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Calcutta High Court

Case No: None

Sham Lal Khettry		APPELLANT
	Vs	
Corporation of Calcutta		RESPONDENT

Date of Decision: April 12, 1929

Acts Referred:

- Calcutta Municipal Act, 1923 - Section 363

Citation: AIR 1929 Cal 781

Hon'ble Judges: Suhrawardy, J; Graham, J; Buckland, J

Bench: Full Bench

Judgement

Suhrawardy, J.
In this revision application the petitioner has asked us to set aside the order of demolition of the boundary walls constructed by him in his premises passed by the Municipal Magistrate of Calcutta. The facts are that sometime in 1911 the petitioner obtained sanction to build a house and according to it he constructed the present house with boundary walls 10 feet high. Recently he raised the height of the boundary walls in order to secure the privacy of his premises to 18 feet. This he did without obtaining sanction from the Corporation. A notice was therefore served upon him u/s 363, Calcutta Municipal Act (Ben. Act 3 of 1923) and the case started against him resulted in the order complained of.

2. "Building" was not defined in the previous Act of 1899, but a definition has now been added by the Act of 1923. According to that definition a wall other than a boundary wall and not exceeding 10 feet in height is a building: and under the provisions of the Act, sanction has to be obtained from the Corporation before constructing any building. It is not disputed that the walls were raised to their present height of 18 feet without sanction from the Corporation; and an application subsequent to the prosecution was made for necessary sanction. The learned Municipal Magistrate has ordered demolition of the boundary walls mainly upon the ground that they were built without the sanction of the

Corporation. The order passed by the learned Magistrate is in these words:

As the 18 feet high boundary walls are unlawful, I direct that so much of those walls be demolished by the Corporation of Calcutta at owner''s expense as will reduce their height to 10 feet.

3. Then he goes on to add:

As it is stated that ladies would be visible by the reduction of the high walls, I have no objection to temporary screens of mats or corrugated iron sheets being put up where required until a change in the configuration of the buildings in the vicinity makes such screens unnecessary.

4. The ground therefore upon which the order was passed is that the building is unlawful, that is, in contravention of the provisions of the law. Section 363, Act of 1923 is not imperative in as much as it says that the Magistrate may make an order directing that such erection &c., &c., or so much thereof as has been executed unlawfully be demolished or altered. One of the grounds on which such an order can be passed is that the erection has not been commenced after obtaining the permission of the Corporation but the section makes it discretionary with the Magistrate to make such an order and it has been interpreted by this Court that this discretion vested in the Magistrate under this section should be exercised on an equitable consideration of all the circumstances of the case: Abdul Samad v. Corporation of Calcutta [1906] 33 Cal. 287. In Chuni Lal Dutt v. Corporation of Calcutta [1907] 34 Cal. 341, it was held that the power of the Municipal Magistrate u/s 449, Act of 1899, corresponding to Section 363 of the present Act is similar to the power exercised by a Court of equity in granting mandatory injunctions and therefore such power should be exercised with due regard to those rules which guide Courts of equity in granting injunctions. The learned Magistrate, it seems to me, has not considered whether the walls have as they are at present caused any inconvenience to neighbours house-owners or are otherwise undesirable from sanitary or any other point of view. The Magistrate does not exercise proper discretion when he takes into account simply the fact that the structures were put up without the sanction of the Corporation and orders their demolition. The object which the legislature had in view by making it discretionary with the Magistrate to order demolition of unauthorized structures will be defeated if it is held that unauthorized structures as such must be demolished. In my judgment the legislature has intentionally vested the Magistrate with such discretion in order that the Magistrate should take into account all the circumstances present in a particular case and then if in its judgment, it is necessary that such structures should be demolished, he should so order. In the present case the Building Inspector of the Corporation has stated (and it has been accepted by the Magistrate) that the walls are necessary for securing privacy of the premises; and further that it would not be objectionable from the municipal point of view if the petitioner put up instead of brick-built walls, matwalls or corrugated iron sheets. This view may or may not be correct but it shows from the point of view of the petitioner that these walls were necessary and that

the Corporation could have no objection on the ground of inconvenience to the neighbours or on any other ground if the walls instead of bricks are made of iron-sheets.

5. In the course of his judgment the learned Magistrate has referred to certain rules contained in Schedule 17 of the Act which require some spaces to be left on two (sic) of a building and some other rules relating to the height of a building with reference to spaces around it which must be at the angle of prescribed degrees mentioned in those rules. They are Rules 30 and 32, Schedule 17 of the present Act. These rules and some others laying down special considerations which should prevail in allowing construction of a building were also in the repealed Act of 1899. Though by the Act of 1923 the definition of building has been introduced no change has made in these rules. Reading these rules it would appear that they were intended to affect buildings and structures dealt with by the Act of 1899 and were never intended to apply to boundary walls which are included in the term "building" by the Act of 1923. For instance there is a provision that some space should be left on both sides of a building; it can hardly apply to boundary walls for it would not be possible to leave any space on the outer side. There were other matters also dealt with by the rules which cannot apply to boundary walls. In my opinion these rules do not apply in the case of boundary walls. Rule 18, Schedule 17, empowers the Corporation to allow boundary walls to be erected to any height which the Corporation may think fit and proper. This discretion is not given in the case of any other building and therefore it is clear that the rules affecting buildings properly so called are not applicable in the case of boundary walls.

6. I am therefore of opinion that the learned Municipal Magistrate should not have passed his order only on the fact that these walls were raised to a height of 18 feet without the sanction of the Corporation. He should have taken into consideration the circumstances of this particular case and if in his opinion it was necessary that these walls should be removed he might u/s 363 order their demolition. If, on the other hand, as is apparent from his judgment there is no such special objection to the walls remaining in their present condition, he should not as a Court of equity order their demolition. In this view of the matter I would make the rule absolute to this extent that the order of the Municipal Magistrate of Calcutta dated 8th October 1928 should be set aside and the matter remitted to him for a consideration of the entire case and all the circumstances attending it and decide it according to law.

Graham, J.

7. In this case a rule was issued to show cause why an order of the Municipal Magistrate of Calcutta directing a portion of the boundary walls to be demolished should not be set aside. The facts are not disputed. The petitioner Sham Lal Khatry residing at 21/2 Baranashibashi Ghose"s Street erected or caused to be erected a boundary wall upon this premises to the height of 18 feet without obtaining the sanction of the Corporation. Now, that being so, it is clear that there was a breach of Section 363, Calcutta Municipal Act (3 of 1923) read with Section 3(7) of the Act, and that the order for demolition is a

valid and legal order.

8. But it is argued that, even if the order was a legal order, the learned Magistrate was not bound to direct the demolition of the wall and that he ought not, having regard to the facts of the case, to have made such an order. One of the reasons advanced in support of this contention is that the Magistrate has himself observed that there would be no objection to a temporary screen consisting of mats or corrugated iron sheets, and therefore it is urged that the walls although over 18 feet in height should have been allowed to remain, and the petitioner should have been merely fined, if necessary, for not obtaining previous sanction. Such temporary erections would, it may be observed, not be the same thing as a pucca wall; but the learned Magistrate may be in error in this view that they would not be open to objection, for such erections, though temporary, may amount to an interference with the rights and amenities of persons occupying houses in the immediate neighbourhood. Be that as it may, the order of the Magistrate is warranted by law and I see no reason why we should interfere with it. The petitioner is not certainly entitled to any sympathy, since he admittedly failed to comply with the law, and it was only after these proceedings were instituted that he made his belated application to the Corporation for sanction. On grounds of principle I think that we ought not to interfere unless there has been some gross or pal-able failure of justice. In the exercise of our revisional jurisdiction, all that is necessary for us to see is whether there has been any error of law, or irregularity, or abuse of, or failure to exercise judicial discretion such as to justify our interference. In my judgment no such case has been made out. It has been urged that the matter should be looked at from the point of view of equity; and reference has been made to the case of Chunni Lal Dutt v. Corporation of Calcutta [1907] 34 Cal. 341. In my opinion equitable considerations ought not to be invoked on behalf of a party who has put himself in the wrong by wilfully disregarding the law. Furthermore even if the view laid down in the reported case which I have just referred be accepted, I would hold that the Magistrate has exercised his discretion and has on a due conperation of the facts made the order for demolition. For these reasons the rule should in my judgment be discharged. (Their Lordships having differed, the case was put before Buckland, J.)

Buckland, J.

9. This is really a very simple matter. The petitioner without sanction and in defiance of the provisions of the Calcutta Municipal Act of 1923 and the rules of the Corporation erected a boundary wall 18 feet high though under the law he was limited to a height of 10 feet. That he has broken the law there is no question- Nor is there any doubt that the learned Magistrate had the power to make the order which he has made. It has been argued that the learned Magistrate did not properly exercise his discretion and that it has not been shown that the wall erected to the height of 18 feet would be a nuisance or, as has been said, an obstruction to the public whatever that may mean. In this connexion it is necessary to point out that there was only one witness called before the Magistrate and that was the Building Inspector. After establishing the case for the prosecution he was cross-examined on points arising out of the provisions of the Calcutta Municipal Act. It is

true that he said that:

Had the boundary walls been made 10 feet high and corrugated iron sheets properly fixed over them to the present height there would be no objection.

10. This appears to have been adopted by the Magistrate in making his order for he said:

I have no objection to temporary screens of mats or corrugated iron sheets being put up where required, until a change in the configuration of the buildings in the vicinity makes such screens unnecessary.

11. The Magistrate in my opinion not only exercised his discretion in the matter upon the very limited materials before him but did so correctly, and his order therefore should be upheld.

12. I desire, however, to add, without expressing any final opinion on the matter, that so far as the Magistrate has referred to corrugated iron sheets it is doubtful whether having regard to the definition of "building" in Section 3, Sub-section 7, Calcutta Municipal Act, corrugated iron sheets superimposed upon a boundary wall 10 feet high would not in law have the same effect as the erection of a masonry structure 18 feet in height. It is also questionable whether upon a prosecution of this nature the Magistrate was competent in effect to give sanction to a structure such as he describes. The Rule is discharged.