

(1992) 06 CAL CK 0015
In the Calcutta High Court
Case No : Matter No. 573 of 1991

Trimplex Industries Pvt. Ltd.

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 26-06-1992

Acts Referred:

Calcutta Improvement Act, 1911 — Section 63
Calcutta Municipal Act, 1951 — Section 380, 635(2)
Calcutta Municipal Corporation (Amendment) Act, 1984 — Section 30(2), 36
Calcutta Municipal Corporation Act, 1980 — Section 390, 391(5), 392, 393, 394

Citation : AIR 1993 Cal 39 : (1992) 2 CALLT 475 : (1992) 2 CHN 163 : 97 CWN 368

Hon'ble Judges : Ajoy Nath Ray, J

Bench : Single Bench

Advocate : Siddhartha Sankar Ray, Pijush Kanti Dutta and Debal Banerjee, for the Appellant; Mihir Ray and Barin Banerjee, for the Respondent

Judgement

This is an application filed by the Writ petitioner substantially for a declaration that the building plan and application for sanction to build at 4A Wood-burn Park, filed by the predecessor in interest of the writ petitioner with the Municipal Authorities stands approved by operation of law.

2. Three dates are the most material in the disposal of this application. On the 4th of January, 1984, the Calcutta Municipal Corporation Act, 1980, came into force repealing the earlier Municipal Act of 1951 by S. 635-thereof. However, the very same section preserved the building rules which had formed Schedule XVI to the said earlier Act of 1951.

3. On the 25th February, 1988, one Smt. Ana Ghosh made an application for sanction to build after demolition of existing structures in relation to the land and premises in question. The requisite fees for the said application were also paid. It should be clarified that the submission of the building plan was made by Smt. Ghosh on 3rd December, 1987 and the fees were paid on the 25th February,

1988 and for our purposes we shall assume that the application was duly completed by or behalf of Smt. Ana Ghosh on the 25th of February, 1988.

4. On the 12th of December, 1990, new Building Rules replaced the earlier Building Rules which had formed Schedule XVI of the 1951 Act and which had been continued by the 1980 Act.

5. Mr. Siddhartha Sankar Ray and Mr. Pijush Kanti Dutta both made submissions on behalf of the writ petitioner on different dates. The learned counsel for the Municipal Authorities namely Mr. Mihir Roy and Mr. Barin Banerjee also made submissions on different days and both the sets of counsel relied upon several Rules of Schedule XVI which were Rules 47,49,51,52,54,5.5 and 56. It is better for the sake of convenience to set out the said Rules herein :--

"47. Application to the Commissioner for permission to erect a new building or make addition or alteration to a building. (1) No person shall erect a new building, or re-erect or make addition and/or alteration to any building or cause the same to be done without first obtaining a written permission from the Commissioner under Rule 55.

(2) Every person intending to erect a new building or re-erect or make addition and/or alteration to any building shall send to the Commissioner an application for permission to execute the work together with the site plan of the site, a plan of the whole building, separate plans for each floor of the building, complete elevations and sections of the work, services plans, a specification or the work and such other particulars as may be prescribed by the Corporation in this behalf from time to time.

49. Signature of plans, elevations and sections.-- Every applicant who intends to erect a building shall satisfy the commissioner as to his exclusive right of erection and. the application, plans, elevations and sections referred to in Rules 47 and 48 of this Schedule shall be signed clearly and in a prominent place by such applicant or applicants (in case the number of applicant is more than one) and by the licenced building architect as required under S. 380 of the Act.

51. Formulation of requirements and objections-- (1) All information and documents which it may be found necessary to require, and all objections which it may be found necessary to make before deciding whether permission to erect a building (other than a hut) should be given, shall be respectively required and made in one requisition, and the applicant shall be apprised thereof at the time of earliest possible date.

(2) Within fifteen working days after the receipt of any application under Rule 47 for permission to execute any work, the Com-missioner may require the applicant-

(i) to furnish him with any information on matters referred to in that rule which has not already been given in the documents received thereunder or with any document prescribed by that rule which has not been sent in, or

(ii) to satisfy him in regard to any objection which may have been taken under these rules to the grant of permission to execute the work.

(3) If any information or documents furnished under sub-rule (2) are, in the opinion of the Commissioner, incomplete or defective, he may, within fifteen working days after the receipt of the same, require further information or documents to be furnished.

(4) If any requisition made under sub-rule (2) or (3) is not complied with within three months, the application received under R. 47 of this. Schedule shall be refused.

52. Grounds on which permission may be refused-- The permission to erect a new building or to re-erect or to make addition and alteration of a building may be refused on the following grounds, namely :--

(1) that the work, or any of the particulars comprised in the site plan, building plans, elevations, sections or specifications would contravene some specific provision of this Act or some specific order, rule of bye-law made thereunder;

(2) that the application for such permission does not contain the particulars or is not prepared in the manner prescribed in this Schedule;

(3) that, in the case of a building (other than a hut) falling within the street alignment or building-line of a public street projected under S. 63 of the Calcutta Improvement Act, 1911 (Ben. Act V of 1911). The permission of the Chairman of the Board of Trustees for the Improvement of Calcutta has not been obtained;

(4) that any of the documents referred to in R. 47 of this Schedule has not been signed as prescribed in R. 49 of this Schedule;

(5) that any information or documents required by the Commissioner under this Schedule have not been duly furnished; or

(6) that the applicant has not satisfied the Commissioner in regard to any objections which may have been taken under these rules to the grant of the said permission.

54. Retention of plan and submission of fresh applications :

When permission to erect a new building (other than a hut) is refused-

a) the Commissioner shall retain two copies of the plans submitted and shall without charge furnish the applicant with his reasons for such refusal in writing :
And

b) the applicant may at any time hereafter send to the Commissioner a fresh application and fresh or modified documents under R. 47 of this Schedule framed with the object of meeting the objections for which such permission was refused.

55. Permission to execute work then to be given or refused by the

Commissioner--(1) Within two months after the receipt of any application made under Rule 47 for permission to execute any work, or of any information or documents or further information or documents required under this Schedule, the Commissioner shall, by written order, either-

- a) grant permission conditionally or unconditionally to execute the work, or,
- b) refuse, on one or more" of the grounds mentioned in R. 52, to grant such permission.

2) When the Commissioner grants permission conditionally under Cl. (a) of sub-rule(1), he may, in regard thereto, impose such conditions, consistent with this Act, as he may think fit.

3) Notwithstanding anything contained in sub-rules (1) and (2) in any case in which it appears to the Commissioner that any public improvements, which may render necessary the acquisition of the site of a proposed building or any part thereof, are desirable and expedient, he may withhold sanction to the building plans submitted in respect of such building for a period not exceeding three months from the date of such submission.

4) The Corporation with approval of the State Government shall fix a scale of fee to be paid in respect of grant of permission for executing any work under this rule.

5) If an application for permission is made for any erection, re-erectioner making addition or alteration of a building situated within an area in respect of which any plan to improve public utility services, widening of roads or for other purposes has been formulated by the Calcutta Metropolitan Development Authority, constituted under the Calcutta Metropolitan Development Authority Act, 1972, (West Ben. Act XI of 1972) the Corporation shall before granting such permission consult the Calcutta Metropolitan Development Authority and if any advice of the Calcutta Metropolitan Development Authority in this regard is not accepted, the reasons therefore shall be communicated to the said Authority.

56. Remedy if Commissioner delays grant of or refuses permission-- If within the period prescribed under R. 55 of this Schedule the Commissioner has neither granted nor refused to grant permission to execute any work, the applicant may refer the matter to the State Government and the State Government may call for the record and on perusal of the record direct the Corporation either to grant or refuse to grant the permission within a specified time and also to take steps against the officer or employee of the Corporation who may be found responsible for the delay in taking steps in this regard.

Subject to the conditions above nothing shall be construed to authorise any person to do anything in contravention of the provisions of this Act or any Rules or bye-laws made there under"

6. On behalf of the writ petitioner it was primarily contended that by operation of

R. 55 set out above, after a lapse of two months from 25th February, 1988, the application for sanction to build in accordance with the plan submitted stood approved by the Municipal Commissioner by operation of law.

7. It will be seen that sub-rules (a) and (b) of sub-rule of R. 55 contemplates two possibilities namely those of express permission and of express refusal of the application to build. The question which arises in this writ application is what would happen in case the Municipal Commissioner makes no communication to the applicant either expressly granting permission or expressly refusing the same.

8. Until 22nd January, 1977, there had remained in the set of rules, one particular rule by which there was an express provision for a deemed sanction. That rule is no longer there and the new Rule 56 has made its way into Schedule XVI as quoted above. The old Rule 56 was as under :--

"Remedy if Commissioner delays grant or refusal of permission"

"56. If within the period prescribed by R. 55, the Commissioner has neither granted nor refused to grant permission to execute any work, such permission shall be deemed to have been granted, and the applicant may proceed to execute the work, but not so as to contravene any of the provisions of this Act or of any Rules or bye-laws made there under"

9. To come to a proper conclusion as to what should be the appropriate legal result of a non-communication by the Municipal Commissioner to the applicant either this way or the other proper, the correct analytical course, in my opinion, would be to weigh the scales on both sides by analysing the consequence of interpretation in the two different ways, namely, there is, or there is not, deemed approval upon lapse of two months.

10. It should be borne in mind that under Rule 55 there is no expressed third possibility. In other words, R. 55 permits an express grant of sanction and also permits an express refusal of sanction, but does not permit the authorities to cause any lapse of the application to be made by mere passage of time. Mr. Ray submitted, in my opinion correctly, that the right to build or re-build upon one's own land is a common law right which is part of the incident of ownership. Such right of ownership cannot be curtailed by any municipal statute save by express grant of powers to authorities made in body of the said municipal statute itself. Mr. Ray submitted, again in my opinion correctly, that the right of a municipal authority to refuse the owner permission to build on his own land is not a common law right but that it is a special statutory right carved out of the incidents of ownership by the exigencies of modern civil requirements.

11. Mr. Ray relied in this regard upon the case of Narendra Nath reported in AIR 1960 Gal 102 and placed reliance on paragraph 6 appearing at page 105 of the report. Mr. Ray submitted on the basis thereof that a Corporation, be it a Municipal Corporation or be it a Corporation formed under the ordinary laws of formation of companies, in any of these cases the company or the Corporation

must set in accordance with its forming charter. Such forming charter might take the shape of a Memorandum of Association with guiding or binding rules, in the shape of Articles in the case of ordinary Companies or it might take the shape of a statute forming the Corporation and giving it powers like in the case of Municipal Bodies. In either case the Corporation or the Company, not being a living legal person or body, would be limited in their jurisdiction to act by reason of their forming charter of statute. I accept the above contention of Mr. Ray.

12. On the basis of these propositions Mr. Ray submitted that the Calcutta Municipal Corporation would have no authority to refuse sanction by reason of any implied or inherent powers. On the other hand, it is to be implied that an owner has a right to build on his own land unless some limitation is made in that regard by some provision of law or Rules. Mr. Ray submitted as a logical consequence hereof that since an implied power to refuse sanction cannot be read into a buildings statute or a building rule, it would be impossible legally to construe the noncommunication of any express opinion of the Municipal Commissioner as an implied refusal on his part to the owner to build upon his own land.

13. The consequence of construing R. 55 as a rule which causes applications to be refused by implication would be that every two months applications would automatically turn stale. This is a most unsatisfactory result. When all is said and done building activity per se is neither illegal nor criminal nor to be frowned upon in any manner. Just as it is to be assumed that public authorities like Municipal bodies are acting diligently and in accordance with law, unless proved otherwise, it is similarly to be assumed that a person building upon his own land will bring up a safe and sound structure with bona fide intentions of using the same legally unless something to the contrary can be proved. On this basis it would be, so to speak, a lazy construction of R. 55 to hold that noncommunication within two months of application to build would mean a refusal of the plan and that the party wishing to build must resubmit the plan and application even if according to him nothing is wrong therewith.

14. On the other hand, if the plan and application are construed to have been sanctioned as submitted upon non-communication of any expressed opinion within two months, then and in that event, the owner would be entitled to exercise his ordinary legal right to build. In exercising such right, notwithstanding anything contained in the plan or in the application the owner would naturally be forbidden from building contrary to any of the irrelaxable building rules that might be applicable to him. This is clear because even the Municipal Commissioner would have no jurisdiction to grant sanction save in accordance with the irrelaxable building rules. In this case if the plan is deemed to have been sanctioned by operation of law in or about the month of April, 1988, then also the building upon the land in question cannot be made even in accordance with the plan submitted save in so far as the same complies with the irrelaxable building rules which were prevalent in the month of April, 1988.

15. Again to remove from our consideration a point which is legally irrelevant and a matter of mere prejudice. It is true that in December, 1990, new building rules have come into operation. It is also true that it is within the realm of possibilities that the irrelaxable building rules as operative in or after December, 1990 would be different from the irrelaxable building rules which were operative in or about April, 1988. It would not however, be at all illegal to build in accordance with the building Rules of 1988 if a true construction of the municipal rules permits the same. After all the Rules of 1988 were not discarded because they had been found to be utterly bad or utterly not in keeping with the norms of safety and hygiene. The 1990 Rules might be better according to the framing authorities, but the earlier rules are not so impracticable as to make any building in accordance therewith either unsafe or unhygienic.

16. Mr. Roy submitted that the new R. 56 replacing the earlier one relating to a deemed sanction, grants a remedy for the Commissioner delaying the grant or refusal of permission as per R. 55. In my opinion, the said remedy is not exhaustive. A bare reading of R. 56 would show that the said rule no doubt provides a sort of remedy to the applicant for non-communication by the Municipal Commissioner, but it is equally manifest that the said remedy is not complete or comprehensive. A part of the remedy consists in the State Government being apprised of a situation where it might direct taking of steps against a defaulting employee. The other is about a direction by the State Government either to grant or to refuse permission, the said direction being made upon the Corporation. There is no Rule that upon such direction, the Corporation shall obey the same. In case the direction is not obeyed the remedy would be again perhaps in a writ Court. The Municipal body is a separate body than the State of West Bengal and carries on its functions in accordance with a statute which has been framed by the State Legislature which, in accordance with the very basic scheme of our Constitution, is utterly different from the executive Government of the State of West Bengal. Under these circumstances a direction under R. 56 made by the State Government to the Municipal Authorities might be of a very persuasively directory force, but would wholly lack the mandate of any law or jurisdiction, legally to compel the acceptance of such direction, as it is, by the Municipal Authorities, being the Corporation itself or the Municipal Commissioner.

17. Accordingly, in spite of the presence of R. 56 and in spite of the removal of the earlier Rule of a deemed sanction, there still remains in law the necessity to construe the legal effect of non-communication under R. 55. Moreover, under R. 56 the applicant has a discretion to apply or not to apply to the State Government; if such a reference is made under R. 56, the consequences as indicated above might follow. But if R. 56 is not resorted to at all by the applicant but Rule 55 is insisted upon then the applicant cannot, be turned out of Court because of the presence of R.56 alone.

18. Indeed, the mere change of R. 56, leaving the other rules in tact would not

be likely to change the whole scheme of deemed sanction which underlay these Rules. For example, Rule 54 contemplates a reasoned refusal as the permitted method. That Rule was left untouched. Thus no question arose ever of any deemed refusal being in the contemplation of any rule making authority. In this background, Rule 56 can only be construed as granting an additional remedy of doing "durbar" with the State Government, if remedy it is, in the eye of law.

19. Both Mr. Roy and his learned Junior Mr. Banerjee submitted that under S, 398 of the Calcutta Municipal Corporation Act, 1950, it would not be open today to hold that the application became approved by operation of law in April, 1988. The relevant parts of the said section is set out below :--

"398. When building or work may be proceeded with.

(1) Where within a period of sixty days or, in cases falling under Cl. (b) to Cl. (m) of sub-sec. (1) of S. 390, within a period of thirty days of the receipt of any notice under S. 393 or S. 394 or of any information under S. 395 the Municipal Commissioner does not refuse the sanction to the erection of any building or the execution of any work, or, upon refusal, does not communicate the refusal to the person who has given the notice, such person may make a representation in writing to the Mayor :

Provided that if it appears to the Municipal Commissioner that the site of the proposed building or work is likely to be affected by any scheme of acquisition of land for any public purpose or by any proposed regular line of a public street or extension, improvement, widening or alteration of any street, the Municipal Commissioner may withhold sanction to the erection of the building or the execution of the work for such period, not exceeding six months, as he may deem fit, and the period of sixty days, or, as the case may be, the period of thirty days, specified, in this sub-section, shall be deemed to commence from the date of the expiry of the period for which the sanction has been withheld.

(3) If the person as aforesaid or any one lawfully claiming under him does not commence the erection of the building or the execution of the work within two years of the date on which the erection of the building or the execution of the work is sanctioned (The words "or is deemed to have been sanctioned") were omitted by S.36 of the Calcutta Municipal Corporation (Second Amendment) Act, 1984 (West Bengal Act XIII of 1984) w.e.f. 5th May, 1984) he shall give notice under S. 393 or, as the case may be, under S. 394 for fresh sanction and the provisions of this section shall apply in relation to such notice as they apply in relation to the original notice."

20. I am unable to agree that there is anything in S. 398 or the sub-sections therein by reason of which the deemed operation of R. 55 cannot be made. Under the first subsection of S. 398, it appears that if within a period of 60 days no refusal is made or communicated by the Municipal Commissioner then a representation may be made in writing to the Mayor. That is all very good. The letter to the Mayor might receive the desired attention. The Mayor and the

Municipal Commissioner might have a heart to heart talk. The Municipal Commissioner might see it fit thereafter to issue a sanction, but then I ask myself this question, is a free Indian citizen (or his Company) to be left to such remedies in the matter of constructing buildings legally on his own land? The answer that I can give myself without any hesitation is in the emphatic negative. It is neither any consolation in practice nor any remedy in law to the writ petitioner to have the satisfaction that he has made a representation to a particular official or authority and that he might be favoured with a grant later on. This approach would be similar to supplications before persons who are exalted by persons who are lowly in stature or prestige. These concepts and these pictures have largely vanished from the society in which we live; we live, not under the rule of authority, but under the Rule of Law.

21. Mr. Roy also submitted that in accordance with sub-section (3) of the above section, the work of building not liming commenced within two years, even from April, 1988, the writ petitioner would be compelled to give fresh notice or apply for fresh sanction.

22. Mr. Dutta placed in this regard R. 62A of the Building Rules contained in Schedule XVI and the said rule is set out below :--

"62A. Renewal of permission to erect a new building in certain cases-- The permission to execute the work of erection of any new building (other than a hut) shall be valid for a period of five years from the date from which it is given and may be renewed thereafter for a further period of five years on payment of a fee of twenty rupees and on production of the previously sanctioned building plans."

23. Mr. Dutta made two-fold submissions to get rid of the difficulties of S. 398(3). First he said that the words "or is deemed to have been sanctioned" having been removed from sub-section (3), the time restriction engrafted in this sub-rule would have no application to his case. It is true that the words might have been removed because of the removal of the deemed sanction that was contained in the old R. 56 which had been removed on and from January 22, 1977. But in a Court of law we are not to guess as to what was the reason for removal unless the express words of the statute, read as a whole leave us in a state of complete perplexity.

24. I see here clearly that the words "or is deemed to have been sanctioned" have been removed from sub-sec. (3) of S. 398.1 see also clearly that there is another time limit prescribed under Rule 62A which is quite plainly not the same the time limit as prescribed in sub-sec. (3). Under these circumstances, in the case of a deemed sanction, such as the one pressed for in favour of the writ petitioner, sub-section (3) would not be the time limit for commencement of work but the time limit would be as prescribed in R. 62A, namely that the execution of works would have to be made within a period of five years from the permission during which time such permission would remain valid in accordance

with the said Rule itself.

25. It is pertinent to mention that the substance of R.62A was all along there in Sch. XVI; it was previously Rule 62(1), coexisting with the old Rule 56 as to deemed sanction. Thus there was no different time limit for plans deemed to be sanctioned than plans expressly approved.

26. The second submission of Mr. Dutta with regard to S. 398(3) was that in regard to the provisions of a transitory nature, the true construction of a statute should be that such transitory provisions should be given a greater emphasis during the period that they remain alive and operative, rather than the other continuous parts of the statute itself. Mr. Dutta said that this is a rule for construction which is comprehensible to common legal sense, because the transitory provisions are in the nature of special provisions applicable only during the time when the transitory provisions remain alive. Other provisions are general in regard to their permanence in time. Thus the transitory provisions would have the supervening effect over the permanent provisions in the same manner as special provisions have precedence over general ones. Mr. Dutta relied in this regard upon the passage appearing at paragraph 189 at page 442 of the book of F.A. Bennion, called "Statutory Interpretation", published in 1984 and the passage placed by Mr. Dutta is set out below :--

"189. Transitional provisions :

Where an Act contains substantive, amending or repealing enactments, it commonly also includes transitional provisions which regulate the coming into operation of those enactments and modify their effect during the period of transition, Where the Act fails to include such provisions expressly, the Court is required to draw such inferences as to the intended transitional arrangements as, in the light of the interpretative criteria, it considers Parliament to have intended."

27. Mr. Dutta stated that the aforesaid book has found the approval of our Supreme Court and he relied in this regard upon the case of Filip Tiago reported in AIR 1990 SC 981. He placed before me paragraphs 15 and 16 of the judgment of Justice Jagannath Shetty in that case and the former of the said two paragraphs is set out below :--

"15. This in effect is the result of the plain meaning Rule of interpreting S. 30(2) of the Amending Act 68 of 1984. But then, it would seem very odd indeed and anomalous too to exclude the present case from the operation of S. 30(2). S.30(2) is the Transitional Provisions. The purpose of incorporating Transitional Provision in any Act or Amendment is to clarify as to when and how the operative parts of the enactments are to take effect. The Transitional Provisions generally are intended to take care of the events during the period of transition. Mr. Francis Bennion in his book on Statutory Interpretation (14th Edition, p. 442) outlines the purpose of such provisions :

189. Transitional Provisions (see above)."

28. In my opinion the aforesaid authorities do somewhat support the contention of Mr. Dutta that transitional provisions would rather be interpreted to modify the general permanent provisions than otherwise. Under these circumstances, the said Rule 62 A would modify sub-rule (3) of S. 398 and stand superior to it in case even of any conflict.

29. It should be borne in mind that Rule 62A is a part of the statute itself which contains S. 398. It is not a case of a Rule made under a statute becoming superior to the statute itself which can never be. However, R. 62A though called a Building Rule was a part of the 1951 Act and is also apart of the 1980 Act and the reason why I say this is as follows.

30. Under S. 635(2)(f), the said Sch. XVI has been continued in force until the making of corresponding provisions under the 1980 Act. This would be an enactment by engraftment. Mr. Dutta has correctly pointed out that this sub-section is contained amongst the six sections under Part "D" of the Calcutta Municipal Corporation Act, 1980 which reads as "Miscellaneous and Transitory Provisions". This Part "D" occurs in the last chapter of the Act being Chapter XXXVIII. Thus the transitional R. 62A being engrafted in the statute would override, at least in this case, sub-rule (3) of S. 398 and as such the grant of any relief to Mr. Dutta's client would not be infructuous because 5 years are still to run out from April, 1988; and it is also not outside the pale of possibilities that upon payment of a fee of twenty rupees a further period of five years to build is obtainable by the Clients to Mr. Dutta.

31. As an ancillary argument in regard to the aforesaid rules, Mr. Dutta has said that even in the section of the 1980 Act, these Building Rules have been referred to again and again and that these rules have been put practically at par with the sections by virtue of the express wording of the sections themselves. Mr. Dutta placed, in this regard, Ss. 391(5), 392, 396(1), 396(2), 405 and 406. Indeed, it is true that these Building Rules must be given equal importance with the sections regarding building itself as the Corporation in effect restricts building activities as much by the operation of the sections as by the operation of the Building Rules themselves. One often comes across the overlapping and repetition in the rules and the sections. For example, S. 396(2) is largely similar to R. 52 of Schedule XVI. Again the prohibition to build as contained in S. 392, i.e., excepting upon a permission, would also be found somewhat repeated in Rule 47 of Schedule XVI which I have quoted above. S. 392 is set out below for ready reference :

"S. 392. Prohibition of building without sanction.

"No person shall erect or commence to erect any building or execute any of the works specified in S. 390 except with the previous sanction of the Municipal Commissioner and in accordance with the provisions of this Chapter and of the Rules and the Regulations made under this Act in relation to such erection of building or execution of work."

32. Mr. Roy also took the point that the writ petitioner itself had never approached the Municipal Authorities. Mr. Roy said that the application for sanction to build was originally made by one Nirmal Kumar Bagaria on behalf of Smt. Ana Ghosh. He said that subsequent thereto there was an order passed by the Hon"ble Mr. Justice Ajit Kumar Sengupta on 7th February, 1989 to the effect that without hearing the objections of a certain tenant S. P. Agarwalla, the Corporation authorities shall not accord any sanction. According to Mr. Roy those hearings were held and that even Agarwalla and Bagaria came to certain agreements or understandings on the basis of which the Municipal Authorities were to be intimated. No such intimation was ever received.

33. Mr. Roy also pointed out that on another petition of the same writ petitioners the Hon"ble Mr. Justice Susanta Chatterji has passed an order on 16th January, 1991 directing the authorities to process the plan. Mr. Roy submitted that on the basis of these events it should be held that the parties had waived their rights, if any, in regard to the sanction coming into existence by operation of law.

34. Mr. Roy also said that upon the application itself, endorsements have been made by Nirmal Kumar Bagaria regarding fulfilment of conditions and that such endorsements having been made there was no further necessity to call for compliance thereof by separate exercise of powers under R. 51 of Schedule XVI quoted above.

35. It has taken a few days of patient and careful argument on both sides for me to come to the conclusion that the petitioners are in possession of a crystallized right in their favour regarding the approval of plan. It was neither clearly nor perhaps at all known or even guessed by the writ petitioners that they were already in possession of such a right until, may be, the instant writ was conceived and thereafter filed. That is quite possible. People often, or at least sometimes, have rights of which they are not wholly aware. Such rights, so to speak, are embodied in the bowels of the law just as precious minerals and stones are buried in the bowels of the Earth. It takes an expert like Mr. Dutta who is consistently painstaking to unearth these valuable. It is well settled in law that waiver means intentional relinquishment of a known right. Such a case of waiver has not been made but by the respondents in the affidavits before me. It could not naturally be so made out as it would be impossible to prove that either Ana Ghosh or Bagaria or M/s. Trimplex know at all of their crystallized right in regard to the plan, deemed to be approved by operation of law, and that they or any of them had intentionally relinquished the same. On the other hand they were clamouring to get approval, and relinquishment of a right to mild was the very farthest from their intentions.

36. Mr. Roy wanted to look at the facts also from this other angle, that a permission to building is a purely personal permission and that a subsequent owner of the land would not be able to utilize the same. With the greatest of respect, in my opinion, this contention is not well founded. There is nothing expressly set out any where in the Act or in the Rules which states that the grant

of a permission to build can be utilized by the person applying for such permission and by that person alone. On the other hand, there are indications that successors in interest with regard to the land would also be successors in interest equally with regard to the approved sanction. Under sub-sec. (3) of S. 398 there is reference to a person lawfully claiming under the one who has been sanction granted to the plan tendered to the Municipal Authorities,

37. Indeed the Municipal Authorities have no axe to grind as regards the person who is carrying on the building activity. These authorities are objectively interested in the building that is about to come up and they are interested in seeing that these prospective buildings do not break the rules of safety, proper planning and proper hygiene. It little matters to the Municipal Authorities as to who is going to abide by such rules or norms so long as the rules or norms are in fact abide by. I am of the opinion, therefore, that the sanction to the lodged application of Smt. Ana Ghosh having ripened by operation of law as early as in April, 1988, it would pass along with the land to any rightful holder thereof unless the sanction had lapsed prior to such passage of title. I have already held that even the period of the first five years under R. 62A is still to expire and accordingly I come to the conclusion that M/s. Trimplex being the present rightful owners of the property whose name has been duly recorded in the register of the Municipal Authorities by due mutation, they, that is the first writ petitioners, would be entitled to avail themselves of the benefit of such deemed sanction.

38. Mr. Roy also relied upon S. 396 of the 1980 Act and place sub-sec.(1) thereof. There should be no dispute that these special provisions relating to buildings at corners of streets and works on either side of new streets or fly overs would attract S. 396 along with Ss. 405 and 406. I am, however unable to come to this conclusion that because of the presence of S. 396 the Building Rules are at all or altogether to be given a go-by. In other words, with the greatest of respect. S. 396 does not appear to be quite the most relevant section for our purpose.

39. Under the erstwhile S. 398A of the 1980 Act there was a blanket prohibition against all buildings exceeding 13 1/2 metres in height. A building 13 1/2 metres in height would be roughly 42 feet high, and that is less than three stories of an old fashioned Calcutta building with floor height of 15 feet. The provision has now been struck down by a Division Bench of this Court and a special leave application sought to be preferred therefrom, at least as per information available until date, has stood dismissed for default. The objections in this regard taken in the affidavit of Anim Kumar Misra dated 3rd June, 1992 in paragraph 3(e) thereof are thus unsustainable. The above Division Bench judgment is reported in 1992 Volume 1 CLJ 355 and alternatively in 1992 (1) Calcutta High Court Notes page 415 the Division Bench consisting of the Hon"ble Mr. Justice Ajit Kumar Sengupta and the Hon"ble Mr. Justice Shymal Kumar Sen,

40. I have already said that no endorsement or undertakings of Bagaria made on the submitted application or plan can detract from the crystallization of the plan

into a ripened approved plan on the expiry of the 25th of April, 1988. The question of any waiver does not arise. I have also indicated that the deemed sanction of the plan must also in law be taken as so sanctioned as to be available to any owner builder, be it the first writ petitioner or be it any subsequent owner of the land subject, however, to compliance with the irrelaxable Building Rules which prevailed in April, 1988 or other Rules, if any, which have been expressly (or by legally necessary implication) made applicable retrospectively to that period of time. Under these circumstances the difficulties felt about the endorsement of Bagaria referred to in paragraph 3(a) of the aforesaid affidavit of Anim Kumar Mitra are unsubstantial.

41. Mr. Dutta also relied upon the case of Taramani Devi reported in AIR 1992 SC 61 for the proposition that before refusing sanction to erect, a hearing should be granted to the person whose right to build is being sought to be affected. If the aforesaid principle is applied to R. 55 of Schedule XVI it must be held that the lapse of two months without communication either this way or the other should rather construed as approval, which would not require a hearing, rather than that it should be construed as a refusal, which would call for a hearing. It is well known that acts of public bodies and authorities are rather to be construed in the line of what is permissible and legal rather than otherwise. If the non-communication is construed as an approval then there would be no breach of natural justice, which breach, however, which would occur in the case of the opposite construction.

42. One last word. There has been a tendency in some cases like the present that the Municipal Authorities worry their heads about what will happen to occupiers of structures to be demolished after the proposed new construction. If it is not already clear, it should be clarified that the Municipal Bodies are not arbitrators in landlord tenant disputes, nor can they become self-appointed guardians of the tenant community at large. A landlord cannot disturb a tenant save by authority of law, and demolition of structures in disturbance of the highest order. A tenant must seek protection elsewhere, and not by supplications before Municipal Authorities, Indeed, even if a landlord gives an undertaking to the Municipal Corporation that he will not evict a tenant, the Corporation would not be able to enforce it for lack of locus standi and the tenant would not be able to enforce the undertaking either as it is not a party to the undertaking. However, if Municipal Authorities direct demolition on the ground of unsafely, the tenant or occupier might well have locus stand! to challenge the same.

43. The writ petition accordingly succeeds. It is declared that the first writ petitioner is entitled as the present owner of the land and premises in question to demolish, build, erect or re-erect in accordance with the application and plan tendered by Smt. Anna Ghosh to the Municipal Authorities on 3-12-1987, money receipt wherefor bearing No. 9553 was issued by the authorities on 25-2-88. It is further declared that whether before or after any or all of the existing building or structure is demolished, the one or ones to be erected or re-erected shall not

contravene, in any event, any of the irrelaxable Building Rules that prevailed on or by retrospective operation are deemed to have prevailed on 25-4-1988. It is further ordered that the works in the manner aforesaid shall be completed on or before the 25-4-1995 and that if the completion is expected to require any longer period, the respondent authorities shall duly extend the time therefore for a further period of 5 years upon payment of the prescribed fees mentioned in Rule 62A quoted above, unless there are good reasons for not doing so, such reasons to be notified to the writ petitioner in writing within 6 weeks of tender of such prescribed fees to the said authorities. The respondents and all of them and their officers, servants and employees shall be restrained by an order of permanent injunction from in any manner obstructing or taking steps against the writ petitioner or its servants, agents, assigns or employees on the ground that there is no expressly permitted, sanctioned or approved plan, in case the writ petitioner commences, continues and concludes its building activities in accordance with the declarations made above.

44. There will be no order as to costs.

45. The parties and all others concerned shall act upon a signed copy of this dictated order upon the undertaking of the advocate-on-record of the petitioners to have the order drawn up, completed and filed in the usual course.

46. Petition allowed.