
(1950) 07 CAL CK 0018
In the Calcutta High Court
Case No : Criminal Revn. No. 424 of 1950

Fazal Elahi

APPELLANT

Vs

Corporation of Calcutta

RESPONDENT

Date of Decision : 21-07-1950

Acts Referred:

Calcutta Municipal Act, 1923 — Section 363, 493

Citation : AIR 1951 Cal 41

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

Bench : Division Bench

Advocate : Bholanath Roy, for the Appellant; Monmohan Mukherjee, for the Respondent

Judgement

Lahiri, J.—This rule is directed against an order of demolition made by a Municipal Mag. at the instance of the Corporation of Calcutta u/s 363, Calcutta Municipal Act.

2. The case of the Corporation is that the petnr. built three structures in premises 28B, Eden Hospital Road without the sanction of the Corporation in violation of building rules framed by the Corporation under the provisions of the Calcutta Municipal Act. The defence of the petnr. was that he had not been served with the notice u/s 363 & that the proceeding was barred by limitation. The learned Mag. found that the notice u/s 363 had been duly served. With regard to two of the structures the learned Mag. refused to make an order of demolition on the ground that there was no evidence that they were built within five years from the commencement of the proceeding, but with regard to one structure which consists of cement asbestos rooms & varandas with masonry walls in the third storey the learned Mag. has made an order of demolition on the ground that it was built without sanction & that the construction was completed within five years.

3 Mr. Roy appearing in support of the rule has not challenged the finding arrived at by the learned Mag. to the effect that the structure was unauthorised in the

sense that it was built without the sanction of the Corporation; but he has argued that every violation of building rules will not justify an order of demolition u/s 363, Calcutta Municipal Act. It is argued that the word "May" occurring in Section 363 invests the Mag. with a discretion to make or to refuse to make an order of demolition & that this discretion should be exercised in favour of the Corporation upon principles which are followed by Cts. of Equity in granting mandatory injunctions or on the ground that the building is a danger or obstruction to the public. The decisions in the cases of Abdul Samad v. Corporation of Calcutta 10 C. W. N. 182 : (8 Cri. L. J. 211) and Chuni Lal Dutt Vs. Corporation of Calcutta support the contentions of Mr. Roy. In the latter case Mitra & Holm-wood JJ. observed as follows at p. 33 :

"Again the wrong may be disproportionately small to the loss which the wrongdoer would suffer by an order in the nature of a mandatory injunction. In such a case the Ct. would not pass a decree for injunction but would saddle the wrongdoer with a decree for damages.... We ought, however, to add that the Municipality has a duty to demolish & ought to get demolished any building which is a danger or obstruction to the public."

The decision in Abdul Samad's case 10 C.W.N. 182 : (3 Cri. L. J. 211) lays down that the Mag. has a discretion in the matter of making an order for demolition & the decision in Chuni Lal Dutt Vs. Corporation of Calcutta lays down the principles upon which that discretion is to be exercised.

4. Mr. Mookerjee appearing for the Corporation has placed before us the decision in Sham Lal Khettry Vs. Corporation of Calcutta, & argued that the decision in Chuni Lal Dutt Vs. Corporation of Calcutta was not followed in this case. On going through Sham Lal Khettry Vs. Corporation of Calcutta, we have come to the conclusion that it does not support the point urged by Mr. Mookerjee. In this case Suhrawardy J. followed the decision in Chuni Lal Dutt Vs. Corporation of Calcutta & was in favour of setting aside the order of demolition made by the Municipal Mag. whereas Graham J. expressed a doubt on the question whether a person who had deliberately violated the law could invoke the aid of equitable principles as laid down therein ; but Graham J. ultimately observed that even if those principles applied he was not prepared to interfere with the discretion exercised by the Municipal Mag. The case was then placed before Buckland J. who, without referring to the principles of Chuni Lal Dutt Vs. Corporation of Calcutta agreed with Graham J. In this state of things we are not prepared to hold that Chuni Lal Dutt Vs. Corporation of Calcutta : was dissented from in the case of Sham Lal Khettry Vs. Corporation of Calcutta, .

6. The Calcutta Municipal Act gives two alternative remedies to the Corporation in case of violation of Building Rules. Section 493 of the Act provides for a fine for unlawfully commencing, carrying on or completing a building & u/s 363 the Corporation has a right to apply for an order of demolition. Under the provisions of Section 363 no appln. for an order of demolition will lie if the Corporation has instituted a proceeding u/s 493. The existence of two alternative remedies

implies that the more drastic remedy of demolition should not be restored to in every case of violation of building rules.

6. For these reasons we follow the decision in Chuni Lal Dutt Vs. Corporation of Calcutta & hold that the findings arrived at by the learned Municipal Mag. are not sufficient in law to justify an order of demolition. But as this point was not raised before him we direct that the case should be sent back for retrial for a consideration of the question whether the circumstances of the present case are such as would justify an order of demolition upon the principles laid down in the case of Chuni Lal Dutt Vs. Corporation of Calcutta . No other question will be allowed to be reagitated. Parties will be entitled to adduce such further evidence as they may be advised to adduce.

7. This rule is accordingly made absolute. The order of the Municipal Mag. is set aside & the case sent back to him for retrial in the light of the observations made above.

Das Gupta, J.

8. I agree.