

(1932) 08 CAL CK 0027
In the Calcutta High Court

I.N. Silas and Another

APPELLANT

Vs

Corporation of Calcutta

RESPONDENT

Date of Decision : 12-08-1932

Acts Referred:

Calcutta Improvement Act, 1911 — Section 65
Calcutta Municipal Act, 1923 — Section 364

Citation : AIR 1933 Cal 341

Hon'ble Judges : M.C. Ghose, J; Jack, J

Bench : Full Bench

Judgement

Jack, J.—In this case a rule was issued upon the Municipal Magistrate and on the Chief Executive Officer of the Calcutta Corporation to show cause why the order, directing the Corporation to entirely demolish and remove portions of a certain building at the expense of the petitioner, should not be set aside or such further order made as to this Court may seem fit on the ground that the learned Magistrate misconceived the scope of Section 364, Calcutta Municipal Act; secondly that the learned Magistrate erred in law in holding the view that in the present case he had no alternative other than to pass an order of demolition inasmuch as the service of a valid notice u/s 299, Calcutta Municipal Act, upon the petitioner had been proved and admitted by the petitioners; thirdly, that upon a proper construction and consideration of Exs. 16 and 18, and upon a consideration of the provisions of law relating thereto the learned Magistrate should have held that the Corporation failed to prove that Chittaranjan Avenue had vested in the Corporation; fourthly, that upon a proper consideration and construction of Section 65, Calcutta Improvement Act, and Sch. 16, Rule 2(6), Calcutta Municipal Act, the learned Magistrate ought to have held that the conditions to the sanction (viz., payment of encroachment fees) imposed by the resolution of the Building Standing Committee dated 20th June 1927, was illegal and ultra vires; fifthly, that the learned Magistrate erred in holding that no question of unauthorized work or of sanction therefor arises in the present case, whereas from the notice u/s 299, which clearly mentions the constructions as

unauthorized, the learned Magistrate should have held that in the present case this question did arise, and sixthly, that assuming that the notices u/s 299 of the Act were valid and that the said notices had been properly served the learned Magistrate should not have passed an order for demolition in the present case and should have dismissed the application for demolition.

2. As regards the first ground, it is suggested that it is only in cases of emergency where there is danger to the public that Section 364 should be used. That question may at once be dismissed inasmuch as no authority has been shown for holding that this section can only be used in such cases. On the second point, I think that the learned advocate is correct in contending that there was a discretion in the Magistrate u/s 364, the wording of the section being that such Magistrate "may" make an order directing the removal of the structure. The learned advocate for the Municipality has suggested that in this case "may" must be interpreted as meaning, "must" and he has referred to Maxwell's Interpretation of Statutes, p. 208. But there are authorities for holding that in this case there is a discretion with the Magistrate and that "may" cannot here be interpreted as meaning "must." The case of Abdul Samad v. Corporation of Calcutta (1905) 33 Cal 287, and other authorities may be referred to. We hold accordingly that the Magistrate was not right in holding that he had no alternative other than to pass an order of demolition. However in the circumstances of the present case we think that on that ground alone, we should not refer it back to him for reconsideration.

3. The next ground was that the Magistrate should have held that the Corporation failed to prove that Chittaranjan Avenue had vested in the Corporation. Referring to the facts of the present case, by a resolution in 1927, Ex. 2, it was resolved by the Corporation that the plan with alterations and additions be sanctioned under Rule 2, Sch. 16 on payment of the usual fees. Subsequently, in July, the Corporation wrote to the petitioner a letter Ex. 3 demanding Rs. 2,682-8-0 as encroachment fees when formal sanction would issue. Then, on 26th September 1927, after examination of the building, the Corporation wrote a letter Ex. 4 demanding Rs. 2,954-1-8 as encroachment fees which was found to be the amount due on exact measurement. They made the demand as encroachment over the public street had been made without sanction.

4. Then in October 1927 the letter Ex. 5, was written by the petitioner to the Encroachment Officer, Calcutta Corporation, promising to pay encroachment fees in full on receipt of a complete statement. The Encroachment Inspector in November sent him the particulars and asked him to pay the fees. In March 1928 there was some further correspondence about the calculation and the Encroachment Inspector sent a detailed calculation and requested early action in the matter by the petitioner. Then in April 1928 the petitioner wrote to the Corporation stating that the Corporation could not claim any encroachment fees as encroachment was made on Improvement Trust land and not on Corporation land. In May 1929 it was resolved at a meeting of the Corporation u/s 65,

Calcutta Improvement Act, that this particular road should be, on certain conditions, taken over by the Corporation and then in June 1929, by Ex. 18, a notice was issued by the Chief Executive Officer of the Corporation taking over the road.

5. The contention of the petitioner is that, in the first place, at the time when the notice demanding the fees issued and the conditional sanction was given, the road had not been taken over by the Corporation and further that the Chief Executive Officer was not entitled u/s 65, Calcutta Improvement Act to take over the road. That should have been done by the Corporation and not by one of its officers. On the other hand we have been referred to Section 12 of the Act which empowers the Corporation to delegate its powers under the Act to the Executive Officer. It has been further pointed out to us that no specific ground was taken in the application to the effect that the Corporation had failed to prove that this road had vested in them because it had been taken over not by the Corporation but by the Chief Executive Officer. Had that ground been specifically taken it would have been open to the opposite party to show that this particular power had been delegated to the Executive Officer. We also find that the Magistrate said that it was not disputed before him that the road in fact vested in the Corporation, and it was obvious that the petitioner must have known that the road would eventually vest in the Corporation.

6. As regards the next ground that the learned Magistrate ought to have held that the condition attached to the sanction, namely, the payment of encroachment fees, was illegal and ultra vires. No doubt under Sch. 16, Rule 2(6), Calcutta Municipal Act, the Corporation was not entitled to demand fees where the road had not vested in the Corporation so that they were not entitled to make the initial demand for fees; and this no doubt accounts for the fact that the Corporation instead of proceeding further under the special provisions took refuge in Section 299 of the Act on which they are entitled to order the removal of any structure projecting or encroaching on the public street, whether erected before or after the commencement of the Act. So that before the notification u/s 299 issued the road had already vested in the Corporation and that the Corporation were entitled under this section to order its removal; and it follows that the Magistrate was entitled u/s 364 on a reference made to him by the Corporation also to order its removal. It is suggested to us in the circumstances of the case, since the demand of fees in the first place was illegal that the Magistrate should have used his discretion and not to have ordered the demolition of the structure. But we find from the record that in the first instance, the sanction was only given on condition that the usual fees were payable and after the petitioner had been informed of the amount of the fees he was quite willing to pay them; he said he would pay on full particulars of the fees being furnished to him. This would tend to show that there was nothing unjust or unreasonable in the demand of the Corporation for the fees. Finding subsequently that owing to a technical error at the time the demand for fee was made, the road had not actually vested in the Corporation the petitioner sought

to take advantage of Clause (6), Rule 2, Sch. 16. He was of course entitled to do so, but in considering all the circumstances we think that the Corporation was justified in having recourse to the provisions of Sections 299 and 864. The Corporation are obviously entitled to the usual fees and if the petitioner takes advantage of the technicality in endeavouring to avoid it, the Municipality are entitled to take any legal steps open to them for enforcing payment. Consequently, the action they have taken seems to be perfectly reasonable and bona fide. It is a pity that they made an unusual delay in giving the notice, the sanction having been given in 1927 and the notice being given in 1929. But in the circumstances of the case we think that the delay has been sufficiently explained. No doubt the Corporation could have stopped the building, but the petitioner having agreed to the payment of the fees they thought that he was acting entirely bona fide. But that does not justify the petitioner's now avoiding payment of the fees.

7. It is suggested in this connexion that the Magistrate should not have taken action u/s 364 in a case in which the civil Court would not pass a mandatory injunction. But, as I have said before, in all the circumstances of the present case, the order which he made was justified inasmuch as we understand that the Corporation would not insist upon the demolition of the structure if their fees and costs are paid. This rule is, accordingly, discharged.

M.C. Ghose, J.

8. I agree.