

(1975) 06 CAL CK 0006

Calcutta High Court

Case No: Matter No. 124 of 1975 (Writ)

Scotts (P) Ltd. and Others

APPELLANT

Vs

Corporation of Calcutta and
Others

RESPONDENT

Date of Decision: June 18, 1975

Acts Referred:

- Calcutta Municipal Act, 1951 - Section 361(c)

Citation: 79 CWN 883

Hon'ble Judges: A.N. Sen, J

Bench: Single Bench

Advocate: R.C. Deb and N.C. Chakraborty, for the Appellant; Dipankar Gupta, General and Jayanta Mitter for Respondent No 1, S.C. Bose and M.B. Banerji, for the Respondent

Judgement

A.N. Sen, J.

In this writ petition the validity of the decision of the Corporation of Calcutta to set up what is commonly described as "Meena Bazar" in a part of Russel Street in Calcutta has been questioned. Russel Street is an important public street which is off Park Street. The petitioners who are eight in number have their established business in various premises in Russel Street. The Corporation of Calcutta has decided to set apart a portion of Russel Street during particular hours of the day for allowing hawkers to come and occupy the portion which may be allotted to the hawkers for the purpose of selling their goods and articles. The portion of the street which has been set apart and earmarked for this particular purpose has been divided into various cubicles which are to be allotted to hawkers on payment of consideration to the Corporation. The hawkers are expected to come and occupy the respective cubicles allotted to each with their goods in trolley or cart, vend the same during the hours of 4 p.m. and 9 p.m. and then leave the street. A part of the Street has also been left open and kept free for vehicular traffic. The hawkers were to occupy the allotted cubicles in the ear-marked portion of the street during the prescribed hours

in the manner prescribed for selling their merchandise and this proposed hawkers market on a portion of the street has been and is described as Meena Bazar., The purpose of setting up of the Meena Bazar the way in which the Meena Bazar is to function and the hours during which the Meena Bazar is to remain open have all been fully stated in paragraph 6 of the affidavit of Bimal Krishna Roy, the Deputy Commissioner (Buildings & Properties of the Corporation of Calcutta affirmed on 28th May, 1975, and intended to be used in opposition to the present petition. The main motive of setting up the Meena Bazar in Russel Street, it is alleged, is to rehabilitate the hawkers who have been evicted from Chowringhee and other areas of the city and part of the Russel Street is considered by the authorities concerned to be suitable for this purpose. The portion which has been set apart for setting up the Meena Bazar to be occupied by the hawkers has been shown in a plan annexed to the said affidavit. The said portion which has been set apart has been divided into various cubicles and each cubicles is to be allotted to a particular hawker on terms and conditions imposed by the Corporation of Calcutta and the hawker to whom a particular cubicle is allotted is to bring his or her merchandise in trolley or cart and is to occupy the particular cubicle allotted to him or her during the hours of 4 p.m. to 9 a.m. One of the terms and conditions on the basis of which a hawker will be entitled to occupy any particular cubicle is that the hawker shall not sub let the use of the space or any portion thereof or sublet, assign or otherwise transfer his or her right title or interest of any portion thereof or in the business conducted in that space or admit any partner in the business without special sanction previously obtained from the Commissioner, Corporation of Calcutta, in the behalf. This decision of the Corporation to set up what is described as Meena Bazar in the public street has been challenged in this writ proceeding by the petitioners.

2. Mr. Deb, learned counsel appearing on behalf of the petitioners, has contended before me that the Corporation of Calcutta has no power or authority to let out any portion of the public street or to allow any portion of the public street to be used as a bazar. It is the contention of Mr. Deb that public streets are intended only to be used as public streets and public streets cannot be utilised for the setting up of any kind of a Bazar. Mr. Deb has further contended that the necessary formalities of law for setting up a Bazar have not also been complied with and it is his contention that without complying with the requirements for the setting up a bazar, no bazar can be started by the Corporation. Mr. Deb has argued that the Corporation is the creature of statute and the Corporation must act within the four corners of the statute. It is the contention of Mr. Deb that the statute does not authorise the Corporation to set up a bazar in the public street. Mr. Deb in this connection has drawn my attention to various provisions contained in the statute. Mr. Deb has submitted that there is no provision in the statute which authorises or empowers the Corporation to set up any kind of a bazar in a public street. Mr. Deb has also relied on the decision of Sinha, J. in the case of [Biswanath Sinha and Others Vs. Sudhir Kumar Banerji and Others](#), and to the decision of Sabyasachi Mukherji, J. in

the case of [Girija Singh and Another Vs. The Corporation of Calcutta and Others,](#). Reliance was also placed on the decision in the case of Maniruddin Bepari v. The Chairman of the Municipal Commissioners, Dacca, reported in 40 C.W.N., 17. Mr. Deb has argued bye-law 12, referred to in paragraph 6(1) of the affidavit of Bimal Krishna Roy does not and cannot authorise the setting up of a Meena Bazar in Russel Street and the said bye-law is of no assistance. Mr. Deb has further argued that in the absence of any specific power conferred by the Act, no power can indeed be created or conferred by any bye-law and bye-laws must be consisted with the provisions of the Act.

3. The learned Advocate-General, appearing on behalf of the respondents, the Corporation and the authorities, has very fairly stated that there is no specific provision in the Act which empowers the Corporation to let out any portion of the public street or to allow use of any public street for the purpose of a bazar. He has, however, argued that u/s 361 (c) of the Calcutta Municipal Act 1951, the Corporation enjoys the power of turning, diverting, or temporarily or permanently closing any public street or part thereof or permanently closing any public square or garden. It is the argument of the learned Advocate-General that as the Corporation of Calcutta enjoys the power of temporarily or permanently closing any public street or part thereof, the Corporation must necessarily be considered to have the power of closing parts of Russel Street. The learned Advocate General has argued that the public streets are vested in the Corporation and they belong to the Corporation and the Corporation, as the owner of the public streets, is entitled to let out the said public streets or portions thereof to hawkers or to allow the hawkers to come and occupy portions of the said public street for selling their articles, particularly as the Corporation enjoys the power of temporarily or permanently closing any public street or part thereof.

4. It is the argument of the learned Advocate-General that as owner of the public street, the Corporation will undoubtedly enjoy the power of letting out the public street or allowing the use of the public street to hawkers in the absence of any provisions to the contrary, particularly in view of the power conferred on the Corporation u/s 361 (c) authorising the Corporation to close any public street or part thereof temporarily or permanently. The learned Advocate-General has in this connection referred to the judgment of Sabyasachi Mukharji, J. in Sourindra Narayan Sinha & Anr. v. The Corporation of Calcutta & Ors. (unreported--and judgment delivered on September 1, 1969) in suit No. 1062 of 1968. The learned Advocate General has placed particular reliance on the following observations :

The power or the right to grant a license is part of the proprietary rights of the Corporation, it is an incidence of ownership of the property. The Corporation would therefore have the right and power to enter into the proposed agreements with the licensees, unless there is any prohibition in the Act, either express or implied. I have not been able to find any. On the contrary there are certain provisions in the Act

which indicate that the Corporation has that right. Section 115 of the Act is in the following terms-- "There shall be one Municipal Fund held by Corporation in trust for the purpose of this Act to which all moneys realised or realisable under this Act (other than fine levied by Magistrates) and all moneys otherwise received by the Corporation shall be credited. The section therefore recognises the fact that save under express provisions of the statute, moneys can lawfully be received by the Corporation. Then there are the provisions of Section 548 of the Calcutta Municipal Act, 1951, indicating certain procedures for licenses and written permissions. Sub-clause (d) of Section 548(1) of the Act provides that the license or the written permission should state the name and address of the person to whom it is granted. Sub-clause (e) requires that the tax or fee, if any paid for the licence or written permission should also be stated. The section therefore confirms the position that the Corporation can realise parking fees from the owners of the motor vehicles if it so wanted. If these portions of the public streets belong to and vest in the Corporation and if after their closure by the Corporation u/s 361 of the Act the public cannot claim any right or way, then, for allowing public to use portions of the public streets for certain period I do not see impediment for the owner charging a fee or an amount. It cannot therefore be said that the Corporation has done something in this case indirectly which it could not have done directly.

5. The learned Advocate-General has further contended that in this instant case, the Corporation has not let out any portion of the public streets to the hawkers. According to the learned Advocate-General the Corporation has not granted the hawkers permission for a consideration to occupy their respective cubicles to be allotted to them in Russel Street during the prescribed hours for selling their goods. The learned Advocate-General submits that this act of permitting the hawkers to occupy the particular cubicle allotted to them during the prescribed hours for selling their merchandise cannot create any interest in the land and cannot be considered to be a case of letting out or leasing out any part of the public street.

6. The learned Advocate-General has relied on the following observations of Sabyasachi Mukherji, J. in the case of [Girija Singh and Another Vs. The Corporation of Calcutta and Others](#) :

To permit stall-holders to occupy or set up stalls in the streets closed either temporarily or permanently would be leasing out that portion because that would be licences coupled with interest and a licence coupled with interest can be classed as a lease in terms of section 362 of the Calcutta Municipal Act. If the Corporation has no right to lease out in case of permanent closure, the Corporation has also no right to lease out in case of temporary closure.

It is in the argument of the learned Advocate-General that the learned Judge has recognised the powers of the Corporation to allow the use of public street, if no interest is created, and the learned Judge has made this exception which covers the instant case.

7. The learned Advocate-General has also very fairly stated before me that apart from the bye law which has been referred to in sub-paragraph (e) of paragraph 6 of the affidavit of Bimal Krishna Roy, he is not in a position to produce any other bye laws of the Corporation of Calcutta which may have any bearing on the question.

8. In my opinion, the Corporation of Calcutta has no right or authority to let out any part of the public street or to allow the use of any part of the public street as Meena Bazar or any kind of a bazar. The Corporation is the creature of the Statute. The powers duties and obligations of the Corporation are contained in the Statute. The Corporation must act according to the provisions of the Statute. The main purpose for which the Corporation has been set up is to cater to the civic needs of the citizens and to provide for them the necessary amenities to which the citizens are entitled under this Act and for which they are required to pay to the Corporation. Public streets are undoubtedly vested in the Corporation and they belong to the Corporation; but, in my view, the Corporation does not become the owner of the public streets in the sense that the Corporation can do whatever the Corporation chooses with regard to the public streets, as a private owner can do with regard to property owned by him. Public streets have been vested in the Corporation for purposes of the Act. Public streets are essentially intended to be used as thoroughfares and the public streets have been vested in the Corporation to see that public streets are properly maintained and can be properly used as thoroughfares. Chapter XXI of the Calcutta Municipal Act, 1951 deals with streets and public streets. Section 349 provides that public streets shall vest in and belong to the Corporation. But the subsequent sections clearly go to show for what purpose public streets are vested in the Corporation. Section 362 is the only section which confers power on the Corporation to sell or lease out any public street or any part thereof. Section 362 reads as follows :

362. (1) When any public street, or part thereof or any public square or garden is permanently closed u/s 361 the Corporation may sell or leave the site of so much of the roadway and footpath as is no longer required, or 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. (2) In determining such compensation u/s 571, the Court shall make allowance for any benefit accruing to the same premises or any adjacent premises belonging to the same owner from the construction or improvement of any other public street, square or garden, at or about the same time that the public street, square or garden, on account of which the compensation is paid is closed." 10. This section makes it clear that only when a public street is not to be used as a public street any more and is permanently closed, the Corporation acquires the right to lease out or sell the said public street or any portion thereof. Powers conferred on the Corporation u/s 361 for permanently or temporarily closing public streets are indeed entirely for different purposes. In the instant case there has been no closure, temporary or permanent, of Russel Street or any portion thereof. The ownership of the Corporation of the public street is not like

the ownership of an individual of his private property. In my opinion, it cannot be said that the Corporation enjoys the power of letting out to hawkers or of allowing them the use of the portions of the Russel Street as owner of the said public street. The observation of Sabyasachi Mukherji, J. in the case of *Sourindra Narayan Sinha & Anr. v. The Corporation of Calcutta & Ors.*, on which the learned Advocate General has relied, to my mind, do not support the contention of the learned Advocate General that as owner of the public street the Corporation is free to do whatever the Corporation chooses with regard to the public streets. In the case of [Girija Singh and Another Vs. The Corporation of Calcutta and Others,](#) Sabyasachi Mukharji, J. while considering his earlier decision in *Saurindra Narayan Sinha's* case on which the learned Advocate-General relied, has observed as follows at pp 621-622:

"In the case *Sourindra Narayan Sinha v. Corporation of Calcutta* being Suit No. 1062 of 1968 the questions of granting licence to certain persons for realisation of fees for parking motor vehicles in the public streets and for that purpose closing portions of the public streets came up for consideration before me. In my judgment delivered on the 1st September, 1969 in the above-mentioned case I held that the Corporation in that case had the right to close portions of the public streets for the purpose of imposing the fee parking zones and thereafter giving licences to the persons to realise fees therefrom, Counsel for the petitioners contended that I had held that decision that the Corporation was the absolute owner after the closure of public street and therefore after the closure the Corporation was entitled to give licences in whatsoever manner the Corporation thought fit and proper. But in that case I held that section 362 did not apply because it was not a question of giving any lease or letting any portion of public street. Granting licence to certain persons of Calcutta for realisation of certain fees for parking motor vehicles was not either leasing out or selling the property. I further held that the Corporation has the power as the absolute owner to close permanently portion of the public street for introducing fee parking zones for the better traffic facility of Calcutta. That case I decided on the facts and in view of the controversy raised in that case and that decision cannot be understood to mean and I should nor be understood as saying that the Corporation is the absolute owner of the property in the sense that the Corporation can close public streets arbitrarily for the purpose not connected With the purpose of the Corporation and/or destructive of its functions and thereby exercise its right of ownership. The Corporation has the right of ownership only for the limited purpose of discharging the different functions given to it by the provisions of the Calcutta Municipal Act.

Setting up a Meena Bazar on a public street is not contemplated by the Calcutta Municipal Act and is no part of the Corporation's duty or functions under the Act. On the other hand, the clear duty of the Corporation of Calcutta is to see that a public street can be properly used as a public street and is properly maintained as a public thoroughfare.

10. In the case of *Biswanath Sinha & Ors. v. Sudhir Kumar Banerjee & Ors.*, 65 C.W.N. 339, Sinha J. observed at pp. 344-345 as follows:

The basic fact is that the Corporation is bound by Statute to provide public streets including footways for the use of the members of the public and to keep them in unobstructed user by the members of the public. I have held that this is not a discretion but a legal obligation. An attempt has been made in I his application to "show that only a part of a footpath has been obstructed, and not the whole. In my opinion, that is immaterial. No part of a footpath or a public street can be obstructed, and such user is wholly illegal. The bye-laws allow certain regulated user of a public street or public footpath, and this is the utmost that the Corporation can allow.

11. In the case of *Maniuddin Bepari v. The Chairman of the Municipal Commissioners, Dacca*, 40 C.W.N. 17, R.C. Mitter J. observed at pp. 18-19 as follows:

It is a fundamental principle of law that a natural person has the capacity to do all lawful things unless his capacity has been curtailed by some rule of law. It is equally a fundamental principle that in the case of a statutory corporation it is just the other way. The Corporation has no power to do anything unless those powers are conferred on it by the statute which creates it. In the Municipal Act of 1384, I do not find any power given to the Municipality to allow the use of a public thoroughfare from day to day for any other purposes than a public pathway. It has no doubt the power to divert a road and if it diverts it, a portion of the old road which is no longer necessary to be used as a road is land for all intents and purposes and as I have stated, the Municipality can deal with that land, which is no longer used as road, under the provisions of sec. 34.

12. In the *Calcutta Municipal Act, 1951*, I do not find any power given to the Corporation to allow the use of a public street from day to day for any other purposes than a public thoroughfare. The Corporation being a creature of the statute has no power to do anything unless those powers are conferred on it by the statute which created it. As the Corporation does not have any power to allow the use of the public throughfare, from day to day, thought during prescribed hours of the day, for the purpose of holding any kind of a bazar, the Act of the Corporation must be considered to be illegal, ultra vires and beyond its powers. No part of a public street can be obstructed for any length of time by the setting up of a Meena Bazar or any kind of a bazar by the Corporation, however laudable the purpose or object for setting up the bazar may be. The Court is not concerned with the motive of the act. The Court has to consider the legality of the act and the competence of the Corporation to do the act. The policy and motive are not relevant for deciding in the facts and circumstances of this case the legality of the act complained of. In this view of the matter, I do not consider it necessary to decide the further question whether any other formalities were required to be complied with before setting up the Meena Bazar in Russel Street. There, however, appears to be some force in this

contention of Mr. Deb. This petition, therefore, succeeds. The rule is made absolute and the order of injunction already passed is confirmed. In view of the order passed on this application it is not necessary to pass any other order on the application. This judgment disposes of the main rule and also the application. There will be no order as to costs. Rule made absolute.