

(1951) 08 CAL CK 0004
In the Calcutta High Court

Case No : Criminal Revision Case No. 968 of 1950

Corporation of Calcutta

APPELLANT

Vs

Surendra Nath Das Gupta

RESPONDENT

Date of Decision : 22-08-1951

Acts Referred:

Calcutta Municipal Act, 1923 — Section 363, 365, 365(1), 365(2), 365(3)
Calcutta Municipal Rules, 1951 — Rule 14, 3, 30, 33, 8

Citation : (1953) 1 ILR (Cal) 176

Hon'ble Judges : P.N. Mookerjee, J; Das Gupta, J

Bench : Division Bench

Advocate : Narendra Kumar Basu and Sunil Kumar Basu, for the Appellant; S.M. Bose, General, Debabrata Mookerjee, Nilkantha Chatterjee and Sudhansu Bhusan Sen, for the Respondent

Judgement

1. The judgment of the Court was as follows:
2. This Rule arises out of a proceeding u/s 363 of the Calcutta Municipal Act for demolition of certain structures alleged to have been built without sanction and in violation of statutory rules made under the said Act.
3. The Corporation of Calcutta is the Petitioner before up and it made the application u/s 363 of the Calcutta Municipal Act, under, inter alia, the following circumstances, namely:
 - (i) that, on February 12, 1947, it was detected, inter alia, by the Petitioner's Building Inspector Ashutosh Chowdhury that in premises No. 2A, Durga Charan Chowdhury Lane, owned by the opposite party Surendra Nath Das Gupta, a fourth storey (along with a new staircase from 3rd floor to 4th floor level) was being added over the existing partly two-storeyed, partly three-storeyed and partly low fourth-storeyed structures of the said premises;
 - (ii) that, according to the said Building Inspector, the said additions were being made without the necessary sanction under the Calcutta Municipal Act and in

violation of Rules 3, 8, 14, 30 and 33 of sch. XVII thereof;

(iii) that, immediately, that is, on the same day, namely, February 12, 1947, a notice u/s 365 of the Act was served upon the opposite party, asking him to stop forthwith further unauthorised constructions pending the decision of the Municipal Magistrate on an application to be made to him u/s 363 of the Act;

(iv) that, on or about July 21, 1947, it was found that, in spite of the said notice u/s 365, the unauthorised constructions had not stopped but had instead proceeded further with the result that the unauthorised structures had practically been completed by that date;

(v) that, it also came to light that even the pre-existing 3rd storey of the said premises on the road-side as also the preexisting 4th storey had all been made without sanction;

(vi) that, thereupon, the whole matter was placed before the appropriate Building Committee and, after the usual notice and hearing, an order was eventually made on May 31, 1948 July 6, 1948, by the Administrative Officer, then exercising the powers, functions and duties of the said Building Committee, for sending the case to the Municipal Magistrate; and

(vii) that, in pursuance of the above order of the Administrative Officer, the application u/s 363 of the Act was made on November 24, 1948, for demolition of the unauthorised structures.

4. Before the Municipal Magistrate the opposite party entered appearance and, in the course of the proceedings there, he filed an application on June 29, 1949, praying that the case might be treated as one u/s 493 of the Calcutta Municipal Act. Thereupon, the learned magistrate, before whom the proceedings were then pending, converted the case into one u/s 493 and, having fined the opposite party Rs. 100 allowed the unauthorised structures to stand. This order of the learned Magistrate, however, was set aside by this Court in Cr. Revision No. 809 of 1949 at the instance of the Petitioner and the case was sent back to be tried as one u/s 363 of the Act by another Municipal Magistrate. This Court's order was passed by the learned Chief Justice on November 10, 1949, and, in pursuance thereof, the matter was placed before another Municipal Magistrate for disposal.

5. At this trial, the opposite party's main plea was that he was a refugee from Eastern Pakistan and had to make the unauthorised constructions under the stress of compelling necessity and extreme and pressing circumstances to give shelter to his relations in distress. He did not and could not deny-as a matter of fact he admitted-that the offending structures had all been built without sanction and that unauthorised constructions had been made even after, and in spite of, service of the notice u/s 365. The opposite party, however, sought to justify his act and conduct on the ground of unavoidable necessity.

6. The learned Magistrate inspected the premises in question and, eventually, by

his order dated September 20, 1950, he dismissed the Petitioner's application for demolition of the offending structures and allowed them to remain, directing the opposite party only to make certain payments to the Petitioner Corporation on account of sketch fee and wait work charges. Against this order of the learned Magistrate, the Petitioner Corporation has moved this Court and has obtained the present Rule.

7. The learned Magistrate has found and there is no dispute now-that the offending structures were all built without sanction and that Rules 3 and 30 of schedule XVII of the Calcutta Municipal Act, relating to road angle and back angle respectively, have been infringed in the present case. The learned Magistrate has also found that, even prior to the present unauthorised constructions, the opposite party had built his third storey in violation or contravention of the sanction, granted to him for the purpose. In spite of his above findings, however, the learned Magistrate has refused the Petitioner's prayer for demolition of the offending structures mainly on the following grounds, namely:

(a) that, as there are other three or four-storeyed buildings on the public street whereon the premises in question are situate and as there is no evidence in this case that the public street below has been rendered dark or insanitary or dangerous by the opposite party's structures and as there is no complaint against the said structures from any adjoining owner, the objection about the infringement of the road angle (r. 3) cannot be regarded as serious;

(b) that, the fact that there are other three or four-storeyed buildings on the said street and the fact that the Petitioner Corporation itself relaxed the road angle Rule 3 in favour of the opposite party when sanctioning the third storey of the disputed premises and granted such sanction with a set back of six feet from the road-side, thus deviating from the road angle rule, are sufficient to show that the objection about the infringement of the road angle rule was never considered serious by the Corporation;

(c) that, as, having regard to the situation and area of the site of the opposite party's premises, No. 2A, Durga Charan Chowdhury Lane, it was not possible to construct buildings without infringing the back angle Rule 30 of sch. XVII the Calcutta Municipal Act, and as even the sanctions granted by the Corporation in respect of the said premises were apparently in violation of this back angle rule, the Petitioner's objection in this regard cannot also be considered to be serious so as to justify an order of demolition;

(d) that, the width of the building is such that it is neither possible to set it back from the road-side so as to satisfy the road-angle rule nor is it possible to set it back from the backside, so as to remove the objection as to back angle;

(e) that, the infringements, complained of, were purely technical;

(f) that, the opposite party had to make the offending structures out of sheer

pressing necessity and in dire distress to provide shelter for his unfortunate homeless refugee relations and an order for demolition in the present case would seriously put at stake the interests of numerous persons and would render them homeless and shelterless and throw them into the street, adding thereby to the difficulties of the solution of the refugee accommodation problem;

(g) that, the unauthorised structures are free from objection from the sanitary point of view and are bright and well-ventilated and their demolition would entail a huge economic waste and would add to the scarcity of houses in the city, and such demolition should not be ordered, particularly when there is a shortage of building materials;

(h) that, in the present case, an order of demolition would operate as a disproportionately heavy punishment and loss to the opposite party which his act and conduct and the circumstances of the case did not at all justify, and

(i) that, on the part of the opposite party, there has been a frank admission of the charge and he has already suffered much in costs in defending these proceedings for demolition at their various stages. He has thus been sufficiently punished and law and authority have also been fully vindicated.

8. Upon the above findings the learned Magistrate has held on the authority of two cases of this Court, namely, Chuni Lal Dutt v. Corporation of Calcutta ILR (1906) Cal. 341 and Fazal Elahi Vs. Corporation of Calcutta, , that, as justice should be administered with equity and as Court's discretion in matters of this kind should be exercised judicially, no order for demolition should be made in the instant case.

9. In our opinion, the learned Magistrate has misdirected himself as to the effect of the decisions cited by him and, in refusing the prayer for demolition in the present case. On the reasons given by him, the learned Magistrate has grievously erred in the exercise of his jurisdiction. There has thus been a failure on his part to exercise his discretion u/s 363 of the Act judicially and an error in the exercise of his jurisdiction and it seems clear to us that, in the circumstances disclosed in this case, the Petitioner's application u/s 363 requires fresh consideration.

10. It is true that the jurisdiction u/s 363 is discretionary but such discretion, as repeatedly emphasised by this Court and as noticed by the learned Magistrate himself, has to be exercised judicially upon a consideration of all the relevant circumstances. Unquestionably also, cases of mere technical breaches of the Building Rules would not merit demolition orders. We have also no doubt in our minds that the cases, cited by the learned Magistrate, namely, Chuni Lal Dutt v. Corporation of Calcutta (supra) and Fazal Elahi v. Corporation of Calcutta (supra), were correctly decided and these decisions are not open to any just criticism. They do not, however, lay down an inflexible rule for the governance of all cases u/s 363 of the Act. The infringements complained of in Chuni Lal's case (supra) were of a purely technical character and there was nothing more in that case

beyond these mere technical breaches. No legitimate exception can, therefore, be taken to the refusal of the Corporation's prayer for demolition in that case. In the case of *Fazal Elahi v. Corporation of Calcutta* (supra) the learned Magistrate ordered demolition merely on the finding that the structures in question were built without sanction in infringement of the Building Rules and this Court held that finding was not sufficient to justify the order and remanded the case for consideration of the other relevant aspects of the matter. Indeed, it is beyond question that the said cases cited by the learned Magistrate lay down the correct tests so far as they go. Those tests, however, are not exhaustive of the circumstances under which demolition can or should be ordered, and that is one of the reasons which induce us to hold that the matter before us has not received adequate and proper consideration and should be further considered.

11. It seems to us clear that a case for demolition may exist even apart from the circumstances noticed in that regard in the cases of *Chuni Lal Dutt v. Corporation of Calcutta* (supra) and *Fazal Elahi v. Corporation of Calcutta* (supra). Where there are gross, deliberate and open breaches of the Building Rules, no matter that the party concerned has great necessity for the offending structures—a total refusal of the prayer for demolition, would not normally be a proper judicial exercise of the discretion vested in the Magistrate u/s 363 of the Calcutta Municipal Act. Graver still is the situation when further breaches are committed and unauthorised structures continue to be added even after and in spite of service of the statutory notice, for stoppage of the unlawful work and if, in such cases, it is further found that the party concerned had, on prior occasions, shown scant respect for the Municipal laws there is, generally speaking, hardly any scope left for invoking equity in his favour. In such cases, the plea of necessity deserves little consideration and ought to be of no avail, as otherwise Municipal law would become a dead letter and would be broken with impunity and without the least hesitation. Necessity would then become an overriding factor and the building, regulations would be practically scraped from, the statute book Administration of justice according to law, for which alone the courts exist, would then come to a stand still and laws evolved for public good and founded on general convenience and the needs of the community and essential for the proper maintenance and administration of Municipal cities would be shattered on the rock of individual needs. Such a situation cannot, indeed be tolerated and courts would clearly be failing in their duty if they overlook or fail to notice this aspect of the matter where it exists. In the cases cited by the learned Magistrate, there was no scope for any such complaint and there, accordingly, this aspect did not fall to be considered. Those cases are, therefore clearly distinguishable from the case before us where, upon the findings of the learned Magistrate himself, there exist some at least of the circumstances which might reasonably necessitate consideration of this aspect. The learned Magistrate rejected the Petitioner's prayer without advertting to this aspect of the matter and such rejection cannot, therefore, be sustained.

12. It is necessary at this stage to consider one argument advanced by the

learned Advocate-General who appeared before us on behalf of the opposite party. Referring to Section 365 of the Act, the learned Advocate-General invited us to hold that, as, in the present case, the Corporation did not follow up the service of the notice under Sub-section (1) with the steps, available to it under Sub-sections (2) and (3), for implementing the same or enforcing compliance therewith, it would not be entitled to any order for demolition. The learned Advocate-General did not argue that there was any absolute bar, statutory or otherwise, against the Corporation in this respect but he contended that by reason of this default on its part the Corporation had forfeited all claims to the exercise of the Court's discretion u/s 363 in its favour. This contention appears to be founded on certain observations made in the case of Chuni Lal Dutt v. Corporation of Calcutta (supra) where the learned Judges likened-though not without reservations-the position of the Municipality in a proceeding u/s 363 to that of a private individual, claiming relief by way of mandatory injunction. Generally speaking, the analogy drawn in Chuni Lal's case is helpful and offers useful and valuable guidance in the matter of exercise of the discretion u/s 363 of the Calcutta Municipal Act, but that analogy is, by no means, perfect. This is clear from the reservations made by the learned Judges themselves and also from the guarded language used by them at several places in the judgment. There is nothing either in Chuni Lal's case (supra) or in the case of Fazal Elahi v. Corporation of Calcutta (supra) which followed the same, to indicate that the failure of the Corporation to take steps under Sub-sections (2) and (3) of Section 365 would disentitle it to an order of demolition and we have also discovered nothing in statute, principle or authority to justify the conclusion that such failure on the part of the Corporation ought in any way to influence or fetter the court's discretion u/s 363 and prevent the passing of an order for demolition. Once the notice u/s 365(1) has been served, the party concerned proceeds with further unauthorised constructions entirely at his own risk and he cannot ask the court to exercise its discretion u/s 363 of the Act in his favour on the plea that the Corporation has neglected or failed to take the statutory preventive steps, available to it under Sub-sections (2) and (3). Failure of the Corporation in this respect would not affect the notice u/s 365(1) and would not relieve the party concerned of the consequences of non-compliance therewith nor vest him with any new equity which, might be pleaded on his behalf for inducing the court to exercise its discretion u/s 363 in his favour. It is also to be seen that the steps contemplated in Sub-sections (2) and (3) of Section 365 are available only against the further unauthorised constructions which follow the service of the notice under sub-s, (1). Non-adoption of such steps cannot also, therefore, be reasonably or legitimately pleaded in defence of prior, unauthorised constructions or infringements of the Building Rules. Examining the position a little more closely it further appears to us that if the learned Advocate-General's contention be sound, that is, if failure to take steps under Sub-sections (2) and (3) of Section 365 be a relevant consideration for the exercise of the discretion u/s 363, the results, in many cases, would be extremely- unjust and improper and even anomalous in some cases. Unauthorised constructions, made after and in

spite of service of the notice u/s 365(1), would be protected while antecedent constructions would be liable to demolition and would thus be in a worse position. In a number of other cases, persons guilty of continuing their acts of infringement of the Municipal law even after and in spite of service of the statutory stop notice u/s 365(1) would get immunity for their anterior infringements as well and would thus be given preference over persons, honestly complying with such notice. In other words in exercising the discretion u/s 363 judicially, courts would be extending greater protection to breaches of the law which are more extensive, more pronounced, more prolonged and/or more deliberate and would thus be recognising a right to earn immunity, total or partial, by wilful continuance of wrongful acts and contumacious disregard to statutory injunctions. Such a situation would be paradoxical. We have, therefore, no hesitation in rejecting this argument of the learned Advocate-General and in holding, as a matter of law, that failure of the Corporation to take steps under Sub-sections (2) and (3) of Section 365 is not a relevant consideration for the exercise of the court's discretion u/s 363.

13. In our opinion, as already expressed, it cannot be argued that any plea of necessity can be available in defence or justification of illegal constructions or that any such plea can be put forward as overriding all other considerations in such matters. It appears to us that there has been in this case no sufficient investigation Or determination of the nature and measure of the alleged statutory infringements, and, upon the materials on record,-at any rate, in the absence of a sufficient investigation or determination of the alleged infringements-we are riot prepared to say that those infringements are merely technical. We are also inclined to hold that, at least in cases of gross and deliberate violations of the Building Rules, considerations of sympathy or of the magnitude of loss or possible economic waste or of the impossibility of complying with the Building Rules are utterly irrelevant and out of place and we are further of the opinion that in such cases at least, reference to the refugee accommodation problem or scarcity of houses or shortage of building materials is not generally very appropriate. Judged in the above light, the reasons, given by the learned Magistrate, do not appear to be either sufficient or apposite or sustainable in law and his order, therefore, cannot stand.

14. Our conclusion, therefore, is that in refusing the Petitioner's prayer for demolition in the present case the learned Magistrate has failed to apply the law correctly and consider all relevant aspects of the matter. There has thus been no proper judicial exercise of his discretion u/s 363 of the Act and, as it seems to us that neither the parties nor the learned Magistrate was alive to all relevant aspects of the matter, this case must go back to the learned Magistrate for a fresh consideration of the Petitioner's application u/s 363 of the Calcutta Municipal Act in accordance with law in the light of the observations we have made above. In the circumstances of this case, we also grant leave to the parties to adduce such further evidence as they might choose to adduce or deem necessary. The case is then to be decided on the evidence already on record and

such further evidence as may now be adduced by the parties.

15. In the above view of the matter, this Rule is made absolute and the case is remanded to the learned Magistrate for retrial in accordance with law as directed above.