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**(1985) 10 CAL CK 0003**  
**In the Calcutta High Court**  
**Case No : C.O. No. 5843 (W) of 1985**

Samaresh Das

APPELLANT

Vs

Calcutta Municipal Corporation and Others

RESPONDENT

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**Date of Decision :** 08-10-1985

**Acts Referred:**

Calcutta Municipal Corporation Act, 1980 — Section 396  
Constitution of India, 1950 — Article 14, 300A, 300A  
West Bengal Town And Country (planning And Development) Act, 1979 — Section 44,  
46, 46(1), 46(2), 46(2)(b)

**Citation :** 90 CWN 173

**Hon'ble Judges :** B.P. Banerjee, J

**Bench :** Single Bench

**Advocate :** Nani Bhusan Sarkar and Srphali Sarkar, for the Appellant; Tapash Chandra Roy and Samaresh Chandra Banerjee, for the Respondent

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## Judgement

B.P. Banerjee, J.—In the writ petition, the petitioner challenged the validity of the Memo dated 29th March, 1985 issued by the District Building Surveyor, District No. IV(P) of the Calcutta Municipal Corporation which is annexure "E" to the petition and the order passed by Shri C. K. Choudhury, Chief Physical Planner, CMDA dated February 27, 1985 which is Annexure "B" to the petition. The case of the petitioner that the petitioner is the owner of the Premises No. 152, Shyamaprasad Mukherjee Road, Calcutta 26 and that there was a structure on the said premises. The petitioner for the purpose of constructing a new building on the premises in question made arrangements with the tenants of the said premises and got the premises vacated and thereafter demolished the old building in question that were standing thereon. Thereafter, the petitioner submitted a plan for construction of a six storied building thereon before the Calcutta Municipal Corporation after obtaining "no objection certificate" from the Metro Railway Authorities and the Calcutta Improvement Trust. The application for sanction of the building plan was submitted to the Calcutta Municipal Corporation on 29.2.84 and thereafter when the petitioner made enquiries in the

matter from the Municipal Authorities about the reasons for delay the petitioner was told by the Municipal Authorities about the reasons for delay that a "certificate of no objection" from Calcutta Metropolitan Development Authority was necessary for sanctioning the plan in question and thereafter the petitioner filed an application before the Calcutta Metropolitan Planning Authority for permission for development under the provision of section 46(3) (b) of the West Bengal Town and Country (Planning and Development) Act, 1979. On 27th February, 1985, Shri C.K. Choudhury, Chief Physical Planner, CMDA rejected the said application for permission for development. The said order was as follows:

As no development has come into operation as contemplated u/s 46(3)(a) of the said Act, the application has to be disposed of on the basis of other material consideration as referred to u/s 46(3)(a) of the said Act. These consideration viz. that this plot would be important for providing space for surface dispersal facilities near Kalighat Metro Rail Station.

In the instant case, the Respondent No. 1 filed an affidavit-in-opposition stating that as the Calcutta Metropolitan Development Authority Objected to the sanctioning of the said plan on the ground that the plot in question would be important for providing surface dispersal facilities near Kalighat Metro Rail Station, it had requested the Corporation Authority that no development permission for the plot No. 152, S. P. Mukherjee Road, Calcutta be given at this stage. It was further stated that the Calcutta Metropolitan Development Authority was the Development Authority under the West Bengal Town and Country (Planning and Development) Act, 1979 and such permission was to be obtained from the said authority. As in the instant case, the said authority had objected to the development of the said plot of land, the plan submitted to the Municipal Authority could not be sanctioned. It was further stated that the Calcutta Municipal Corporation was bound by such objection made by the said Authority in the matter of sanctioning of the said plan and that plan could not be sanctioned for construction and the permission in question till such time of the said objection had not been removed.

2. Mr. Nani Bhusan Sirkar, learned Advocate appearing on behalf of the petitioner, contended in the first place that under the provision of Section 44 of the West Bengal Town and Country (Planning and Development) Act, 1979 no person could use or permitted to be used any land or carry, out any development in that area otherwise than in conformity with such development plan and as such according to Mr. Sarkar, if any development had been prepared in that event, the Calcutta Metropolitan Development Authority had no authority and/or jurisdiction to refuse to grant any permission for making any construction and development on the land in question. Admittedly the land in question is situated within the area of operation of West. Bengal Town and Country (Planning and Development) Act, 1979 and that under the Scheme of the Act, if a development plan has been prepared by the said Authority, in that event no person can use or permit to be used such land in conformity of that plan and that u/s 46 of the said Act, the

authority concerned has a right to grant and/or refuse permission. According to Mr. Sarkar, the provision of Section 46 could only be invoked if the development plan under the said Act has been made. Mr. Sarkar further contended that the order passed by the Chief Physical Planner CMDA is on the fact of it illegal inasmuch the same amounts to derivation of the petitioner's property without the authority of law. It was submitted that if the land was needed for any public purpose or for a purpose of Metro Rail in that event nothing prevented the said authorities to acquire the said land under the provision of law by paying appropriate compensation, but the said authorities by passing an executive order cannot deprive the petitioner of right of enjoyment of the said property. Further, it was contended that even assuming that there was no development plan, in that event also, the authority concerned may either grant permission or refuse permission, altogether. But such an order that permission could not be given at this stage is dehors the provision of the law. Mr. Sarkar further submitted that in any event section 46(3) of the said Act confers an uncontrolled, unguided and uncanalised power inasmuch as what are materials that would be taken into consideration had not been provided in that Act and further in a matter like this, when a person is deprived of his right of enjoyment of his property permanently or otherwise, the person concerned had no opportunity to make representation and that an Executive Authority had been provided- with the power to refuse permission to make any construction without giving any opportunity and/or hearing. Further that the plot in question may be required in future for any public purpose cannot be a ground for refusing permission to make any construction on the said land. Mr. Sarkar further submitted that on the plot in question there was an existing building and that the said building had been demolished for the purpose of construction of six storied building thereon and that constructing a building after demolishing the old one does not and cannot come within the purview of development in the meaning of the said Act. There are buildings on the two sides of the land and that further at the time of the hearing it was admitted by the parties that by the side of the building a multi-storied building is being constructed by the Government of India. But the petitioner had been prevented from making any construction upon his land and that is on the face of it arbitrary and malafide. It was further contended that a person could not be deprived of his property without any authority of law as provided in Article 300A of the Constitution of India.

3. At the time of hearing of the application, Mr. Tapas Chandra Roy, learned Advocate appearing on behalf of the respondents, produced before this Court an interim report of the Committee on Metro Rail and Urban Development dated March, 1984 and also produced a map showing the limit of "inner impact area" for immediate development freeze and outer impact area by the side of the Metro Rail. On the basis on the said plan Mr. Roy submitted that no construction can be granted for carrying out any constructional work in the said "inner impact area".

4. Section 46(1) of the said Act provides that "Any person of body (excluding a

department of the Central or the State Government or any local authority) intending to carry out any development on any land shall make an application in writing to the Planning Authority or Development Authority for permission in such form and containing such particulars and accompanied by such documents and plans as may be prescribed. "

5. Section 46(1) of the said Act provides that any person or body intending to carry out any development on any land shall make an application in writing to the Planning Authority or Development Authority for permission in such form and containing such application accompanied by such documents and plan as may be prescribed and that thereupon the Planning Authority may refuse to grant permission. Section.46(2) of the said Act provides that -

(2) On such application having been duly made and on payment of the development charge as may be assessed under Chapter IX.

(a) the Planning Authority or the Development may pass an order -

(i) granting permission unconditionally, or

(ii) granting permission subject to such conditions as it may think fit, or

(iii) without prejudice to the generality of clause (a) of this sub-section the concerned authority may impose condition -

(i) to the effect that the permission granted is only for a limited period and that after the expiry of that period the land shall be restored to its previous condition the use of the land permitted shall be discontinued.

(ii) for regulating the development or use of any other land under the control of the applicant or for the carrying out of works on any such land as may appear to the authority expedient for the purpose of the permitted development.

Sub-section 44 of the section 46 provides :

(4) When permission is granted subject to conditions or is refused, the grounds of imposing such conditions or such refusal shall be recorded in the order and the order shall be communicated to the applicant.

Section 44 of the said Act reads as follows:

4. Use and development of land to be in conformity with Development Plan. After the coming into operation of any Development Plan in any area, no person shall use or permit to be used any land or carry out any development in that area otherwise than in conformity with such Development Plan :

Provided that the Planning Authority or the Development Authority may allow the continuance, for a period not exceeding 7 years of the use, upon such terms and conditions as may be imposed by the concerned authority, of any land for the purpose and to the extent, for and to which it is being used on the date on which such Development Plan comes into operation.

6. After considering the respective submissions and the provisions of the said Act, it appears that u/s 44 even after the development plan had come into force, the Calcutta Metropolitan Development Authority may allow continuance for a period not exceeding 7 years of the use upon such terms and conditions as may be imposed by the concerned authority on any land for the purpose and to the extent, for and to which it is being used on the date on which the said plan comes into operation. Section 44 makes it clear that even after the development plan had come into force, the CMDA has power to allow continuance of the user of the land in question for which it was being used for a period of 7 years from the date of the coming into operation of the development plan. Admittedly, though the Act was passed in the year 1979 and has come into effect from 1980, no such plan has yet been made excepting the said interim report which had been prepared that too in March, 1984 which had not yet been finalised. If a development plan had been prepared in that event, no person can carry out any work, whatsoever, in the area in question, except in accordance with the development plan. In the instant case, no such development plan has been prepared and the Act is totally silent about the particulars of that "material consideration" which may be considered by the concerned authority in dealing with the application for permission for development. The ground on which the said application has been rejected appears to me beyond the scope and ambit of the powers conferred under the Act. Not only Section 44 provides power even after the development plan has been prepared to allow user of the land for the period of 7 years, Section 46(2) (b) of the said Act also provides ground of permission for a limited period imposing certain terms and conditions. Under the scheme of the Act and/or under the relevant provision of the said Act, it is nowhere provided that the Calcutta Metropolitan Development Authority had been conferred with any power to prohibit the use of any land in a particular manner in contemplation of preparation development plan and/or requisition of the land in question. In other words, the authorities concerned had not been provided with power to freeze such land.

7. Article 300 A of the Constitution of India provides that - "No person shall be deprived of his property save by authority of law". But in the instant case, the petitioner is being deprived of his property by not permitting the petitioner to use the land and to construct upon the land on mere contemplation that the authorities concerned might require in near future the said land for the purposes of "surfaced dispersal facilities near Kalighat Metro Rail Station" and further the Chief Physical Planner, CMDA had acted in a manner which is neither warranted nor permitted under the law. Under the law at best he could grant permission and refuse the permission. But he had no authority and/or jurisdiction to refuse the permission for the present on mere speculation and mere hypothetical proposition. This in my view is clearly beyond the scope and ambit of the said Act and that the refusal to grant permission cannot be made on this ground. No development plan had been prepared showing that this land would be required for the purpose of surfaced dispersal facilities near Kalighat Metro Rail Station

nor in the map showing "inner impact area" indicated that the said land would be required for any purpose and that the mere holding of a private opinion by the said Chief Physical Planner, CMDA without any materials on record or even proposal that the said plot "would be important for providing space for surface dispersal facilities near Kalighat Metro Rail Station" cannot confer, jurisdiction upon the said authority to reject the permission. to make construction on the said land. If any development is made in that event, the said authority could certainly refuse the permission on the ground that the said land was considered by the said authority as important for the said purpose. This clearly amounts to deprivation of the property without the authority of law. The word "deprive" means according to Webster's Third New International Dictionary, "to keep from the possession, enjoyment or use of something Accordingly prohibition on the right of enjoyment or user of property comes under the purview of Article 300 A of the Constitution. There is no provision under the Act under which the CMDA had been conferred power to refuse permission in contemplation that the said land may be included in a development plan. In the absence of such a specific provision in the Act, in my view, the impugned order passed by Shri C.K. Choudhury is on the face of it illegal, invalid and is violative of the provisions of Article 300 A of the Constitution of India. Further, the contention of the respondents is that the Section 46(3) of the said Act provides such power upon the said authority to consider any material according to their choice for the purpose of rejecting the application in that event the said provision of Section 46(3) of the said Act has to be declared ultra vires the provision of Article 14 of the Constitution of India as the same conferred an uncontrolled, unguided and uncanalised power upon the executive in depriving a person the Constitutional protection of Article 300 A of the Constitution of India. The mere word "material consideration" in Section 46 of the said Act do not provide any guideline. Under such circumstances the courts have to see the character of the authority to which it is entrusted, the purpose for which it is conferred, the particular circumstances in which it has, in fact, been exercised and the materials available to the courts. In the instant case the impugned order of the CMDA is on the fact of it perverse and the alleged ground upon which it was passed is beyond the scope, purview and the object of the said Act. It is a well established principle of law that a discretion conferred by a statute on an Administrative agency must be exercised freely with all due consideration and care and with no prior restraints imposed by the agency itself. The exercise of a statutory power is invalid unless the repository of the power has acted honestly and in good faith. The deliberate promotion of a purpose, be it public or private, alien to that for which that power was to be exercised is to be regarded as an act of bad faith. Where a prima facie case of misuse of power has been made out, it is open to the. Court to draw inference that unauthorised purpose has been pursued if the competent authority fails to adduce any grounds sup-parting the validity of its conduct. Discretionary powers must always be exercised in good faith for the purpose for which they were granted and within the limits of the Act or other instruments conferring the power.

8. In *Padfield v. Minister of Agriculture, Fisheries and Food* reported in (1968 A.C. 997) the House of Lords had to consider the dispute under the milk marketing scheme established under the Agricultural Marketing Act, 1958. The Act provided for a committee of investigation which was to consider and report on certain kinds of complaint "if the minister in any case so directs". The Milk producers of the region close to London complained that the differential element in the price fixed for their milk by the milk marketing board was too low since it ought to reflect the increased cost of transport from other regions but had not been revised since the Second World War. But since that region was in a minority on the board, and any increase would be at the expense of the other regions, the Board could not be persuaded to act. The Minister had power if the committee of investigation so recommended to make an order Overriding the Board but he refused to direct the committee to act saying that since producers were represented on the board they should be content with the normal democratic machinery of the marketing scheme. His officials also added incautiously that if the committee made a favourable report, the minister might be expected to take action on it. The whole object of the minister's overriding power, however, was that he might correct the "normal democratic machinery" where necessary and the suggestion that he might be embarrassed by a favourable report, was, as Lord Reed said "plainly a bad reason." It was held that where there was a relevant and substantial complaint, the minister had a duty as well as a power and that he could not use his discretion to frustrate the policy of the act, otherwise he would be rendering nugatory, a safeguard provided by the act and depriving the producers of a remedy which Parliament intended them to have. The Mandamus, was, therefore, granted to compel the minister to act as the law required. The importance of the House of Lord's above decision was underlined by Lord Denning M.R. in the case of *Breen v. Amalgamated Engineering Union* (1971) 2 W.R. 175 at 190 that discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this : the statutory body must be guided by the relevant considerations and not by irrelevance. If its decision is influenced by extraneous considerations which it ought not to have been taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith : Nevertheless, the decision will be set aside. That is established by *Padfield vs. Minister of Agriculture, Fisheries and Food* which is a landmark in modern administrative law.

9. In *The State of Punjab and Another Vs. Khan Chand*, it is held by the Supreme Court that "the vesting of discretion in authorities in exercise of powers under an enactment does not by itself entitle contravention of Article 14. What is objectionable is the conferment of arbitrary and uncontrolled discretion without any guidelines, whatsoever, with regard to the exercise of that discretion. Considering the complex nature of problem which have to be faced by a modern state, it is but inevitable that the matter of details should be left to the authorities acting under an enactment. Discretion has, therefore, to be given to the authorities concerned for the exercise of powers vested in them under an

enactment. The enactment must, however, prescribe the guidelines for the furtherance of the objects of the enactment and it is within the framework of those guidelines that the authorities can use their discretion in the exercise of the powers conferred upon them. Discretion which is absolute, uncontrolled and without any guidelines in the exercise of the powers can easily degenerate into arbitrariness. When individuals act according to their sweet will, there is bound to be an element of "pick and choose" according to the notion of the individuals. If a legislature bestows such untrammelled discretion on the authorities acting under an enactment it abdicates its essential function for such discretion is bound to result in discrimination which is negation and the antithesis of the ideal of equality before law as enshrined in Article 14 of the Constitution. It is the absence of any principle or policy for guidance of the authority concerned in the exercise of discretion which vitiates an enactment and makes it vulnerable to the attack on the ground of violation of Article 14. It is no answer to the above that executive officers are presumed to be reasonable men who do not stand to gain in the abuse of their power and can be trusted to use "discretion" with discretion. Further, it appears that there is nothing in the Act that the officers to whom the power can be delegated must not be below a particular rank".

10. In view of the above decision of the Supreme Court, I am of the view that Section 46(3) of the said Act is not ultra vires as the court does not strike down the provision in a Statute on the assumption that the person invested with power under it would exercise it "with an evil eye and unequal hand". In such a case the law itself is not bad because it is capable of being administered in an impartial and reasonable manner. So long as Courts are open, as held by the Supreme Court in the above case, in the country and the doctrine of abuse of power is there, there is no apprehension that any power will be exercised arbitrarily or in a discriminatory manner merely because the power is apparently capable of being so exercised.

11. Accordingly, I hold that the order passed by Shri C. K. Choudhury, Chief Physical Planner, CMDA dated 27th February 1985, is on the face of it arbitrary and illegal and as such violative of the provisions of Article 14 of the Constitution, of India and as the same also amounts to deprivation of the property without the authority of law, violation of the provision of Article 300 A of the Constitution of India. Further, I hold that the Divisional Building Surveyor also acted illegally and without jurisdiction in refusing to sanction the said plan on the basis of the said order passed Shri C. K. Choudhury, Chief Physical Planner. CMDA Section 396 of the Calcutta Municipal Corporation Act do not provide provision that such sanction of plan can be refused in the absence of a "no objection certificate" from the CMDA in the facts and circumstances of the case. In the facts and circumstances of the case I hold that the CMDA had no authority and/or jurisdiction under the law to refuse such permission and/or to prohibit the Calcutta Municipal Corporation from sanctioning the Plan according to the provisions of the Calcutta Municipal Corporation Act. In the result, the writ application succeeds. The order passed by Shri C.K. Choudhury, Chief Physical

Planner dated 27.2.1985 is set aside which is Annexure "B" to the petition and the respondents No. 1 to 3 and 4 are directed to sanction the plan submitted by the petitioner in this behalf before the said authority on 29.2.1984 if the same conforms with the requirement of the provision of Calcutta Municipal Corporation Act and/or the Rules and Regulations framed thereunder without taking into consideration the order passed by Shri C. K. Choudhury, Chief Physical Planner, CMDA dated 27.2.1985. Such application for sanction of the plan which is pending before the said authorities directed to be disposed of within a period of six weeks from to-day in the manner indicated in this judgment in accordance with law. There will be no order as to costs.