
(1941) 01 CAL CK 0009
In the Calcutta High Court

Hirendra Nath Datta

APPELLANT

Vs

Corporation of Calcutta and Others

RESPONDENT

Date of Decision : 20-01-1941

Acts Referred:

Government of India Act, 1935 — Section 205
Specific Relief Act, 1877 — Section 45

Citation : AIR 1941 Cal 386

Hon'ble Judges : Edgley, J

Bench : Division Bench

Judgement

Edgley, J.—In this case an application has been made to this Court u/s 45, Specific Relief Act, for a mandatory order on the Corporation of Calcutta requiring the Corporation to rescind an illegal sanction given to Purnendu Nath Tagore and others to proceed with the building of certain structures which they propose to erect at premises No. 140, Cornwallis Street, Calcutta. The petitioner also asks that the Corporation of Calcutta may be directed to deal with the matter in accordance with law. Pending the hearing of this application, Purnendu Nath Tagore and others have been restrained from proceeding with the construction of the proposed additional buildings. The petitioner, Hirendra Nath Dutt, is the proprietor of premises Nos. 139B and 139/I, Cornwallis Street, while the Tagore opposite parties are the owners of the premises situated at No. 140, Cornwallis Street. The latter premises are separated from those of the petitioner by a strip of land which is about nine feet in width. It was stated in the petition that the petitioner's boundary line along this strip of land was at a distance of approximately 6"-9" to the south of his house, while the remaining area, 2"-3" in width, belonged to the opposite parties. In January 1989, the Tagores submitted plans to the Corporation of Calcutta for the erection of a third storey to their house at No, 140 Cornwallis Street. These plans were rejected by the building department of the Corporation, but, as a result of an appeal filed before the Buildings Standing Committee by the Tagores, the plans were subsequently sanctioned at a meeting of the Buildings Standing Committee, which was held on

26th February 1940, subject to the omission of a covered verandah overlooking the space between the two houses which it was proposed to include in the third storey.

2. The petitioner maintained that the Buildings Committee had acted illegally in sanctioning the plans which clearly infringed Rules 30 and 32 of Schedule 17, Calcutta Municipal Act. He stated that if the proposed additional buildings were constructed, they would interfere with the ventilation and sanitation of the petitioner's premises, Nos. 139B and 139/1, Cornwallis Street, and that, as he had no other adequate remedy under the general provisions of the law, he applied for relief u/s 45, Specific Relief Act. The case for the Tagores was to the effect that the Buildings Committee of the Calcutta Corporation had acted properly with reference to the plans in the exercise of their powers under Schedule 17, Calcutta Municipal Act, that the proposed additions to the Tagore house would interfere in no way with the amenities of the petitioner's house, and that he was not entitled to the mandatory order which he claimed. The case for the Corporation was to the same effect. The first contention put forward by Mr. S. M. Bose on behalf of the petitioner was that the erection of a third storey in premises No. 140, Cornwallis Street, involved the violation of Rule 32 of Schedule 17, Calcutta Municipal Act. This rule provides that, if either side of a domestic building is not attached to the adjacent building, an open space shall be left between the buildings "extending along the entire length of such side and forming part of the side of the said domestic building":

(2) The minimum distance across such space from every part of the said domestic building to the boundary line of the land or building immediately opposite such part shall be (a) six feet, if there is a building next to such boundary line or within two feet of it, or (b) four feet, if there is an open space of two feet or more on the other side of such boundary line.

3. In the present case there is an open space of more than two feet between the boundary line and the petitioner's house. So, it follows that there should be a space of four feet between the Tagores' house and the boundary line separating that house from the petitioner's premises. Admittedly, the space between the northern wall of the Tagores' house and the boundary line on the ground level is less than four feet in width. According to Mr. Sircar, a civil engineer who gave evidence in connexion with this case, the width of this space varies from 3'-4 1/2" to 3'-6 1/2". Mr. Ghose however contends that this space has been increased in the second and third storeys by throwing back the wall of the Tagore building in such a manner that in the third storey the requirements of Rule 32 of the schedule are fulfilled. This contention finds some support in the testimony of Mr. Sircar, which is to the effect that the plan as sanctioned for the third storey provides an additional eight inches of space between the northern wall of the Tagore house and the boundary line. Mr. Ghose therefore contends that, if these eight inches are added to the space which has already been left on the ground floor level, it should be held that the requirements of Rule 32 have been met. Mr.

Bose's contention, on the other hand, was that the term "space," to which reference is made in Rule 32, only means the space on the ground, and, as the requisite space had not been left between the Tagores' house and the premises of the petitioner at the time when the Tagores' house had been originally constructed, and, as the required space had not been left open to the sky throughout its entire area, the mere rectification of these defects in the third storey would not amount to a compliance with the provisions of Rule 32. He urges therefore that it would be illegal to construct this storey without providing a space of four feet between the premises of the opposite parties and the boundary line from the ground upwards. The case for the Tagores as set forth in their pleadings was to the effect that Rule 32 can have no application, because Sub-rule (1) of this rule does not require the aforementioned space to be left at the side of a domestic building, if such side abuts on a public square or street which is not less than six feet in width, or on a private street or partition passage which, in the opinion of the Corporation, is likely always to be kept open to the sky and which is not less than eight feet in width.

4. The space to the north of the Tagores' house is clearly neither a public square nor a public street within the meaning of the Act. I am also not prepared to hold that it is a partition passage, as this expression seems to contemplate a passage provided during the course of partition proceedings of the kind expressly mentioned in the last portion of S. S (54), Calcutta Municipal Act. The question must however be considered whether the space between the Tagore house and that of the petitioner constitutes a "private street." This expression is defined in Section 3 (54) as follows:

"Private street" means any street, road, lane, gully, alley, passage or square which is not a "public street" as denned in this section, and includes any passage securing access to four or more premises, belonging to the same or different owners, but does not include a passage provided in effecting a partition of any masonry building amongst joint owners where such passage is not less than eight feet wide.

5. This definition is not very clear, but, if it be compared with the definition of "public street" in Section 3 (57) of the Act, it would appear to have been the intention of the Legislature that it should refer to some space between neighbouring buildings, which has been left not merely for the purpose of detaching one set of premises from another, but for securing access to the premises situated thereon not to the public at large, but to a limited section of the public who may have occasion to go to the premises situated on the space in question. "It includes any passage securing access to four or more premises," and by implication it may be taken that it would not include a passage which secures access to a smaller number of premises. This being the case, I am of opinion that the passage between the Tagore house and that of the petitioner is not a private street, and, as the expression "street" means a public or private street (Section 3 (67)), this space cannot be a "street" at all. In fact, during the

course of his argument Mr. Ghose did not attempt to maintain the position which had been adopted by his client in their manager's affidavit to the effect that the space intervening between the two houses was a private street. He maintained however that having regard to the provisions of Rule 94 of the schedule, the Corporation were empowered to relax the operation of Rule 32 for the purpose of preventing the demolition of any portion of the buildings which had already been constructed, and that, as far as the height of the building was concerned, neither Rule 3 nor Rule 30 had any application, as Rule 3 only applied in the case of that portion of a building situated at the side of a street, and Rule 30 related only to the space at the back of a domestic building. He also contended that Mr. Bose's argument as to the meaning of the term "space" in Rule 32 was contrary to the meaning of the language in which that rule had been framed.

6. In my view Mr. Ghose's argument must be accepted with regard to that portion of the third storey, which it is proposed to erect on the north side of the Tagore building, provided that no portion of it overlaps the plane of the angle contemplated by Rule 30, to which reference will be made hereafter. As regards the height of the proposed building, this can only be regulated by Rules 3 and 30 which have no application with regard to the height of buildings erected at the side of a space such as that which separates the houses of the parties in this case, except in so far as buildings abutting on the side space may overlap the plane of the angles mentioned in Rules 3 and 30. On this point Mr. Sircar's evidence seems to make it clear that the proposed storey on the northern side of the Tagore building could not possibly overlap the plane of the angle prescribed in Rule 3, and, as regards the angle mentioned in Rule 30, if it overlaps the plane of this angle at all, it would only be to a very slight extent, and there would apparently be no difficulty in bringing this portion of the proposed third storey within the plane of the angle in question.

7. I am not prepared to accept Mr. Bose's argument with regard to the meaning of the term "space" in Rule 32, It is clear from the language used in Rule 32 (2) that the required space is not merely the space between two buildings at the ground level but is the space " between every part of the said domestic building to the boundary line of the land or building immediately opposite such part." Admittedly, the rules do not operate for the purpose of compelling the demolition of any masonry structure which was erected before these rules came into operation, and their general intention seems to be to ensure compliance with them as regards alterations of and additions to an existing building, while the original structure of such building may be left intact. This is clearly the intention of Rule 91 in respect of the space at the back of buildings, and the same intention underlies Rule 94, I think therefore that it is permissible for the Tagores to erect a third storey abutting on the open space between the two buildings, provided the buildings comprising such third storey are thrown back a sufficient distance to secure an open space of not less than four feet between them and the boundary line, and that they do not transgress the provisions of Rule 30, which will now be discussed. As regards that portion of the third storey which it

is proposed to erect at the back of the Tagore house, Mr. Bose argues that the Buildings Committee acted illegally in sanctioning the plan in view of the mandatory provisions of R, 30 of Schedule 17 to the Calcutta Municipal Act, read with Rule 91. The relevant portions of these rules are as follows:

Rule 30, - There shall be, at the back of every domestic building, an open space extending along the entire width of the building and forming part of the site thereof. (2) The said space shall be of such width that any of a series of imaginary lines drawn across such space at an angle of sixty three and a half degrees with the horizontal, from points on a level with the plinth of the building and situated on that side of the said space which is furthest from the building, shall not intersect any portion (other than open or balustrated parapets not more than four feet in height) of the building:

Provided as follows : (ii) in the case of three storeyed buildings the angle referred to in this rule shall be increased from 63 1/2 degrees to 68 degrees and (iii) in the case of any building in which there are both an outer and inner courtyard, a minimum distance of six feet shall be permitted.

Rule 91.- Rule 30 shall apply to alterations of or additions to, any domestic building above the ground floor, even though the open space required under the said rule has not been left on the ground floor.

8. There is no open space at the back of the Tagore house which would make Rule 30 in-applicable by reason of the provisions of Sub-rule (4), which states that this rule shall not apply in the case of

(a) a building the back of which abuts on a public square or street or a place dedicated to public use and not likely to be built upon not less than 16 feet in width.

9. In fact, the house has been built on the extreme western edge of the Tagore property and no space of any description has been left between the house, and the boundary line. Rule 91 makes the provisions of Rule 30 applicable in respect of additions to existing buildings, and, if Rule 30 be read in conjunction with Rule 91, it is clear that the imaginary line drawn at the prescribed angle must begin from the top of the western plinth of the Tagore house. Mr. Sircar's evidence makes it plain that a line so drawn would exclude the whole of that portion of the proposed third storey, which lies to the west of the Tagore house, and also a small staircase room which it is proposed to erect above another staircase room on the third storey, which was in existence at the time when the plans were submitted to the Calcutta Corporation, but which was temporarily dismantled in connexion with the rebuilding operations after the plans had been passed by the Buildings Committee on 26th February 1940. It is argued by Mr. Ghose that the petitioner has no locus standi to object as regards the westernmost portion of the proposed new building, as the owner of the premises which lie immediately to the west of the Tagore house has sworn an affidavit in which he states that he has no objection to building operations being undertaken in accordance with the

plans.

10. I am not prepared to accept this argument. It must be assumed that in framing the statutory rules relating to the space to be left between buildings and their height, the Legislature had in view the general convenience of all residents in the municipal area in order to ensure proper ventilation and sanitation for the ratepayers, and possibly adequate means of preventing the spread of fires from one building to another. In this view of the matter, it is impossible to say that the petitioner would not be affected by any breach of the existing rules, and, in my view, he has a clear right to insist that these rules should be strictly observed by the Corporation in reference to any plans for the extension of the Tagore building. Mr. Ghose during the course of his argument admitted that, as far as the proposed new storey on the western side of the Tagore building is concerned, the plans which have been sanctioned by the Buildings Committee do in fact transgress the provisions of Rule 30. He maintained, however, that this is a relaxable rule. As far as new buildings are concerned, it may be relaxed under R.. 31, and, as regards additions to and alterations of buildings, it may be relaxed in the manner provided in Rule 94. As regards the latter rule, Mr. Ghose argues that, as contemplated by Rule 91, there may be cases In which the open space required by Rule 30 was not left when the building was originally constructed, and that the main purpose of Rule 94 is to allow builders in special cases, further to add to buildings which may have been erected on the prescribed open space, provided that such additions do not otherwise infringe the provisions of the rules relating to the height and extent of the buildings. I am not prepared to accept this argument. The relevant portion of Rule 94 is in the following terms:

Notwithstanding anything contained in this schedule but subject to the provisions of Section 331, the Corporation may at any time, in dealing with any application to erect a new building...to add to, alter, or do any other work referred to in Section 330 to, any building erected before the first day of April 1900, relax, for special reasons to be recorded in writing, the following rules in this schedule in the manner and circumstances specified hereunder, namely:

(a) Rules 30 and 32 may be relaxed so as to prevent the demolition of any material part of any masonry building existing on the space required to be kept open under the said rules:

Provided that (i) the new building conforms to the other rules of this schedule; and (ii) in no case shall the height or extent of the buildings on the said space be increased or added to, unless this is otherwise permissible under the said rules.

11. It will be seen that the power of relaxation is severely restricted, and, in any case, special reasons for relaxation must be recorded in writing. No such reasons have been recorded in the present case. In any event, however, as far as the proposed new storey is concerned, any relaxation can only be allowed for the purpose of preventing the demolition of any material part of the existing masonry building, which may have been constructed on the space which is

required to be left open under the rules contained in this schedule. I have already pointed out that, although it appears that certain existing structures on the northern side of the Tagore house transgress the provisions of Rule 32 as regards the permissible space between that house and the boundary line, the Corporation may allow those portions of the house to remain standing. Similarly, on the western side they need not insist upon the demolition of any portion of the building, which was in existence at the time when the plans are submitted to them and which is found to fall above the plane of the imaginary line drawn at an angle of 68° from the edge of the western plinth.

12. Proviso 1 prescribes that the new building must conform to the other rules of Schedule 11. One of those rules is Rule 91, which, as I have already pointed out, has the effect of ensuring that any additions at the back of such a house as the Tagore house shall not rise above the plane of an angle drawn at 68° from the westernmost edge of the plinth. If Mr. Ghose's interpretation of Rule 94 were accepted, conformity with the provisions of Rule 91 would be impossible. In my view the main intention of Rule 94 is to ensure that any new buildings, which may be constructed as additions to existing buildings which did not leave the required space, should comply, as far as possible, with the rules contained in the schedule as regards the provision of ventilation and sanitation, and at the same time to prevent any inconvenience which would result by insisting upon the demolition of buildings which had already been erected on the space required to be left open under the existing rules. Rule 94 certainly was not framed with the object of allowing additional encroachments on the minimum space which the Legislature considered necessary for the purpose of providing ventilation and sanitation; and, in my view, this intention is further emphasized by proviso (ii) to Rule 94, which expressly prohibits increase of the height or extent of the buildings erected on the space which should have been kept vacant, "unless it is otherwise permissible under the said rules." In this connexion, I have been unable to discover any rule in the schedule which could be construed to allow any extension of the buildings which would fall above the plane of an angle of 68° drawn from western side of the plinth of the Tagore house. The utmost relaxation that can be allowed under Rule 94 is to permit the Tagores to retain any structures which were existing above this plane at the time when the plans for the construction of the third storey were submitted to the Corporation. Any further addition to these buildings would, in my view, amount to an illegal contravention of the rules and interfere with the amenities of the locality.

13. As regards that portion of the third storey, which it is proposed to erect opposite Cornwallis Street, admittedly the Tagores are protected by Rule 3 of Schedule 17. Cornwallis Street is 67 ft. wide, and under proviso (iii) to Rule 3 it will be permissible for the Tagores to raise a building abutting on that street to a height of 80 feet. It is further clear from Mr. Sircar's evidence that, in any view which may be taken of Rule 3, the height of the easternmost portion of the proposed third storey is well within the prescribed limit. Although the Corporation in their pleadings apparently intended to take the point that an application u/s 45,

Specific Relief Act, would not lie in the present case, Mr. Santosh Kumar Basu did not press this contention. In a somewhat similar case, which was decided by Panekridge J. on 13th November 1940 (*Arayilagath Chandroth Mohamad v. Corporation of Calcutta*), the point had been taken that Sections 17 and 19, Calcutta Municipal Act, would provide the petitioner with an adequate remedy. The learned Judge, however, after discussing these sections, pointed out that the Act furnished no specific and adequate legal remedy to persons in the position of the applicants, and with this view I entirely agree.

14. In my opinion, all the requirements of Section 45, Specific Relief Act, are present in this case, and my conclusion is that, although the Tagores may be allowed to proceed with the proposed extension of their house in respect of that portion of the third storey, which faces Cornwallis Street, and, as regards the proposed extension on the northern face of the building, up to the imaginary line drawn under Rule 30 from the western plinth, they cannot be allowed to construct any portion of the proposed addition on the western side of the house, which would have the effect of violating the provisions of Rule 30. There will, therefore, be a mandatory order requiring the Calcutta Corporation to deal with the plans submitted by the opposite parties in accordance with the provisions of the Calcutta Municipal Act, 1923, and Schedule 17 thereto annexed. There will also be an injunction against the opposite parties prohibiting them from proceeding with their building operations until the plans in respect of these buildings have been sanctioned by the Corporation in accordance with law. It has been agreed between the parties that the petitioner and the Tagore opposite parties will pay in equal shares Mr. Sircar's fees not exceeding Rupees 340 in all. Subject to the exclusion of this item the Corporation will pay the petitioner's costs of this application, and the Tagores will pay their own costs. The costs will be taxed as of one day's hearing of a suit. Certified for the employment of two counsel. Certificate u/s 205, Government of India Act, 1935, is withheld.