
(1955) 07 CAL CK 0010
In the Calcutta High Court
Case No : Matter No. 87 of 1955

Ajoy Kumar Ghose

APPELLANT

Vs

Corporation of Calcutta and Others

RESPONDENT

Date of Decision : 22-07-1955

Acts Referred:

Calcutta Municipal Act, 1951 — Section 415
Calcutta Municipal Rules, 1951 — Rule 5(4)
Constitution of India, 1950 — Article 226

Citation : AIR 1956 Cal 410

Hon'ble Judges : Sinha, J

Bench : Single Bench

Advocate : Anil Sinha, for the Appellant; B.S. Bagchi, for Corporation of Calcutta and S.K. Dutt, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—This application relates to a shop-room situated in premises previously numbered as 23, Canning Street and now known as 183, Old China Bazar Street. It is in the occupation of Ajoy Kumar Ghosh, the petitioner, who carries on a business therein under the name and style of Ghosh Brothers, in Carpets, Mattings, Buckets and other goods. The said property, together with the contiguous premises Nos. 178 to 185, Old China Bazar Street, belonged to one Fazal Hossain, Mohammed Shafique and Mohammed Hanif. In or about 15-8-1954, the Respondent 4, Estate Birendra Kumar Shaw Ltd., a company incorporated under the Indian Companies Act, purchased the said premises No. 23, Canning Street, together with the contiguous premises Nos. 178 to 185, Old China Bazar Street. So far as premises No. 183, Old China Bazar Street (formerly No. 23 Canning Street) is concerned, it is a dilapidated structure, about a hundred years old. The surrounding structures have all been demolished for the purpose of building an entirely new construction. This shop-room however is bravely holding out and has to a great extent been successful in preventing the new construction being built. The Corporation of Calcutta (Respondent 1)

through the Commissioner (Respondent 2), is taking steps with a view to demolish the shop-room, as a structure which is in a ruinous condition and dangerous to public safety. This application is an attempt to hold up the demolition and to perpetuate the existence of the structure.

2. The present owner, respondent 4, challenges the title of the petitioner to be in the premises at all, on the ground that he is a mere trespasser. It is not possible for me in this application to decide disputed questions of title. I must, however, state a few facts without which it would not be possible to appreciate the background upon which this application has been made. I have already mentioned that Fazal Hossain and others were the previous owners of premises No. 23, Canning Street. Banku Behary Pal and Sons were the tenants of the shop-room in question for over fifty years. It appears from an affidavit of Dharmadas Shrimani affirmed in May, 1955 (Annexure "B" to the affidavit-in-opposition filed by Pannalal Shaw) that in 1948, he was the sole proprietor thereof. In that year, Fazal Hossain and others filed a suit against Banku Behary Pal and Sons (Suit No. 699 of 1948) in this Court for recovery of possession on the ground of building and rebuilding. On 30-4-1948, the suit was decreed. In execution thereof, the owners recovered possession on 14-11-1949. On 4-11-1950, an application for restoration of possession was made by Banku Behary Pal and Sons before the Rent Controller. On 5-1-1951, a partnership business was registered under the name and style of Banku Behary Pal and Sons. The records show, that one Pankaj Kumar Mukherjee and Ajit Kumar Das were the partners thereof. Ajit Kumar Das has affirmed an affidavit dated 12-5-1955 (Annexure "B" to the affidavit-in-opposition filed by Pannalal Shaw) in which he has stated that he was never a partner of the firm of Banku Behary Pal and Sons and his signature must have been forged in the application for registration. On 6-1-1951, this new firm of Banku Behary Pal and Sons obtained possession of the shop-room by virtue of certain orders of the Rent Controller stated to have been obtained ex parte. On 19-3-1951, these orders were set aside. But Fazal Hossain and others never regained possession, on the other hand they were involved in continuous litigation. The petitioner claims to be a sub-tenant under the said Pankaj Kumar Mukherjee. In December, 1953, Fazal Hossain and others filed a suit in this Court being Suit No. 4075 of 1953, against Banku Behary Pal and Sons and Ghosh Bros., for recovery of possession etc. On 15-8-1954, they sold the whole property (23 Canning Street and 178 to 185, Old China Bazar Street) to respondent 4. The present owners have continued the demolitions until there remains only this shop-room to be demolished. On 12-5-1955, the petitioner lodged a complaint u/s 507/506, I. P. C. with the Chief Presidency Magistrate, Calcutta. On or about 14-4-1955, he made an application u/s 144, Cr. P. C. This application was rejected. On 5-5-1955 the petitioner filed a suit in this Court, against Respondent 4, inter alia for an injunction restraining the Company or its agent etc. from interfering with the rights of the petitioner and for other reliefs.

3. On 27-4-1955 Respondent 4 wrote to the Director West Bengal Fire Service, to the effect that the shop-room was in a dangerous state of disrepair, and steps

should be taken to save the public from imminent danger. On 29-4-1955, similar letters were addressed to the Commissioner and City Architect of the Calcutta Corporation. It appears that even before these letters were written, the Insecure Building Surveyor of District II had visited the premises on 21-4-1955 and made the following report:

"On inspection it is found that the one storeyed shop, and godown as shown in the sketch are lying in a dangerous state. The building has outlived its useful existence and it is not worthwhile to repair the same. The godown portion is vacant, the beams have sagged to maximum limit and may yield at any moment. The roadside room is occupied by a shop. A crack has developed right from the ground to the roof and a portion of the roof is hanging due to the demolition of the adjoining wall. Action under Rule 5 (4) of Schedule. XVJI is necessary for the safety of the inmates and passerby. Submitted for orders."

4. On 5-5-1955, the District Building Surveyor District II inspected the structures and reported to the Chief Building Surveyor. The relevant part of his report is as follows "

"....This room is part of a big building all of which have been demolished by the owners. By demolishing the other portion of the old building, this room has been rendered insecure as cracks have occurred in all the 4 walls and a portion of the roof has fallen down. The Road side wall on the last has been most dangerous as the top portion of this wall has been severed from the main building including the parapet wall and is out of plumb. So I think immediate action should be taken to demolish the entire room,"

5. On the same day, the premises was inspected by the Fire Protection Officer and it was reported that the roof was so completely damaged as to give way at any moment. There was one mezzanine floor of wood on which a 15" brick pillar has been raised upto the ceiling to take off the load at a corner and this was in itself highly dangerous as the pillar had no supporting base. There were several wide cracks all over the walls on all sides and it was feared that heavy transport vehicles which usually ply through the locality might cause further damage and it was, not known when the structure will collapse, trapping the occupiers and the shoppers. The Director, West Bengal Fire Services, wrote to the City Architect, communicating this information and gave his opinion that the structure was highly dangerous and should be forthwith pulled down.

6. On 6-5-1955, the City Architect gave his certificate as required u/s 5 (4) of Schedule XVII, Calcutta Municipal Act, to the effect that such demolition was necessary for the safety of public or the inmates of the building and that the inmates should be summarily removed. On 7-5-1955 the Commissioner, thereupon, ordered the demolition of the premises and removal of the inmates.

7. On 10-5-1955, the Secure Building Surveyor, Dist. No. II gave notice, inter alia to the petitioner that the demolition will start on the morning of 16-5-1955.

8. On 13-5-1955, this rule was issued upon the respondents to show cause why a writ in the nature of mandamus should not be issued, directing them to forbear from giving effect to the order dated the 7th day of May, 1955 and/or tile notice dated the 10th of May, 1955, for demolition of the premises No. 183, Old China Bazar Street, and/or why they should not withdraw or cancel the same and for other reliefs. There was an interim order restraining the demolition," pending the hearing of the rule. On 10-6-1955, when the rule came up for directions, it was" alleged by the petitioner that there was a hole in the roof and unless it was covered up by corrugated tin plate, the shop will be flooded in the rains. Thereupon I made the following order :

"Status quo will be maintained i.e. the petitioner will be restrained from causing any further repairs to the premises in question and the respondents on the other hand will not cause demolition thereto pending disposal of the Rule.

The petitioner will however be at liberty to cover the alleged hole on the roof with 3 days" notice to the Corporation and the landlords."

9. It is alleged that notice was given to the landlords and the Corporation that the covering up would be done on 14-6-1955. There are conflicting versions of what happened on 14-6-1955. It is admitted, however, that at least four holes were covered up on the roof, by tin sheets fixed by plaster and brick work. This however ia plainly in excess of the order made. The respondent 4 urges that the petitioner is in contempt and should not be heard. I do not think that it is necessary to decide this case upon any such technical grounds. It is quite plain to me upon the evidence adduced that the shop-room in question is in an extremely ruinous condition and there is imminent danger of the structure collapsing and endangering public safety. The structure should at once be demolished. Apart from the affidavits and the report, a glance at the photographs (Admittedly of the structure in question) will show that it is an ancient structure in an extreme stage of dilapidation, and should be taken down at once. The best photograph is annexed to the affidavit of Pannalal Shaw (Ex. "E") affirmed on 13-5-1955 in the suit of 1955 (Ajoy Kumar Ghosh v. Estate Birendra Kumar Shaw Ltd.). Mr. Sinha appearing on behalf of the petitioner admits that it is a photograph of the premises in question. The photograph clearly shows that there is a tremendous crack in the front wall and that the roof and parapet on the right hand top corner of the picture, are in danger of imminent collapse. The other pictures included in Ex, "E", show how the demolition of the surrounding structures has removed all lateral support, leaving the structure in question, isolated and in danger of collapse at any moment.

10. There is before me the affidavits of two Engineers. The first one is by Sachish Chandra Lahiri (affirmed on 21-6-1955), used in support of the opposition. It supports the above view and mentions the ground to roof cracks in the walls. The petitioner has used an affidavit of Uditendu Prokash Mullick (affirmed on 22-6-1955), an Engineer on the panel of this Court. I regret to observe that Mr. Mullick should never have made the report, annexed to his affidavit. As an

Engineer on the panel of this Court, he owes a duty not only to his client but also to the Court. The report conveys or tries to convey that the structure is in good and strong condition except the damage to the roof which according to him can be easily repaired. According to him the walls are "Generally very well plastered". There is no mention of any crack anywhere or subsidence of the parapet or roof at any point. A glance at the photographs mentioned above will show that this is a completely incorrect picture of the structure in question.

11. These being the facts in this case, Mr. Sinha, appearing on behalf of the petitioner, has mostly confined himself to points of law. I will now" proceed to deal with them. The first point taken by Mr. Sinha is that the order of demolition is bad, because it was not upon notice to his client, and because the petitioner had no opportunity of satisfying the Commissioner that the certificate of the City Architect was wrong and that the premises did not require demolition. In order to examine this point it will be necessary to refer to the relevant provisions of the Calcutta Municipal Act. The first provision is Section 415(c), which lays down that if the owner of any building, which is unfit for human habitation fails to demolish such building when required to do so u/s 433 Sub-section (2), the Commissioner may make" an order directing the owner or occupier thereof to demolish the same. Before making such an order the owner or occupier, as the case may be, must be given an opportunity of being heard. Section 431 provides that the securing, repairing, etc., of buildings shall be regulated by the rules contained in Schedule XVII. Section 432 lays down that if the Commissioner thinks that any building or portion of a building used for dwelling purposes is unfit for human habitation, he may, if he thinks that an alteration will make it fit for that purpose, require the owner to make the alteration. If the Commissioner thinks that no such alteration will make it fit for human habitation, he may apply to the Standing Health Committee to prohibit the further use of such building for such a purpose. In such a case, the Standing Health Committee must serve notice upon the owner or occupier so as to give him an opportunity of being heard. We next come to Schedule XVII R, 5. This rule had three sub-clauses originally, namely, Sub-clause (1), (2) and (3). By notification No. 3041/MTE-39/53 dated 7-4-1954 published in the Calcutta Gazette Ext. dated 7-4-1954, Part 1 page 508, a further sub-clause, namely, Sub-clause (4) has been added. This has been promulgated by the Governor in exercise of the power conferred by Sub-section (1) of Section 532, Calcutta Municipal Act, 1951.

12. The relevant part of Rule 5 of Schedule XVII, now reads as follows:

"5. (1). If any wall or building or any thing affixed thereto be deemed by the Commissioner to be in a ruinous state, or likely to fall, or to be in any way dangerous, he shall forthwith cause a written notice to be served on the owner and also to be put on some conspicuous part of the wall or building or served on the occupier (if any) of the building, requiring such owner or occupier, forthwith to demolish, repair or secure such wall, building or thing as the case may require.

(2) The Commissioner may also, if it appears to him necessary to do so, cause a

proper, hoarding or fence or other means or protection to be put at the expense of the owner of such wall or building for the safety of the public or the inmates thereof; and may also, after giving them such notice as the Commissioner may think necessary, require the inmates of the building to vacate it.

(3)

(4) (a) Notwithstanding anything contained In the foregoing sub-rules the Commissioner, may forthwith or with such notice as he thinks fit, demolish, repair or secure or caused to be demolished, repaired or secured, any such wall or building or thing affixed thereto, on the report of the City Architect of the Corporation certifying that such demolition, repair or securing of the building, wall or thing is necessary for the safety of the public or the inmates of the building.

(b) In such case the Commissioner may cause the inmates of the building to be summarily removed from the same or such portion thereof as he may consider necessary.

(c) All expenses incurred by the Commissioner in taking action under this sub-rule shall be paid by the owner of such wall, building or thing.

(d) Any action taken by the Commissioner under Sub-rule (4) shall, unless the contrary is proved, be deemed to have been taken lawfully and in good faith and with due care and attention."

13. It will appear that a notice is required in Sub-clause (1) and the latter part of Sub-clause (2). Under Sub-clause (1), the Commissioner must call upon the owner to demolish. Under Sub-clause (2) the Commissioner can put up protective hoardings or fences. Suppose however that a wall or building is in imminent danger of collapsing and there is no time to give notice but that the Commissioner is called upon to act at once, in the interest of public safety. Hitherto, there was no provision under which he could act. Sub-rule (4), supplies the omission. Mr. Sinha argues that the sub-rule having been promulgated by the Governor under a rule-making power, cannot be supported because it is contrary to and inconsistent with the provisions of the Act. I am unable to accept this argument. It cannot be said to be inconsistent with the provisions of the Act because there was no provision in the Act dealing with this particular contingency. It is well known that more than half of the structures In the City of Calcutta are so time-worn, as to have lived beyond their allotted span of existence. Because of the exigencies of War, very few of such ancient structures have seen any repairs for the last decade or so, and many have collapsed and/or are on the verge of collapsing. On the other hand, there is acute housing shortage and people are clinging to structures in which they would, under normal circumstances, shudder to live. Undoubtedly, Government had to do something in the matter, and it has promulgated Sub-rule (4) in Rule 5 of Schedule XVII.

14. Mr. Sinha tried to argue that this sub-rule is ultra-vires because it offends

against Article 19(1)(f) of the Constitution. I am unable to permit him to argue this point as he has not taken this as a ground and it would be improper to allow him to urge a constitutional ground, invalidating a statutory provision, without notice to the other side. But even if I allowed him to take the point I should be prepared to hold that the restriction was a reasonable restriction. He then fell back on the rules of natural justice and cited the leading case of -- "Cooper v. Wands-worth Board of Works", (1863) 143 E.R. 414 (A). The 76th Section of the Metropolis Local Management Act, 18 & 19 Vict. C. 120, empowered the district board to alter or demolish a house, where the builder has neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation. It was held that this did not empower them to demolish the building, without first giving the party guilty of the omission an opportunity of being heard. Earle C.J., held that the provisions of the statute are subject to the well known qualification that no man is to be deprived" of his property without his having an opportunity of being heard. This principle has been followed in -- "Hopkins v. Smeth-wick Local Board of Health" (1890) 24 QBD 712 (B), where Wills J. held that in condemning a man to have his house pulled down, a judicial act was implied, and Justice demanded that the man should be heard.

15. While these cases undoubtedly lay down correctly the general principle applicable to such cases, an exception is also recognised. This is to be found in the case of -- "Cheetham v. The Mayor etc., of the City of Manchester" (1875) 10 CP 249 (C).

16. This case dealt with the provisions of the Manchester Improvement Act, 30 Vict. C XXXVI, which are very much like the provisions of the Calcutta Municipal Act, which we are considering. u/s 58, any two justices, if it appeared to them that any house or building or wall therein was in a ruinous or dangerous state, might order the same to be properly fenced and guarded by the Mayor at his expense, to be later on reimbursed and paid by the owner. u/s 59, the owner of such a building, etc., could be ordered (A notice to be served for that purpose) to take down secure or repair such house building or wall, within a specified time. Section 38 is important and must be set out:

"Section 38 -- In addition to the powers conferred by Section 59, Manchester Police Act, 1844 the Corporation may, either before or after the presentment under that section, cause any building which they may consider dangerous to be watched or guarded by the Police or otherwise; and, if the Surveyor of the City, or, in his absence, any duly qualified Surveyor, shall certify in writing that there is imminent danger from any building, the Corporation shall and may, without any presentment, notice, or other formality, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the Corporation shall think requisite."

17. The City Surveyor having certified that there was imminent danger from a building, the town clerk on behalf of the Corporation of Manchester caused the building to be taken down and repaired. Holding that the certificate of the City

Surveyor was conclusive, Lord Coleridge proceeded to say as follows:

"Some remarks have been made as to the stringent character of the provisions in Section 38 of the Act of 1867. I agree that those provisions are somewhat stringent. But it seems to me that the Act is a very salutary one; and if general convenience and the interest of the public require them, however stringent enactments may be, private rights and interests must give way, and the law must not be suffered to remain a dead letter." Keating J. said:

"I am of the same opinion As to the first point I think it would be impossible to give any effect to the Act unless we held the certificate of the Surveyor to be conclusive. The provision in Section 38 is no doubt a very stringent one, resting in the Surveyor, as it does absolute power to say that a man's house shall be pulled down. The legislature, however, appears to have thought it necessary to confer upon him this power; and it is pur business to see that their intention is carried out. It would be impossible for the Corporation to act at all if a question could in every case be raised before a jury as to the propriety of the certificate." Deuman J. said:

"Looking at the subject-matter with which Section 38 of the Act of 1867 was dealing it would be impossible to work out the object of the legislature had in view unless the certificate were held to be conclusive. It was necessary that some person should have power to form a judgment upon which prompt action could be taken."

18. It will be observed that the wording of the Manchester Act, is much superior to the words of the Calcutta Municipal Act. The Manchester Act speaks of "imminent danger", which is really the foundation of the rule. The local Act means the same thing but expresses it in a round about way. Rule 4 (a) states that the City Architect must certify that the building wall or thing which is in a ruinous state or likely to fall or to be in any way dangerous should be demolished, secured or repaired, for reasons of public safety or of the safety of the inmates of the building. Thereupon, the Commissioner must make up his mind whether he shall give notice to the owner or occupier or whether he would act "forthwith". It is not the law that the Commissioner can arbitrarily pull down any building in Calcutta that he does not approve of, without any reference to its owner. That would be giving him dictatorial powers which may easily be abused. The discretion that the law gives him is within a narrow compass. There must be an "imminent danger" of the building or wall falling down or collapsing and there must be a danger to public safety or to the inmates -- a danger which must be met forthwith and brooks of no delay. Under such circum-stances, if notice has to be given and the parties heard, the very purpose of the repair or demolition would be frustrated.

19. It must also be remembered that the case above-mentioned is an action at law and not one for a high prerogative writ. In an application under Article 226, it would not be an insuperable bar that there was the certificate by the City

Architect. This Court can always determine whether public officials have kept within their statutory limits. Probably an application under Article 226 is about the only remedy that the owner would have left, if there is an abuse of this provision or a mala fide or dishonest use of the power. While the High Court would be very reluctant to intervene, where experts like the City Architect consider a particular structure to be in imminent danger, it must deal with such applications with great care and circumspection, inasmuch, as the rule is a very stringent one and makes a deep inroad into the rights of property, guaranteed to the citizen.

20. On the facts of this case, I have not the slightest hesitation in holding that the City Architect has rightly certified that the structure should come down at once, and the Commissioner is perfectly justified in ordering demolition of this structure.

21. I will now proceed to consider a few minor points which have been urged before me. It is said that Sub-rule 4 (a) gives a discretion to the Commissioner to act. forthwith or to give such notice as he thinks proper, but it is pointed out that the Commissioner does not Indicate in his order whether it should be done forthwith or upon notice. I think that the whole tenor of the certificate and the order made thereon is that action must be taken at once. I have now before me, the affidavit of the Commissioner supporting this view. It would certainly be more appropriate, if the Commissioner is sufficiently explicit in his orders in future. In this particular case, I do not think that any one was ever in doubt as to the purport of the order. It is next argued that the notice dated 10-5-1955 speaks of demolition on 16-5-1955, but there is no order of the Commissioner to that effect. I don't think there is any substance in this point. The Commissioner has ordered demolition of the structure. He is not going to do it himself, and his subordinates must have some reasonable time to make arrangements to carry out the order. This is all that has been done, and I find no defect in the notice dated 10-5-1955.

22. A point is made that the demolition order is not a bona fide order but is merely an attempt by the landlord to evict the tenant with the help of the Corporation, it is an admitted fact that the landlords attempted to evict the petitioner but failed. It is not denied that they wrote letters to the Commissioner and the Director Fire Services, requesting them to take steps for demolition. That by itself does not show that the Corporation; its Commissioner and City Architect, together with the Director of Fire Services, are all acting in collusion and conspiracy, merely to help the landlords to get rid of a troublesome tenant. I have set out above the dangerous condition of the structure. While a demolition will undoubtedly assist the landlord in evicting the tenant, the reason why the Corporation is moving in the matter has nothing whatsoever to do with the eviction of the petitioner. It is impelled by considerations of public safety and the facts related before me amply demonstrate that, it is guilty of no mala fide act or intention. I might refer here to the fact that in the suit by the tenant, Mukharji,

J. has passed an order against the landlord but has expressly said that he was not deciding anything about the rights of the Corporation to demolish the structure.

23. For the reasons stated, this application must fail and is dismissed. The rule is discharged. All interim orders vacated. There will be no order as to costs.