art. 14 it must be said that while reasonable classification is permissible classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, and the State of Bombay v. Balsara reported in (1951) SCR 682 on 708-9 : (AIR 1951 SC 318 at p. 326). So, in order to satisfy a challenge under Art. 14, the Act must not only be non-discriminatory, but also be immuned from arbitrariness, unreasonableness or unfairness (substantial or procedural) and also consonant with public interest (K.S.T.D.C. v. K.S.T.A.T. reported in Karnataka State Tourism Development Corpn. Ltd. and Others Vs. Karnataka State Transport Appellate Tribunal and Others, The Supreme Court in Prabhakaran Nair and Others Vs. State of Tamil Nadu and Others, held in unequivocal term in para 36 that after all shelter is one of our fundamental rights and this principle laid down by the Supreme Court cannot be trampled by a stroke of pen by the C.M.C. authorities or the Mayor-in-Council to order for the demolition of a building without giving the affected party an opportunity to convince, the Mayor-in-Council that the act is not illegal or violative of rules.

23. In the well-known case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, a Bench consisting of 7 Judges of the Supreme Court headed by Chief Justice Beg held in unequivocal terms as under :

"Although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislation. The principle of audi alteram partem, which mandates that no one shall be condemned unheard, is part of the rules of natural justice. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a vital pervasive rule effecting mass areas of administrative action. The enquiry must, always be : does fairness in action demand that an opportunity to be heard should be given to the person affected?..... The law must now be taken to be well-settled....."

All legislations need not be held ultra vires but those which are contrary to natural justice and arbitrary must be struck down.

24. I could not follow the undernoted submission of Mr. Roy, the learned Counsel appearing for the Corporation : "It is humbly submitted at the very outset that a statutory provision, more oppressive than the other but covering the same field, would not per se be tainted with the vice of discrimination but it will only be so if and when there is no intelligible differentia between the two provisions". This argument on behalf of the Corporation itself is enough to censor sub-section (8) of Sec. 400 of the C.M.C. Act. The further argument of the Corporation that the reasons should, be recorded in writing is a measure of check and balance, but such reasons are not immediately made known to the person affected and this is of no material consequence. On a challenge to the action, the Court is always entitled to call for, look into and examine the validity and bona fides of such reasons. This argument appears funny because without giving any notice and with-out disclosing the reasons of demolition when the act of demolition is already carried out then challenging the action in court and the court's power to examine the reasons at once becomes meaningless and infructuous. The reason recorded in the file of Mayor-in- Council for prompting to take an immediate action remains under secrecy so far the affected person is concerned and the house is demolished. Is this justice or natural justice? The plea of Sec. 587 of the Act is also out of tune. Mr. Roy very much relied upon the decision in the case of M/ s. Rayala Corporation (P) Ltd. v. The Director of Enforcement, New Delhi (AIR 1970 SC 494) (supra) where constitutional validity or statutory provisions providing for two different and distinctive kinds of punishment for same acts or offences under the Foreign Exchange Regulation Act, 1947 (since repealed) was upheld. Section 23 of the said Act provided penalty to be imposed by the Director of Enforcement as well as conviction by a court of law. In my opinion the said repealed Act of 1947 did not come in conflict with Articles 14, 21 and 300A in any way.

25. In the unreported Original Side matter of Aftab Ahmed v. Calcutta Municipal Corporation his Lordship Mr. Justice Suhas Chandra Sen by an order dated 9th December, 1987 did not incline to go into the vires of Sec. 400 (8) of the C.M.C. Act, 1980 as it would have been entirely premature because the Corporation records showed that it did not pass any order under Sec. 400 (8) in that matter.

It was observed by his Lordship that "at this stage" there is no reason to presume that the power given in this subsection would be abused. More so, Sen, J. did not go into the in-depth consideration of the constitutional validity of the impugned subsection because his Lordship thought that it would be an exercise in futility. In the unreported decision of *Alcove Properties Pvt. Ltd. & Ors.v. The Calcutta Municipal Corporation* (Matter No. 627 of 1984) the judgment of which was delivered on 21st August, 1984 P.C. Borooah, J. did not go into the vires of the impugned sub-section (8).

26. It is contended on behalf of the Corporation that in determining the question of the validity or otherwise of a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down this statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation or arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. And on this submission several decisions were cited. This particular submission itself on behalf of the Corporation is enough to strike down the arbitrary and unjustified impugned sub-section (8) of Sec. 400 on the basis of the acceptance of guilt. The Corporation's contention that the condition prevailing in the City of Calcutta and the spurt of unauthorised constructions demand the existence of an emergency power with which the Mayor-in-Council must be equipped with. I shall deal shortly about the spurt of unauthorised constructions in the City and its causes. During argument Mr. Roy submitted that such a power is also necessary to deal with a situation, as for example, some construction starts at midnight on Chowringhee Road itself, then in that case would the Corporation go through the entire process of hearing as laid down in the Act of 1980 and would not the people of Calcutta suffer indefinitely in such a process? This example has no leg to stand on. If in the middle of any public road, big or small, a construction is being made by some irresponsible citizens then should the Corporation require the aid of sub-section (8) of Sec.400? If the Corporation is so helpless then it better approach the State to confine the force of sub-section (8) of Sec. 400 by legislation to such particular aspects only. In my opinion there are various provisions in the Act which come to the rescue of the Corporation to deal with the emergency but there must be a will to perform the duty and not the will to abate the wrong-doers.

27. In view of the fact that the vires of Sec.400 (8) of the C.M.C. Act, 1980 had been challenged, the Court was inclined to hear the views of the State of West Bengal and granted sufficient time. By its order dated 4th May, 1989 the Registrar, Appellate Side, was directed to communicate the order to the learned

Advocate General forthwith and the order was conveyed to the learned Advocate-General on 15th May, 1989. But instead of the learned Advocate-General, Mr. J. N. Halder, appeared for the State and presented the State's view points. Mr. Halder also submitted a short note of arguments and the very second paragraph of the said note is worth quoting : "In spite of the provisions contained in Sec. 400(1) of the said Act, Sec. 400 (8) had to be brought into the Statute Book because of the notorious fact of large scale unauthorised constructions of and/or continuance of dangerous old buildings which would endanger the lives and limbs of the inmates, neighbours and passer-bys if immediate action for demolition of such building are not taken. Procedure provided for in Sec. 400 (1) being time consuming and not effective in many cases, legislature had to vest the power by Sec. 400(8) for taking decision for demolition of buildings with the Mayor-in-Council which is a separate and different authority than the authority, namely, Municipal Commissioner, as provided in Sep. 400(1) of the Act". According to the learned. State Advocate sub-section (8) has been brought into the Statute Book for two purposes; large scale unauthorised constructions and continuance of dangerous old buildings. For continuance of dangerous old buildings, as I have pointed out hereinbefore, there are provisions in the Act which give the Corporation ample powers to act quickly and immediately. But as far as the unauthorised constructions are concerned immediate action for demolition is not at all necessary because such constructions generally do not immediately or imminently endanger the public at large and in those cases sub-section (1) is to be followed and no arbitrary and unreasonable action putting the person affected in dark should be taken.

28. Mr. Halder submitted that the opinion of the Mayor-in-Council is objective and it is arrived at or must be arrived at after taking into consideration the information received from the Municipal Commissioner as well as from any other source or body and after verification by spot inspection by the Councilor of the Ward concerned, Chairman of the Borough Committee concerned and any Member of the Mayor-in-Council and also after taking expert opinion and" after deliberating thereon a decision is taken. At the same time he submitted that no guideline as to the technology and methodology for the exercise of power under Sec. 400(8) is in existence nor Rules have been framed by the State Government touching this sub-section. If so, then how the learned State Advocate submitted the aforesaid guideline before the Court and where is the sanction behind it? No record has been produced to substantiate it. He further submitted that this Court may direct the State Government to make appropriate Rules for the purpose of sub-section (8) and till such Rules are framed this Court by exercise of its power of judicial review may issue guidelines for interim period. The two submissions as quoted in this paragraph are contradictory to each other and belies the first contention. It is not the duty of the Court to frame interim guidelines and this Court is not going to perform this exercise. which has already been discouraged in several decisions. It is the duty of the State Government to frame Rules and if the State Government has not done so since the enforcement of this Act on 4th

January, 1984, it indirectly appears that the State Government itself is not serious about this sub-section (8) of Sec. 400 which infringes the Constitution.

29. The State relied heavily on the decisions in *R.S. Dass Ors. Vs. Union of India (UOI) and Others*, and *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, The case of *R. S. Dass (supra)* relates to requirement of giving reasons under Regulation 5 of the Indian Administrative Service (Appointment by Promotion) Regulations, 1955 which was subsequently amended by Notification dated 3rd January, 1977. It was held by the Division Bench of the Supreme Court that the Amended Regulation S is not violative of Articles 14 and 16 of the Constitution because requirement of giving reasons cannot be read into on the basis of principles of natural justice. It was further held by Their Lordships that Rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and the background of statutory provisions, nature of the right which may be affected and the consequences which may entail its application depends upon the facts and circumstances of each case. I find that the amendment of Regulation 5 of the said Rules, in fact, regulates the promotion through a Selection Committee and a guideline has been provided for the Selection Committee to categories the eligible officers in different categories and process it. This decision does not at all help the respondents because "reasons" to be recorded in writing forms part of the impugned sub-section. In the case of *Olga Tellis (supra)* it was held that deprivation of right to livelihood except according to just and fair procedure established by law can very well be challenged as violative of Article 21. The 5 Judge Bench of the Hon"ble Supreme Court held that an equal important facet of the right conferred by Article 21, which is wide and far-reaching is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effected contend and meaningfulness but it would make life impossible to live..... deprive a person of his right to livelihood and you shall have deprived him of his life. Article 21 has a very wider ambit and hits sub-section (8) of Sec. 400. During the course of argument Mr, Halder pointed out that owing to the omission of Article 19(1)(f) by the Constitution (44th Amendment) Act, 1978 the right of a citizen to acquire and hold and dispose of property has ceased to be a fundamental right and as such reasons for demolition of a building need not be communicated to the owners or occupiers in the light of this amendment. Mr. Halder squarely forgot that Right to property is very much enshrined in the Constitution under Article 300A which I have quoted above. Does the authority of law" as contained in this Article excludes the Rule of Natural Justice? This contention is rejected.

30. The provision of sub-section (8) of Sec. 400 of the Calcutta Municipal Corporation Act, 1980 requires the Mayor-in-Council to form an "opinion", "for immediate action" and "record in writing the reasons" for the demolition of

buildings and works. In the light of my discussion hereinbefore : (a) there is no basis on which an opinion is to be formed; (b) why an immediate action is necessary when so many provisions are there for such demolition; and (c) the reasons to be recorded in writing shall adorn the file of the Corporation and remain a top secret from the person whose property is going to be demolished. One fine morning he will find that his property is being demolished by the Corporation authorities. This rule of jungle cannot survive in a civilised society and a welfare State." Sub-section (8) of Sec. 400 of the Act comes in direct conflict with other provisions of the said Act for the identical purpose where the principle of natural justice has been adequately spelt out before demolition even in dangerous situations. Hostile discrimination cannot be done between two groups of persons doing the same act and one group being treated under Sec. 400(1) to (3) on the one hand and the other group under subsection (8) of Sec. 400 on the other hand. This hostile discrimination is absolutely a wrongful act. If the law itself or a particular provision of the statute is unconstitutional or invalid on the ground of breach of any other law or any provisions of the Constitution or if it is otherwise invalid then it cannot be said to be saved by authority of law" as spelt out in Article 300A of the Constitution. If the statutory provisions expressly or impliedly exclude the requirements of the principle of Natural Justice as in the instant case with the object to stop unauthorised construction then how Sec. 400(1) to (3) lays down principles analogous and pertaining to natural justice? The dual standard cannot be followed in one and the same nature of case and as such this subsection (8) must be held to be violative of the principle of natural justice, and, therefore, void and unenforceable. That no one shall be condemned unheard, is one of the basic principles of natural justice which is known as *audi alteram partem*. The chief rules of natural justice are to act fairly, in good faiths without bias, and in a judicial temper; to give each party the opportunity of adequately stating his case, and correcting or contra-dicting any relevant statement prejudicial to his case, and not to hear one side behind the back of the other. A man must not be judge in his own cause, so that a judge must declare any interest he has in the subject-matter of the dispute before him. A man must have notice of what he is accused. Relevant documents which are looked at by the tribunal should be disclosed to the parties interested. In short, not only should justice to be done, but it should seem to be done *Local Government Board v. Arlidge* reported in (1915) A.C. 120; and *R. v. City of Westminster Assessment Committee* reported in (1941) 1 KB 53. The adherence to principle of natural justice as recognised by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes. The principles are four in number : (a) that every person whose civil rights are affected must have a reasonable notice; (b) that he; must have reasonable opportunity of defence; (c) the hearing must be impartial; and (d) the authority must act in good faith, reasonably and never arbitrarily (*Frome United Breweries v. Bath Justices* (1926 AC 586) (supra); and *Board of Education v. Rice* (1911) AC 179). This view has been very specifically spelt out in the case of *Mrs. Maneka Gandhi Vs. Union of India* (UOI) and *Another*, and the principle of natural justice or *audi alteram*

partem is taken by the Hon"ble Supreme court as well-settled.

31. It must also be pointed out once again that sub-sections (1) to (7) of Sec. 400 of the C.M.C. Act, 1980 are totally independent and separate set altogether and have no bearing on or inter-connected with sub-section (8) in any way. No where it is stated in the Act or in Sec. 400 that after issuance of notice as per first proviso of sub-section (1) if the construction is still continued then resort may be taken direct under sub-section (8) disregarding other sub-sections or Sec. 400 or other provisions of the Act. On the contrary it is crystal clear that the first proviso of subsection (1) is mandatory in nature. But, in spite, the word "Notwithstanding" has been used in sub-section (8) to nullify the whole exercise under sub-section (1) and (3) which is basically arbitrary and contrary to audi alteram partem. Further, the Corporations powers are expressly stated in Sec. 29 read with Sec. 33 of the C.M.C. Act of 1980 and those powers are wide and of mandatory character, as discussed hereinbefore, and cannot be curtailed ,or truncated by subsection (8) of Sec. 400 of the Act notwithstanding specific powers given to the Mayor-in-Council under the said sub-section (8).

32. I am sorry to say that the deteriorating condition prevailing in the City of Calcutta is, in reality, the creation of the Corporation officials themselves. Construction of unauthorised buildings are never checked in proper time and it is no secret that when any construction commences the Corporation officials seldom take effective measures to check the progress of the construction instantaneously. For reasons best known to the Corporation officials, and well-known to the public, such constructions are allowed to flourish and when the constructions go higher up three or four stories or even more then notices are issued and half-hearted attempts are made to contain them. The newspapers often flash stories "of the Corporation negligence but the Corporation in its usual way take snail-like action but, of course, when some officials are arrogant for "some reasons" with particular promoters or owners of buildings for their illegal action then suddenly they are victimised with sub-section (8) of Sec. 400. The Mayor or the Mayor-in-Council cannot but be silent, helpless spectators of the whole drama of unauthorised constructions when the very machinery of the Building Department of the Corporation itself is rusted and off the rails. I am fully conscious of the fact that the mushroom growth of unauthorised constructions in Calcutta has taken the shape of an epidemic but the blame for giving indulgence to the law-breakers squarely lies with the Corporation officials and staff of this particular department because only with the active connivance of a section of them such a colossal performance be enacted, otherwise it is unthinkable. Corruption and bribery have taken a place of prime importance in the Calcutta Municipal Corporation, this cancer in the body of the Corporation has tarnished the fair-image of once the reputed Municipal Authority of India nurtured by Surendranath Banerjee, Deshbandhu Chittaranjan Das, Netaji Subhas Chandra Bose, A. K. Fazlul Huq and Bidhan Chandra Roy.

33. One wonders why an unauthorised construction cannot be nipped in the bud

at its very inception if effective and forceful actions are taken by the Corporation authorities. The Corporation is only alarmed when the buildings go high up and then the method of Chengis Khan is put into operation. I myself had the occasion to come across during my judicial functioning from a certain record of the Corporation of a building case in which the officer concerned instructed the issuance of notice for the stoppage of the construction work and after scrutiny of the record I found that the order of the official was definitely carried out but after several notes of reminder in the file and it took only a number of years. During argument on behalf of the Corporation it was submitted that it usually takes a long time in the Municipal Building Tribunal to dispose of appeals. This is no defence to abandon the process of law and to hang somebody without giving him a fair trial. The number of Tribunals can very well be increased to cope with the increasing appeals and the Tribunals could be directed to dispose of appeals within a reasonable time, exceptions apart. It must be said that subsection (8) of Sec. 400 of the Act is a most dangerous weapon in the hands of the Calcutta Municipal Corporation and the hands wielding this particular weapon must be amputated without least delay. In view of the detailed discussion hereinbefore, I am inclined to accept the submissions of Mr. Dutt and disagree with the contentions made by Mr. Roy and Mr. Halder.

34. In the circumstances aforesaid, I hold that sub-section (8) of S. 400 of the Calcutta Municipal Corporation Act, 1980 is inconsistent with and ultra vires to Arts. 14, 21 and 300A of the Constitution of India. I further hold that sub-section (8) of Sec. 400 is violative of Secs. 29 and 33 of the Calcutta Municipal Act, 1980. In the event sub-sec. (8) of S. 400 of the Calcutta Municipal Corporation Act, 1980 is struck down.

35. All the writ petitions are allowed. There will be no order as to costs.

36. I record my appreciation of the assistance given to the Court by Mr. B. C. Dutt, Mr. Syed Ataunnabi, Mr. P. K. Roy and Mr. J. N. Halder.

37. Mr. Banerjee, the learned Advocate, appearing for the Calcutta Municipal Corporation prays for stay of the operation of the judgment and order on the undertaking, on instructions, that the Corporation shall not take any action under sub-section (8) of S. 400 of the C.M.C. Act, 1980. Considering the aforesaid undertaking given by the Calcutta Municipal Corporation through its learned Advocates, let there be an order of stay of the operation of judgment and order passed today for eight weeks.

38. If an urgent application is filed for certified copy of the judgment, the same be given expeditiously.

39. Petitions allowed.