

(2015) 03 CAL CK 0057
In the Calcutta High Court
Case No : Writ Petition No. 704 of 2012

Saraf Infra Projects Ltd. and Others APPELLANT
Vs
State of West Bengal and Others RESPONDENT

Date of Decision : 20-03-2015

Acts Referred:

Cantonments Act, 2006 — Section 3, 4
Constitution of India, 1950 — Article 14, 19(1)(g), 245, 246, 246(1)
Works of the Defence Act, 1903 — Section 3, 3(2)

Citation : AIR 2015 Cal 136 : (2015) 2 CALLT 589 : (2015) 3 CHN 195

Hon'ble Judges : Sambuddha Chakrabarti, J.

Bench : Single Bench

Advocate : Sakti Nath Mukherjee, Senior Advocate, Joyjit Ganguly, Tarique Quasimuddin and Sanchita Chaudhuri, for the Appellant; Sadhan Roychowdhury, Advocate, T.M. Siddiqui and Ankita Mitra, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sambuddha Chakrabarti, J.—By this writ petition the petitioners have inter alia prayed for a declaration that Sections 628 and 629 of the Kolkata Municipal Act, 1980 (the Act, for short) are ultra vires the Constitution of India, a writ in the nature of Mandamus commanding the respondents authorities to desist from insisting on implementation of those provisions of the Act, a writ in the nature of Prohibition restraining the respondent No. 4 from insisting on exercising its right under those two provisions of the Act and for other reliefs.

2. The petitioner No. 1 had entered into a franchise agreement with the owners of Raddison Hotels which is an international chain of deluxe hotels. In terms of the said agreement it had been authorized to operate the hotel using the name of Raddison Hotel in Kolkata.

3. The petitioner No. 1 purchased a certain premises for a valuable consideration to establish a five star hotel and to run it in the internationally acclaimed brand name Raddison Hotel. Subsequently the petitioners obtained sanction of a

building plan from the Kolkata Municipal Corporation (the Corporation, for short) and different sanctions and permissions from other authorities as well.

4. The petitioners have alleged that at no point of time the Corporation or any authority mentioned the requirement of taking any other permission or referred to Section 628 of the Act which requires permission from the Central Government prior to the grant of sanction of any building plan in an area known as "Hastings" in Kolkata.

5. Based on the correspondence exchanged between the army and the Corporation authorities the petitioners have argued that since the year 1984 there has been no clarification or understanding between the two authorities regarding the identity of the area to which the said provision applies.

6. The petitioners were allowed to build a fourteen-storied structure on the said land until September, 2011 when the work of fitment started on the concerned property. In the process they had spent a huge sum for procuring the land and for making the construction.

7. From September, 2011, however, the army authorities started objecting to the structure. According to the petitioners between their property and the closest wall of Fort William there is a distance of about 1,500 meters. From the concerned property only three ramps of the Vidyasagar Setu are visible but the campus of the Fort William is not, even from its highest point. But in spite of it the army authorities by a letter, dated February 9, 2011 requested the Municipal Commissioner of the Corporation to take appropriate action for demolition of the building as that had been constructed without obtaining the sanction of the Central Government.

8. The petitioners have alleged that Sections 628 and 629 of the Act have been invoked by the army authorities to deprive the petitioner No. 1 of its right to enjoy the property and its shareholders to carry on the business and have questioned their constitutional validity on the ground that these provisions interfere with a citizen's right to enjoy his or her property merely on the basis of its location. The right of the respondents over the concerned land are governed by two statutes, viz., the Cantonment Act, 2006 and the Works of Defence Act, 1903. Sections 628 and 629 of the Act are beyond the legislative competence of the state legislature, the petitioners have argued, and violative of Article 246 of the Constitution of India.

9. It has been further stressed by the petitioners that in any event the provisions of Sections 628 and 629 of the Act do not provide to a civilian or an individual owner of a property including an artificial person any compensation should the army authorities refuse to grant permission or disallow optimum utilization of the property and thus they are contrary to the provisions of the Cantonment Act, 2006 as well as the Works of Defence Act, 1903.

10. It is the further case of the petitioners that the two impugned provisions lead

to the deprivation of their fundamental right to carry on business and, therefore, are in violation of Articles 14, 19(1)(g) and Article 300A of the Constitution of India. Unless there is a declaration under the Works of Defence Act, 1903 or under the provisions of the Cantonment Act, 2006 it is to be presumed that a structure does not pose any threat to defence installations. The petitioners have relied on a circular issued by the Ministry of Defence, Government of India under the Works of Defence Act, 1903 that beyond 500 meters from any defence installation no structure poses any security hazard. But in spite of it without defining or identifying the lands which are subject to provisions of Sections 628 and 629 of the Act and in violation of the Cantonment Act, 2006 and the Works of Defence Act, 1903 the army authority has sought to restrict the enjoyment of the property by the petitioner No. 1.

11. According to the petitioners, there is no restriction with regard to the construction of buildings near the defence installations in the other parts of the city. Thus, there is every possibility of an arbitrary exercise of power by the Central Government or the General Officer Commanding.

12. It was submitted by the petitioners that relations between the Union and the states with regard to making of laws have been provided in Part XI of the Constitution of India. Article 246(1) says that Parliament has exclusive power to make laws with respect to any matter enumerated in List I in the Seventh Schedule, i.e., the Union List. Article 246(2) provides that Parliament and subject to Clause (1) the legislature of any state also has the power to make laws with respect to any of the matters enumerated in the List III in the Seventh Schedule. The legislature of any state has exclusive power to make laws for such state or any part thereof with respect to any of the matters enumerated in the List II in the Seventh Schedule. Thus under the Constitution there is a three-fold distribution of legislative powers between the Union and the states which has been made by three lists in the Seventh Schedule to the Constitution.

13. Defence of India, Naval, Military and Air Force works have been included in the Union List. Thus only Parliament has the authority to legislate on these issues. Works of Defence Act, 1903 and the Cantonment Act, 2006 are central Acts. By operation of Article 372 of the Constitution of India Works of Defence Act, 1903 must be deemed to be a central Act.

14. The object of the Works of Defence Act, 1903 has been to provide for imposing restrictions upon the use and enjoyment of land in the vicinity of works of defence in order that such lands may be kept free from buildings and other obstructions and for determining the amount of compensation to be made on account of such imposition. Section 3 of the said Act may be reproduced below:

"3. Declaration and notice that restrictions will be imposed.

(1) Whenever it appears to the Central Government that it is necessary to impose restrictions upon the use and enjoyment of land in the vicinity of any work of defence or of any site intended to be used or to be acquired for any such

work, in order that such land may be kept free from buildings and other obstructions, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders."

15. Thus, it is clear that whenever it may appear to the Central Government that it is necessary to impose restriction upon the use and enjoyment of land in the vicinity of any work of defence etc. a declaration shall have to be made to that effect according to the procedure as provided in Section 3 of the said Act. It is also the duty of the Collector under Section 3(2) of the Act to cause a public notice of the substance of the declaration to be given at convenient places in the locality.

16. In the present case there has not been any notification or a declaration covering the land of the petitioner. Mr. Mukherjee, the learned Senior Counsel for the petitioners, submitted that the effect of the absence of any declaration under Section 3 of the Works of Defence Act is that the Central Government does not require to impose any restriction on the enjoyment of the property of the petitioners.

17. Mr. Mukherjee submitted that it is also obvious from the scheme of the Constitution that a state legislature is only empowered to legislate in respect of any matter falling under List-II or List-III subjects in the Seventh Schedule to the Constitution. The power to enact laws in respect of Entries 1 to 4 of the List-I of the Seventh Schedule is the prerogative of Parliament. The state legislature has no legislative competence to enact a law in respect of any matter falling within the exclusive jurisdiction of Parliament to enact.

18. The petitioners relied on the case of Prof. Yashpal and Another Vs. State of Chhattisgarh and Others, where the Supreme Court held that the use of the expression "subject to" in Entry 25 of List-III of the Seventh Schedule clearly indicated that the legislation in respect of the excluded matters cannot be undertaken by the state legislatures. Any state legislation which stultifies or sets at naught an enactment validly made by Parliament would be wholly ultra vires.

19. According to Mr. Mukherjee the impugned provisions of the Act constitute a clear case of transgression on the part of a state legislature into the Union List. And as such they cannot prevail over the Defence of India Act, 2003.

20. The petitioners elaborated their submissions that the procedure established by the enactments, viz., those laid down in Section 3 and followed by the other provisions of the Act of 1903 cannot be left to the discretion of the administration. According to Mr. Mukherjee since no notification or declaration has been issued by the Central Government under S. 3 or S. 4 of the Cantonment Act, 2006 in respect of the land of the petitioner No. 1 Sections 628 and 629 of the Act cannot have an overriding effect to negate the freedom of the petitioner No. 1 to enjoy its property.

21. The petitioners also relied on the case of Corporation of Calcutta and Another Vs. Liberty Cinema, where the Supreme Court held that if the state legislature cannot confer a power upon the state government it is not easy to see how it could confer a wider power which it could not otherwise exercise by a municipality. If the powers of municipality are derived from legislation under Article 246 of the Constitution read with Entries in the legislative lists which are relevant, the state legislature cannot confer any higher power on the municipality than it itself has. The Supreme Court further held that as power could be conferred on a municipal corporation only by law the nature or quantum of power that could be vested by a law of the state legislature could not transcend the limitation prescribed by the Constitution on the state legislature. The state legislature can confer on the corporation only those powers which are within its legislative power and relevant to the topic.

22. The petitioners have further argued that the impugned Sections of the Act have also the potential of depriving a citizen of his right to enjoy the property. A person may be deprived of his right to property under Article 300A only by operation of law. The challenge of the petitioners is that the impugned sections provide for such deprivation by administrative discretion and the respondents enjoy unbridled power. Mr. Mukherjee has laid stress on the proviso to Section 629(2) of the Act which declares that no person shall be entitled to any compensation on account of demolition or alteration which may be directed by the Municipal Commissioner if the construction had been carried on or completed without obtaining the sanction of the Central Government.

23. According to the petitioners the effect of the denial of sanction by the Central Government amounts to denying to the petitioner No. 1 or its shareholders the right to enjoy their property. In this connection they relied on the case of State of Rajasthan and Others Vs. Basant Nahata, where the Supreme Court held that in the absence of any substantive provision contained in a Parliamentary or legislative act a person cannot be refrained from dealing with his property in any manner he likes. Such statutory interdict would be opposed to one's right to property as envisaged under Article 300A of the Constitution of India.

24. No affidavit-in-opposition has been filed by the respondents. So far as the Corporation is concerned towards the end of the hearing it was submitted by its learned Advocate that they have not received any instruction whether to oppose this application or to support it.

25. Since the constitutional validity of two sections of a state legislation was under challenge notice was served upon the learned Advocate General. Mr. Sadhan Roychowdhury, learned advocate, appeared for the learned Advocate General and submitted his written notes of submission. On behalf of the petitioners and the Union of India as well written notes of submission were filed over and above their submissions in court.

26. Mr. Roychowdhury submitted that the challenge to the constitutional validity

of Sections 628 and 629 of the Act was not maintainable as the subject-matter of the law is in no way connected with or has any nexus with any provisions of Part-III of the Constitution and, therefore, they cannot be declared void under Act 13(2). He has further submitted that the law does not infringe the rights under Article 300A of the Constitution of India and as such there is no question of deprivation of right to property.

27. Mr. Roychowdhury further submitted that these provisions of law had been there on the statute book under the previous enactment as well. The corresponding provisions of the Act of 1951 were Sections 598, 599, 600 and 601 and the present enactment had received the assent of the President of India on December 28, 1981.

28. According to Mr. Roychowdhury legislative competence has not been under challenge in the present case. On the other hand the only challenge is that the two pre-constitutional enactments as mentioned above are operating in the concerned field and, therefore, the law under challenge should be declared ultra vires. According to him the State Government has every right to make the concerned law and the law has been enacted by applying the doctrine of occupied field. The scheme of the law includes protection of heritage and the law is to be considered from that perspective as well.

29. Mr. Roychowdhury further argued that there was no conflict or repugnancy between the law under challenge and the central Acts as purposes of both the legislations are independent of each other. According to him even if there is any conflict between the two laws the only way to resolve it is to seek for legislation by Parliament.

30. Mr. Roychowdhury submitted that the petitioners had filed a writ petition earlier and by an order of a learned single Judge they have been relegated to the defence authorities. The proceeding before the defence authorities is still pending. The instant writ petition which is a parallel proceeding is not permissible in law. The petitioners have not preferred any appeal from the order passed on the earlier writ petition. On the contrary they had participated in the proceeding before the defence authorities. Therefore, the stand of the petitioners amounts to approbation and reprobation and they have chosen to blow hot and cold in the same breath. He prayed for dismissal of the writ petition.

31. Mr. Basu, the learned Advocate for the Union of India, agreed with the admitted position that it was only since March, 2011 that the Army started raising objection to the construction raised by the petitioner No. 1 when the latter had approached the Army authorities for beautifying the area under the Vidyasagar Setu ramps. Between the Army land comprised in Fort William and the and the property there are about seven ramps of the Vidyasagar Setu which are all public roads. The Army authorities filed a writ petition earlier being W.P. No. 931 of 2011 which was disposed of on July 2, 2013 by a learned Single Judge inter alia directing the Secretary, Ministry of Defence or his delegate to decide

whether the land of the petitioners fell within the area where the Central Government could exercise control.

32. Although according to the petitioners no decision had been taken by the Central Government the Union of India submitted that the Joint Secretary, Ministry of Defence determined the said question by an order dated September 24, 2014 holding the area of the land in Hastings where the building stands included in Kolkata and, therefore, the building plan required prior permission of the Central Government. Moreover, the hotel shall pose a continuous threat to the defence safety and security.

33. Mr. Basu submitted that there is always a presumption as to the constitutional validity of a provision of law and the burden is upon the person who attacks it to show that there has been a clear transgression of the constitutional principles. According to the Union of India the pith and substance of the state legislation has not transgressed into the legislative field of Parliament in incorporating Sections 627, 628 and 629 of the Act. Rather they avoid the conflict with the existing law.

34. Article 245 of the Constitution of India having authorized Parliament to make laws on the subjects enumerated in Entries Nos. 1 to 4 in List-I of the Seventh Schedule it is clear that the state legislature incorporated the impugned provisions to avoid any conflict while enacting the impugned provisions in the Kolkata Municipal Corporation Act, 1980. It was further submitted that these provisions of the Act being special the general provisions relating to sanction of building plans in other areas must yield to the special provision. Article 14 of the Constitution of India not having prohibited a reasonable classification the impugned provisions of the Act do not infringe on the equal protection of law guaranteed by the Constitution of India.

35. It was moreover submitted that the right to property including the right to its use and enjoy is not an absolute right in view of the Works of Defence Act and, therefore, the petitioners cannot challenge the said law. In view of the threat to defence the reliefs sought for by the petitioner, if allowed, will be opposed to public policy.

36. I have given my anxious consideration to the respective submissions of the learned advocates. The submission of the petitioners that the impugned provisions of the Act are in excess of legislative competence and, therefore, contrary to the central laws needs a close and minute scrutiny.

37. There is no dispute with the stand taken by the petitioners that the distribution of legislative power in the three lists of the Seventh Schedule to the Constitution of India postulates that a state legislature can only legislate on a subject included in List-II or List-III. There is also no dispute that the defence of India and works of Army, Navy and Airforce are subjects which are included in Entries 1 to 4 of List-I on which only Parliament is competent to legislate. The principles of law enunciated in the cases of Prof. Yashpal and Another (Supra)

and Liberty Cinema (Supra), as relied upon by the petitioners, are very well settled. We, however, need to examine if there has been any infraction of them by the impugned provisions of the Act.

38. The validity of the submissions of the petitioners require a detailed examination of the impugned provisions. The impugned provisions of the Act are set out below:-

"628. Sanction of Central Government required for erection of masonry building.- The Corporation shall not give or be deemed to have given permission to erect a masonry building in that part of Hastings which is included in Kolkata unless and until the sanction of the Central Government is obtained, and such sanction shall not be applied for unless the plan of the building and the site-plan of the land are approved by the Commissioner of Police.

629. Demolition or alteration of buildings erected without such sanction.-(1) if the erection of any masonry new building in that part of Hastings which is included in Kolkata is, after the commencement of this Act, commenced, carried on or completed without obtaining the sanction of the Central Government, the Municipal Commissioner shall, if requested by the General Officer Commanding the Presidency District to do so,-

(a) by written notice direct the owner to demolish or alter the building, or

(b) himself cause the building to be demolished or altered at the expense of the owner.

(2) No person shall be entitled to any compensation on account of such demolition or alteration."

39. Reading the two Sections in their contextual perspective does not really carry the conviction that the state legislature ever intended to transgress into an area on which it lacked legislative competence. It cannot be said that the state legislature was legislating anything on a matter falling in the Union List. All that Section 628 says in substance is that the Corporation shall not give or be deemed to have given permission to erect a masonry building in that part of Hastings which is included in Kolkata until and unless a sanction of the Central Government has been obtained. Such sanction shall not be applied for unless the plan of the building and the site plan of the land are approved by the Commissioner of Police. Section 629 in turn deals with the demolition or alternation of buildings erected without such sanction.

40. Hastings is a military area containing military office and quarters and various other military establishments. The impugned sections do not really make any law in respect of the matters falling in Entries 1 to 4 of the List-I. On the contrary they have recognized the primacy of the central legislation and merely stated that without the approval of the Central Government no building in that part of the city of Kolkata shall be erected. Thus, the approval of the Central Government was recognized and it will not be proper to read it as entrenching on

or legislating on a prohibited area on which the state legislature is incompetent to make laws. On the other hand the petitioners might have had something to complain if the state legislature would have legislated the way the Works of Defence Act has been enacted.

41. It may also be mentioned that the Works of Defence Act, 1903 occupied the relevant field from long before the first Calcutta Municipal Act, 1923 was enacted. That Act had restricted and controlled the construction of buildings in the vicinity of the army areas. It is worth mentioning that the petitioners have not challenged the constitutional validity of the Works of Defence Act, 1903 or the Cantonment Act, 2006 as unreasonable or interfering with their right to property.

42. The state legislature appears to be keenly conscious of its limitations and, therefore, it refrained from legislating anything on matters covered by Entries 1 to 4 of List-I. Sections 628 and 629 of the Act, read in the proper context, suggest that the whole idea was to avoid an area of conflict or overlapping with the legislative field occupied by Central Acts and that is why the self-imposed prohibition was necessary. The various entries in the three lists of the Seventh Schedule to the Constitution deal with the respective fields of legislation. The impugned provisions of the Act are clearly not reletable to any entry in the Union List and thereby saving them from the vice of legislative incompetence.

43. I quite agree with the submissions made on behalf of the Union of India that the area of Hastings which is included in Kolkata needed a special legislation and, therefore, the other provisions of the Act in respect of the grant of sanction to the building plans were not deliberately made applicable to that part of the area. Since Hastings which is included in Kolkata contains military establishments including the Fort William the state legislature thought it pre-eminently necessary that an approval of the Central Government should be obtained before any building plan was submitted for sanction to the Corporation.

44. The impugned provisions of the Act cannot also be assailed on the ground of violation of Article 14 of the Constitution of India. The situation in Hastings where the Fort William is located is very different from other parts of the city. If, therefore, a special provision of law is laid down or a separate procedure is provided for obtaining a building plan, the same cannot be struck down as contrary to the principles of equality. Such differentiation must be held to be based on a reasonable classification between different areas of the city. And that is why the state legislature decided that a formal approval from the Central Government is a pre-condition for consideration of any building plan in that part of the city. It is not understood how in the teeth of such specific restriction contained in the Act itself the Corporation which is the creature of the Act could accord sanction to the building plan without insisting on the compliance of the preconditions as mentioned in the impugned provisions of law.

45. I do not agree with the submissions of the petitioners that the impugned

provisions of law give an unbridled power in the hands of the executive or because of these two sections right of enjoyment of the property has been hampered. The petitioners cannot be heard to say that the impugned sections do not contain any provision about the consequences if the Central Government does not give any prior approval. Where any law or enactment requires prior approval of any authority before embarking on any activity it shall not be done unless the approval is taken. If such approval is not accorded the obvious answer will be that construction of a masonry building shall not be permissible. An enactment is not rendered bad merely because it postulates the sanction of some authority before a certain thing is done.

46. It is also very difficult to accept the submission of the petitioners that the impugned Sections of the Act violate the right to property under Article 300A of the Constitution of India. Right to use any property is always subject to some restrictions. Absolute right to use a property without any corresponding restriction is inconceivable. Article 300A bars deprivation of property save by authority of law. In the case of *Jilubhai Nanbhai Khachar, etc. etc. Vs. State of Gujarat and another, etc. etc.*, it has been held that deprivation can only be made by an Act of Parliament or State Legislature, rule or statutory order having the force of law. Thus there is no lack of authority in the present case.

47. The question is whether legislature in its wisdom and regard being had to the other overwhelmingly important considerations including the security of the state can put any restriction on the use and enjoyment of the property of a particular area and if so whether such restriction can be, without anything more, be described as violative of Article 300A of the Constitution of India.

48. In the case of *K.T. Plantation Pvt. Ltd. and Another Vs. State of Karnataka*, a three-judge bench of the Supreme Court held that deprivation of property under Article 300A of the Constitution of India must be in accordance with law which must be just, fair and reasonable. The Supreme Court had held that deprivation of property by statute must take place for public purpose or public interest. The purpose must be primarily public and not primarily a private interest. The concept of public purpose has been given fairly expansive meaning which is to be justified upon the purpose and object of the statute.

49. The condition imposed for the grant of prior permission in the facts of the case cannot be held to be an unreasonable one and the legislation also does not put an absolute embargo on the owner of the property to construct a building. The restriction has been necessitated by the wider and larger interest of the defence of India and as such it should not be considered either as a transgression into or a negation of an individual's right to property. A condition attached for obtaining a sanction is very different from an absolute ban to obtain a sanction from the appropriate authority.

50. That reasonable restrictions on the use of properties in the larger public interest or the interest of the nation may be imposed has been jurisprudentially

recognized for a long time. In the case of *Grape Bay Ltd. vs. Attorney-General of Bermuda*, reported in [2000] 1 WLR 574, five members of the Judicial Committee of the Privy Council held that restrictions on the use of property imposed in public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid. Section 629(2) of the Act disentitles a person to any compensation. But that should not be taken to mean depriving the owner of his enjoyment of property. The rationale behind the legislation seems to be the violation of the requirement provided in Section 628 of the Act, i.e., obtaining prior sanction of the Central Government. This has been all the more clarified by the use of the word "such" in Section 629(2) which makes a demolition of a masonry building for contravention of the pre-condition of Section 628 wholly different from the demolition in other cases.

51. The present petition is also silent on when the petitioners acquired the property. In any case, since the impugned provisions were contained in the old Act as well, the petitioners must be presumed to have notice of the requirements of law when they became owners of the property.

52. A regulatory restriction on certain user of a property is very different from and cannot be equated with its deprivation. After all, as was the point taken by Thomas Hobbes centuries ago, property is a function of legality. It is created by the state. For him, all the habitual restraints that a civil society relies upon are created by discipline and the operation of law. The more modern jurisprudential concept of property, the vast societal and economic changes with bewildering rapidity notwithstanding, prefers more disciplined insistence on such restrictions to a far greater degree than conceived of earlier. Prof. G.W. Paton observed in his usual wont: "The increasing interference by the State with the rights of owners and the rise of collectivist theories are modifying the notion of irresponsibility or absolute control and leading to the theory that property is a social responsibility." [G.W. Paton-A Textbook of Jurisprudence, (4th Edition, 1st Indian Edition) p. 536].

53. In the case of *State of W.B. Vs. Terra Firma Investment and Trading Pvt. Ltd.*, a question cropped up for consideration was whether Section 398A of the then Kolkata Municipal Corporation (Amendment) Ordinance, 1989 subsequently replaced by the amendment Act, was valid. By the said Act the state government took a decision to impose a ban on the submission of building plans for high-rise constructions for a period of one year within which period it was expected that new building rules would come in force. When the constitutional validity of the same was challenged the High Court held that the ban being absolute and extending to the whole city was patently unreasonable and, therefore, the amendment Act was declared to be unconstitutional. In the appeal taken to Supreme Court it was held, after considering social and demographic realities of the metropolitan city, that it was not for the courts to examine the building regulations framed by the development authorities. Statutory authorities are entrusted with such power under different statutes. The Supreme Court

expressed its doubt about how the provisions of the Ordinance or Act could be held to be violative of Article 14 of the Constitution of India merely because it imposed a ban on passing building plans exceeding a certain length in height for a certain period. The Supreme Court negated the contention of the respondents to claim an absolute or vested right to get its plan passed by a writ of a court by mere submission of a plan for construction of a building which has not been passed by the competent authority as no right had accrued.

54. While dealing with the petitioners' challenge to the constitutional validity of Sections 628 and 629 of the Act it is necessary to bear in mind that law always leans in favour of upholding the constitutional validity of a legislation. In the case of Bhavesh D. Parish and Others Vs. Union of India and Another, , the Supreme Court held that merely because a statute had come up for examination and some arguable points are raised the legislative will should not be put under a cloud. There is always a presumption in favour of the constitutional validity of any legislation unless the same is set aside for breach of the provisions of the Constitution. Again in the case of R.K. Garg and Others Vs. Union of India (UOI) and Others, the Supreme Court very specifically held that there might be possibilities of abuse in a legislation but on that account alone it cannot be struck down as invalid. The burden is upon him who attacks it to show that there has been a clear transgression of the constitutional provisions. The Supreme Court went that far to lay down that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds. The test in every case would be whether the provisions of the Act are arbitrary having regard to all the facts and circumstances of the case. The terms "reasonable, just and fair" derive their significance from the existing social context.

55. The Supreme Court had approved the said principle in the case of State of U.P. and Others Vs. Sukhpal Singh Bal etc. etc., .

56. In the present case it cannot be said that the petitioners have discharged their initial onus to satisfy the conscience of court that there has been a transgression of the constitutional principles. It would be hardly possible to accept the stand taken by them that by enacting Sections 628 and 629 of the Act the state legislature wanted to legislate on an area which was not within its competence. On the other hand it appears on proper construction of those two sections that it decided not to legislate on the areas on which there are central legislation or on the subject which falls within the exclusive legislative domain of Parliament. The impugned sections of the Act sufficiently indicate the legislative intent of abstinence from legislation.

57. Sections 628 and 629 of the Act must be read in the context of the entire municipal legislation. The Act provides that the state government has power to include or exclude certain areas within the municipal corporation area or to exclude it from the Act. This is a legislative process which does not depend upon

the compliance of the principles of natural justice and in enacting special provisions as to land and building in Hastings which is included in Kolkata the stipulation to obtain prior permission from the Central Government must be read in the context of the existing specific central legislations. The purpose of the Act was to amend and consolidate the law relating to municipal affairs of Kolkata which included construction of buildings and a host of other municipal affairs. It was only in respect of this particular area that the legislature refrained the Corporation from sanctioning any building plan without the prior permission of the Central Government. The necessity arose out of the obvious legislative incompetence to make any law in respect of sanction of building plan or to allow any building plan without the permission of the Central Government. The context of including Sections 628 and 629 in the Act is the prior legislation by the Central Government in the concerned field and the exclusive prerogative of Parliament to make any law in respect of Entries 1 to 4 of List-I to the Seventh Schedule of the Constitution.

58. In the case of Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others, the Supreme Court held that interpretation of a statute must depend on the text and the context. A statute is best interpreted when we know why it was enacted. The statute is to be read with the glasses of the statute-maker. With these glasses a statute must be looked as a whole and discovered what each section, clause, phrase or word is meant and designed to say. The Supreme Court reminded us that no part of a statute or no word of it can be construed in isolation.

59. If every legislation has an object and a history the absence of such legislation has an equal context. When the state legislature enacted so many provisions on the municipal affairs of the city the absence of any legislation with regard to the construction of buildings in a particular area is not without its purpose, context and more importantly, significance. The legislative silence is eloquent.

60. On behalf of the Union of India it was submitted, relying on the judgments in the cases of A.S. Krishna Vs. State of Madras, , Bharat Hydro Power Corpn. Ltd. and Others Vs. State of Assam and Another, and Vijay Kumar Sharma and others Vs. State of Karnataka and others, that in order to examine the constitutionality of an impugned legislation or a part of it the pith and substance has to be ascertained first. That is to say, if a statute is found in substance to relate to a topic within the competence of a legislature it should be held to be intra vires even though it might incidentally trench on a topic not within its legislative competence. The real test for deciding the pith and substance of a legislation is not to determine whether any encroachment by the Act has taken place on any legislation. On the contrary the appropriate test would be to try to appreciate what the pith and substance of the statute actually is.

61. In the case of The State of Kerala Vs. M.T. Devassia and Another, , the Supreme Court reiterated the well-settled principle that an incidental

encroachment by state legislature on a matter which is in the Union List is permissible if the impugned legislation in the pith and substance relates to the subjects which are within the competence of the state legislature and there is no conflict between the law passed by Parliament and that enacted by the state legislature.

62. For the present purpose even that exercise may be redundant. A holistic reading of Sections 628 and 629 of the Act does not raise any doubt that the state legislature did not transgress into the exclusive area of the Union List or the legislation made by it in any way journeyed into a foreign field. These two sections do not legislate. They merely require a permission of some authority who has the prerogative to legislate on certain matters. These two sections, therefore, recognize the law made by the Central Government as supreme.

63. Thus, the reliefs sought in the writ petition including a declaration that Sections 628 and 629 of the Kolkata Municipal Corporation Act are ultra vires the Constitution of India cannot be granted. I find no merit in the writ petition and the same is dismissed.

64. There shall be no order as to costs.

65. Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.