

(1951) 06 CAL CK 0002
In the Calcutta High Court
Case No : Criminal Revn. No. 999 of 1950

Dhanapati Devi

APPELLANT

Vs

The Corporation of Calcutta

RESPONDENT

Date of Decision : 13-06-1951

Acts Referred:

Calcutta Municipal Act, 1923 — Section 363, 493
Criminal Procedure Code, 1898 (CrPC) — Section 248, 403, 439
Evidence Act, 1872 — Section 114, 16

Citation : AIR 1952 Cal 467 : (1951) 1 CALLT 164 : 55 CWN 751 : (1952) 2 ILR (Cal) 321

Hon'ble Judges : Das Gupta, J;Chakravartti, J

Bench : Division Bench

Advocate : Nalin Chandra Banerjee, for the Appellant;Monmohan Mukherjee, for the Respondent

Judgement

Chakravartti, J.—This Rule is directed against an order dated 7-10-1950 passed by the learned Municipal Magistrate, Calcutta whereby he ordered the demolition of certain unauthorised structures erected by the petitioner. The Rule is an open Rule, but of the seven grounds mentioned in the petition, Mr. Banerjee, who appeared for the petitioner urged only three.

2. The facts are as follows: The petitioner Dhanapati Debi is the wife of one Banwarilal Rajghorja and the owner of premises No. 10/2 Syed Sally Lane, Calcutta. In or about February 1945 she became desirous of making certain additions to the fourth storey of the building and applied to the Corporation for the necessary sanction. The additions she proposed to make were two rooms in the fourth storey and a stair case leading from the third storey to the fourth. No sanction was given. On 4-7-1946, a Building Inspector of the Corporation visited the premises, apparently on receipt of some information, and discovered that construction of walls preparatory to the erection of two rooms was proceeding. He immediately caused, a notice u/s 365 of the Calcutta Municipal Act to be served. There is some dispute as regards the manner in which that notice was

served, but since nothing turns on that notice, I need not tarry to mention the details of that controversy. In due course, the matter was taken up by the Building Committee of the Corporation and was brought up at a meeting held on 23-12-1947. The petitioner was duly informed of that meeting and a representative of hers attended. It was decided at the meeting that an application u/s 363 of the Calcutta Municipal Act should be made for securing a demolition order and in accordance with that decision, a proceeding was instituted. While that proceeding was pending in the Magistrate's Court, the matter came to be considered once again by the Building Committee, as it seems to have been thought that some irregularity had crept in which made the continuance of the proceeding then pending, inadvisable. Accordingly, another meeting of the Building Committee was held on 28-6-1949 and at that meeting it was decided to withdraw the proceeding that was pending and start a fresh one. It appears from the Minutes of the meeting which have been exhibited in the case that the irregularity, which weighed on the members of the committee in deciding to withdraw the proceeding that was then pending, was that the name in which the person guilty of the alleged unauthorised construction was being proceeded against, was not the correct name. The petitioner's case is that she received no information of the meeting that was held on 28-6-1949 and accordingly got no opportunity to represent what she had to say against the proposed demolition. It appears that in pursuance of the resolution adopted by the Building Committee at its meeting of the 28th of June, an application was made to the Magistrate on 14-2-1950 for the withdrawal of the proceeding then pending and then on the same day a fresh proceeding was instituted. It will be seen from the dates which I have given that about eight months elapsed between the date on which the Corporation decided to institute a fresh proceeding and the date on which such proceeding came actually to be instituted a not very impressive example of expedition with which public business is transacted by the Corporation.

3. I may add that in the meantime, in spite of the notice u/s 365 and the proceeding instituted u/s 363 the petitioner completed the unauthorised constructions.

4. The Corporation examined four witnesses before the Magistrate while the petitioner examined only her husband. The learned Magistrate, upon a consideration of the oral and documentary evidence adduced before him, came to the conclusion that the Corporation had made out a case for demolition and accordingly he made the order that is complained against.

5. I have already stated that only three grounds were urged on behalf of the petitioner. They are: (1) that no opportunity having been given to the petitioner for being heard by the Corporation before the institution of the proceeding u/s 363 was decided upon, the proceeding is utterly void; (2) that the magistrate failed to apply the correct principles in exercise of his discretion in favor of making a demolition order, and (3) that the previous proceedings having been

withdrawn, the withdrawal amounted to an acquittal and consequently the second proceeding was barred u/s 403, Criminal P. C.

6. I will take the grounds in the order in which they were urged. But before I do so, I must observe that. the explanation submitted by the learned Magistrate is of no help at all to this Court and can hardly be called an explanation. Thus, with regard to the point that the petitioner had been given no opportunity for being heard, the learned Magistrate simply says that there is enough evidence on the record to indicate that she had been given such opportunity but the learned Magistrate does not specify what that evidence is so that we are none the wiser for his explanation. Since a ground has been taken that no opportunity was given to the petitioner, and since this Court asked for an explanation from the learned Magistrate, it was his duty to point out, if there was evidence on the point, on what evidence he had actually acted. Similarly, with regard to the ground that the previous proceeding having been withdrawn, the second proceeding was barred by law, the learned magistrate says that the previous proceeding was withdrawn with his leave to institute a fresh proceeding. He adds that although there is nothing in the order sheet to indicate that such leave was given still it was a fact. What the learned magistrate was trying was not a civil suit and it is difficult to see of what benefit leave given by him to institute a fresh proceeding could have been to anybody in a proceeding u/s 363 of the Calcutta Municipal Act. In any event, if he made no record of the leave said to have been given by him, it would have been better for him not to mention the matter at all. We certainly cannot take notice of anything which should have appeared on the record, but does not.

7. As regards the first point urged by Mr. Banerjee I am of opinion that it is entirely without substance. The Corporation has exhibited the Minutes of its two meetings and one finds recorded therein the following sentence; "The party and the complainant had been invited to attend." This sentence appears after a statement to the effect that the consideration of the case had been postponed to the 14th of June, 1949 for the presence of the parties. Apparently, what happened was that the date first fixed for the meeting was the 14th June, but one on behalf of the petitioner was present on that day in spite of information having been sent and for that reason the meeting was adjourned till the 28th June, on which date the matter was actually taken up. In addition to this entry in the Minutes, the Corporation also exhibited a Register of letters sent by it to parties in cases heard and dealt with by the Building Committee. There appears on that Register under the date June 25, 1949 an item numbered 37 and against that item there is an entry to the effect that a letter was sent to the petitioner at 10/2 Syed Sally Lane under a certificate of posting. The necessary postage stamps covering all the letters mentioned in the page, are affixed in the Register itself. The Register was spoken to by P.W. 4, one Dinesh Chandra Majumdar. In view of the materials present on the record, it appears to me that under the provisions of Sections 16 and 114 illustration (f) of the Indian Evidence Act, as interpreted in decided cases too numerous to mention, there must be a

presumption that the letter was duly received by the petitioner. In order to rebut that presumption, the petitioner examined only one witness, her husband. He certainly said that no notice of the meeting had been received, but the evidence he gave cannot be sufficient to rebut the presumption, inasmuch as he did not say that he had ascertained from his wife that she had not received any notice. He spoke simply on his own account, and any statement by him that no notice had been received would not suffice to rebut the presumption arising from the materials I have mentioned that a letter from the Corporation had been received by his wife. It is well known now that in two successive cases, the case of *JITENDRA NATH v. MONMOHAN*" 57 IA 214 (PC), and another the case of *"MOHAMMAD AKBAR KHAN v. MUSHRAF SHAH"* 61 IA 371 (PC) the Judicial Committee has held that even in the absence of any specific material raising any presumption it must ordinarily be presumed that the statutory requirements had been complied with & the statutory notices given. In the present case it is not necessary to go so far and the more limited principles based on the sections of the Evidence Act, are quite sufficient to establish that it must be held that the notice was received by the petitioner. The first ground accordingly fails.

8. The second ground does not appear to have been urged before the learned magistrate at least in the form in which it was taken before us. The argument that was advanced was based on a recent decision of this Court in the case of *Fazal Elahi Vs. Corporation of Calcutta*, , and it was to the effect that before he decided to make a demolition order, the Municipal Magistrate should have applied his mind to the principle which Courts of Equity paid regard to when "called upon to grant a mandatory injunction. It was contended that the Calcutta Municipal Act provided two alternative remedies to the Corporation in cases of violation of building rules and if in a particular case the Corporation preferred not to prosecute the person guilty of the violation but to seek demolition of the unauthorised structure, the Corporation would have to satisfy the magistrate that not merely were the constructions unauthorised but also that they could not be allowed to stand without affecting prejudicially sanitation, ventilation or rights of other kinds or easement rights of neighbouring owners. Speaking for myself, I find it difficult to subscribe to the view that when a" member of the public has violated some statutory rules relating to the erection of buildings and the local body, entrusted with the administration of the rules, seeks demolition of the unauthorised structures by way of a remedy specifically provided by the law, the principle which applies as between private individuals when one is seeking a mandatory injunction against the other, must still be applied. If in such a case the magistrate is to let the unauthorised constructions stand, simply because it is not proved that they will affect prejudicially sanitation or ventilation of other houses in the locality, this City may well be filled up in no time with unauthorised constructions of all kinds and people will be free to indulge in indiscriminate building, once they know that they can purchase; as it were, the right of violating the building rules by paying a small fine. I find it particularly difficult to appreciate the references to equity for equity does not relieve against a statute.

It is not however necessary for me to express any definite dissent from the principles which, it is said, were laid down in the case cited, for the actual order in that case is that the magistrate should reconsider the whole matter and decide whether the drastic remedy for demolition was called for in that case. The decision seems to be based principally on the earlier decision in the case of Chuni Lal Dutt Vs. Corporation of Calcutta . That was a case where a person applied for sanction for construction of a building, but in the course of the actual construction he departed slightly from the plan that had been sanctioned. For such deviation from the plan he was prosecuted by the Corporation and fined by the magistrate. The Magistrate also directed him to make certain alterations in the structures. He paid the fine, made the alterations directed to be made and thereafter the building was reassessed and a higher tax was levied on the footing that the room newly added had been an improvement of the existing structure. It was thereafter that an application was made for demolition of the room and it was that application which the magistrate refused to grant. It was in dealing with a case of that kind that the High Court observed that a demolition order was not to be made in every case as a matter of course. There is, it is true, a statement to the effect that the principles generally applied in the case of mandatory injunctions should be applied in proceedings for demolition under the Calcutta Municipal Act but I am not quite sure that their Lordships intended to lay down that rule as a general proposition. In any event, even if a general proposition was laid down in the case reported in Chuni Lal Dutt Vs. Corporation of Calcutta and such proposition was re-affirmed in the later case, it is not necessary for us on the facts of the present case, to dissent from those decisions, because we are satisfied that the magistrate in effect applied his mind to the considerations which are declared to be relevant by the decisions cited. The learned magistrate has given elaborate reasons as to why he considers demolition necessary and he has expressly referred to the fact that if the constructions were allowed to stand they would seriously affect the sanitation of the place. This is not a case where a sanction had been obtained and in building in accordance with the plan sanctioned, some small departure had occurred. Now is it a case where the effect of letting the construction stand would be negligible? It is a case where the construction was commenced without sanction and completed in disregard of a prohibitory order. The learned Magistrate has taken into consideration the heavy expense incurred in constructing the rooms and the stair-case and has balanced against that expenditure and the loss likely to be caused to the petitioner the detriment to the sanitation of the place and the probable effect of allowing structures, built in open defiance of the Corporation, rules to stand. In all the circumstances of the case, I am of opinion that the Magistrate exercised his discretion properly and that in doing so he acted on the principles which according to the case cited before us, should be applied. The second ground also must therefore fail.

9. Like the second ground, the third ground of Mr. Banerjee was not also taken before the learned Magistrate, but as he said that it went to the root of the

learned Magistrate's jurisdiction we allowed him to take it before us. The ground, as I have already stated, is that the previous proceeding having been withdrawn, no second proceeding could be instituted under the law, as the withdrawal of the previous proceeding operated as an acquittal of the petitioner. In my opinion this argument is entirely misconceived. Reference was made to Sec. 248 of the Code of Criminal Procedure. That section provides that:

"If a complainant at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same and shall thereupon acquit the accused."

It will be noticed that the section speaks of a "complainant" and speaks of an "accused" and also speaks of "acquittal". It therefore presupposes that there must be a "complaint", secondly a complaint of an "offence" and thirdly a person "accused" of the offence. If one now turns to the definition of "complaint" given in Section 4(1) (h) of the Code, one finds that "complaint" means the allegation made to a Magistrate with a view to taking his action....."that some personhas committed an offence." That leads us to the definition of "offence" which is to be found in Section 4(1) (o) of the Code and the definition is that "offence means any act or omission made punishable by any law for the time being in force." Section 363 does not provide for any punishment of the person -guilty of the unauthorised construction and the infringement dealt with by the Magistrate under that section is not in view of the section an "offence". It is quite true that the erection of an unauthorised structure is an offence u/s 493 of the Calcutta Municipal Act, but what we have to consider on the present argument is the character of the proceeding u/s 363 and the remedy available to the Corporation and the order that can be made against the person proceeded against under that section. A mere glance at the definition which I have quoted is sufficient to establish that a proceeding u/s 363 cannot be treated as a criminal proceeding in regard to an offence and if that is so, Section 248 can have no application. To take the matter a little further the petitioner could claim immunity not on the basis of Section 248 alone but on the basis of Section 248 read with Section 403. Section 403 again speaks of conviction or acquittal of an offence & unless it can be established that in the contemplation of Section 363 the infringement dealt with by the Magistrate is an offence, neither Section 248 nor Section 403, Cr. P. C. can have any possible application. Indeed this matter was dealt with at length by a Division Bench of this Court in the case of "KRISHAN DOYAL v. CORPORATION OF CALCUTTA" 54 Cal 532 : 31 CWN 506, where it was laid down that a party to a proceeding u/s 363 of the Calcutta Municipal Act for the erection of an unauthorised structure was not an "accused" within the meaning of the Code of Criminal Procedure and that the erection of an unauthorised structure was not an "offence" within the meaning of the Code so far as Section 363 of the Calcutta Municipal Act was concerned. I may add that a close parallel to proceeding u/s 363 of the Calcutta Municipal Act is furnished by proceedings u/s 133, Cr. P. C. With regard to the proceedings under that section

of the Code, it is now well settled that they are not criminal proceedings in the strict sense of the term. They do not involve any offence and the person proceeded against is not an accused person.

10. I may add also that even assuming Section 248, applied, the petitioner could not claim any immunity from the second proceeding in the present case, inasmuch as no order of acquittal was actually passed on the previous occasion. It is clear from the terms in which Section 248 is expressed that the withdrawal of the complaint does not by itself operate as an acquittal but an order of acquittal by the Magistrate is further necessary. It is true that the section directs that the Magistrate shall acquit the accused but if the Magistrate does not actually do so, one of the essential facts necessary for attracting the operation of the section is lacking.

11. In view of the reasons given above, I am Unable to hold that the second proceeding was barred by reason of the fact that the previous proceeding was withdrawn. Some attempt was made by the learned Advocate appearing for the Corporation to make out that the subject-matter of the two proceedings was in fact distinct and different. I should find it very difficult to accept that contention but as the petitioner fails for the reason I have given, it is not necessary to pursue the question of fact further.

12. All the grounds urged by the petitioner accordingly fail and the Rule is discharged. The interim order stands automatically vacated.

13. As the time fixed by the learned Magistrate has expired we direct that the unauthorised structures complained of be demolished by the Corporation at the expense of the owner within two months from today and the Corporation do submit a report to the learned Magistrate after the demolition.

Das Gupta, J.

14. I agree.