

(2013) 12 CAL CK 0046

Calcutta High Court

Case No: W.P. No. 22850 (W) of 2012

Jayanta Chatterjee and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision: Dec. 4, 2013**Citation:** (2014) 4 EFLT 199**Hon'ble Judges:** Ashim Kumar Banerjee, Acting C.J.; Debangsu Basak, J**Bench:** Division Bench**Final Decision:** Disposed Off

Judgement

Debangsu Basak, J.

In the present era environment requires protection and preservation. Every available greenery in a city needs to be zealously guarded. The present public interest litigation seek remedial measures for the boulevard on the Southern Avenue in the city of Kolkata. It is one of the last surviving boulevards in Kolkata. According to the petitioners the boulevard islands in the Southern Avenue was put to improper use, encroached upon and no attempt made for the preservation of the greenery.

2. Mr. Utpal Bose appearing on behalf of the petitioners drew our attention to the various instances of improper use of the boulevard islands. Near Golpark a public convenience was set up. Opposite Lake Kalibari the boulevard was allowed to be used by Lake Kalibari to store building materials. A portion of the boulevard was converted to swimming pool and a portion was allowed to be used by a school. All of these according to Mr. Bose were improper use of the boulevard and appropriate orders should be made for their removal. He placed the reply to the Right to Information query at page 35-A of the writ petition to contend that Kolkata Improvement Trust was the owner of the boulevard. With regard to Lake Kalibari the Right to Information stated that talks with Lake Kalibari Authority was on and that Lake Kalibari has started beautifying the boulevard and that the fencing will be opened very soon. The reply is dated May 25, 2011. Nothing has been done by Lake

Kalibari since then according to him.

3. Mr. Bose relied on section 35-C(i) and (j) of the Kolkata Improvement Trust Act, 1911 to contend that the Kolkata Improvement Trust did not give permission to Lake Kalibari to use the boulevard. He also relied upon section 35-C(2) to contend that it was the duty of the Kolkata Municipal Corporation to prevent wrongful user of the boulevard.

4. Mr. Asoke Kumar Banerjee, appeared for the Kolkata Municipal corporation. He contended that section 35-C(2) of the Kolkata Improvement Trust Act, 1911 was not attracted.

5. Mr. Tapan Kumar Mukherjee, Additional Government Pleader appeared for the State. The State did not use any affidavit in the proceedings.

6. Mr. Jayanta Kumar Mitra appeared for the Lake Kalibari Authority. He vehemently opposed the grant of any relief in the proceedings. He relied upon sections 48, 54 and 65 of the Kolkata Improvement Trust Act, 1911 to contend that no scheme was formulated or is in place. Since no scheme is in place the question of applicability of sections 35-A to 35-C of the Kolkata Improvement Trust Act, 1911 did not arise. He also questioned the reply dated May 25, 2011 at page 35-A of the writ petition which states that Kolkata Improvement Trust was the owner of the boulevard.

7. He then relied upon various provisions of the Kolkata Municipal Corporation Act, 1980 to contend that the boulevard was vested with the Kolkata Municipal Corporation. It was for the Corporation in any event to grant permission for stacking of building materials which the Corporation did upon receipt of requisite fees. The Corporation had acted rightly in granting such permission. Such permission had enured to the benefit of the public as no building material was required to be stacked on the pavement or the road leaving the same free for pedestrian and vehicular traffic. Grant of permission is the exclusive domain of the Corporation. Such permission being reasonable and not vitiated by capriciousness or arbitrariness the Court need not interfere with the same.

8. In its affidavit Lake Kalibari Authority at paragraph 4 (e) to (h) stated as follows:

(e) On the basis of my application, the Kolkata Municipal Corporation gave permission by letter dated 14.6.2012 to use the boulevard in front the Lake Kalibari on temporary basis for six months. The said permission has again given for six months by letter dated 2.1.2013.

Copies of the letters dated 14.6.2012 and 2.1.2013 are annexed hereto and marked to the Letter 0-4.

(f) That after getting the permission for the Kolkata Municipal Corporation to use the boulevard in front the temple, the Temple Authority has cleaned the Boulevard and beautified the same with trees and made the Some copies of the boulevard with

plantation of trees are annexed hereto and marked 0-5 collectively.

(g) On the basis of the order of the Kolkata Municipal Corporation, the work for curving on marble stone is going on the boulevard to complete the construction of new temple.

(h) That to complete the beautification of the temple some more time is required and to expedite the beautification of the temple the boulevard is required for curving the marble and after the completion of the beautification of the temple, the temple authority will take a step for beautification of the boulevard in front of the temple and a plan for beautification of boulevard is already made by the temple authority.

A copy of the proposed beautification plan in front of the temple is annexed hereto and marked 0-6.

9. Paragraph 4 (f) of such affidavit appears to have some lines missing.

10. Mr. Mitra drew our attention to section 343 of the Kolkata Municipal Corporation Act, 1980 to submit that all public streets, squares, gardens in Kolkata stood vested in the Kolkata Municipal Corporation. He also placed reliance on section 343(3) of the Kolkata Municipal Act, 1980 to submit that it was for the Corporation to transfer to the Board of Trustees for the Improvement of Kolkata public streets, squares or other land as the provisions of section 54 of Kolkata Improvement Trust Act, 1911 required. He placed reliance on section 54 of the Kolkata Improvement Trust Act, 1911 to submit that no scheme was formulated. Therefore, according to him section 35-A to 35-C of the Kolkata Improvement Trust Act, 1911 has no manner of application. Relying on section 375 of the Kolkata Municipal Corporation Act, 1980, he submitted that the Kolkata Municipal Corporation can grant permission for temporary erection of a structure on a public place on payment of such fees and on such conditions as may be determined by the Corporation.

11. He drew our attention to section 371 of Kolkata Municipal Corporation Act, 1980 and submitted that it was for the Corporation to grant permission to erect or set up any wall, fence, rail posts or other structure on any street. The definition of street was also relied upon by Mr. Mitra placed sections 48, 54 and 65 of the Kolkata Improvement Trust Act, 1911 and submitted that it was only for corporation to grant permission as done in the instant case. He contended that since grant of permission to use the boulevard was the exclusive domain of Corporation the decision of the Corporation in granting such permission cannot be looked at by the Court as a Court of appeal.

12. Fact remains that the permission of the Kolkata Municipal Corporation has expired. Mr. Mitra handed over a copy of the application dated June 13, 2013 seeking extension of time from Kolkata Municipal Corporation and submitted that the same is pending.

13. He relied upon *Inland Revenue Commissioners and another v. Rossminster Ltd.* and other 1980 AC 952. and *Laker Airways Ltd. v. Department of Trade* 1977 (1) QB 643 to contend that the High Court is not a Court of appeal of executive action and that Courts should not interfere with policy decisions. He relied upon [M. Naina Mohammed Vs. K.A. Natarajan and Others](#), [S.R. Bommai and others Vs. Union of India and others etc. etc.](#), and [M.C. Mehta Vs. Union of India \(UOI\) and Others](#), to emphasize the scope of power of a Court to review an executive action.

14. He further contended that Lake Kalibari was using approximately 5% of the total boulevard area and that upon completion his client would beautify the boulevard.

15. Kolkata Improvement Trust despite directions for filing affidavits did not use any affidavit. During hearing they did not appear.

16. Question is whether the boulevard island can be allowed to be used by a private person for stacking building materials? The question answers itself. The authorities were not exactly covering themselves with glory in granting permission. Thankfully no permission exists as on date.

17. Right to have a living atmosphere congenial to human existence is a part of right to life. [M.C. Mehta's case (supra)]

18. A healthy environment is a part of the fundamental right to life. Right to live in a clean city is recognized as both a constitutional and statutory right. Article 48-A of the constitution enjoins that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. Article 51-A(g) specifies that it shall be the duty of every citizen of India to protect and improve the natural environment including, forests, lakes, rivers and wildlife, and to have compassion for living creatures. Looked at in such prospective the greenery of a boulevard needs protection. User of a boulevard to stack building materials does not advance the cause of a clean or healthy environment, rather it actually demolishes it.

19. We need not go into the issue as to whether the boulevard stood vested with the Kolkata Improvement Trust in view of the provisions of the Kolkata Improvement Trust Act, 1911 or that the same is the property of the corporation under the Kolkata Municipal Corporation Act, 1980. In its reply under Right to Information Act the Executive Engineer of the corporation has stated that Kolkata Improvement Trust is the owner of the boulevard. Could Kolkata Improvement Trust or the Corporation as the owner of the boulevard grant permission to stack building materials? The permission granted by the Corporation was not for a public purpose. A public place was allowed to be utilized by a private person may be upon payment of fees. The receipt of fees is not sufficient compensation for the environmental damage and impact that stacking of building materials causes to the boulevard.

20. The case reported at Inland Revenue Commissioners and another v. Rossminster Ltd. and others 1980 AC 952 relates to a writ petition seeking to quash a warrant for seizure of documents. The relevant authority under the English Taxes Management Act, 1970 was empowered to seize documents. It was held in such context, that seizure of documents by an officer under the appropriate statute involved the decisions by the officers as to what documents which may be seized. The decision making power was given to the officer by statute, he was not required to give his reasons and the public interest immunity provided justification for his refusal to do so. Since he did not disclose reasons the Court did not find any ground to set aside his decision on error of law. In the case at hand neither the provisions of the Kolkata Improvement Trust Act, 1911 nor the Kolkata Municipal Corporation Act, 1980 under which a permission to stack building materials was given statutorily empower the permit granting authority not to give reasons. In India Courts frowned upon decisions of the executive uninformed with reasons. Mr. Mitra then relied on Laker Airways Ltd. v. Department of Trade 1977 (1) QB 643 for the proposition that Judges have nothing to do with either policy making or carrying out of policy. In the instant case, K.M.C. and State have appeared. None of them have contended that it was the policy of either of them to allow building materials to be stacked at a boulevard. No policy of the State has been pressed into service in this regard.

21. Mr. Mitra relied upon [M. Naina Mohammed Vs. K.A. Natarajan and Others](#), as well as [M.C. Mehta Vs. Union of India \(UOI\) and Others](#), to emphasize on the scope of power of Court for judicial review. In the M.C. Mehta's case (supra) the Supreme Court was of the view that it was imperative for the authority not to legalize blatant illegalities. In that case land earmarked by the Delhi Development Authority for a particular purpose was sought to be used for a different purpose. In such context the Hon"ble Supreme Court held that land cannot be permitted to be used contrary to the stipulated user except by amendment of the master plan after due observation of the provisions of the Act and Rules. It went on to say that inaction by be Government amounts to indirectly permitting unauthorized use which amounts to the amendment of the master plan without following the due procedure.

22. Relying on Naina Mohammad case (supra) it was contended that should the Court discover any error of law on the part of the corporation or Kolkata Improvement Trust the Court ought to remit the matter for fresh consideration by the Corporation. No permission subsists as on date.

23. None of the authorities cited by Mr. Mitra assist his case. In fact, in the M.C. Mehta's case (supra) the Supreme Court was of the view that the Courts ought to intervene when illegality such as the instant case is brought to the notice of the Court.

24. Four instances of wrongful user of the boulevard had been canvassed by the petitioners. The first being conversion of a portion of the boulevard for public convenience. Such conversion being for a public purpose we are not minded to

interfere. The second instance is that of a portion of the boulevard being converted into a swimming pool. Again the same being for a public purpose we are not minded to interfere. The third is the permission granted to a school to use a portion of the boulevard as a playground. Public element is involved. School children use it for play. We are not minded to interfere.

25. The last being the user of the boulevard by the respondent No. 5 to stack building materials is what we will address. The respondent No 5 states that at present sculpting work is being carried out at such boulevard. The temple is nearing completion. The sculpting work cannot be rushed and that they require at least two years' time to vacate the boulevard. They also submitted that they would beautify the boulevard as shown in their affidavit.

26. At present there is no subsisting permission of K.M.C. for the respondent No. 5 to use the boulevard for sculpting work or for that matter for any work. However, to facilitate the respondent No. 5 to vacate the boulevard we allow the respondent No. 5 six months' time from date to vacate the boulevard. Within a period of three months, thereafter, the respondent No. 5 will beautify the boulevard as shown in its affidavit. With the aforesaid directions this writ petition is disposed of. There will be no order as to costs.

Ashim Kumar Banerjee, A.C.J.

I agree.