
(1909) 08 CAL CK 0051
In the Calcutta High Court

Bhagwan Das

APPELLANT

Vs

Rash Behari Mullick

RESPONDENT

Date of Decision : 05-08-1909

Acts Referred:

Citation : (1909) 08 CAL CK 0051

Judgement

Ryves, J.—The facts are as follows: There was a large rambling building abutting on the north side of Shibu Thakur's Lane in Calcutta known as No. 67, Shibu Thakur's Lane. Some four years ago it was partitioned by a decree in a suit between Rash Behary Mullick, the complainant's predecessors, and one Bansidhar, the predecessor-in-title of the petitioners. According to this decree 3/4th of the building, on the south, i.e., adjoining Shibu Thakur's Lane, was allotted to Bansidhar, while 1/4th on the north or rear of the premises was given to the complainant. In order to provide access to the portion that fell to the complainant, it was agreed that a strip of land 4 feet broad along the eastern boundary of the premises allotted to Bansidhar should remain open for ever. At the time of the partition, portions of the southern end of the building were partly one-storied, partly two-storied and partly three-storied. After the partition had been carried out, the two partitioned portions were separately assessed, and numbered 67 and 67-1 respectively--67 representing the smaller and most northern-most portion in the possession of the complainant, Rash Behary Mullick, and 67-1 representing the southern-most portion now owned by the petitioners. In November 1906, Bansidhar obtained sanction to re-build his portion according to a sanctioned plan (Exh. C since transferred to the file of the other case).

2. The alterations made by Bansidhar were chiefly in the southern-most portion of his premises so that although these were raised to 3 stories the complainant's portion, i.e., No. 67 was not materially affected. Bansidhar, however, deviated from the sanctioned plan, and built the portion abutting on the lane 2 ft. 6 in. higher than he should have done.

3. He was subsequently after enquiry, ordered u/s 449 to demolish the

unsanctioned portion of the third story within 2 months. He failed to comply with this order and proceedings were then taken against him u/s 580. As, however, he died during their pendency, they were withdrawn.

4. The present petitioners then acquired by purchase the interest of Bansidhar in the premises which had fallen into partial ruin and on the 17th June 1908, they put in a formal application to re-erect the premises, which they stated in their application was numbered in the assessment book, as 67 Shibu Thakur Lane." Attached to this application was a detailed plan showing the proposed alterations. This plan was sanctioned by the District Engineer on the 2nd July 1908.

5. It is suggested that when the application for sanction was presented, i.e., on the 17th June 1908, the premises built by Bansidhar were at any rate partially in existence, that they were subsequently pulled down and the whole re-built. It is quite apparent that the petitioners made use of their sanction most expeditiously for we find that, on the 10th July, that is, only 8 days after they had obtained their sanction, the complainant petitioned the Chairman stating that the petitioners were erecting a building in contravention of the building regulations and that it was then a source of nuisance to him.

6. On the 11th July, the Secretary of the Municipality informed the complainant that his petition had been sent to the District Engineer for enquiry and necessary action (Exh. 3 on the other file). Shortly afterwards a notice was admittedly received by the petitioners, on or about 12th August, to stop further work. The petitioners, however, pressed on with the re-building, and complainant tired of waiting for the Municipality to move, himself filed a complaint u/s 632 of the Act, alleging that the buildings in course of construction were a nuisance, and demanding an enquiry under that section. This was filed on the 14th August 1908 which certainly shows that the complainant acted with due promptness.

7. It is alleged in the 2nd paragraph of the Complaint that the building was still under construction. This is not denied by the petitioners and is, therefore, probably true. When the enquiry was finished (which was protracted owing at least to some extent to adjournment made at the request of the petitioners) it was found that the whole building had been completed, so that it would appear that in spite of the notice u/s 580, on 12th August 1908 by the Municipality and of the filing of this complaint on the 14th August 1908, the petitioners persisted in completing their building operations with all haste.

8. On enquiry, after hearing the evidence of both sides, the learned Magistrate found that the building was a nuisance within the meaning of the Act and made an order for its abatement holding (1) that the so-called sanction of the 22nd July 1908, given by the District Engineer, was ultra vires and, therefore, a nullity; (2) that in any case it was obtained by fraudulent misrepresentation and was, therefore, not a valid sanction. It is to quash this order that this rule was obtained. It is not suggested that the order is unreasonable in itself that is to say that a smaller modification would be sufficient. It is contended that the order is

altogether illegal and on three main grounds. It has been argued: (1) that Section 632 of the Calcutta Municipal Act does not apply to a case of this kind where the nuisance, if any, affects an individual and does not the public generally. It is argued, that it was open to the Municipality to take action if it was thought necessary u/s 449 and if the Municipality, after their attention had been drawn to the facts, do not move, the lower Court and this Court should not interfere u/s 632, but should leave the injured party to vindicate his rights in a Civil Court. The term "nuisance", however, has been defined in the Act and the definition is wide enough to cover this case. Whether or not the building is a "nuisance" is obviously purely a question of fact. The erection of this wall thirty-three feet high close up against the house of Rash Behary Mullick thereby depriving him of light and air, certainly is a "nuisance" to him and the occupants of his house and u/s 632 any "person who resides in Calcutta may complain to a Magistrate of the existence of any nuisance." Unimpeachable evidence was given to prove that the building did constitute a nuisance and even the petitioner's own witness admitted it. I, therefore, think the Magistrate had jurisdiction to make the order.

9. Then it is argued that inasmuch as the buildings complained of were in fact sanctioned by the District Engineer and erected in accordance with this sanction the Corporation is estopped from saying that the officer granting the sanction had no authority to grant it, and, that in any case the Court cannot consider whether or not the present building or any part of it contravenes the building regulations since they have been sanctioned.

10. As regards the ground taken by the petitioner, it seems to me that the question, whether the Corporation is estopped from questioning the legality of the sanction given by their officer, is irrelevant in these proceedings. That is a matter which concerns the present petitioner and the Corporation. It cannot affect Rash Behary Mullick who is in no way bound by the act of the Corporation. He, as a resident of Calcutta, has a right to move u/s 632, and, if a nuisance exists, it is no answer, it seems to me, to say that the Corporation sanctioned it, consequently I think a great deal of the argument which related to the circumstances under which the sanction was given was irrelevant and unnecessary. It seems to me that if a building erected whether in contravention of the building regulations or not, or "whether with or without sanction, is in fact a nuisance a person residing in Calcutta who is affected by it, has the right of moving a Magistrate u/s 632 to abate it and it is within the jurisdiction of the Magistrate to pass order under that section if in his discretion he is so advised. Whether he should or should not exercise his discretion is another matter, and will depend on the circumstances of the particular case one of which certainly is whether the complainant has moved promptly The plea of hardship raised by the petitioner is, I think, worthy of very little attention. They must have known that the building they were erecting contravened the regulations of the Act. It has been found that they obtained their sanction by misrepresenting facts of which they certainly had knowledge and I personally do not think that the lower Court

on the evidence has arrived at a wrong conclusion on this point and they persisted in hurrying on the completion of the building in spite of a notice to stop work. Whether they have a remedy against the Corporation or any other remedy it is unnecessary to consider.

11. Lastly, it is urged that the Court must consider the terms of the partition decree between Rash Behary Mullick and the petitioner's predecessor-in-interest and that as under that decree certain specified easements only were reserved to the portion owned by Bash Behary Mullick, he is not entitled to anything more. I confess I was impressed by the argument at the hearing of the learned Counsel for the petitioner on this part of the case. The quarrel it was said was one between two rival landowners who had had their rights inter se decided by Civil Court decree. The Municipality as such in the public interest had refrained from taking action. Why then should not the parties be left to their remedies in the Civil Courts especially when the alterations had in fact been sanctioned by a responsible officer of the Municipality? On consideration I do not think there is very much substance in the argument having regard (1) to the evidence as to how the sanction to re-build was obtained, (2) to the rapidity of the construction in spite of the protest of the other side. The partition decree affected the premises as they then stood but in any case that decree cannot be held to override the provisions of the Act which is directed to provide for public sanitation among other public considerations.

12. So long as the conditions were unaltered, presumably the sanitation of the whole premises remained the same. As soon, however, as the owner of one of the divided parts desired to re-build his portion as a separate building he came within the provisions of the Act and he was bound to comply with its terms. It would be no answer for him to say if for instance the proposed buildings had been refused sanction that he was entitled under his decree to build in contravention of the rules laid down in the Act. This argument in effect implies that parties can contract themselves out of the provisions of the Municipal Act. But that is not so. Once the house was partitioned and separately assessed it would not be open to the owner of 67/1 to rebuild his premises in total disregard of the regulations of the Act. I would discharge the rule.

Coxe, J.

13. I agree.