
(1999) 05 CAL CK 0004

In the Calcutta High Court

Case No : Writ Petition No. 16121 (W) of 1998

Md. Firoj Ali and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 05-05-1999

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 344
Constitution of India, 1950 — Article 226

Citation : AIR 1999 Cal 260

Hon'ble Judges : P.K. Samanta, J

Bench : Single Bench

Advocate : Arun Mitra and Saibal Kr. Acharyya, Jaharlal De and Guru Saday De, for the Appellant; Ashoke De, R. Bhattacharjee and Tapas Kr. Ghosh, (for Nos. 5 to 7), for the Respondent

Final Decision : Allowed

Judgement

P.K. Samanta, J.—A Councillor of Suri Municipality and an owner of a Stall in Commercial Complex II of Suri Municipality have filed this writ petition for commanding the Respondent/Municipality not to give any effect to the resolution of the Board of Councillors of the said Municipality dated 28th July, 1998 for construction of new stalls at Suri Masjid Bari More (four point junction at Suri Police Station) and at the side of the road on the outer boundary limit of market complex No. II near Suri Bus Stand. The said resolution was taken by a majority decision of the Board of Councillors while the petitioner No. 1 objected to such proposal. This writ petition was moved as the Respondent/Municipality published in a local daily on 5th August, 1998 a notification dated 4th August, 1990 inviting applications for allotment of such stalls which will be constructed in the places as above pursuant to the said resolution. It may be stated herewith that it was decided by the said resolution that in all 16 shop rooms comprising 8 shop rooms in each floor will be constructed at Suri Masjid Bari More and 18 stalls will be constructed along with Eastern Side of the road on the outer boundary limit of market complex No. II near Suri Bus Stand.

2. Initially this writ petition was moved as a public interest litigation before the Division Bench of this Court. By an order dated 24th September, 1998 and interim order was passed to the effect that if any, construction is carried on, the same may not encroach the road or may not violate the building rules and if the stalls are constructed the same may not be allotted without the approval of the Court. Thereafter by an order dated 1-2-1999 the Division Bench of this Court sent the matter back to the regular single Bench with the following observations :--

"When some arguments were advanced on the question of locus standi of the writ petitioners to move this Public Interest Litigation matter, we now feel that a dispute may arise about the locus standi of the writ petitioners to move this writ petition. Accordingly, without going into the same, we are of the view that purpose would be served if we refer the matter to the appropriate regular Bench for consideration of the entire matter without questioning the locus standi of the writ petitioners to move this Public Interest Litigation matter which would not be treated as such. Accordingly, let this matter be referred to the regular Bench immediately.

Since, the interim order granted on 24th September, has been extended and is still continuing even up to this date, we also extend the same for a further period of 3 weeks from date with liberty to the petitioners to apply for extension of this interim order on the self same application and on the other hand it will be open to the respondents to oppose the same and also to ask for vacation and/or variation of the interim order in presence of the petitioner.

We also make it clear that the grant of interim order shall not mean that the writ petitioners shall be entitled to such an order before the regular Bench. All questions are left open to be decided by the regular Bench in accordance with law."

3. This Court further upon consideration of the matter by an order dated 26th February, 1999 passed an interim order directing the Respondent/Suri Municipality not to make any construction by encroaching upon any road and/or in violation of the building rules and at the same time the Respondent/Municipality was restrained from constructing the stalls in question pending hearing of the writ petition.

4. The Respondent/Municipality contested the writ petition by filing affidavit-in-opposition. It is the specific case of the Respondent/ Municipality that construction of stalls at Suri Masjid Bari More (four point junction near Suri Police Station) would be made within municipal land where there is 34" wide road, which width towards west is about 19" and towards east is about 22". So far as it relates to construction of stalls along the eastern side of the road near Suri Bus Stand it was specifically stated that in between the boundary wall of the market complex No. II and the outer limit of the municipal land up to the public road there is a space of 8" width. In all 18 stalls facing the road were proposed to be

constructed along the said 8" wide space by leaving aside 3" space open by the side of the road. The said construction of stalls was proposed in public interest to remove unauthorised stall holders from public thoroughfares and to rehabilitate them upon such construction.

5. The writ petitioners on the other hand contended that both the places as above are very crowded and busy areas. Suri Masjid Bar More (four point junction) is situated near Suri Police Station and Suri Judges" Court. Similar by the public road near Suri Bus Stand by the side of the market complex No. II is a very congested area. If the Respondent/Municipality for the purpose of rehabilitation of unauthorised holders of stall on the roads convert the areas into permanent shopping areas just by shifting them from the public roads to the municipal land just by the side of the said public roads the situation instead of improving will worsen further and will cause serious inconveniences to the local public not only at present but far more badly in future years. It will also cause serious problem to the movement of traffic as well as pedestrians through the public roads at those places. The proposal as above was therefore not for the interest of the general public residing within Suri Municipality.

6. On the facts as above the dispute thus arose as to whether the resolution of the Respondent/ Municipality to construct those stalls in the places as above, was for the interest of public or for the interest of few unauthorised hawkers and/or holders of stalls in public thoroughfares and whether the Court in exercise of its writ jurisdiction is empowered to interfere with such decision of the body of the Municipality.

7. This decision of the Board of Councillors was not contended to be in exercise-of power under any provisions of the Statute. The said resolution of the Respondent/Municipality is therefore an administrative decision taken for the purpose of administration of the Municipality.

8. Mr. Ashok De, learned Advocate appearing on behalf of the Respondents seriously contended that the question of feasibility of construction of shop rooms in the areas as above and/ or the questions whether the areas are appropriate sites or not and whether pedestrians would be affected by such construction of shop rooms in the areas as above are matters of which judicial review is not permissible. Mr. De, argued that it is well settled that the Court is not concerned with the merits of such decision of the Respondents/ Municipality except that it may review the decision making process and in support of such contention referred to several decisions of the Supreme Court reported in Om Prakash Poplai and Rajesh Kumar Maheshwari Vs. Delhi Stock Exchange Association Ltd. and Others and Union of India (UOI) and Others, D.K. Yadav Vs. J.M.A. Industries Ltd., and Tata Cellular Vs. Union of India, The Supreme Court in the case of Om Prakash Poplai (supra) in a matter relating to selection of members by the expert committee came to the finding that the area of play was limited to 20% and having regard to the fact that the members of the expert committee comprised of members nominated by the Central Government felt it difficult to accept the

contention that they acted in an unreasonable and arbitrary fashion and consequently held that the enhancement of the number of members of stock exchange is a matter of policy which was chalked out carefully after extended correspondence between the Delhi Stock Exchange and the Central Government and in such matters of policy the Court is always reluctant to interfere. The decision of the Supreme Court in the case of Bandara District Central Co-operative Bank (supra) is not of significance inasmuch as the question involved therein as to whether the power given to the State Government to declare any other officer of the society as a designated officer shall be bad in absence of a proper guidelines. The case of Tata Cellular (supra) is though of relevance in this case but the principles laid down merely as shortly put are that the grounds upon which the administrative action is subject to control by judicial review can be classified under the illegality, irrationality and procedural irregularity. The said principles are no doubt uncontroversial. Though there may not be a clear case of illegality and/or procedural irregularity in the formation of the decision by the Respondent/Municipality in this case but it is necessary to find out as to whether there is any irrationality in arriving at such a decision upon consideration of the objective criteria in relation to the obligation it has to discharge towards its rate payers.

9. The objectivity as sought to be infused in this administrative decision though in the form of social policy decision, did not have the formulation of an opinion on subjective satisfaction of the view prospects of the areas concerned, which from its locations are evident to be busy intersection of roads and all the needs of the local people of a market in the area. The Municipality could not use its non-statutory decision making powers to achieve a social policy which would be inconsistent with the obligation to its rate payers and the goal to which it should work. Correct balance lies between the interest of rate payers and development of all municipal areas upon preserving the interest of other sections of local society. Though the answer must lie in the perception of those making decision not in the Court, but where perceptions are drawn on unsubstantial considerations, the Court should interfere though may not substitute its decision. At page 392 of Administrative Law -- HWR Wade & C.F. Forsyth, 7th Edition, it has been noted that:--

"The whole concept of unfettered discretion is inappropriate to a public authority which possesses powers solely in area that it may use them for the public good."

10. The scope to interfere with such administrative decision by the Court is limited to the extent as to whether the same was taken fairly and the authority did not go wrong on matter of substance. Since no conceivable procedure emerge in this case for taking such resolution in a meeting of the Board of Councillors of the Respondents/Municipality so it may not be a case of an administrative decision taken unfairly without following the norms of procedural safeguard, but still it may require consideration whether the authority went wrong on a matter of substance. The question therefore crops up for

consideration whether such decision was just and in the greater interest of public. Whether the authority had genuinely addressed itself to the matter before it and regarded all relevant consideration.

11. The geographical locations of the areas proposed for construction have not been disputed by the Respondents/Municipality. Suri Masjid Ban More is, admittedly a four point junction situated near both the Suri Police Station and Judges" Court. It has not been disputed by the Respondents/Municipality that the said four point junction is a very busy and crowded section of the locality. Similar is the position in respect of the area near Suri Bus Stand and Market Complex No. II. It is not the case of the Respondent/Municipality that in between the public road for movement of traffic and the municipal land near Suri Masjid Bari More where the construction of stalls have been proposed there is a pathway for the pedestrians. Same is the position at the eastern side of the public road near Suri Bus Stand by the side of boundary wall of the market complex No. II. As per the proposal only a 3" space will be left open by the side of the public road in front of the stalls proposed for construction. It is not at all difficult to conceive that the areas as above in the suburbs remains very congested and crowded in most hours of the day. It is also within common knowledge that these suburban areas were not developed in a planned way. Public roads were not even constructed keeping in mind the load of the traffic it is required to bear even today far less to speak of the future. Growth of population and housing problem had forced a large population to settle down in these suburban areas around Calcutta who are required to maintain daily link between these areas and Calcutta for their livelihood. As a result the load of traffic and number of pedestrians in these areas are increasing in astronomical proportion every day. In these suburban areas public roads were also not constructed by making provisions for walk ways for the pedestrians. It is also within common knowledge that in these suburban towns the same public road is used both for the vehicular movements and public walk way. In a condition like these if stalls are constructed for shopping, though on the municipal land, but just by the side of the public roads at busy and crowded intersections where the shoppers will throng the area regularly, it is easily imagined that the situation as of to-day will not only worsen but will be chaotic and beyond control in the years to come. The Respondents/Municipality has not disclosed any plan for development of the said areas nor for widening of the public roads situated in those areas to meet the future demands of the situation. It is also riot difficult to perceive that once these stalls are constructed the shoppers will visit the stalls so constructed just by the side of the public roads for their shopping and will spill over to the public roads. It will cause inconveniences both to the shoppers and vehicular movement of traffic on those public roads. The utility of the present width of the public roads in those areas will diminish in course of time.

12. Mr. Ashok De, further argued upon reference to. the decisions of the Supreme Court in Ahmedabad Municipal Corporation Vs. Nawab Khan Gulab Khan and others, Labha Ram and Sons and Others Vs. State of Punjab and Others,

that the Municipal Corporation has a constitutional and statutory duty to provide means for settlement by allotment of stalls. In the case of Ahmedabad Municipal Corporation (supra) the Supreme Court did not lay down as a rule of law that in all cases where there would be eviction of unauthorised traders, stall holders, such evicted persons should necessarily be provided with alternative accommodations at the expense of the State. It on the other hand observed at Para 29 of the said report that the Court may not as a rule, direct that the encroachers should be provided with an alternative accommodation before ejection when they encroached public properties, but each case requires examination and suitable direction appropriate to the facts requires modulation. However, in the said decision it was observed that the municipal corporation has a constitutional and statutory duty to provide means for settlement and residence by allotting the surplus land under the Urban Land Ceiling Act, and if necessary by acquiring land and providing house sites or tenements as the case may be according to the scheme formulated by the corporation, the financial condition of the corporation may also be kept in view but that would not be a constraint on the corporation to avoid its duty of providing residence/plots to the Urban weaker sections. It would therefore be the duty of the Corporation and/or Municipality to evolve appropriate schemes. At the same time, the Supreme Court at paragraph 20 of the said judgment observed as under :--

"Every Municipal Corporation has statutory obligation. to provide free flow of traffic and pedestrians" right to pass and repass freely and safely; as it concomitance the Corporation/Municipality have statutory duty to have the encroachments removed. It would therefore be inexpedient to give any direction not to remove, or to. allow the encroachment on the pavements or footpaths which is a constant source of unhygienical ecology, traffic hazards and risk prone to lives of the pedestrians. It would therefore, be necessary to permit the Corporation to exercise the statutory powers to prevent encroachment of the pavements/footpaths and to prevent construction thereon. The Corporation should always be vigilant and should not allow encroachments of the pavements/footpaths. As soon as they notice any encroachment they should forthwith take steps to have them removed and would not allow them to settle down for a long time."

13. In this case the resolution and/or decision of the Respondents/Municipality does not appear to be upon consideration of the statutory obligation it is required to discharge as observed by the Supreme Court, nor it was contended to be a scheme which alone could evolve in a situation like this. On the other hand holders of unauthorised stalls upon public roads who have no legal right to be necessarily provided with alternative accommodation for their rehabilitation in the event of their eviction from such public roads and/or properties and for the sake of interest of such 34 unauthorised holders of stalls in public roads the interest of the general public of the locality, the statutory obligation of the Respondents/Municipality to provide free flow of traffic and pedestrians" right to pass and re-pass freely and safely were sought to be abandoned by the aforesaid

decision of the Respondent Municipality.

14. The case of Labha Ram and Sons and Others Vs. State of Punjab and Others, is not on the issue as raised, in this case. In the said case the point involved as to whether upon establishment of a new market (location of such establishment was not in controversy at all) the existing traders should be given preference for allotment or should be asked to compete in an open auction with the rest of the public for such allotment in the new market. The said case is not a decision laying down a rule of law that the unauthorised holders of stalls in public roads have a constitutional right to be provided with alternative accommodation and/or means for settlement or that the Municipal Corporation has a Constitutional and/or statutory duty to provide means for settlement to the holders of stalls who encroached public roads and/or thoroughfares in setting up their stalls.

15. In this connection one more distinctive feature should not be lost sight of. In this case it does not appear that there was an assumption of the balance of public interest, proper developing and maintaining of the particular areas in the context of growth of population, traffic movement, importance of the areas against the interest of few unauthorised holders of stall in public streets. The administrative decision must be based upon relevant consideration which in this case does not appear to have been made. The object to settle the unauthorised holders of stall on the public streets and thereby to make free the public streets and roads from encroachment though was perfectly reasonable in itself but the decision to settle them by creating a sort of marketing area placed in the very busy intersection of roads in a municipal area in exercise of administrative power is in its face devoid of concept of purpose. Because it lost sight of the importance of the areas' growth factor and the resultant effect upon establishment of shopping stalls in the areas in near future. Thus in all corners the colour and pretence of settling unauthorised stall holders by removing encroachment of the public street for public conveniences run against the very concept of public conveniences in the areas concerned. Therefore, the impugned decision cannot be sustained inasmuch as there is an abuse of discretion by failing to strike a balance between the need of settlement of unauthorised stall holders and the conveniences of the public at large. Thus, in effect such administrative decision, is abuse of discretion, is unreasonable and not enough with all relevant considerations. The same therefore cannot have the support of law.

16. In this connection a passage from Lord Diplock's formal statement of Judicial Review as appended in appendix-I of Administrative Law - H.W.R. Wade & C.F. Forsyth, 17th edition is inspiring and quoted hereunder -- "My Lords, I see no reason why simply because a decision making power is derived from a common law and riot a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a state today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground 1

would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case-by-case basis may not in course of time add further groups. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community, but to dispose of the instant case the three already well established heads that I have mentioned will suffice". This concept of Lord Diplock also finds its place in the Supreme Court decision in "the case of Tata Cellular Vs. Union of India, of the report.

17. I, therefore, venture to indicate in this case too that the decision of the Board of Councillors lacks proportionality in a sense that a proper balance was not struck between the need to rehabilitate the unauthorised holders of stalls in and around the streets and the choice of locations for such rehabilitation. Unproportionality of the impugned decision could also be had from the fact that the traders who were doing their businesses by unauthorisedly making stalls by encroaching public roads in the areas at Sun Masjid More and Municipal Market Complex No. II near Suri Bus Stand, were sought to be merely pushed back and kept within the municipal land just by the side of the public roads overlooking the possible inconveniences of the local pedestrians, growth rate of vehicular movements in those roads in future years and actual need of the public of the locality of a shopping area in such busy intersection of roads. Once settled as such, it is common experience, it will not be possible to keep them within the bounds. It will be impossible to be vigilant on regular basis to see that their trading activities do not spill over to the public roads. The decision appears to be not only short sighted but for the interest of few who again carry on their trades illegally by encroaching public roads, at the cost of larger interest of the local public for all time to come.

18. The next question was raised on behalf of the Respondent as to the standing of the writ petitioners against the impugned administrative decision of the Respondent/Municipality. The question as to standing of the writ petitioners became somewhat complex in view of the order of the Division Bench directing the petition be not treated as a public interest litigation and should be decided as a regular writ petition.

Therefore, the standing of the petitioner for an action for judicial redress for public injury may not be looked into from the angle of a public interest litigation but at the same time it cannot be denied that the petitioner/councillor was jointly and severally obliged to the well-being of the public and proper development of the areas under Municipality.

19. It was contended on behalf of the respondents that the petitioner No. 1 is a councillor of the Respondents/Municipality and such administrative decision was taken as a majority decision of the councillors in presence of the petitioner/councillor. The same therefore cannot be challenged by him in as much as the same was also his decision. The other writ petitioner is a stall holder in an

establishment of municipal market of the respondent/municipality and therefore a rate payer and a resident of a locality and he is therefore not a person affected by the said decision of the municipality. It was further pointed out from the minutes of the meeting of the Board of Councillors of the Respondent/Municipality that the petitioner/councillor did not put note of dissent in relation to this matter in an earlier occasion in the year 1995 but had strongly objected to the impugned decision taken in the last meeting of the Board of Councillors. Accordingly, it was also contended that the petitioner No. 1 is debarred from disputing the present decision of the Municipality. So far as it relates to this contention of the Respondent it does not reveal anything more except that if one acts in a particular manner and/ or perceives a particular notion at a particular time must always act and perceive in similar fashion for all time to come and cannot have a better wisdom or better perception of the situation afterwards, which is not correct always in the sphere of public policy decision,

20. The argument of Mr. De, learned Advocate that the petitioners have no legally protected and judicially enforceable right also cannot accept in this particular case. The decisions of the Supreme Court relied on by him namely *Mani Subrat Jain and Others Vs. State of Haryana and Others*, *Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Others*, and *The Nagar Rice and Flour Mills and Others Vs. N. Teekappa Gowda and Bros. and Others*, are not of any help in this case. Both the cases of *Nagar Flour Mills (supra)* and *J. M. Desai (supra)* deal with a question as to whether a rival in trade has a right to invoke certiorari jurisdiction to challenge the grant or permission in favour of his competitor. In the context of those cases it was held that the expression person aggrieved must receive a strict construction because the right to carry on business being a fundamental right under Article 19(1)(g) of the Constitution, its exercise is subject only to the restrictions imposed by law in the interest of the general public under Article 19(6). The rival competitor cannot have any grievance against policy and/or grant of licence by the authority concerned for carrying on businesses. The decision in the case of *Mani Subrat Jain (supra)* is distinguishable because it held that the Governor is not bound to act on the advice of the High Court and therefore was not bound to appoint the appellants as District and Additional District and Sessions Judges on the recommendations of the High Court and therefore, the appellants who were recommended by the High Court had neither any legal right to be appointed nor the Governor had the legal duty to appoint the appellants. In this connection it may be stated that the law about standing has moved forward in the recent years. At page 711 of *Administrative Law by Wade and Forsyth (7th Edition)* it was noted as under:---

"the essence of standing, as a distinct concept, is that an applicant with a good case on the merits may have sufficient interest to be allowed to pursue it. The house of Lords" new criterion would seem virtually to abolish the requirement of standing in this sense. However, remote the applicants" interest, even if he is merely one tax payer objecting to the assessment of another, he may still succeed if he shows a clear case of default or abuse. The law will now focus upon

public policy rather than private interest".

21. In this case the petitioner/councillor has a public duty and in due discharge of his public duty he opposed the decision of the municipality. This public duty amounts to a sufficient interest to confer a standing. It cannot be said that a councillor who owes a public duty and has therefore a sufficient interest in the issue can only vindicate his views before the administrative body which takes the decision as a whole and has no power or the standing to vindicate his grievance before the Court of law. The petitioners are both rate payers and are interested in the proper development of the area under the municipality and therefore have sufficient interest in the eye of law. The impugned decision if purported to affect the future growth and development of the locality, the interest of the petitioners both as rate payers and as residents and more particularly as a councillor of the municipality with public duties constituted the criteria of their standing for vindicating their grievance before the Court of law. The petitioners are therefore not merely busy bodies but are interested persons in the developmental growth of the municipality. Therefore, the standing of the writ petitioners in the cause of public policy cannot be denied.

22. Furthermore, the petitioner/councillor is the person interested in the matter of any decision that may be taken administratively in due discharge of his obligation towards the rate payers and his function as a councillor of the municipality. The said petitioner can further be termed as a person aggrieved as his opinion was discarded as to the choice of location for settlement of unauthorised stall holders. The said petitioner having thus failed to secure his opinion vindicated in a meeting of the Board of Councillors is certainly entitled to vindicate his stand in a Court of law by challenging the decision of the Board of Councillors on the score that the same was not in the interest of the public at large.

23. In the views as above I am inclined to interfere with the resolution/decision of the Board of Councillors of the Respondent/Municipality dated 28th July, 1988 and I, accordingly, do so by setting aside the same. However, I also make it clear that this judgment shall not stand in any manner whatsoever to mean that since the aforesaid resolution and the decision of the Board of Councillors of the Respondents/Municipality have now been set aside so the Respondents/Municipality is not under any obligation to remove the hawkers and/or unauthorised holders of stall on public roads or that no further action is needed against them unless suitable alternative accommodation is made available to them for their rehabilitation. I rather direct the Respondent/Municipality to act strictly in the spirit of "the observation made by the Supreme Court in the case of Ahmedabad Municipal Corporation Vs. Nawab Khan Gulab Khan and others, as quoted hereinbefore. The writ petition is thus allowed.

24. If urgent xerox certified copy of this order is applied for by the parties, the same should be given as, expeditiously as possible.