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**(1957) 11 CAL CK 0002**

**Calcutta High Court**

**Case No:** Matter No. 206 of 1956

Suhrit Mitra

APPELLANT

Vs

Corporation of Calcutta

RESPONDENT

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**Date of Decision:** Nov. 20, 1957

**Acts Referred:**

- Calcutta Municipal Act, 1951 - Section 218, 219, 261, 349, 349(1)
- Constitution of India, 1950 - Article 226

**Citation:** 62 CWN 186 : (1959) 1 ILR (Cal) 113

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

**Bench:** Single Bench

**Advocate:** R.L. Sinha, for the Appellant; Sisir Mukherjee, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

P.B. Mukharji, J.

This is an application by a rate-paying citizen of Calcutta invoking the Constitutional Writ under Article 226 of the Constitution against the Corporation of Calcutta.

2. The subject of this application is the use to which the Corporation can put public parks and squares in the city. The occasion is the prospect of use of city's public square by a circus party.

3. In this case the Corporation of Calcutta by a Resolution of September 20, 1956 of its Standing Town Planning and Improvement Committee decided to grant permission to occupy Marcus Square, a public square in the city, for a period of three months in consultation with the party or parties paying to the Corporation a lump sum of Rs. 25,000 and on depositing such security against any damage to the ground as may be fixed by the Commissioner and subject to other usual terms and conditions. The party in view was the owners of Kamala Circus.

4. By an amendment of that Resolution it was further decided to re-affirm it with two qualifications, namely,

(a) That in the meantime the Chief Law Officer be requested to give his opinion regarding the points raised in the letters received from Solicitor Shri Sovendra Nath Ghosh.

(b) That pending the receipt of the opinion of the Chief Law Officer no intimation be given to the party regarding the allotment.

5. In fact no allotment has been made.

6. There were several applications for taking Marcus Square on hire. One of the applicants was one Morris Dean for whom the Solicitor of the present applicant made an application for a temporary lease of Marcus Square. The Corporation, however, decided to grant the temporary lease of the ground of Marcus Square to the owners of Kamala Circus, and the application, of all other applicants, including that of Morris Dean, were rejected. It is now the contention of the applicant who is not Morris Dean but for whom the Solicitor is the same Morris Dean's Solicitor that the Corporation has no power to make this arrangement in respect of a public square like Marcus Square.

7. On October 9, the applicant Suhrit Mitra who is incidentally also a Solicitor of this Court applied for a Writ in the nature of Mandamus directing the Corporation to forbear and restrain from giving effect to the Resolution of the Standing Town Planning and Improvement Committee of the Corporation of Calcutta for leasing out Marcus Square to K. Damodaran, Proprietor of Kamala Circus of 13A Chittaranjan Avenue, Calcutta. He obtained a Rule on the same date. The Rule now comes up for disposal.

8. The short but important point for decision in this application is whether the Corporation can use a public square or park for performance by a Circus Company.

9. On behalf of the applicant it is argued that an arrangement such as this leads necessarily to the temporary closure of a public square. It is contended that this is not permissible u/s 261 of the Calcutta Municipal Act, 1951. By Section 361(c) of the Act it is provided:

The Corporation may \* \* \* \* temporarily or permanently close any public street or part thereof, or permanently close any public square or garden.

10. There is a proviso added to this section by way of an amendment which says:

Provided that no public square or garden or part thereof shall be permanently closed except in accordance with a resolution carried at a meeting of the Corporation by a majority of not less than two-thirds of the total number of Councillors and Aldermen of the Corporation.

11. There has been no such Resolution of a meeting of the Corporation with any such majority in this particular case.

12. It is then argued that by Section 362 of the Calcutta Municipal Act it is provided that-

When \* \* \* any public square or garden is permanently closed under 361, the Corporation may sell or lease \* \*\*\*\* the site of the square or garden, as the case may be, making due compensation to, or providing means of access for, any person who may suffer damage by such closing.

13. Sub-section (2) of Section 362 then goes on to provide how such compensation will be determined by making allowance for any benefit accrued by reason of the improvement of public square or garden.

14. The argument advanced on behalf of the applicant is that Section 361(c) of the Act only mentions expressly the right of the Corporation to "permanently close" any public square or garden. Therefore, it is said that the Corporation has no right to temporarily close a public square or garden. This reason is attempted to be fortified by reference to the fact that both the rights to temporarily or permanently close are given expressly in the case of a public street in the very same sentence. It is, therefore, contended that while the Corporation has a right to permanently close a public square or garden, it has no right to temporarily close the same. Appeal is made to the language of Section 362 of the Act by saying that it is only when the Corporation has permanently closed a public square it is then and then only that it has a right to lease the site of the square and not in any other case such as of a temporary closure.

15. The argument, therefore, rests on two propositions. The first proposition is that the Statute gives no right to the Corporation to temporarily close a public square. The second proposition is that the Corporation has no right to lease the site of a public square except in the case where the "public square has been permanently closed by the Corporation. As these two tests are not satisfied in this case, the applicant seeks to set aside the decision and the Resolution of the Standing Town Planning and Improvement Committee.

16. Learned Counsel on behalf of the Corporation relied on Section 521 of the Calcutta Municipal Act as the statutory authority for the Corporation to lease or otherwise transfer on such terms as it may think fit, any land or buildings vested in it. Section 521(ii) of the Act provides:

In addition to the powers expressly conferred by any other section of this Act for the acquisition and disposal of land or buildings, the Corporation may-

(ii) sell, lease or otherwise transfer, on such terms as it may think fit, any land or buildings vested in it.

17. It is best to dispose of first this contention of the Counsel for the Corporation based on Section 521 of the Act. I do not consider that Section 521 is at all a defence to the argument advanced on behalf of the applicant. I shall briefly state my reasons for taking this view. Section 521 confers additional powers to the Corporation over and above those expressly conferred by any other section, but those additional powers are expressly said to be ""for the "acquisition and disposal of land or buildings". In my judgment this is not a case for acquisition or disposal of land or buildings within the meaning of that section. This Section 521 appears in Part VI, Chapter XXXII, of the Calcutta Municipal Act, 1951, with the Chapter heading, "Acquisition, Disposal and General "Improvement of Land and Buildings" with the sub-heading, "Acquisition and disposal of land and buildings". That it is not acquisition in this case is obvious, and the point need not be laboured. Section 517 of the Act describes for what purpose and how the Corporation can acquire land or building. Section 518 provides the scheme for carrying out certain improvements. Section 519 give the power to the Corporation to carry out improvements. Section 520 provides for the right to transfer land and buildings to person for carrying out such improvements. It is in that context and in that juxtaposition that Section 521 comes immediately thereafter. I am, therefore, of the opinion that the additional powers for acquisition and disposal u/s 521 of the Act must be limited in the light of the express words used in that section, "for the acquisition and disposal of land or buildings" and not for any other purpose. I am satisfied that in this case the permission to Kamala Circus to occupy Marcus Square to show and exhibit Circus performances does not come within the meaning of ""acquisition and disposal of land or buildings" under that Section 521 of the Statute.

18. Then again the expression "land or buildings" must not be confused with the expression "public square and garden" on the naive assumption that every public square necessarily contains land and may also have some buildings or portions of structure on it. There is no definition for a public square or garden under the Calcutta Municipal Act. Section 5(60) defines a "public ""street" to mean among other things, "a square over which the "public have a right of way". While a public street will certainly under that definition include a square over which the public have a right of way, it does not necessarily follow that a public square is a public street.

19. For these reasons I am satisfied that Section 521 of the Act is no defence for the Corporation.

20. But this does not dispose of the application. The question still remains whether the action, of the Corporation can be Defended by other provisions of the Calcutta Municipal Act. Reference, therefore, is necessary to such other provisions.

21. Section 349(1) of the Calcutta Municipal Act, 1951, declares that:

All public streets and squares \*\*\*\*\* including the soil, \* \* \* of such \* \* \* squares \* \* \* and all erections, materials, implements and other things provided for such \* \*

\* squares \* \* \* shall vest in and belong to the Corporation.

22. This means that the site of the square is vested in the Corporation and that it belongs to the Corporation. The Corporation is, therefore, the legal owner. It follows, therefore, under the doctrine of incidental powers of the Corporation that the normal incidents of ownership should be given to the Corporation unless the Statute expressly creates any inroad upon them or provides for any restriction. Such restrictions are to be found in the provision regarding maintenance such as is contained in Section 351. While the owner may neglect his property, the Corporation cannot because the Statute casts a duty upon it for the purpose of public convenience that these squares should be suitably maintained and the Corporation should take all necessary steps for the same. Similarly, Section 361 provide for restriction that while an ordinary owner could have sold and let the land vested in him, the Corporation cannot sell or let the site of a public square or garden except according to the statutory resolutions, and statutory majority as provided in the proviso of Section 361. While it is true that no express right to temporarily close; a public square is given by Section 361(c) of the Act such as the one given in the case of public street, I shall nevertheless read the right to temporarily close a public square as an incidental and necessary right due to the fact that the square is vested in and belongs to the Corporation u/s 349 of the Act, The reason why the Statute gives express right even to temporarily close a public street is because of the common law doctrine of the highway with the right of way at any time and as a thoroughfare while that notion is absent in the case of a public square. This express statutory right to temporarily close a public street therefore does not mean an implied exclusion of such right in the case of a public square. I, therefore, can certainly consider that in order to take away the public right of thoroughfare on a street and highway even power to temporarily close such a street had to be given to the Corporation. That is the reason why the difference is made in the case of a public street and a public square or garden. It is not the reason in my view that the Statute wanted not to grant a right of temporary closure of a public square or garden to the Corporation. To concede to such a construction would lead to the most impractical situation. In the interest of the public, public parks and squares or gardens are closed during certain hours at night. If I hold that a temporary closing of a public square or garden is not permitted by the Statute, then all these provisions for closure of parks during certain hours of the night and all the by-laws contained in those provisions would be meaningless.

23. I shall now come to what I consider to be a more practical objection to the application. When a public square or garden is allowed to be used for a circus performance either to a circus company or a circus party, does it mean that the public square or garden is temporarily "closed" as a public square or garden. I have already said that there is no definition of a public square or garden. I, therefore, take the ordinary meaning of the expression public square or garden. I mean by that expression a square or a garden in the city of Calcutta to which a citizen has a

right to resort for purposes of relaxation, entertainment and recreation. Is a circus a recreation for the public or a section of the public? If so, the use of a public square or garden for purposes of circus exhibition or performance is well within the ordinary functions and uses of a public square or garden in the city. It is true that the right of access to the public square or garden will be restricted and limited both by the hour and perhaps by the fee, but that is not "closing" the public square or garden at all within the meaning of the Statute. Among the special powers of the Corporation u/s 526 (iii) and (iv) express powers are provided for the Corporation for laying out and maintenance of squares, gardens and playgrounds, and the supplying and maintenance of equipment for game in playgrounds and the playing of music in squares, gardens or other public places. By Section 527 of the Calcutta Municipal Act, 1951, the Corporation is given the power to make by-laws for carrying out the provisions and intentions of the Act, such as among others item (43) "\* \* \* supervision and control of \* \* \* circuses "\* \* and other places of public resort, recreation or amusement "and prescribing the terms and conditions subject to which "licenses may be granted for keeping open such places". Among the by-laws I find in by-law 2 the following provision:

2. On the occasion of any public entertainment, ceremony or exhibition taking place in any square or garden after permission has been obtained from or given by the Chief Executive Officer in that behalf the square or garden shall be kept open or closed for such period and upon such terms and conditions as may be considered by the Chief Executive Officer expedient and notified by him in the manner mentioned in by-law 1, or in one or more local newspapers.

24. The other by-laws make interesting reading showing wholesome rules for the proper use of public squares and gardens. These by-laws and the old ones are still in force. In this case the stage in which notice in the newspaper is required was not reached when the applicant moved this Court for a rule for annulling the resolution and the decision of the Standing Town Planning and Improvement Committee.

25. Section 548 of the Act provides for licenses and written permission under the Act or under any rule or by-law made thereunder and the requirements and the contents of such licenses. Such contents among others must state the purpose and the period if any for which the license is granted as well as the restrictions and conditions, if any, subject to which it is granted, and the tax or fee, if any, paid for the license or written permission. Section 548(2) says that-

Except when it is in this Act or in any rule or by-law made thereunder otherwise expressly provided, for every such license or written permission a fee may be charged at such rate as may from time to time be fixed by the Corporation and such fee shall be payable by, the person to whom the license or written permission is granted.

26. I also find other references to circuses. Section 442 of the Calcutta Municipal Act provides-

No person shall, without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf, keep open circus.... or other similar place of public resort, recreation or amusement,

27. so long as it is not a private performance. Section 444 of the Act gives the power to the Commissioner to stop use of the premises when used without or otherwise than in conformity with the terms of the licence. In providing in Schedule IV of the Act for tax on trades and callings u/s 218 and 219, Schedule IV provides rules as to licenses for such trades and callings with classification of these trades, among, which I find circus appearing as item 10 of class II, item 26 of class III, item 39 of class IV, item 56 of class V and item T6 of class VI. These rules regulate licenses. On a reference to all these provisions I cannot hold that circus is not a public entertainment. I am inclined to take the view that it is a great entertainment for many and for a large i section of the public. It was argued that, circus very often creates a nuisance in the locality. Wo doubt if it does create a nuisance, ordinary remedies to prevent the nuisance are open to any person affected. But that does not make the act of the Corporation in granting the licence or permission illegal or ultra vires the Statute.

28. Now actually the resolution of the Corporation of September 20, 1956, is in these terms:

That permission to occupy Marcus Square ground for a period of three months from such date as may be fixed by the Commissioner in consultation with the party or parties paying to the Corporation a lump sum of Rs. 25,000 and on depositing such security against any damage to the ground as may be fixed by the Commissioner and subject to other usual terms and conditions be granted.

29. The modified resolution of the same Committee was in these terms:

That the previous resolution of the Committee, dated the 20th September, 1956 be re-affirmed with the following two riders added:

(a) That in the meantime the Chief Law Officer be requested to give his opinion regarding the points raised in the letters received from Solicitor Shri Sovendra Nath Ghosh, and

(b) that pending the receipt of the opinion of the Chief Law Officer no intimation be given to the party regarding the allotment.

30. In the light of the provisions of the Calcutta Municipal Act, 1951, which I have analysed above I do not find that the Corporation in passing these two resolutions acted beyond the statutory powers. It may be recorded however that this case did not go beyond the stage of passing the resolution and in fact no license or lease had

in fact been granted for making over the possession of the Marcus Square for the purpose of circus performance.

31. I, therefore, discharge the Rule and dismiss the application. There will be no order as to costs.