

(1995) 07 CAL CK 0025

Calcutta High Court**Case No:** Civil Order No. 12246 (W) of 1995

S.M. Sajjad

APPELLANT

Vs

The Calcutta Municipal
CorporationRESPONDENT

Date of Decision: July 24, 1995**Acts Referred:**

- Calcutta Municipal Act, 1951 - Section 173
- Calcutta Municipal Corporation Act, 1980 - Section 131(3), 173, 401, 401(5), 602

Citation: (1998) 2 ILR (Cal) 310**Hon'ble Judges:** Satyabrata Sinha, J**Bench:** Single Bench**Advocate:** S.N. Sanyal and D. Sen, for the Appellant; Dipankar Chakraborty and Somnath De, for the Respondent

Judgement

Satyabrata Sinha, J.

An interesting question of law with regard to the power of Calcutta Municipal Corporation to recover costs in purported exercise of its power conferred upon it u/s 401(5) of the Calcutta Municipal Corporation Act, 1980 (hereinafter for the sake of brevity referred to as "the said Act") is in question in this application. The Petitioner is the owner of premises No. 61/F, Topsia Road, Calcutta. Allegedly he made some unauthorised constructions, as a result whereof on and from May 27, 1995 guards were posted by the Respondents to see the activities of construction, if any, being carried on in the said premises.

2. The Learned Counsel for the Petitioner has raised two contentions in support of this application. It is firstly contended that although a power had been conferred upon the Respondents Corporation to post guards, they cannot continue to do the same for an indefinite period keeping in view an undertaking given by the Petitioner as far back as in June, 1995 that he would not raise any construction whatsoever. It

was next contended that in any event as the Schedule appended to the said Act does not envisage levy of penalty for alleged violation of Section 401 of the said Act, no penalty can be imposed. The Learned Counsel for the Respondents, however, submits that in terms of Section 131(3) of the said Act, budget estimate is required to state the rates at which various taxes, surcharges, cesses and fees shall be levied by the Corporation in the year next following. According to the Learned Counsel, although Section 602 of the said Act confers power upon the Respondents to make regulation, non-framing thereof does not disentitle the Corporation to levy penalty by way of surcharges. In this connection, my attention has been drawn to a Circular letter being No. 1 of 1995-96 dated April 3, 1995. In support of his aforementioned contention, the Learned Counsel has relied upon a decision of a Division Bench of this Court in Corporation of Calcutta v. Sambhu Das Pyne 1985(1) C.H.N. 195.

3. Section 131(3) is an enabling provision. The said provision does not empower the Corporation to levy any penalty. A substantive provision is required to be made for levy of penalty in the said Act itself and in absence of such a provision, no penalty can be imposed. Section 610 of the said Act provides for imposition of fine for certain offences. The said provision reads thus:

610. Punishment for certain offences - whoever -

(a) Contravenes any provision of any of the sections, Sub-sections, clauses or proviso or any other provision, of this Act mentioned in Column 1 of Schedule VI, or

(b) fails to comply with any order or direction lawfully given to him or any requisition lawfully made to him under any such section, Sub-section, clause or proviso or other provision,

shall be punishable -

(i) with fine which may extend to the amount, or with imprisonment for a term which may extend to the period, specified in that behalf in column 3 of the said Schedule or with both, and

(ii) in the case of a continuing contravention or failure, with an additional fine which may extend to the amount specified in Column 4 of the said Schedule for every day during which such contravention or failure continues after conviction for the first such contravention or failure.

4, The Sixth Schedule appended to the said Act provides for levy of penalty for violation of any provisions but Section 401 of the said Act does not figure therein and thus, no penalty can be imposed in terms thereof.

5. Section 602 of the said Act" empowers the Corporation to make regulation not inconsistent with the provisions of the said Act or Rules made thereunder for discharging functions under the said Act.

6. Section 618 of the said Act reads as follows:

618. General penalty. - Whoever, in any case in which a penalty is not expressly provided by this Act, fails to comply with any notice order or requisition issued under any provision thereof, or otherwise contravenes any of the provisions of this Act, shall be punishable with fine which may extend to one thousand rupees, and in the case of a continuing failure or contravention, with an additional fine which may extend to one hundred rupees for every day after the first during which he has persisted in such failure or contravention.

7. A mere perusal of the aforementioned provisions would show that costs of deputation u/s 401(5) of the said Act has to be determined in terms of the Regulation framed in that regard. Regulation has been defined to mean regulation framed under the said Act. Power to make regulation by the Corporation has been conferred u/s 602 of the said Act.

8. The submission of the Learned Counsel for the Respondent corporation appears to be self-contradictory. An order imposing penalty in exercise of its general power as conferred u/s 618 of the said Act can be passed by the Corporation only upon complying with the principles of natural justice, as in terms of the said provision, the doctrine of principle of natural justice has not been expressly or by necessary implication excluded. It is now well known that when an order entails evil consequences, principles of natural justice must be complied with unless the same is excluded by any statute. Evidently, the Sixth Schedule opened to the said Act does not envisage imposition of any penalty for violation of the provision of Section 401(5) of the said Act.

9. It is now well settled principle of law that Statutory Authority must exercise its jurisdiction within four corners of the Statute. It, therefore, could realise any penalty and/or costs of deputation provided such a provision existed in the said Act. As indicated hereinbefore, the Costs to be realised from the owner of a building has to be determined on the basis of the regulation which is to be framed in terms of the provisions of the said Act. It is not a case where the act itself provides for a machinery to realise such costs. The costs incurred by the Respondents can be realised as a penal measure from the owners of the building. Deputation of persons is done with a view to seeking or watch the premises in order to ensure that the erection of the building and/or execution of the work is not continuing. The said provision provides for a special power on the Corporation. Such cost has to be determined in terms of the procedure laid down in terms of the regulations to be framed. Such costs are also recoverable from such person as arrear of tax which necessarily implies determination thereof by the Corporation as such an order would be at par with a decree which is capable being executed. Such a determination of costs, therefore, in my opinion, only could have been made in terms of the regulation and not otherwise.

10. The Circular No. 1 of 1995-96 upon which strong reliance has been placed by the Learned Counsel for the Respondents, merely shows that certain fees and charges

were specified for levy therefore upon all concerned. A matter which is required to be done by way of Statute cannot be done by reason of a circular. A circular is not a substitute or regulation which has the force of law. It is now well known by reason of various decisions of this Court as also of Supreme Court of India, that the Statutory authority cannot perform any function it likes unless the same is expressly provided for in the Statute unlike a natural person. Reference in this connection may be made to *Maniruddin Bepari v. The Chairman of the Municipal Commissioners, Dacca* 40 C.W.N. 17. The same view has been taken by this Court in *Scott (P) Ltd. v. Corporation of Calcutta* 77 C.W.N. 883 and *Sasanka Sekhar Pande v. State of West Bengal* 190 C.W.N. 924 . In [M. Pentiah and Others Vs. Muddala Veeramallappa and Others](#), the Apex Court held that an action of a statutory corporation may be ultra vires its powers without being illegal. It also held that when a statute confers an express power, a power inconsistent with that given expressly cannot be implied.

11. In *Corporation of Calcutta v. Sambhu Dae* (Supra) upon which reliance has been placed by Mr. Chakraborty, the Division Bench of this Court was considering absolutely a different fact-situation. The fact in the aforementioned case was that a consolidated rates was fixed upon a Bustee. The learned Single Judge held that in absence of any Rule framed u/s 173 of the Act which was then existing, no such rate can be imposed. The Division Bench reversing the decision of the learned Single Judge held that power of the Corporation to impose consolidated rate upon a Bustee cannot remain suspended pending framing of a Rule. The learned Judge observed that Section 173 of the Calcutta Municipal Act, 1951 did not either impliedly or expressly lay down that until rules were made by the Standing Finance Committee, consolidated rate could not be lawfully imposed in the case of Bustee. As indicated hereinbefore, Sub-section (5) of Section 401 of the said Act categorically states that the cost for posting a Constable can be made in terms of the regulations framed by the Respondent Corporation under the said Act.

12. It is now beyond any cavil of doubt that in the event "the Statute itself is a complete code without not only incorporates the power to levy or assess or recover tax ; but also provides for a machinery therefore, such power can be exercised although no Rule has been framed therefore. On the other hand, if machinery for assessment, levy or recovery of the tax or any other import is subject to the rules or regulations, the Statute does not become workable unless and until such rules or regulations are framed.

13. By reasons of such regulations, the mode and manner of such determination has to be prescribed. It is also necessary to designate officers for this purpose. Moreover, difficult amount, of costs may have to be specified keeping in view the personnel deputed therefore, period of deputation and other relevant factors.

14. Sub-section (5) of Section 401 of the said Act is a special provision. Sub-section (4) of Section 401 of the said Act empowers the authorities of the Municipal Corporation or other employees of the Corporation, apart from its power under

Sub-section (1) of Section 401 of the said Act. A person, as indicated herein before, who violates the provision of Sub-section (1) of Section 401 of the said Act may become liable for payment of penalty in terms of Section 618 of the said Act. The power to recover costs incurred by the Corporation for deputation of police officer or employees is in addition to such powers.

15. In this view of the matter, I am of the opinion, that as costs for such deputation is required to be determined by the Corporation in terms of the regulations, no such costs can be levied unless a regulation is framed. It is not in dispute that there does not exist any machinery for determination of amount of such costs of deputation. In other words, the manner and the extent of determination of such costs must be laid down by the Corporation itself by framing an appropriate regulation, so that as soon as such a determination is made, the owner/occupier of the premises in question who has raised any construction in violation of the provisions of Section 401 of the said Act can be asked to pay such amount failing which such costs can be recovered as an arrear of tax under the said Act. Unless there exists an order passed by a Competent Authority in accordance with law, such an order cannot become executable so as to enable the Corporation to recover the said cost as an arrear of tax. In this view of the matter, I am of the opinion that as no regulation has to be framed in terms of the provisions of the said Act, the requirement thereof cannot be said to have been fulfilled by issuing an executive order. A regulation is a subordinate legislation, whereas a circular letter is merely an executive instruction. Where a Statute provides a matter to be done in terms of a sub-ordinate legislation, the same, in my opinion, cannot be done by issuing an executive instruction inasmuch as the statutory authority must perform their functions as laid down under the Statute and not otherwise.

16. For the reasons aforementioned, this application is disposed of with the following directions:

1) Keeping in view the undertaking given by the Petitioner, measurement of the works carried out by the Petitioner may be taken by an officer deputed by the City Architect.

2) No costs of such deputation can be recovered from the Petitioner, but it would be open to the Respondent Corporation to proceed as against the Petitioner in terms of Section 618 of the said Act, If any deputation of any officer is made in terms of Section 401(5) of the said Act, the costs therefore have to be borne by the Corporation.

3) Having regard to the facts and circumstances of this case, it is expected that Mayor-in-Council, shall bestow their attention upon the matter immediately and take appropriate steps for framing a regulation in this regard at an early date.

17. Let a plain copy of the operative portion of this order duly countersigned by the Assistant Registrar (Court) be handed over to the Learned Counsel appearing for

both the parties on usual undertaking.