
(1990) 08 CAL CK 0008
In the Calcutta High Court
Case No : Matter No. 160 of 1990

The Calcutta Municipal Corpn. and Others	APPELLANT
Vs	
Debu Bhattacharjee	RESPONDENT

Date of Decision : 06-08-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : 95 CWN 492

Hon'ble Judges : Bhagabati Prasad Banerjee, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bhagabati Prasad Banerjee, J.—This is an appeal filed by the appellant, Calcutta Municipal Corporation and others, from the judgment and order dated 18th May 1990 passed in a writ application being Matter No. 160 of 1990 filed by the respondent, Debu Bhattacharjee. By the said order the learned Trial judge allowed the writ petition filed by Debu Bhattacharjee and set aside the order passed by the Mayor-in-Council, Calcutta Municipal Corporation dated 16th February 1990 and granted a consequential relief to him by way of quashing the order dated 2nd January 1990 passed by the Mayor-in-Council. The learned Trial Judge also directed the Calcutta Municipal Corporation to implement the orders dated 7th May 1986 and 10th May 1986 passed by the Mayor-in-Council within 31st July 1990. The facts relevant for the purpose of this appeal may be stated as follows: -

Stall no. D(N) - 13/1 covering about 4 sq. ft. of area in S.S. Hogg Market premises of the Calcutta Municipal Corporation was allotted to the Respondent-writ petitioner. On a representation made by the writ petition the said area was extended by 8 sq. ft. making the total area of 12 sq. ft. Subsequently the writ petition made another representation and upon that remaining 47.69 sq. ft. of stall no. D(N)-13, which included the entire stall nos. D(N)-13/1 (sic) D(N)-13, was allotted to the petitioner making the total area to 59.69 sq. ft. The writ

petitioner was allowed to carry on business there. In or about -December 1985 a devastating fire broke out in the S.S. HO(SIC)G Market destroying greater part of the market including Block D, where the writ petitioner was carrying on his business. In January 1986 the Calcutta Municipal Corporation published in the Calcutta Municipal Gazette its decision for rehabilitation of the owners of the Stalls, which were destroyed by fire. Pursuant to the said decision two separate stalls being Stalls nos. 10 and 61 under Shed No. 3 at the temporary New Market in the Maidan were allotted to the writ petitioner and this allotment was made by reason of the petitioner's occupation, possession and enjoyment of the destroyed Stalls Nos. D(N) - 13/1 and 13. The case of the petitioner was that after construction of the new complex of the S.S. Hogg Market the writ petitioner was entitled to two stalls being Stalls nos. D(N) -13/1 and 13 covering total 59.69 sq. ft. of area. The writ petitioner stated that this claim was founded on the basis that two temporary stalls in the Maidan market were allotted to him. The petitioner made the said claim for 59.69 sq. ft. of area on the basis of the order passed by the Mayor-in-Council on 10.5.86. The said order passed with regard to the representation of the petitioner for allotment of space for stall no. D(N) - 13 in S.S. Hogg Market measuring about 47.69 sq. ft. The said order is as follows: -

.....I would suggest that the remaining area of Stall no. D(N) - 13 measuring 47.69 sq. ft. (curtailing 8 sq. ft. from the original area Stall No. D(N) - 13 as the said area of 8 Sq. ft. as already been allotted to D(N) -13/1 as back extension by Dy. Commissioner (M) on 3.6.81) as per opinion of Asstt. Engineer (Civil) on 7.5.86 be allotted to the R.O. of Stall No. D(N)-13/1, S.S. Hogg Mark subject to payment of charges as per new schedule and policy decision.

2. It appears that pursuant, to the said order passed by the Mayor-in-Council on 10.5.1986 the petitioner had deposited a sum of Rs. 29,145.87, which was accepted by the respondent Corporation" on 10.5.1986 by granting a receipt in this behalf. It also appears that temporary real location of stalls of Maidan Market was made in favour of the writ petitioner after the previous stalls in the S.S. Hogg Market were destroyed by fire. From the certificate of shifting of stalls, which was granted by the Corporation, it appears that the writ petitioner was the holder of the Stall no. D(N)-13. After shifting to the temporary Maidan Market premises, stalls nos. 10 and 61 in Shed III were allotted to the writ petitioner. The date of shifting has been shown to be 8.9.86. An undertaking was also taken from the writ petitioner to the effect that if there was any (sic) Corporation dues against stall No. D(N)-13, the same would be paid off by the writ petitioner before the final allotment was made. The certificate of shifting and temporary reallocation of stalls was issued under the signature of the Market superintendant, S.S. Hogg Market, which was countersigned by the Deputy Municipal Commissioner (Market:) on 3.4.87 writ petitioner in terms of the order of the Mayor-in-Council deposited a sum of Rs. 29,145.87 p and the deposit was made in the Suspense account without any prejudice to the Corporation at an early date in order to enable the Department to take further action in the matter.

The case of the petitioner is that when reallocation was made after a valid order was passed and payment pursuant thereto was made for the stalls and when the petitioner was occupying the temporary stalls at Maidan Market and when the petitioner was awaiting for allotment of stalls in the New Market complex at S.S. Hogg Market, the petitioner received a letter dated 16.2.90 from the. Market Superintendent, S.S. Hogg Market, which is quoted as follows: -

With reference to this office letter no. H.M. 38 dated 10.5.86 this is to inform you that Hon"ble Mayor, Calcutta Municipal Corporation as per his order dated 15.2.90 has been pleased to cancel the allotment of Stall No. D(N)- 13 covering an area of 47.69 sq. ft. at S.S. Hogg Market and refund the money deposited by you in this regard in suspense account without any prejudice in supersession of earlier order of the authority in this regard.

Hence you are hereby requested to receive back the money deposited in this connection after observing ail procedure in this regard.

3. This action on the part of the respondent Corporation was under challenge before the learned Trial Judge and the respondent in the affidavit has stated that in view of the judgment and order passed by Shyamal Kumar Sen J. in Matter No. 4606 of 1987 dated 22.7.88 the said allotment made by the Mayor-in-Council in favour of the writ petitioner stands quashed and set aside and that the parties thereto not having filed any appeal against the said order of Shyamal Kumar Sen J. dated 22.7.88, which finally determined the issue with regard to the allotment made by the Mayor-in-Council in favour of the writ petitioner, the writ petitioner cannot challenge the order of the Mayor-in-Council, when the matter was set at rest by that judgment and no appeal was preferred by the writ petitioner against the said decision. It may be mentioned that the subject-matter of the writ application (Matter No. 4602 of 1987), which was decided by Shyamal Kumar Sen J. on 22.7.88, was with regard to non-allotment of a stall in favour of one Lala Patti Traders" Association in the New Market Complex at S.S. Hogg Market; and that being aggrieved by non-allotment of a stall in the New Market Complex the said application was moved alleging that in the old market, which was destroyed by fire, the said Lala Patti Traders" Association was the erstwhile allotted the original stall no. D(N)-13, which was subsequently allotted to the writ petitioner. Mr. Justice, Shyamal Kumar Sen passed the following order dated 22.7.88 in Matter No. 4602 of 1987: -

Accordingly there will be a writ in the nature of mandamus directing the Calcutta Municipal Authorities to pass a fresh decision for allotment of a stall in respect of D(N)-13 in the proposed newly constructed complex and not to effect the allotment pursuant to the said stall until the decision is taken. The respondent Calcutta Municipal authorities will take a decision as to if the petitioner is entitled to get the allotment of the said stall and for that purpose determine the rights of the petitioner after hearing the petitioner. In case the respondent Municipal Authorities decided not to allot the said stall to the petitioner the Municipal Authorities will give a reasoned order for the same. Such decision will be passed

after considering the submissions after hearing the writ the respondent Municipal Authorities decided not to allot the said stall to the petitioner the Municipal Authorities will give a reasoned order for the same. Such decision will be passed after considering the submissions after hearing the writ petitioner no. 1 and the Municipal authorities after hearing will give notice to the petitioner. The Municipal authorities are directed to pass a reasoned order after hearing the petitioner within six weeks from date. It is recorded that I have not adjudicated on the question as to if the respondent no. 5 had only right vis-a-vis the Municipal Authorities and all questions relating thereto are left open.

Shyamal Kumar Sen, J.

recorded in his order that His Lordship has not adjudicated on the question as to whether the respondent no. 5 had any right vis-a-vis the Municipal authorities and all questions relating thereto were left open. The learned Trial judge considered the facts, which were placed before His lordship and also considered the records of the proceedings, which were produced before the learned Trial judge. The learned Trial Judge recorded as follows in the judgment: -

The Corporation has produced the record and particularly the pages 58 to 63 of the record are very material in deciding the case. Mr. Justice Sen while disposing of the writ petition directed the Corporation to take a fresh decision for the allotment of Stall no. D(N)-13 after giving a hearing to the Lala Patti Traders Association and not to effect the allotment till such decision is taken. The matter was heard by the Municipal Commissioner on 21st April, 1988 and he rejected the claim of the allotment of new stall to the said Association and recommended the allotment of Stall D(N)-13 to a new party for consideration by the Mayor. Here the allotment of the stall in question to a new party, as it has been referred to in the order by the Municipal Commissioner, should be the petitioner and the petitioner alone and none else because from page 59 of the record the opinion of the Chief Municipal Law Officer given in December 1988 must be quoted in full to foil the Corporation's game: -

Lala Patti Traders Association has no claim as because the matter has been finally decided by the Municipal Commissioner as per direction of the Hon'ble High Court.

Authority may take an independent decision regarding the allotment to Shri D. Bhattacharjee.

4. It must be noted that the Chief Municipal law officer's opinion is right if read with the Certificate of Shifting of Stall, to the Temporary Reallocation of Stall at Maidan Market; Stall No. 10 in shed No. 3 in lieu of the old Stall no. D (N)-13 as appearing from the xerox copy of the said certificate enclosed as annexure "B" to the writ petition on page 30, and this document contains the signatures of the petitioner, the Market Superintendent and the Deputy Municipal Commissioner (Markets) dated 3rd April 1987. The Chief Municipal Law Officers' note in reality pointedly refers to the orders dated 7th May 1986 and 10th May 1986 made in

favour of the petitioner by the Member, Mayor-in-Council. In the light of the CMLO's opinion, in his note of 23rd December 1988 the Superintendent referred to this Stall's allotment to the petitioner which was sanctioned by member, Mayor-in-Council, and in respect of Which the party had paid charges on 10th May 1986 and he placed matter before the authorities for consideration. Then appears from an endorsement dated 24th December 1989 by an officer in the reasons to the effect "now it is upto the authorities to take decision in the above matter in view of the opinion of CMLO at page 59 and also the note of DMC (Building & COMM) dated 27th December 1988 to the Superintendent to put up a note to MMIC (Mkt.) through Municipal Commissioner for a decision, etc. Thereafter with regard to the same Stall D(N)-13 the Superintendent gives a note on 4th January 1989 with reference to the above note of DMC(B) to the effect. "Project Dept. may kindly be requested to let us know whether any space has been kept reserved for the Stall or not. If kept, the quantum of area may pl. let know to us for further decision in the matter. The Superintendent S.S. Hogg Market by his note dated 15th February 1989 sent the relevant file of the stall including file of Stall no. D(N)-13/1 to the P.A. of to the Mayor. The following is he order of the Mayor dated 2nd January 1990 which he endorses to the Municipal Commissioner as under:-

Proceed fresh allotment of Stall NO. D(N) -13 of S.S. Hogg through normal procedure.

On 14th January 1990 the Municipal Commissioner forwarded the file to DMC(Mkt.) and on 9th January 1990 it was sent the Senior Superintendant (Market) and he endorsed it for compliance. On 6th February 1990 the Senior Superintendent (Market) directed the Superintendent, S.S. Hogg Market to comply with the direction of the Mayor dated 2nd January 1990. Till this stage there is no indication that the fresh allotment of the stall in question is not meant for the petitioner. The hearing given to the Lalapatti Traders Association by the Municipal Commissioner on 21st April 1988 and the decision thereon has been interpreted by the opinion of the Chief Municipal Law Officer as contained in page 59 of the record that by "a new party" is meant Sri D. Bhattacharjee and no one else. The endorsement of 2nd January 1990 by the Mayor for fresh allotment of the said stall through normal procedure in the light of the Opinion of the Chief Municipal law Officer and other notings of the Senior Officers of the Corporation means only the petitioner and no one else.

5. Now something strange happened which is noted on page 63 of the record and a note is submitted to the Municipal Commissioner through DMC (Mkt.) by the Superintendent, S.S. Hogg Market, which I quote in full as under:-

Order of the Mayor dt. 2,1,90 at page 61 may kindly be seen.

In order to comply with the orders of Mayor dated 2.1.90 firstly allotment of Stall No. D(N)-13, S.S. Hogg Market to Sri Debu Bhattacharjee may please be cancelled and the entire amount of Rs. 29, 034.79p. paid by Sri Debu

Bhattacharjee in Suspense Account without any prejudice for a Stall no. D-13 may please be returned to the depositor.

and this note was approved by the Municipal Commissioner and sent both to the MMIC(Mkt.)/Mayor (vide page 63 of the record) and the Mayor put his seal of approval by putting his signature on 15th February 1990 without referring the (sic)me first to the Member, Mayor-in-Council (Market)."

6. Mr. Anindya Kumar Mitra, Learned Counsel on behalf of the appellant Corporation contended in the first place that the factual approach of the learned Trial judge was not correct, inasmuch as, it was contended, that the Mayor of Calcutta Municipal Corporation had no occasion to pass any order cancelling the allotment of the respondent writ petitioner in the appeal and as such the learned Trial judge was wholly wrong in adjudicating the question as to whether the mayor of Calcutta Municipal Corporation had any jurisdiction to set aside the order passed by the Mayor-in-Council. Next it was contended that the learned Trial judge should have dismissed the said application filed by the respondent writ petitioner on the ground that in the earlier writ application filed by the Lala Patty Traders" Association in Matter No. 4602 of 1987, the Hon"ble Mr. Justice Shyamal Kumar Sen by an order and judgment dated 22.7.88 had adjudicated the issue involved in the writ application viz. the validity of the order of allotment made by the appellant in favour of the respondent no. 5 therein, the writ petitioner herein. It was pointed out that Lala Patty Traders" Association filed the said writ application (Matter no. 4602 of 1987) challenging the validity of the orders dated 7.5.86 and 10.5.86 by which the Mayor-in-Council had allotted Stall no. D(N)-13/1 in S.S. Hogg Market ignoring the claim of the said Association, who was allottee of the original stall no. D(N)-13 of the said Market and that the said Association had all along been in possession of the said area mentioned in the said petition. In the said writ petition the respondent Debu Bhattacharjee was the respondent no. 5 therein. Shyamal Kumar Sen J. allowed the writ application by the order dated 22nd July 1988 in Matter No. 4602 of 1987, which constituted res judicata in view of the fact that in the body of the judgment it was observed that the decision for reallocation of the stall no. D(N)-13 in favour of the respondent-writ petitioner was absolutely illegal and arbitrary and should be set aside. The Learned Counsel on behalf of the appellant contended that even though no Rule was issued on that writ application for quashing and/or cancelling the order of allotment of stall no. D(N)-13 was passed but in view of the findings made by His Lordship in the body of the judgment it should be taken for granted that His Lordship had in fact cancelled the said order, otherwise His Lordship could not have directed the Calcutta Municipal Corporation authority to pass a fresh order. It was submitted that a fresh decision could be directed to be taken only when the impugned order, which was the subject matter of that writ application, had been set aside. Mr. Mitra further contended that in case the submission with regard to res judicata fails and it is found that there has been no res judicata with regard to the issue relating to the allotment made in favour of the respondent, this Court should hold that the allotment made by the Mayor-in-

Council by the orders dated 7th May 1986 and 10th May 1986 were all illegal, arbitrary and in violation of the relevant, provisions of law. It was submitted that new temporary stalls were made and allotted in the Maidan Market solely for the purpose of rehabilitating the stall owners, whose previous stalls in the S.S. Hogg Market were destroyed by fire. Under these circumstances the order of allotment by the Mayor-in-Council was wholly illegal and arbitrary. It was further submitted that the order passed by the learned Trial Judge was wrong and should be set aside. Lastly it was contended by Mr. Mitra that the allotment, of the stalls had not been made in the old market and so the writ respondent had no legal right to move the writ application for enforcing his legal right against the appellant, Calcutta Municipal Corporation. It was submitted that in any event the said allotment was not legal and as such an illegal allotment cannot be enforced by the respondent by filling a writ application.

7. Mr. Gautam Chakraborty, learned Advocate, appearing on behalf of the respondent writ petitioner contended in the first place that the learned Trial Judge proceeded on the basis of the facts not only evident from the petition and the affidavit but also from the records of the Calcutta Municipal Corporation, which were produced and which were set out in the judgment of the learned Trial Judge. It was submitted that the decision of the learned Trial Judge was based on the facts that were available before His Lordship and it could not be said by any stretch of imagination that the factual approach of the learned Trial Judge there was no question of resjudicata with regard to the issue decided by the learned Trial Judge. It was pointed out that Shyamal Kumar Sen, J. did not quash and/or set aside the allotment made in favour of the respondent no. 5. The learned Advocate drew our attention to the ordering portion of the judgment, wherein the allotment made in favour of the respondent no. 5 was not cancelled. But on the contrary His Lordship made it clear that His lordship had not adjudicated the right of the respondent no. 5 at all. All questions relating thereto were left open by His Lordship. It was submitted that from the judgment it appears that His Lordship did not make any final pronouncement with regard to the issue of allotment made in favour of the defendant no. 5 by the Municipal Corporation. The only thing that was directed by His Lordship was to give hearing to Lalla Patti Traders" Association, who was occupying the original stall no. D(N)-13 free of rent for distribution of drinking water to the members of the public. Their representation was only directed to be considered. Mr. Chakraborty also submitted that from the judgment it will appear that the writ of mandamus was issued only for the purpose of passing a fresh decision of allotment of stall after giving hearing to Lalla Patti Traders" Association and not to give any effect to the allotment already made until such decision is taken. It was observed by His Lordship in the body of the judgment in the last paragraph that His Lordship had not adjudicated upon any of the questions with regard to the allotment in favour of the respondent no. 5 therein (the writ petitioner herein). All questions relating thereto were left open. Mr. Chakraborty submitted that it would be evidently clear that the allotment in favour of the respondent no. 5 was not set aside and

no final determination was made by His Lordships and as such the question of application of principle of res judicata did not and could not arise in the facts and circumstances of the case. Reference was made to the provision of Section 11 of the CPC to submit that unless the issue is finally decided in the earlier proceeding between the parties, there could not be any question of res judicata on that issue in the subsequent proceeding. Mr. Chakraborty further submitted that the issue in question was not finally determined by His Lordship. On the contrary His Lordship kept the issue open in the last paragraph of his judgment and as such direction with regard to res judicata had no basis at all. It was further pointed out that His Lordship did not enter into the question with regard to validity of allotment made in favour of the respondent no. 5 therein. The only direction that was given was to take fresh decision before giving effect to the allotment. The intention was very clear that as the claim of the said Association was not considered for allotment, it was felt that their claim should be considered after giving hearing to the said Association. It was submitted that if it was the intention of His Lordship that allotment in favour of the respondent no. 5 should be considered, in that event His Lordship could have given hearing to the respondent no. 5 and hence it was no longer open to make any submission on the judgment passed by His Lordship. Next it was submitted that in the earlier writ application, which was filed by Lalla Patti Traders' Association, the Corporation took the point that the allotment made by the Mayor-in-Council in favour of the respondent no. 5 therein was valid, proper and legal ignoring the claim of the writ petitioner therein, namely, Lalla Patti Traders' Association and therefore at this stage after lapse of several years it was no longer open on the part of the Corporation to contend that the order passed by the Mayor-in-Council was illegal, invalid and improper. The respondent cannot attack his own order made in this proceeding. The Calcutta Municipal Corporation tried to justify their action in this behalf and now in the present writ application the Calcutta Municipal Corporation authority" cannot take any stand contrary to what was taken in the earlier writ proceeding. It has to be accepted as legal and valid. It was further submitted by Mr. Chakraborty that if it was the intention of the respondent to establish that the allotment made in favour of the writ petitioner was illegal, in that event the Calcutta Municipal Corporation authority was not powerless to initiate a proceeding in accordance with law for cancellation of that order. But the respondent had already acted upon the decision taken by the Mayor-in-Council, which was communicated to the writ petitioner, by the orders dated 7.5.86 and 10.5.86. Subsequently on the basis of the said orders payments were made by the writ petitioner, which were accepted by the respondent and the Calcutta Municipal Corporation authority on the strength of the said decision, made allotment of a temporary stall treating the writ petitioner as the holder of Stall NO. D(N)-13 and the temporary reallocation of stall in favour of the writ petitioner was a conclusive proof that the writ petitioner was rightly treated to be the stall holder in respect of Stall No. D(N)-13 in the portion of the S.S. Hogg Market, which was destroyed by fire and the writ petitioner was considered to be the holder of the new stall, and the temporary stall no. 10 in

Shed no. III in the Maidan Market was allotted. It was also pointed out by Mr. Chakraborty that on the basis of the order dated 10.5.86, which was communicated to the writ petitioner, a sum of Rs. 29,000 and odd was realised from the petitioner and a receipt was granted by the Revenue Officer of the Calcutta Municipal Corporation and nobody has come forward to state that the said receipt was granted by any unauthorised person and/or by mistake and/or erroneously issued. Mr. Chakraborty contended that on the basis of the said decision taken by the Mayor-in-Council coupled with the factum of receipt of payment and issuance of certificate of shifting and allotment of a temporary stall in the Maidan Market it can be conclusively proved that the order of allotment made by Mayor-in-Council was taken to be legal and acted upon by the respondent and the respondent had acquiesced in it and the respondent had no jurisdiction to contend that the said allotment was illegal after lapse of so many years and after so many things that happened on the basis of the said order. It was submitted that the action of the respondent cannot be treated as invalid after lapse of so many years, and after the respondent had acquiesced in it, and for all practical purpose they had accepted the said allotment as valid and legal. In our view the learned Trial Judge had not committed any error and there was no mistake in the approach of the learned Trial judge on the factual aspect of the matter inasmuch as the learned Trial Judge had considered all aspects of the matter and the orders passed by the Mayor-in-Council, which were communicated to the petitioner dated 7.5.86 and 10.5.86 and acceptance of the money deposited for such allotment and also the temporary allotment of stall after fire had destroyed a portion of the S.S. Hogg Market in their proper perspective. The learned Trial judge also considered the facts apparent from the records, which were produced before the Court. The learned Trial Judge had also considered the note of the Chief law Officer given in December 1988 and also the effect of the order of Shyamal Kumar Sen J. in Matter No. 4902 of 1987.

8. The learned Trial Judge also considered the fact that after the judgment of Shyamal Kumar Sen J. passed in Matter NO. 4902 of 1987 hearing was given to Lala Patti Traders' Association by the Commissioner, Calcutta Municipal Corporation who has rejected the representation of the Lala Patti Traders' Association on the ground that there was no necessity for allotting a separate stall for the purpose of distribution of free drinking water as the new complex provide facilities for supply of drinking water by providing tap etc. It was also a fact that after the order was passed by the Commissioner, Calcutta Municipal Corporation, the matter was placed before the Mayor, Corporation of Calcutta, who has endorsed the view that after the representation of Lala Patti Traders' Association was considered in terms of the order of Shyamal Kumar Sen J. in Matter No. 490 of 1987, steps should be taken for fresh allotment of the stall in question by following the usual procedures and the allotment of the stall made in favour of the writ petitioner was treated as cancelled.

9. From the facts it appears that the learned Trial Judge has duly considered the fact which was evident not only from the facts but also from the records

produced before the learned Trial Judge by the respondents.

10. With regard to the contention that the allotment of stall in favour of the writ petitioner was decided and concluded finally in the earlier writ application which was disposed of by Shyamal Kumar Sen J. in Matter No. 4902-87 and the matters required to be considered in the light of the judgment delivered in Matter No. 4902-87.

11. The question of *res judicata* would only arise if a question between the parties was raised, heard and decided in an earlier proceeding and such a question cannot be allowed to be raised in a subsequent proceedings as a matter of legal policy.

12. In the earlier writ application in Matter NO. 4902-87 the question that was decided by Shyamal Kumar Sen J. was that whether the Lala Patti Traders' Association have any right to have fresh allotment for free distribution of drinking water in the newly constructed market on the basis of the original allotment made in their behalf and whether that right could have been ignored by the Municipal authorities by allotting the same to the writ petitioner. In the earlier applicator, the right of Lala Patti Traders' Association against the Municipal Corporation was decided and his Lordship after considering the facts and circumstances of the case held that a decision was required to be taken with regard to the claim of Lala Patti Traders' Association by giving a hearing to that party and His Lordship also made it abundantly clear in the last paragraph of the judgment that his Lordship has not gone into the issue regarding allotment of stall made by the Municipal Corporation in favour of the respondent no. 5 herein, namely, the respondent/writ petitioner herein.

13. In our view, when his Lordship has clearly observed in the last paragraph of the judgment that "it is recorded that I have not adjudicated on the question as to if the respondent no. 5 had any right vis-a-vis the Municipal authorities and all questions relating thereto are left open." This recording, made by his Lordship in the last paragraph of the judgment, in our view, make it abundantly clear, that his Lordship had not adjudicated this issue which was left open and, as such, it "cannot be held by any stretch of imagination that the allotment in question made in favour of the writ petitioner was raised and finally decided by his Lordship and the said question could not be raised in this proceeding on the basis of the principles of *res judicata*. His Lordship issued a writ of Mandamus directing the Calcutta Municipal Authorities to pass a fresh decision for allotment of stall in respect of the newly constructed complex only after giving hearing to the petitioner herein, namely, Lala Patti Traders' Association and not to effect, allotment until the decision is taken. From the ordering portion there was no indication that the respondent no. 5, namely, the writ petitioner, should be given any opportunity before any decision is taken. From this it is abundantly clear that his Lordship did not intend to touch any of the rights of the writ petitioner, who was respondent no. 5 herein, and that there had been no adjudication with regard to the respondent no. 5 herein.

14. Accordingly, in our view, when it is clear from the judgment that the issue in question had not been decided finally in the earlier proceedings, the question of res judicata cannot come into play and, in the instant case, not only the issue was not finally decided but kept it open and made it clear that, the same was not adjudicated upon by his Lordship.

15. From this we are of the view that the contention of the Learned Counsel, appearing for the appellant, that the Learned Trial judge should have rejected the writ application on the principle of res judicata has no substance and that this submission is without any substance.

16. The other question is that the order of the Mayor-in-Council was raised in this appeal by the Learned Counsel, appearing on behalf of the appellant, that even if it is found by this Court that the principle of res judicata is not applicable in the instant case, this Court should hold that the order of the Mayor-in-Council was illegal and without jurisdiction and did not create any right in favour of the Respondent. In the instant case as herein before stated, on the basis of the order that was passed by the Mayor-in-Council, moneys were accepted by granting receipts and nobody has come forward to say that the receipts were granted by the persons who were not competent and/or the receipts were granted by mistake and/or due to error. In the instant case, on the basis of the order, the writ petitioner was treated to be the stall-holder and stall no. D(N)-13 as per Municipal record and, accordingly, after the portion of the said market was destroyed by fire the writ petitioner was allotted in respect of the old stall. A shifting order was passed by allotting stall no. 10 in shed no. 3 and this certificate of shifting was signed by the Market; Superintendent which was counter-signed by the Deputy Commissioner (Maidan). Nobody has come forward to say that this certificate was issued illegally and/or by person not authorised or competent. These facts go to show that from 1986 the respondents have accepted the allotment made in favour of the writ petitioner as valid and legal and, in our view, after so many years, the respondent cannot come forward and contend that the said allotment was void and illegal.

17. It is a well settled principle that the respondent cannot attack its own order. The respondent did not initiate proceedings for cancellation of the order by following the procedure and, after, giving a hearing to the writ petitioner. That was not done.

18. Secondly, in the earlier writ application, Lala Patti Traders" Association contended that the allotment made in favour of the respondent no. 5, namely, the writ petitioner herein, was illegal and that their claim for allotment was not considered and the allotment was made in that proceedings. The Calcutta Municipal Corporation had taken a clear stand that their action was valid, legal and tried to assail that order but, ultimately, Shyamal Kumar Sen, J. in the earlier proceedings in Matter NO. 4902-1987 issued a Writ commanding the respondents to give a fresh hearing to Lala Patti Traders" Association for giving the said Association an opportunity to be heard and, thereafter, to give effect to

the order made in respect of the stall in question. After the judgment was delivered a hearing was given to the Lala Patti Traders' Association in which it was found that in the new building there was no necessity for providing a free space for the purpose of distribution of drinking water as the new complex is already fitted with adequate provision for supply of drinking water in the form of taps and other arrangements and, as such, the claim of Lala Patti Traders' Association for allotment of space was rejected as the authorities decided not to allot any space for supply of drinking water. In this connection the Commissioner, Corporation of Calcutta, decided the claim by the order dated 22nd September, 1988. It was held that no new stall is to be allotted to the said Association in the new complex because of the arrangements made for supply of drinking water and discharge of water. The Lala Patti Traders' Association was allotted a free space in the old market for the purpose of supply of drinking water where there was no provision for supply of drinking water through taps and other arrangements and it was stated that the system of distribution of drinking water by hand, which was used previously, was made in an unscientific manner and, accordingly, the municipal authorities decided not to allot any stall to Lala Patti Traders' Association for distribution of drinking water. This determination was made only to decide the claim of Lala Patti Traders' Association and it has nothing to do with the claim of the writ petitioner with regard to the allotment already made by the Mayor-in-Council by the order dated 10th May, 1986. It is also a matter of legal policy that a party cannot be allowed to take different stands in different proceedings between the parties. The Municipal authorities took a clear stand in the earlier proceedings for the allotment made in favour of the writ petitioner and in this proceedings they cannot be allowed to say that the order was illegal and, as such, they have no obligation to carry out that order which was passed by them. This course of action is not open because of the reason that the respondents, cannot attack its own order and particularly on the basis of the principle laid down by the Supreme Court in the case of *The Nayagarh Co-operative Central Bank Ltd. and Another Vs. Narayan Rath and Another*, It was held that even though the appointment of Narayan Rath was invalid as no action was taken for removing him from service on the ground that the appointment was void for several years. In that case, Supreme Court observed that "it was not open to the registrar in our opinion to set aside the respondent no. 1's appointment as Secretary after having acquiesced in it and after having from all practical purpose accepted the said appointment as valid." In the instant case the respondent municipal authorities accepted the said allotment as valid from 1986 and in our view because of, the conduct and action taken in this behalf for all these years having acquiesced in it and, at this stage, they are not allowed to take any stand that their action was invalid and, as such, they are free from obligations arising out of the order in question. The trend of events go to show that the municipal authorities treated the action as valid and proper.

19. The Learned Counsel referred to various provisions of the Statute. In this

connection we do not feel it necessary to go into this question because of the determination already made in this behalf. In our view, the respondents cannot be allowed to turn round and take a contrary stand at this belated stage in the facts and circumstances of the case and, accordingly, in our view, the learned Trial judge was right in allowing the writ petition. We do not find any reason to interfere with the decision of the Learned Trial Judge.

20. Accordingly, the appeal is dismissed. It is made clear that the writ petitioner, the respondent herein, shall pay to the municipal authorities new rates of rent and charges that is imposed by the municipal authorities in respect of other stalls. All interim orders are vacated. There will be no order as to costs.

21. The writ petitioner who is present in Court has given an undertaking in Court and undertakes that in case the appellant succeeds in the Supreme Court or in any other forum the stalls which will now be occupied by the appellant will be vacated. In view of the undertaking given there is no reason to grant stay of the operation of the order.

Suhas Chandra Sen, J.

I agree.