
(1988) 07 CAL CK 0052
In the Calcutta High Court
Case No : F.M.A.T. No. 410 of 1983

Dilip De Sarkar and Another	Vs	APPELLANT
Anil Krishna Pal and Others		RESPONDENT

Date of Decision : 13-07-1988

Acts Referred:

Bengal Municipal Act, 1932 — Section 449, 453, 5(50)

Citation : 93 CWN 95

Hon'ble Judges : G.N. Ray, J

Bench : Single Bench

Advocate : A.K. Ray and Gautam Dirghanai, for the Appellant; Gopal Ch. Chakravarty, Udayan Chakravarty and Samjukta Bhattacharyya, Public Prosecutor Majumdar and Bharati Mutsuddi, for the Respondent

Judgement

G.N. Ray, J.—This appeal is directed against the judgment dated February 5, 1988 passed by the learned trial Judge in C.O. No.5053(W) of 1986. The respondents Nos. 6 and 7 are the appellants in the instant case and the respondent No. 1, Shri Anil Krishna Paul moved a writ petition out of which the said Civil Order No. 5053(W) of 1986 arose. Shri Paul moved the writ petition inter alia contending that South Dum Dum Municipality failed and neglected to take appropriate action in removing and or cutting the coconut tree which caused obstruction and" thus annoyance to him and also the pedestrains within the meaning of section 449 of the Bengal Municipal Act. It was contended that under the provisions of the Bengal Municipal Act in Chapter XXI, the Municipality had a statutory obligation to remove the said obstruction when the Municipality had come to the finding that the said coconut tree had caused obstruction within the meaning of section 449 of the Bengal Municipal Act. The relevant facts relating to the writ petition may be stated as follows: -

There is a coconut tree belonging to the appellants Dilip Kumar De Sarkar and Kanai Lal De Sarkar who are respondents Nos.6 and 7 in the writ petition. It is the case of the writ petitioner Shri Anil Paul that the said coconut tree is

constantly dashing the eastern room on the terrace of the house of the said Shri Paul and a portion of the said room has been damaged and there is a likelihood of further damage and loss of property. There is also an apprehension of the loss of life because of the position of the said coconut tree. It is contended that the said coconut tree has been planted by the appellants De Sarkars on the common passage and in the facts of the case such coconut tree should be removed. The South Dum Dum Municipality caused an inspection and inter alia came to the finding that the said coconut tree was really causing disturbance and was dashing against the house of the writ petitioner, Anil Krishna Paul. It was therefore decided by the Municipality that the said coconut tree should be cut down by the Dey Sarkars and a notice to that effect was issued by the Municipality. The appellants however did not comply with such direction of the Municipality and an attempt to cut the same even with the help of Police failed because of the resistance given by the said Dey Sarkars. It however, appears that the writ petitioner thereafter lodged a complaint to the Executive Magistrate and a report from the Municipality was called for. From the report it transpired that the said coconut tree was causing danger to the house of Sri Paul and was posing a threat to the local residents and neighbours. The learned Executive Magistrate, however, did not take any decision on the same but referred the matter back to the Municipality. It was at this stage that Sri Paul moved the aforesaid writ petition.

2. At the hearing before the learned trial Judge the appellants contended by opposing the writ petition that there was no case of nuisance because of the situation of the said coconut tree within the meaning of Section 449 of the Bengal Municipal Act. It was contended that section 449 of the Bengal Municipal Act really envisages a nuisance of public nature and even if it is assumed that the said coconut tree had been occasionally dashing against the house of Sri Paul, it was at best a private nuisance for which an action in tort could have been brought by the said Sri Paul in an appropriate forum and the Municipality had no occasion to take any action for cutting the said coconut tree under Chapter XXI of the Bengal Municipal Act. In support of such contentions, the appellants relied on the decision made in the case of *The Commissioner of Calcutta Corporation v. Prafulla Kumar Sarkar & Ors.*, reported in 69 CWN 674. It was held in the said decision by relying on an earlier decision of this Court made in the case of *Khagendra Nath Mitter v. Bhupendra Nath Dutta*, reported in 15 CWN 316 that the definition of nuisance within the meaning of section 5(50) and section 583 of the Calcutta Municipal Act is wider in amplitude and although such definition is not restricted to the meaning of nuisance as understood in common law, the definition of nuisance under the said provision does not include all private nuisances. It was also contended that the writ petition itself was not-maintainable because the dispute was purely in the realm of private dispute and the Municipal authority had no jurisdiction to take any step in solving such private dispute and to issue notice for cutting the said coconut tree. The learned trial Judge, however, did not accept the said contentions of the appellants and it

was inter alia held by the learned trial Judge that the Municipality being a public body had not done anything wrong by directing the said appellants to remove the coconut tree which if allowed to remain in the said premises, would damage not only the building of the petitioner but may also endanger the safety and security of the petitioner's family, passers by and other members of the public. The learned trial Judge accordingly allowed the writ petition and directed the Municipal authority to remove the coconut tree from the premises of the appellants, if necessary, by taking assistance of Lake Town Police Station and the Officer-in-Charge of the said Police Station was directed to render such assistance, being aggrieved by the aforesaid judgment, the instant appeal has been preferred by the appellants and Mr. Roy, learned counsel appearing for the appellants has contended before this Court that the nuisance as defined in section 449 of the Bengal Municipal Act really envisages nuisance partaking the character of public nuisance. Mr. Roy has submitted that although this court has held in the aforesaid decision that the definition of nuisance under the Calcutta Municipal Act is wider in amplitude this Court has nonetheless held that the nuisance within the meaning of the Calcutta Municipal Act really envisages nuisance of public nature and the definition under the Bengal Municipal Act is similar. Accordingly the same view should be taken. Mr. Roy has referred to various sub-clauses under clause (a) of sub-section(2) of Section 449 of the Bengal Municipal Act and has submitted that the allegations made in respect of the said coconut tree do not fulfil any of the conditions referred to in the said clauses of sub-section (2) of Section 449 of the Bengal Municipal Act. He has therefore submitted that the learned trial Judge has misappreciated the scope and import of section 449 of the Bengal Municipal Act and has erroneously proceeded on the footing that the said coconut tree was a source of nuisance within the provisions of section 449 of the Bengal Municipal Act and as such, action could be taken by the South Dum Dum Municipality for removing the said nuisance. Mr. Roy has further submitted that in any event if it is assumed that the said coconut tree has really caused a nuisance within the meaning of Section 449 of the Act, no further action for ultimate removal of the said nuisance by cutting the coconut tree can be taken unless on the complaint of the Municipality the Executive Magistrate directs such removal. Mr. Roy has submitted that in the instant case the Municipality has not made any complaint to the learned Magistrate u/s 453 of the Bengal Municipal Act and as such, in the absence of any adjudication made by the learned Magistrate there was no occasion for cutting the said coconut tree and the learned trial judge without considering the provisions of section 453 has given a wrong direction for cutting the coconut tree.

3. Mr. Chakravarty, learned Counsel appearing for the writ petitioner - Respondent No. I has however, submitted that under clause (b) of sub-section (2) of Section 449 of the Act, the Commissioners of the Municipality on the complaint of two or more persons residing in the neighbourhood may come to a finding that any act or omission has become a case of nuisance to the neighbours or to the inmates of premises affected or to the public and in that event such act

or omission shall be deemed to be a nuisance to be dealt with under the provisions of Chapter XXI. To appreciate the said contention of Mr. Chakravarty clause (b) of sub-section 2 of section 449 of the Bengal Municipal Act is out below :

2(b) " Any act, omission, condition or thing which the State Government by notification shall declare to be a nuisance or which due inquiry by the Commissioners on the complaint of two or more persons residing in the neighbourhood is found by the Commissioners to be a cause of annoyance to the neighbours or to the inmates of the premises affected or to the public or to be dangerous or injuries to health; shall be deemed to be a nuisance to be dealt with under the provisions of this Chapter;

Provided that no nuisance shall be deemed to have been committed in respect of any accumulation or deposit necessary for the effectual carrying on of any business, trade or manufacture if it be proved to the satisfaction of the Court that the accumulation or deposit has not been kept longer than is necessary for the purpose of the business, trade or- manufacture and that the best available-means have been taken for preventing injury or danger thereby to" the public health;

"Author of a nuisance" in this Chapter means a person by whose act, default or sufferance the nuisance is caused, exists or is continued, whether he is an owner or occupier or any other person".

4. Mr. Chakravarty, learned counsel has submitted that in the instant case, not only the. respondent No. 1 Shri Anil Krishna Paul but few other neighbours made a written complaint to the South Dum Dum Municipality that the said coconut tree was dashing against a portion of the house of Sri Paul and was posing a threat to the safety and security of neighbours and the members of the public passing near the said coconut tree. Mr. Chakravarty has submitted that in view of such written complaint made by two or more persons residing in the neighbourhood, the Municipality caused an enquiry for the purpose of finding as to whether or not the existence of the said coconut tree had really become a case of nuisance to the neighbours or to the inmates of the premises affected and on such enquiry the Municipality has come to a finding that the existence of the said coconut tree has become a case of nuisance to the neighbours of the locality and/or to the inmates of the affected premises. Mr. Chakravarty has, therefore, submitted that the existence of the said coconut tree must be deemed to be a nuisance within the meaning of section 449 of the Bengal Municipal Act and therefore the Municipality was justified, in taking appropriate action by directing the appellants to remove the said nuisance by cutting the said coconut tree. Mr. Chakravarty has, however, submitted that although the Municipality has not made any formal complaint to the Executive Magistrate u/s 453 of the Bengal Municipal Act, the writ petitioner had lodged such complaint and the learned Magistrate thereafter directed the Municipality to hold an enquiry and report. It appears that the Municipality has submitted before the learned Executive

Magistrate its report on the basis of the enquiry caused by the Municipality to the effect that the said coconut tree had caused a "nuisance". Mr. Chakravarty, has therefore submitted that in the special facts of the case, it may be held that the Municipality had made a complaint to the learned Executive Magistrate. He has, therefore, submitted that the learned Trial Judge was justified in holding that the said coconut tree was a source of nuisance and was liable to be removed and the direction given by the learned trial Judge in removing the said coconut tree is legal and just and no interference is called for in the instant appeal.

5. After considering the respective contentions of the learned counsel for the parties it appears to us that the "nuisance" as contemplated under clause (a) of sub-section (2) of Section 449 of the Bengal Municipal Act is not public nuisance as understood in common law and the import of the definition is wider in amplitude. But such nuisance is also not just a private nuisance. To be "nuisance" within the meaning of 449(2)(a), the nuisance alleged must partake the character of public nuisance or be akin to public nuisance although it may not be strictly public nuisance. But apart from such nuisance, under clause (b) of sub-section (2) of Section 449 of the Bengal Municipal Act, any act or omission or condition or thing which may cause annoyance to the neighbours or to the inmates of the premises affected should also be deemed to be a nuisance provided on due enquiry by the commissioners on the complaint of two or more persons residing in the neighbourhood, the Municipality comes to the finding that such act or condition or thing had caused annoyance to the neighbours or to the inmates of the premises affected by the said thing. In the instant case, such complaint was made by more than two persons of the neighbourhood and the Municipality had caused enquiry and has come to the finding that the said coconut tree had really caused annoyance not only to the inmates of the house of Shri Paul but also to other inmates of the locality. In the aforesaid circumstances, the Municipality was justified in proceeding under Chapter XXI of the Bengal Municipal Act and giving a notice to the appellants for removing the said coconut tree. It is true that when the appellants did not comply with the directions of the Municipality for removing the said coconut tree the Municipality should have made a complaint u/s 453 of the Bengal Municipal Act, 1932 before the Executive Magistrate and the Executive Magistrate if satisfied that the alleged nuisance exists may make an order on the Commissioners of the Municipality directing the Municipality to remove or prevent the recurrence of the nuisance or an order requiring the removal and/or prohibiting the recurrence of the nuisance. In the instant case, however, it appears that the said complaint about the nuisance caused by the coconut tree had been made by Shri Paul and not by the Municipality. But the Municipality pursuant to the notices issued by the learned Executive Magistrate has submitted its report inter alia to the effect that the Municipality on enquiry has come to the finding that such coconut tree has caused nuisance to the inmates of such house and also to the passers-by. In the aforesaid circumstances, we do not think that any direction should be given to the Municipality to make a further formal complaint u/s 453 of the Bengal

Municipal Act, 1932 and the report already submitted by the Municipality may be treated as the complaint made by the Municipality u/s 453 of the Bengal Municipal Act in order to shorten the course of lis pending for long time. It, however, appears to us that the learned Magistrate has not come to any specific finding as to whether or not the alleged nuisance as found by the Municipality was really existing and the same should be removed. The learned Magistrate on the contrary has referred the matter back to the Municipality.

6. In the aforesaid circumstances, we direct the learned Magistrate to consider the case of nuisance stated to have been caused by the said coconut tree within the meaning of clause (b) of sub-section (2) of Section 449 of the Bengal Municipal Act on the basis of the report of the Municipality by treating it as a complaint made u/s 453 of the Bengal Municipal Act and to pass appropriate orders on the same. If the learned Magistrate comes to the finding that the said coconut tree has caused nuisance and is liable to be removed, appropriate steps will be taken by the Municipality for removal of the tree in accordance with the provisions of Chapter XXI of the Municipal Act. Let such adjudication be made by the learned Magistrate within three months from today after giving a reasonable opportunity to all the interested persons including the writ petitioner, the appellants and the authorities of South Dum Dum Municipality. The appeal is accordingly disposed of. There will be no order as to costs, either in the writ proceeding or in the instant appeal.

Let the certified copy of the order be given to the parties in the event of an urgent application being made for the same.

Pabitra Kumar Banerjee, J.

I agree.