

(1958) 09 CAL CK 0032
In the Calcutta High Court
Case No : A.F.O.D. No. 111 of 1958

Corporation of Calcutta and Another	Vs	APPELLANT
Satdeo Sarma		RESPONDENT

Date of Decision : 19-09-1958

Acts Referred:

Calcutta Municipal Act, 1923 — Section 431, 432, 433, 532, 560

Citation : AIR 1959 Cal 377

Hon'ble Judges : P.N. Mookerjee, J;P.K. Sarkar, J

Bench : Division Bench

Advocate : Bankim Chandra Dutta and Bhabani Sankar Bagchi, for the Appellant; Satyendra Prosad Sen, for the Respondent

Final Decision : Dismissed

Judgement

P.N. Mookerjee, J.—In this appeal two interesting questions have been raised and they arise under the Calcutta Municipal Act, or to be more precise, under Rule 5(4) of Schedule XVII thereof. The appeal is by the two defendants, the Corporation of Calcutta , and its Commissioner and it is directed against a decree of the court below declaring a certain order of the Commissioner bad and inoperative and declaring further that the notices, issued in connection with the carrying out of the order were inoperative and issuing also a permanent injunction to restrain the Corporation and its officers and men from giving effect to the said order and notices.

2. The suit was filed under the following circumstances:

That, on September 10, 1957, the defendant No, 2 Commissioner directed demolition of Premises No. 5 Tamsook Lane. Burrabazar, which is a partly one-storied, partly two-storied and partly three-storied building, under Rule 5(4) of Schedule XVII of the Calcutta Municipal Act. This was communicated to the plaintiff (who is a tenant of the said premises) by a notice, served on September 14, 1957, and he (the plaintiff) was also directed by the said notice to deposit

Rs. 1923.95 nP. as cost of demolition and, thereafter on September 19, 1957, another notice, dated September 17, 1957, was served on him intimating that the Insecure Building Inspector would enter the said premises on September 21, 1957, for carrying out the said demolition work. The plaintiff, thereupon, filed the present suit on September 20, 1957, for inter alia, the declarations aforementioned and denying further his liability for the costs, demanded from him.

3. The court below decreed the suit in part holding inter alia that the impugned demolition order and the connected notices were bad and granting the plaintiff necessary reliefs in respect of the same.

4. The plaintiff's challenge was based on two grounds. He urged, in the first place, that the Rule namely, Rule 5(4), under which the defendants purported to act, was ultra vires. He urged further that, in any event, in taking the above steps, the defendants did not act in compliance with the said Rule or within the four corners thereof and, as such, their action was bad and inoperative in law and the plaintiff was entitled inter alia to a declaration to that effect and also to consequential injunction. The court below rejected the first submission but accepted the second and decreed the suit accordingly.

5. The appellants argue that the steps, taken by them, were perfectly in accordance with law and, in any event, they were protected from challenge by suit. They support also the trial court's finding that the Rule in question, namely, Rule 5(4), is not ultra vires. Here the plaintiff-respondent demurs and he urges further that the other finding of the court below, namely, that the appellants' actions, impugned by him, were bad and inoperative in law is correct and should be maintained. These rival contentions have now to be carefully examined.

6. It is necessary at this stage to set out the relevant facts in some detail and we proceed to do so as follows:

The chapter opened with an inspection of the disputed premises by the Corporation's Building Inspector (D. W. 2) who, on July 29, 1957, after such inspection, submitted his report (Ex. B (1)) to the Insecure Building Inspector to the following effect:

"I. B. S. Inspected and found that the inside verandhas, at each level and also verandhas at each level over Tamsukh Lane, are in most dilapidated condition. The wooden beams have been bent and tiles have been damaged. The verandhas require immediate demolition. The roofs of the building also have been damaged. The whole building is in dilapidated condition. Immediate action may be taken according to law. Submitted for inspection."

7. Thereafter, on August 21, 1957, the Insecure Building Inspector inspected the Premises and submitted his report, Ex. B, to the City Architect. This report appears as follows:

"C.A. Inspected the above premises. The report of B.I. on prepage may please be

seen, This is a three stoned building lying in a most dilapidated condition. The walls on the North have bulged out and the roof and floors have sagged in places. The walls have badly worn out. Beams and bargas have decayed and sagged. The building has become a source of nuisance. The verandas may collapse at any time. Departmental demolition of the entire building may be taken up U/R 5(4) of Schedule XVII for the safety of the public and of the inmates thereof. Your inspection is solicited. Submitted."

8. The City Architect approved this report (vide Ex. B2) on 22-8-1957. and, on 10-9-1957, the City Architect signed a certificate (Ex. A1) in the following terms:

"Commissioner. For your authority to (A)(i) demolish departmentally under Rule 5(4) of Schedule XVII of the Act. The entire building partly one, partly two and partly three storied at 5, Tomsook Lane in respect of which the City Architect certifies that demolition is necessary forthwith for the safety of public or the inmates of the building and (ii) to cause summary removal of the inmates thereof; (B) to sanction the estimate of cost of demolition amounting to Rupees 1923.90 n.P."

and submitted it to the Commissioner. Thereupon, on the same day, the Commissioner directed immediate demolition of the building (vide Ex. A) in the following terms:

"A--Approved--On a consideration of the records and the facts of this case I decide that the demolition should be carried out forthwith and without any prior notice but the owners and occupiers be informed by letter of the date of demolition and the costs thereof; and the demolition be carried out expeditiously and the inmates be removed summarily. B.--Sanctioned- B. K. Sen, 10-9-57. Commissioner, Corporation of Calcutta."

9. This direction of the Commissioner was followed by the two impugned notices (Exs. 1 and 2) which were served on the plaintiff, as stated above, and which occasioned the present suit.

10. The plaintiffs case was that Rule 5(4), under which the defendants purported to act and proposed to demolish the disputed building was ultra vires and as such the order of demolition and the notices which were issued to give effect to the same were all illegal and invalid. His further case was that, even if the Rule was not ultra vires, the defendants did not act in conformity with it so as to give validity to the steps, taken by them or to their proposed action. His third submission was that the disputed building was not one to suffer demolition under the above Rule,

11. In the trial court the plaintiff succeeded on his second ground but his first submission was rejected by the learned trial Judge and, on his third submission, the learned Judge could not find definitely in his favour. In the light of the said findings the suit was decreed in part by the learned trial Judge, declaring the impugned order and notices bad and inoperative in law and issuing permanent

injunction restraining the defendants from giving effect to the same. The defendants have appealed from this decree. The plaintiff has filed a cross-objection, challenging the adverse findings against him.

12. All the three questions, enumerated above and urged before the trial court, were argued before us with fullness and very great elaboration but, having given the matter our best and most anxious consideration, we have reached the conclusion that the learned trial Judge was right on each of them and his ultimate decision should be affirmed in the facts and circumstances of this case. We proceed to give our reasons.

13. As to the third submission we may at once state that we agree with the learned trial Judge in holding that the materials on record are not sufficient to justify a finding in favour of the plaintiff respondent and we prefer to leave that question open in the present proceedings so that neither party may be prejudiced on the point in any future proceeding where that question may again arise for consideration.

14. On the question of ultra vires there is a decision of this Court reported in *Ajoy Kumar Ghose Vs. Corporation of Calcutta and Others*, . There the matter was elaborately considered by Sinha, J. and, so far as the different aspects of this question, covered by that decision, are concerned, nothing practically remains to be added and we need only express our respectful concurrence with the said learned Judge. We shall however, refer also to some additional arguments, touching the point at issue, which were advanced before us and give our views on the same.

15. It was argued by Mr. Sen that before Sinha, J., the effect of certain sections of the Act on this question of ultra vires of the relevant Rule 5(4) was not raised for consideration and that made all the difference in the ultimate result. He urged strongly that if those provisions had been brought to the notice of the learned Judge his decision would have been otherwise. We are unable to accept this submission.

16. Mr. Sen referred, in particular, to Sections 431, 432 and 433 and Sections 560 and 561. He also referred to Section 532 which contains the rule-making power under the Act. This latter section runs as follows:

"(1) The State Government may, on the recommendation of the Corporation, by rules alter, add to or cancel any part of- or any rule contained in, any schedule except Schedule 1.

(2) All references in this Act to any schedule which may be amended under this section shall be construed as references to such schedule as for the time being so amended."

Rules, therefore, may be made to alter, add to or cancel any part of, or any rule contained in, any schedule except Schedule 1. It is in the exercise of this power that the impugned sub-rule (Rule 5(4)) was made. The sub-rule, therefore, is

prima facie valid and we do not find anything in the sections, referred to by Mr. Sen, which, in any way, affects or alters that position. Rule 5(4) purports to deal with an emergency which was not contemplated or covered by Sections 432 and 433 and, indeed, it is clear, on a reading of Sections 431 and 532, that the power to supplement the provisions of the Act, relating inter alia to demolition of buildings by appropriate rules was expressly reserved under the last quoted section. This is confirmed by Section 535 which makes the rules made on publication a part of the original Act so that reference to the Act in Section 431 would include the new Sub-rule 5(4) and the exception, mentioned in Sub-section (5) of Section 561 to that section and the preceding Section 560, would be attracted to this sub-rule. It is noteworthy also that, u/s 532(2), reference in the said Section 431 to rules, contained in schedule XVII, would include the new Sub-rule 5(4). Rule 5(4), therefore, is fully authorised by the Act and is not inconsistent with any of the provisions thereof. The question of ultra vires must, therefore, be answered against the plaintiff respondent and the decision of the learned trial Judge on the point must be affirmed.

17. We turn now to the remaining question, namely, the second submission of the plaintiff as noted hereinbefore. This is the crucial question in the case and it requires very serious and careful consideration and to that task we proceed at once.

18. We have set out above the relevant facts and also the relevant extracts from the Corporation papers. They do not, in our opinion, show sufficient compliance with the terms of the Rule, under which the defendants purported to act, to give legal validity to the steps, taken by them, or to their proposed further action. Rule 5(4) no doubt authorises the Commissioner to take immediate action for demolition of a building for the safety of the public and the inmates thereof but that he can do only "on the report of the City Architect" "certifying that such demolition is necessary for the safety of the public or the inmates of the building" and such report, we think, should be either on a personal inspection by the City Architect himself or at least by a competent officer of near rank. Demolition of a building forthwith and without notice is a very serious matter and we do not think that the Legislature contemplated action by the Commissioner except on a report, as envisaged by us hereinbefore. The final decision in the matter would undoubtedly be with the Commissioner but that decision has to be and can be taken only on a report which, according to our reading of the Act, can be made only on an inspection, as set out by us above. The Rule, no doubt, does not expressly refer to any such particular inspection but without having an inspection by some competent person, if not personally by himself, no report, worth the name,--at any rate, no report, as contemplated by the Rule can be submitted by the City Architect and such competent person in the contemplation of the Act appears to us some one at least near about the rank of the City Architect if not the City Architect himself. We do not of course, think that, merely because the report of the City Architect or the order of the Commissioner was in a printed or typed sheet or form, that would necessarily invalidate them or make them bad

and inoperative in law. The defect, however, that we have found in the present case is much more fundamental and vitiates the, entire proceedings. On this ground we hold that in the facts and circumstances of this case, the decision of the learned trial Judge is right and we uphold his said decision and dismiss this appeal.

19. We may just add here one or two words on the English case of *Cheetham v. Manchester Corporation* (1875) 10 C. P 249, on which strong reliance was placed by Mr. Dutt on behalf of the appellants. We do not think that that case is of much assistance to the appellants here or is in any way opposed to the view we have taken above. All that follows from that case, so far as it is relevant for our present purpose, is that the Legislature has selected the person who is to form a judgment on the question of immediate demolition of the building but it does not necessarily preclude the Court from examining the materials on which the said judgment is or purports to be based for seeing whether he has acted in terms of or in accordance with the Act and in compliance with its provisions. The Commissioner here is to base his decision on the report and certificate of the City Architect and the latter, according to our reading of the Act, is to submit his report and certificate after inspection by himself or by some competent and responsible authority, as noted hereinbefore, and that has not been done in the present case. Even the reports (Exs. B and B1) show that the inspecting officers suggested and their said reports were really made subject to a personal inspection by the City Architect. We do not think, therefore, that the Act has been sufficiently complied with to give validity and effect to the Commissioner's decision (Ex. A).

20. We must make it clear, however, that, if the defendants think that demolition of the disputed building is necessary "for the safety of the public or the inmates of the said building", it will be open to them under this very judgment and notwithstanding any observation, made herein, to proceed recording to Rule 5(4) and to take steps for its immediate demolition according to law and nothing said herein will preclude them from so acting.

21. We have, therefore, come to the conclusion that this appeal should fail subject to this that if the defendants, namely, the Corporation and the Commissioner, or any appropriate authority think, on a proper consideration of the matter in accordance with law, that the disputed building should be forthwith demolished for the safety of the public or the inmates of the building, they may, if FO authorised under the law, proceed to take necessary steps for such purpose and demolish the same under and in terms of Rule 5(4) of Schedule XVII of the Calcutta Municipal Act, which has been held by us not to be ultra vires, or any other appropriate law in that behalf and nothing in this proceeding will stand in their way in taking the aforesaid action.

22. Subject as above, the appeal is dismissed. The cross-objection also must be dismissed in view of our findings made above. There will, however, be no order as to costs either in this Court or in the Court below.

23. P.K. Sarkar, J. : I agree.