

**(1989) 04 CAL CK 0061**

**Calcutta High Court**

**Case No:** None

Asoke De

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

---

**Date of Decision:** April 26, 1989

**Acts Referred:**

- Calcutta Municipal Corporation Act, 1980 - Section 199, 2(32), 200, 200(3), 416
- Constitution of India, 1950 - Article 14, 226, 276

**Citation:** 93 CWN 1052

**Hon'ble Judges:** K.N. Yusuf, J

**Bench:** Single Bench

**Advocate:** Mukul Prokash Banerji, Saktinath Mukherjee, Tapan Kr. Roy, Kalyan Bandhyopathayay and M.P. Chakraborty, for the Appellant; S.K. Chatterjee, P.K. Banerjee, Aloke Ghosh, R.N. Mitra, A. Kundu and Debabrata Mukherjee, for the Respondent

---

### **Judgement**

K.M. Yusuf, J.

The petitioner has moved the writ court for several reliefs including a direction not to change the residential nature of the building in question for commercial purpose, restraining the police authority from granting police licence in respect of a restaurant or hotel in the premises, in action on the part of the Calcutta Municipal Corporation from stopping or removing of the restaurant or hotel from the said premises. The premises in question is premises No. 40, Jatin Das Road, Calcutta -29. Briefly speaking, the case of the petitioner is that the premises No. 40, Jatin Das Road is a dwelling house within the meaning of section 2(32) of the Calcutta Municipal Corporation Act, 1980 for use wholly or principally for human habitation. The petitioner entered into a registered agreement of lease dated 10th July, 1987 with the respondent No. 14, the owner of the said premises, in respect of a specified portion of the said premises in the ground floor as a lessee for a period of 25 years with effect from July 1987 at a rental of Rs. 1,500/- per month. The petitioner who is a legal practitioner is residing in the said premises with his family members and

having his chamber at 44B, Jatin Das Road, a few yards away from the said premises. The petitioner states that the premises is exclusively a dwelling house and there is or was no restaurant or hotel in the said premises or in its neighbourhood at any point of time. In the ground floor of the said premises one room is kept by the owner and the same was used for his drawing room. A sketch map has been annexed with the writ application as Annexure "A" to give an idea of the entire premises. It is the further case of the petitioner that in the front portion of the said premises there was an unused room and this particular room was let out to respondents Nos. 15 to 18 where these respondents started a business under the name and style of Quality Grill Food Products on and from 29th April, 1988. Initially the respondents Nos. 15 to 18 were using this particular room as their office room and the owner gave assurance to the petitioner that respondents Nos. 15 to 18 would be using the room as an (sic)ice of their catering business and these respondents had been maintaining a kitchen somewhere at Deshpriya Park. In the sketch map this particular room being used by the respondents Nos. 15 to 18 has been marked as "X". In the meantime the respondents Nos. 15 to 18 with a view to change the modus operandi of their business constructed a pucca room at the backyard of the said premises marked as "Y" in the sketch "map obviously with the consent of the owner and without any sanctioned plan and from 10th October, 1988 (the Mahalaya day) they started moving, preparing and cooking various types of food from 8 a.m. to 11 p.m. daily and converted the front room marked "X" as eating house-cum-hotel. As the owner, the respondent no. 14, is residing in the first floor and the petitioner is residing in the ground floor absolutely adjacent to the kitchen marked "Y" it became emphatically impossible for the petitioner to stay in the said premises because of such large scale cooking and smoke, smell, gas, odour, etc. coming out from such food processing for almost 15 hours a day. Such large scale cooking not only pollutes the natural air with gas and foul odour but it creates smoke nuisance and air pollution causing health hazard for the petitioner and his family members. The kitchen is situated very near to the bed room of the petitioner. On the southern end of the premises opposite to the kitchen there is a toilet marked "Z" and this toilet has been made open to the customers of the restaurant or hotel which is now functioning under the same and style of Quality Gill Food Products. In the eastern side also there is a small passage leading to the toilet. On both eastern and western sides the petitioner has his bed room and both the passages are used by the outsiders (i.e. the customers of the restaurant or public) thus completely doing away with the privacy and security of the petitioner and as such he had to close down his windows and doors all through the day and night. It is the specific case of the petitioner that the respondent no. 14 i.e. the owner, has not obtained any sanction of the construction of the kitchen from the Corporation and that the respondents nos. 15 to 18 are carrying on their business in the said premises without obtaining any police licence, health licence, food licence, fire licence and other statutory licences which are indispensable for running an eating house, restaurant or hotel. It is the further case of the petitioner that The respondent no.

14 had permitted the respondents nos. 15 to 18 to use part of the building for kitchen, toilet and eating house contrary to the provision of Section 416(1) Clauses (b), (c) and (d) of the Calcutta Municipal Corporation Act, 1980.

2. Apart from this the petitioner had referred to the various sections of the Calcutta Municipal Corporation Act, 1980 to bring home the point that the business is being carried on in violation of the provisions of the said Act including the use of water connection for domestic use which is now being used for the business of hotel. Also the petitioner has lodged complaints to the police authorities that the hotel business is being carried on in contravention of Calcutta Police Act. A similar complaint was lodged with the Secretary, Food & Supplies Department, Government of West Bengal. Though the enquiry was held no action was taken by the authorities. It is stated that the business is being carried on without any food licence from Food Department and also any fire licence from the Directorate of Fire Services. It is further contended by the petitioner that he has come to know that the police authority is taking steps for granting police licence to respondents nos. 15 to 18 contrary to the provisions of law. The whole emphasis of the petitioner is on the point whether a particular business or a manufacturing establishment is or is not a nuisance to those who may be disturbed or annoyed thereto in the place of its location. Hence the writ application for a direction upon respondents nos. 1 to 13 to take appropriate action against respondents nos. 15 to 18 and to stop or close down the said eating house known as Quality Grill Food Products also known as Fast Food Centre.

3. The respondent No. 14, the owner of the premises, by an affidavit-in-opposition stated that since 1950 the premises No. 40, Jatin Das Road has been used for both residential and commercial purposes by various tenants and it is not exclusively for residential purpose. The kitchen at the back yard referred to by the petitioner was constructed in the year 1931 and used as such by the owner of the premises all along. It is stated that the Quality Grill Food Products owned by the respondents Nos. 15 to 18 cater food from 12 noon to 9.30 p.m. It is neither a hotel nor an eating house as alleged. It is stated by this respondent that as he himself is residing with his family in the said premises had there been any nuisance of any nature he would have taken action himself. He contended that there is no foul smell which can be termed intolerable or nuisance. So far the toilet is concerned the owner's case is that the question of violation of privacy or security of the petitioner does not arise. It is further contended by this respondent that the requisite licences for running the business of respondents nos. 15 to 18 had already been obtained and/or are obtainable. He once again emphasises that the kitchen in question is not a new construction at all and this kitchen is not adjacent to the bed room of the petitioner as alleged by him.

4. The respondents nos. 15 to 18 in their Affidavit-in-Opposition strongly challenged the contention of the petitioner. This affidavit is affirmed by the respondent no. 15,

Hiranmoy Chatterjee, one of the partners of the Quality Grill Food Products. The case of these respondents is that by two registered deeds of lease they became the lessees in respect of the premises in question, one deed related to the room in the front portion of the said premises and another to the kitchen which according to these respondents are described in the deed of lease as "a kacha construction having an asbestos roof". It is very boldly asserted in the Affidavit-in-Opposition that to effectively operate the said Quality Grill Food Products the deponent as a partner applied for the requisite licence and obtained the same u/s 199 and 200 of the Calcutta Municipal Corporation Act, 1980. It is further stated that these respondents have applied for licence under Prevention of Food Adulteration Act before the Calcutta Municipal Corporation and the receipt of the licence itself is a licence issued by the Health Officer and the Licencing Authority. Health licence u/s 421 of the C.M.C. Act, 1980 has already been applied for and the inspection has taken place but could not be granted as the matter is sub-judice in the High Court though the Inspector concerned found the premises and the arrangement made in order. A police licence has also been applied for and inspection has taken place and found to be in order but could not be issued due to the High Court's order. This Affidavit-in-Opposition specifically states that the said Quality Grill Food Products is a Fast Food Centre and the customers can order and take away prepared food, and the office room contains only a for(sic) rack sufficient only for four persons to eat in standing posture. It is fun admitted in the affidavit that the Fast Food Centre of the Quality (sic) Food Products is very popular in and around the locality and the said premises is used as kitchen and office of the Centre. It is denied that this premises is exclusively used as a dwelling house and in support of this contention the affidavit states that behind the garage of the said premises here used to be a dhobikhana for the last 30 years having an open chula used by the dhobis. It is further stated that the room at the portion of the premises used as kitchen by these respondents for their business is beyond the writ petitioner's demised premises and it at (sic)st 13 feet away from the room which is allegedly used as the bed rooms of the writ petitioner. These respondents alleged ulterior motives on the part of the writ petitioner violative of Article 14 of the Constitution by preventing these respondents from carry on their livelihood. The toilet referred to in the writ petition is never used for the use of public or for the customers of the Fast Food Centre.

5. It is also denied that there is any obstruction to free air and light as alleged. So far the kitchen is concerned as it is a kacha structure with asbestos roof as such the question of violation of any statutory law does not arise. So far the question of water connection is concerned it is denied that the kitchen has any water tap but the water is carried from outside. It is also denied that substantial number of gas cylinders are stored. The further contention of respondents nos. 15 to 18 is that there is enough scope in the Calcutta Municipal Corporation Act, 1980 for lodging complaint for any violation of municipal laws and the writ jurisdiction of the High Court need not be invoked for the purpose.

6. The petitioner in the two Affidavits-in-Reply have dealt with the Affidavits-in-Opposition filed by the landlord and the respondents no. 15 to 18.

7. On 20th December, 1988 this Court appointed Mr. Rupendra Nath Mitra, an Advocate of this Court, as a Special Officer to visit the premises No. 40, Jatin Das Road, Calcutta, and to see and inspect whether there is any existence of any hotel or restaurant and/or Fast Food Centre run by the respondents Nos. 15 to 19 and the location of the kitchen and eating house as specified in the sketch map marked Annexure "A" to the writ petition and any other feature which the Special Officer shall note. The Special Officer has submitted his report dated 10th January, 1989 along with the minutes of the inspection dated 26th December, 1988 with 24 photographs. From the report of the Special Officer it appears that the eating house and the kitchen as well as the toilet in question are situated at the place marked in the sketch map as "X", "Y" and "Z". Mr. Hiranmoy Chatterjee, the respondent no. 15, told the Special Officer that the kitchen is used for the purpose of preparation of food for the Fast Food Centre known as Quality Grill Food Products. The Special Officer noticed inside the kitchen sink tank, refrigerator, etc. and other utensils. There is no water connection in the kitchen from the Corporation line. The front room in the premises is about 9 1/2" x 7" and there is one cash counter and a folded rack used for the purpose of eating food by the customers. The Special Officer also noticed a sign board with the inscription Quality Grill Food Products. On the glass of the room it was inscribed ".Chinese, Moglai and continental food available here. You can eat or take home from 12 noon to 9.30p.m.". The Special Officer also entered into the premises occupied by the writ petitioner and saw his thakurghar which is adjacent to the kitchen, the distance will be about 56 inches or 4 feet 8 inches and the distance from the door of the kitchen to window of the bed room is 156 inches, roughly 13 feet. On the western side of the building through 14 feet common passage there is a toilet and in front of the building a dhobikhana and a garage with small enclosure with a chula. Some photographs were taken by the Special Officer to explain to the Court the exact location of the disputed premises.

8. Mr. Saktinath Mukherjee, the learned Advocate appearing for the petitioner, submitted that the premises no. 40, Jatin Das Road is primarily a residential house and the petitioner took lease of the premises for his residential purpose. The respondents Nos. 15 to 18 took lease of the room in the north-eastern corner of the said premises with facility of common privy for their" office purpose as is apparent from the recital portion of the Indenture of Lease dated 11th May, 1988 whereas by another Indenture dated 30th September, 1988 they took lease of one room situated in the south-eastern corner of the said premises for their business purpose as it also appears from the said deed.

9. Mr. Mukherjee first cited Section 199 of the Calcutta Municipal Corporation Act, 1980 and submitted that it is a corporation tax meant for any profession, trade or calling as mentioned in Schedule IV of the Act. This particular tax on professions,

trades or challenges derives its force from Article 276 of the Constitution of India and is a tax on income other than income tax which is a Union subject. He takes the Court through Sec. 396 of the Act which relates to sanction for the execution of building and thereafter Section 416 which relates to the change of use of the building without any written permission of the Municipal Commissioner or otherwise than in conformity with the conditions, if any, of such permission. Then he cited Section 419 which puts a bar upon the establishment in any premises, any factory, workshop or trade in which steam, electricity, water or other mechanical power is employed. Sub-section (2) of Section 419 further imposes conditions of not granting permission on the ground of density of population in the neighbourhood and the nuisance of inhabitants, etc. The next important provision is Section 421 of the Act which says that eating houses cannot be established without the permission of the Municipal Commissioner and all the aforesaid permissions must be strictly subject to the provisions of Section 425 of the Act. His next contention is that Section 435 stops the use of any premises for non-residential purpose without municipal licence and such licences are to be obtained under Schedule V, Part I, Item 23(xxvi). If any provision of the Act is violated in relation to the aforesaid matter then the Municipal Commissioner is quite competent, to stop the use of the premises in contravention of law u/s 441 of the Act. He next drew the attention to certain portions of the affidavit-in-Opposition filed by respondents nos. 15 to 18, the first one is Annexure "D" which is just a receipt of fee of Rs.30/-dated 25th November, 1988 paid to the Health. Department of the Corporation for issuance of a health licence and is not a licence in itself as is claimed by the respondents nos. 15 to 18, another one is Annexure "E" which is an application to the District Health Officer (IV) received by him on 29th November, 1938 for a licence u/s 421 of the Act for the Fast Food Centre (eating house). Another is a letter addressed to the Commissioner of Police being Annexure "F" for a police licence for the said Fast Food Centre under the name Quality Grill Food Products a copy of which was handed over to the Commissioner of Police on 29th November, 1988. The last one is an application for a police licence of which Clause 7 is filled in by Hi(sic)noy Chatterjee as "eating house, new case."

10. Mr. Mukherjee strongly submitted that by merely taking a licence u/s 199 of the Act which in fact is a tax on professions, trades or callings by virtue of Article 276 of the Constitution one can have no legitimacy of carrying on any kind of business at his sweet whim. For eating house or Fast Food Centre as in the instant case a written permission of the Municipal Commissioner u/s 421 of the Act is essential as well as u/s 419. Further Section 435 imposes extra restriction on the grant of municipal licences in respect of premises not to be used for non-residential purpose. After dealing with the facts of the case and the legal aspects relating thereto, Mr. Mukherjee submitted that the Corporation authorities have not taken any action and were guilty of inaction or non-action in taking appropriate steps against the private respondents. He concluded his argument by submitting that this is a fit case

where mandamus lies and is not certainly an appropriate case for a civil suit. The writ of nandamus is the only weapon to stop the private respondents from creating a mass kitchen in a residential premises not so authorised under the law. He also cited following case laws in support of his contention : (1) K. Ramadas Shenoy v. The Chief Officers,- Town Municipal Council, Udipi & Ors., reported in AIR 1974 SC 2177; (2) Ch. Ananda Rao v. Joint Collector, West Godavari, Eluru & Ors., reported in AIR 1985 AP 162; (3) Kumuda Sundari Properties (Private) Ltd. & Ors. v. Mamdang Tea Co. Ltd., reported in AIR 1986 Cal. 266 and (4) Ila Pal Chowdhury v. K. G. Dutt, reported in ILR 1958(1) Cal. 143.

11. Mr. Mitra, the Advocate appearing for the respondent no. 14, the owner of the premises, submitted that the premises in question is used for business purpose for a long period. He further submitted that the writ application is premature and does not lie at this stage. He contended that as the police licence has not yet been granted the question of any haste on behalf of the petitioner does not arise. While referring to Section 583 of the Calcutta Municipal Corporation Act, 1980 he submitted that if any person is aggrieved he is at liberty to file a complaint of any nuisance to a Municipal Magistrate under the said provision and the law will take own course. In the circumstances, he submitted that there is no haste on the part of the petitioner to run to the Writ Court for the redress of his grievances when the Corporation Act already provides for the redress of such grievances. Relating to the writ petitioner's allegation of unauthorised construction of the kitchen at the rear of the premises, Mr. Mitra submitted that the construction was there since 1931 and cannot be said as an illegal one. In this connection he cited the case of Lalu Mohan Mitra & Ors. v. Samirendra Kumar Ghosh & Ors., reported in 81 CWN 870 (sic) to bring home the point that the adjoining owner of the premises cannot come to Court only for the simple reason that someone is (sic) (sic)tion in violation of the plan or the rules and according to him this principle applies in this case as well.

12. Mr. D. Mukherjee, the learned Advocate appearing for the respondents Nos. 15 to 18, forcefully defended the action of his clients in opening the Fast Food Centre in the premises in question. Apart from supporting Mr. Mitra on the point that the writ application is premature, he (sic)tted that the writ petitioner did not object to the kitchen when he was in(sic)ed as a lessee and, as such, there is no change of any nature whatsoever from the position ante but conceded during the argument that the respondents have no licence or permission from the authorities as required under the law except the one under Sec. 199 of the Act. He, too, submitted that it is not for the Writ Court to decide the matter but Section 583 of the C.M.C. Act, 1980 provides the procedure to check any nuisance on the complaint of any individual. He submitted that the points raised by the petitioner are disputed question of facts which cannot be decided in writ jurisdiction and the Court should dispose of the writ application by directing the authorities concerned to act in accordance with law. He further submitted that the allegation of inaction or non-action on the part of the authorities is absolutely incorrect because the authorities concerned did take action

but could not complete the same because the petitioner rushed to the Hon"ble High Court and obtained an order against the concerned authorities. In support of his contention Mr. Mukherjee cited three case laws, namely (1) State of U. P. & Anr. v. Raja Ram Jaiswal & Anr. reported in AIR 1985 SC 1108; (2) Forward Construction Co. & Ors. v. Prabhat Mandal (Regd.) Andheri & Ors., reported in AIR 1986 SC 391; and (3) M/s. Sen Mahasay & Anr. v. Corporation of Calcutta, reported in AIR 1966 Cal. 203.

13. Mr. Alope Ghosh appearing for the Corporation of Calcutta submitted that the kitchen in question in the said premises is prima facie an unauthorised structure and action has already been taken against the owner of the premises in accordance with law. He denied the allegation of inaction on the part of the Corporation made by the petitioner.

14. Mr. Chatterjee, the learned Advocate appearing for the State, produced the record and submitted that no police licence has yet been granted to the respondents nos. 15 to 18 for the Quality Grill Food Products or the Fast Food Centre nor any conclusion as regard to the inspection and holding of an enquiry has been drawn in view of the order of the Hon"ble High Court.

15. I have carefully gone through the facts of the case, perused the record and given my considerate thought to the submissions made by the learned Counsels appearing for the respective parties. To me it appears that the premises no. 40, Jatin Das Road is mainly used as a residential building and rarely for commercial purpose of minor significance. From the report of the Special Officer it also appears that when he made inspection of the said premises on 26th December, 1988 he did not find the building being used for commercial purpose but used mainly for residential purpose. Of course he has mentioned a room being used as dhobikhana with a chula but from the arguments advanced (sic) the parties it was clear that the dhobikhana is not of much significance and at considerable distance from the portion occupied by the petitioner and that too without a Bhati which is considered an inseparable part of washermens business. The Special Officer very specifically mentioned in his report that Shri Hiranmoy Chatterjee, he respondent no. 16 herein, told him that the kitchen at south-end of the promises is used for the purpose of preparation of food for the Fast Food Centre known as Quality Grill Food Products. He also found a sign board in the front room with the inscription of Quality Grill Food Products with description of varieties of food inscribed on the glass. It was also written on the glass that the Fast Food Centre is open from 12 noon to 9.30 p.m. The Special Officer also pointed out in his report that the location of the kitchen and the eating house as specified in the sketch map, being Annexure "A" to the writ application, are accurate including the position of the toilet. He also noticed the petitioner"s thakurghar adjacent to the kitchen and the distance between the kitchen and the thakurghar is less than 5 feet and the distance from the kitchen to the window of the bed room of the petitioner is but 13 feet. These facts are not in



dispute and go a long way to support the contention of the petitioner that a kitchen meant for preparation and supply of food products on a large scale from 12 noon to 9.30 "o" clock at night is undoubtedly a source of considerable nuisance to the members at the ground floor of the premises. This is virtually to turn the portion of the premises from the front room to the rear kitchen on the ground floor of the premises for commercial purpose of the nature which is bound to be of unhygienic conditions and health hazard for a residential quarter and even may lead to various ailments. The photographs taken by the Special Officer by the help of a photographer fully supports the report of the Special Officer. Furthermore four of the photographs indicate a full fledged kitchen running in the said premises with the help of gas cylinders and a storage of water in sintex tank. The sign board is also prominently displayed with inscription on glass. It appears from the photographs that almost all the requirements of preparation of large quantity of food products are provided in the said kitchen. One photograph undoubtedly points out to a dhobikhana in front of the building quite away from the place occupied by the petitioner which actually is a garage and where only three persons appear to be working. The chula referred to by the Special Officer obviously appears for the ironing purpose of the washerman and is of no importance.

16. The writ petition is directed mainly against the nuisance that is being caused by the business of respondents nos. 15 to 18 under the name and style of Quality Grill Food Products which is causing considerable nuisance to the petitioner and the purpose of the Court is to ascertain whether such a type of business with a kitchen for the preparation and production of huge quantity of food adjacent to a residential flat is in keeping with the law of the land and whether such type of business should be allowed in a residential house. It is an admitted position that when the petitioner took lease of the portion of the ground floor in July 1987 in the said premises there was no such business of any restaurant or hotel or there was no kitchen for the preparation and supply of huge food products. The room in front marked "X". in Annexure "A" to the writ application was used by the owner of the premises, respondent no. 14, as his drawing room. It was only in April 1988 that the business under the name and style of Quality Grill Food Products started and the kitchen was opened at the rear of the premises marked "Y" in the said Annexure "A".

17. Now the question revolves round the point whether a business of restaurant, hotel or eating house such as the one now under consideration under the name and style of Quality Grill Food Products also known as Fast Food Centre can be carried out in a mainly residential premises without the permission as required under the law. Section 419 of the Calcutta Municipal Corporation Act, 1980 clearly lays down that a trade in which it is intended to employ steam, electricity, water or other mechanical power cannot be carried out in a premises without the permission in writing of the Municipal Commissioner and such a permission" shall not be granted in contravention of Section 425 of the said Act. Similarly Section 421 of the Act gives

the description of eating houses where public are admitted for consumption of food or drink. For" the food sold or prepared for sale for such consumption cannot be established in a premises without the permission in writing of the Municipal Commissioner. Above all, section 435 of the said Act provides that a premises shall not be used for non-residential purpose without municipal licence and this Section 435 is to be read with Schedule V, Part-I Item 23 (XXVI) which is "Food" and the establishment of this type of trade or business in which a premises is used for non-residential purpose and to run this hotel business without municipal licence as required by this section is punishable with a fine of Rs. 5,000/- or six months imprisonment or both as well as a daily fine of Rs.200/- under Schedule VI of the Act. It is an admitted position that the respondents Nos. 15 to 18 have no permission from the Calcutta Municipal Corporation as per the provisions of the Calcutta Municipal Corporation Act to run the business of eating house or hotel or the Fast Food Centre. Save and except a trade tax Certificate of Enlistment u/s 199 of the said Act, the petitioner does not possess any other licence as required under the law and this particular trade tax does not entitle him to carry on the business of Fast Food Centre which is being illegally carried on in the said premises. I have recently dealt with Sections 199 and 200 of the Calcutta Municipal Corporation Act, 1980 in detail while delivering judgment in the case of Abdul Rashid v. The Calcutta Municipal Corporation & Ors., reported in 1989(1) CLJ 412 and held that mere obtaining of a trade tax certificate would not exonerate anybody from the guilt he has been committing by not complying with other provisions of law. A mere payment of Rs. 30/- on 25th November, 1988 as the fee for the application of licence under the Prevention of Food Adulteration Act, 1954 to the Chief Municipal Health Officer and Licensing Authority and the receipt granted to that effect cannot be treated as the licence at all. It is but a money receipt and no further. Similarly, an application for police licence was made on 25th November, 1988 to the Commissioner of Police, Calcutta, a copy of which was handed over personally to the Police Commissioner on 29th November, 1988, the xerox copy of which has been annexed with the Affidavit-in-Opposition of the respondents nos. 15 to 18, being Annexure "F" hereto. When the State produced the- said application by respondent no. 16 which was handed over to the Police Commissioner I noticed at the right top corner of the said application a note initialed by the Commissioner of Police signifying to process it quickly. I do not know whether such a procedure is followed or such an interest is taken by the Commissioner of Police in all such applications filed for police licence for a hotel or eating house. It was submitted by the State Advocate that the said application for police licence was in process but could not be finalised due to the interim order of the High Court. The submission of a copy of the application dated 25th November, 1988 directly to the Commissioner of Police on 29th November, 1988 is an indicator to the fact that the respondents nos. 15 to 18 were apprehensive of getting a police licence for their Quality Grill Food Products in normal course and this is the reason why they personally handed over a copy of the application to the Police Commissioner and succeeded in getting his

recommendation for early processing. In all fairness the Commissioner of Police should not have initialled the said application signifying a green signal to his sub-ordinate police officials. Had not the petitioner rushed to the High Court, the police licence would have been granted in the twinkling of an eye.

18. From the facts discussed above it is abundantly clear that if the business of Quality Grill Food Products would continue in premises No. 40, Jatin Das Road where the petitioner is a lessee under the respondent no. 14, the petitioner will not be able to reside peacefully in the ground floor of the said premises for the enormous nuisance and public activity that will remain associated with the business of the said Fast Food Centre or a eating house in front of the premises and its kitchen at the rear of the premises. It would be quite prejudicial to the interest of the petitioner to use his bed room from noon to late at night in a state of most unhygienic sanitation and ventilation and the entire surroundings of the premises right from "X" to "Y" on the eastern side and then from the entrance to "Z" on the western side as marked in the sketch map being Annexure "A" would be centre of public activity which is very contrary to the conception of residential premises. Such type of business activity will render peaceful habitation on the ground floor of the said premises by the petitioner and his family members miserable. The municipal laws have been enacted to look after the interest of the community at large. Any sanction granted contrary to the provisions of the Calcutta Municipal Corporation Act will nullify the action of the Corporation and such an action will be illegal in the eye of law. It was quite unfair on the part of the Calcutta Municipal Corporation to issue Certificate of Enlistment u/s 199 of the Act without proper enquiry under sub-section (3) of Section 200 of the said Act, The Municipal authorities failed to satisfy this Court that a proper enquiry was made by the authorities as required u/s 200(3) of the Act. In my opinion the petitioner is fully within his rights to seek his redress from the Writ Court for a command upon the State respondents including the police authorities and the Calcutta Municipal Corporation not to grant any licence for a business which will directly affect the petitioner and cause great nuisance to him. The concept of locus standi has assumed wider dimensions in the day to day expanding horizons of socioeconomic justice and welfare of the State. An aggrieved person like the petitioner cannot be "told off at the gates", to use the words of Mr. Justice Krishna Iyer (as His Lordship then was) in one of his classic judgments. The decision reported in AIR 1974 SC 2177 (supra) and another one reported, in 1985 AP 162 (supra) go a long way to support the contention of the petitioner. The petitioner is within his right to get relief by way of mandamus if there is breach of rules and regulations of the Corporation. The petitioner, therefore, has rightly approached the Writ Court for the redress of his grievances and on the strength of the case laws reported in ILR 1958"1) Cal. 143 (supra) and another reported in AIR 1986 Cal. 266 (supra) he is fully entitled to move this writ application. In the above perspective the submissions made by Mr. Saktinath Mukherjee have substantial merits.

19. So far the contention of Mr. D. Mukherjee, the learned Advocate, I am afraid that his submission has no force. He has submitted that the law would take its own course and referred to Section 583 of the Calcutta Municipal Corporation Act, 1980. Of course Section 582 provides for complaint regarding nuisance and the procedure thereof, but a person who is most aggrieved and upon whom injustice is being done more than 12 hours a day cannot wait for the slow process of law to take its course. I do not agree with Mr. Mukherjee when he submitted that there are disputed questions of facts which cannot be decided in the Writ Court. What are the disputed questions of facts? Is it in dispute that no Fast Food Centre has been opened in front of the premises No. 40, Jatin Das Road where food is served to the public from 12 noon to 9.30 p.m.? Is it a disputed question of fact that there is no kitchen at the rear of the premises which is used from noon till late at night for the production of various types of continental and moglai dishes on a large scale? Is it a disputed question of fact that a good number of people do not visit the Quality Grill Food Products during its business hours and consume food there or take away prepared food from there for consumption? Is it a disputed question of fact that the toilet marked "Z" in the sketch map is not being used by those using the kitchen and some of the customers during the business hours of the said eating house? All the above, facts are admitted facts. The learned Advocate for the respondents nos. 15 to 18 admitted all these facts during argument and even went a step further in stating in the Affidavit-in-Opposition that this Fast Food Centre is "very popular in and around the locality".

20. Further, is it a disputed question of fact that gas cylinders and other materials connected with the preparation and production of vast quantity of food are not used in this particular kitchen? Is it a disputed question of fact that there is no nuisance and air pollution of any kind during the whole process of cooking in the kitchen of the Fast Food Central? Is it a disputed question of fact that the kitchen at the rear of the premises is not an unauthorised structure when the Corporation itself submitted before this Court that action has already been taken with regard to this unauthorised construction? In my opinion the contentions of Mr. Mukherjee have no leg to stand on. He has referred to the decision of *M/s. Sen Mahasay & Anr. v. Corporation of Calcutta* (supra). But I fail to understand how this case law will help him when the expressions "other place" and "eating house" used in Section 442 of the Calcutta Municipal Act, 1951 was under discussion there. It was held in this case that as the expression "eating house" has not been defined in the Calcutta Municipal Act, 1951 as such the Court had to fall upon the dictionary meaning of the words. But in the Calcutta Municipal Corporation Act, 1980 Section 421 clearly defines eating houses which should not be established without the written permission of the Municipal Commissioner and includes hotel, restaurant, refreshment room, snack shop, sweetmeat shop, tavern, wine shop, betel shop, etc. etc. as well as any place where the public are admitted for repose or consumption of any food or drink or "where food is sold or is prepared for sale for any such purposes". Equally

ineffective is the case of *State of U. P. & Anr. v. Raja Ram Jaiswal & Anr.*, (supra) wherein it was held by the Supreme Court that the High Court could not proceed to take over the functions of the licensing authority and direct the licensing authority by a mandamus to grant a licence. The position is totally different in the instant case and definitely this Court is not going to command any licensing authority to grant a licence. But nowhere in the case law referred to above the Supreme Court observed that the High Court has no jurisdiction to come to the rescue of a hapless poor victim for the redress of his grievances. This case also does not help Mr. Mukherjee's clients. Of course Mr. Mukherjee has cited the Supreme Court decision in the case of *Forward Construction Company & Ors. v. Prabhat Mandal & Ors.*, (supra) where he wanted to bring home the principle of *res judicata* in respect of commercial use of the premises in question. Apparently on the strength of the Special Officer's report that he noticed a washman's shop in the garage and on the strength of this case law the learned Advocate wanted to establish his point that once the premises has been used for commercial use of the purpose then a writ challenging the commercial use of the premises subsequently would operate as *res judicata*. But the fact of the case cited is totally different. Here the Supreme Court ruled that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the "matter of claim or defence. Here the Bombay High Court held that in the earlier writ petition the validity of the permission granted under Rule 4(a)(i) of the Development Control Rules was not an issue and that the writ petition filed by one Shri Thakkar was not a bona fide one. And upon that finding the above observation of the Supreme Court was made. I do not find any such case exists here. Never the question whether this particular premises was ever used for commercial purpose was any issue in the Court of Law. This case, too, fails to help Mr. Mukherjee. He further contended that the writ application is premature as the stage has not come for the petitioner to file the writ application and take relief from the High Court be all the authorities have not yet issued licences or permissions in favour of the respondents nos. 15 to 18. In my opinion the writ petition cannot be said to be premature because the nuisance must be nipped in the bud before it creates harm and injury to anyone. Accordingly the submissions made by Mr. Mukherjee do not appeal to me.

21. Mr. Mitra appearing on behalf of the respondent no. 14, the owner of the premises, in his short submission almost took the same line of defence as those of respondent nos. 15 to 18. He has also argued that Section 583 of the Calcutta Municipal Corporation Act, 1980 is already in the statute to protect the petitioner from any unlawful act and cited 81 CWN 870 (supra) wherein a Division Bench of Calcutta High Court held that a person has an obligation to the Municipal Corporation and not to an adjoining owner not to make any construction in violation

of the building rules or the sanctioned plans. If one does so, it is for the Corporation to start action against him and it is not for the neighbouring owners to come to Court only for the simple reason that one is making a construction in violation of the plan or the rules and such neighbours would not be entitled to any injunction unless the defendant's action amounts to an actionable nuisance. This is a decision in a Second Appeal against a judgment and decree passed by the Additional District Judge, 13th Court, Alipore, affirming the judgment and decree passed by a Ld. Munsif of Sealdah. But here the matter lies before the Writ Court under Article 226 of the Constitution of India and the High Court is competent to interfere when an aggrieved party has a statutory legal right which entitles him to a relief when such right has been infringed. It is well known principle that under Article 226 the High Court can exercise its jurisdiction for the enforcement of (a) fundamental rights as well as of (b) non-fundamental or ordinary rights. In this connection I may point out the case of Calcutta Gas Company v. State of West Bengal, reported in AIR 1962 SC 1044. So the contention of Mr. Mitra fails. His other submission that writ petition is premature and does not lie as the police licence and other licences have not yet been granted also fails on the basis of the discussion made hereinbefore. His further submission that the kitchen was constructed along with the building sometime back in 1931 and is not an unauthorised construction is also of no merit in view of the Corporation's contention that it is an unauthorised construction. His argument that the premises was used for business purpose as well is not substantiated, save and except a statement made in paragraph 3 of owner's Affidavit-in-Opposition Mr. Mitra has forcefully argued that no finding should be given by this Court that the petitioner is suffering any injury or nuisance as these facts are denied by his clients. But this contention of the learned Advocate goes very much against the facts on record. As such I differ on all the points with Mr. Mitra.

22. In view of the aforesaid discussion I have come to the definite finding that nuisance of extra-ordinary dimension is being carried "on at premises No. 40, Jatin Das Road, Calcutta-29, merely on the strength on a Certificate of Enlistment obtained from the Calcutta Municipal Corporation under Sections 199 and 200 of the Act somehow or other. From the facts discussed above it is crystal clear that if permission is granted by the authorities concerned for carrying out the business of Quality G(sic) Food Products in the said premises by the respondents Nos. 15 to 18 which is a residential premises the writ petitioner and his family members will, undoubtedly, continue to inhale smoke, air pollution and reel in allied nuisance causing serious health hazard. It is an admitted position that the continuous cooking of different varieties of food for a large number of people would undoubtedly cause considerable smoke, smell, gas, odour, etc. thereby creating air pollution and nuisance of considerable magnitude during the major part of the day and night which certainly will push the petitioner and his family members to a pitiable plight because of the proximity of the kitchen, the restaurant to the residential quarter of the petitioner. And this criminal health hazard cannot be

allowed to continue for long.

23. In that view of the matter the writ application must succeed. I direct the respondents nos. 2 to 13 and 19 to forthwith take action against the respondents nos. 15 to 18 for the removal of the business of hotel, restaurant or eating house from the premises No. 40, Jatin Das Road, Calcutta-29. I further direct the respondents nos. 15 to 18 to close down forthwith the said eating house or restaurant which" they are carrying on illegally. It is further directed that the authorities of the Calcutta Police including the respondents nos. 2, 3, 4 and 5 and the Calcutta Municipal Authorities including the respondents nos. 7, 8, 9 and 10 as well as the respondents nos. 11, 12 and 19 are restrained from issuing any licence, permission or order authorising the running of kitchen, restaurant or eating house in the said premises No. 40, Jatin Das Road, Calcutta-29, in view of the findings made in the judgment. I quash the licence or Certificate of Enlistment issued in favour of Quality Grill Food Products under Sections 199 and 200 of the Calcutta Municipal Corporation Act, 1980 for the year 1988-89 and, if any, thereafter. The writ application is thus allowed. The respondents nos. 15 to 18 shall pay costs assessed at 100 G.M.s to the petitioner. before ! conclude ! must record my astonishment as to how the respondents nos. 2 to 13 and 19 allowed the respondents nos. 15 to 18 to carry on the business of Quality Grill Food Products with its restaurant and kitchen since 10th October, 1988 without any valid statutory document in the possession of the partners of the said business from the concerned authorities. This is a sad commentary on the performance of administration of our city and, on those who are the enforcers of the law and order in the metropolis. No explanation has been given by any of the State respondents or the Corporation why they did allow the concerned respondents to carry on their business without any legal authority so long even after the matter came to their notice. Until and unless one gets all the required permissions from the authorities concerned one is not entitled to open any business of any nature whatsoever. Here I find a blatant example of violation of law to the prejudice of common citizens, and equally criminal act on the part of the concerned authorities not to check it.

Mr. D. Mukherjee, the learned Advocate appearing for the respondents nos. 15 to 18, prays for stay of the order. The prayer for stay is refused.

K.M. Yusuf, J.

I agree.