

(1958) 01 CAL CK 0026
In the Calcutta High Court
Case No : Matter No. 231 of 1956

Ismail G.H. Ariff and Another

APPELLANT

Vs

Benoy K. Sen and Others

RESPONDENT

Date of Decision : 10-01-1958

Acts Referred:

Calcutta Municipal Act, 1951 — Section 557, 560, 560(2), 561, 575
Calcutta Municipal Rules, 1951 — Rule 5, 5(1), 5(2), 5(4)

Citation : AIR 1958 Cal 360

Hon'ble Judges : D.N. Sinha, J

Bench : Single Bench

Judgement

D.N. Sinha, J.—This case has a somewhat long history but briefly the relevant facts are as follows :

2. The petitioners are the mutwallis to the wakf estate of Golam Hossain Cassim Ariff deceased, usually known as the G. H. S. Ariff Estates. Premises No. 37, Armenian Street, Calcutta, is one of the properties belonging to the said wakf estate. It consists of three buildings, partly three-storied and partly four-storied and contains a large number of flats usually let out to tenants. The respondent No. 5, Ladhuram Tapuria, was in occupation of one of the flats on a portion of the third floor of the fourth storey of the said Premises; he is still in possession. It appears that as early as April, 1949 the tenants of 37, Armenian Street, including Ladhuram Tapuria, made complaints to the Chief Architect of the Calcutta Corporation about the deplorable state of the said building. It was particularly stated that the roof was in such a dangerous condition that slabs of lime plaster were falling on the head of the inmates. In my judgment in Ladhuram Tapuria v. Benoy Kumar Sen, Matter No. 97 of 1954 D/- 24-8-1955 (Cal) (A), I have set out a relevant portion of the letter of complaint wherein it was stated that the matter was serious and fraught with great danger to the inmates. It was further stated that

"the state of the building is a menace to our very existence..... ..no city

administration can be silent witnesses to such undignified neglect of the land."

Upon this, the District Building Surveyor caused the premises to be inspected and the insecure building inspector gave his report showing extensive damages which required immediate repair. Thereupon, notices under Rule 4 (1) of Schedule 18 of the Calcutta Municipal Act, 1923 were served on the petitioners as owners, and the occupier, namely, Ladhuram Tapuria, calling upon them to remove certain C. I. Sheds on the fourth storey, to repair the roof of the fourth floor level and to secure and repair the rest of the building etc., "as these are lying in a dangerous condition."

3. Objections were thereupon filed and were heard by the Administrative Officer who made an order that the requisitions contained in the said notices were to be complied with within three months and, in default, the matter be referred to the Municipal Magistrate. The objection of the landlord was that it was not possible to undertake part repair of the roof which had to be entirely lifted before it could be adequately dealt with. This they found impossible of performance because the said tenant, Ladhuram Tapuria, would not vacate the portion in his occupation on the fourth storey. The petitioners as the landlords served solicitors' letters upon the tenants but to no purpose. The Corporation at that stage, finding that neither the owners nor the occupiers were complying with the notices, referred the case to the Municipal Magistrate u/s 488 read with Rule 4 (1) of Schedule 18 of the Calcutta Municipal Act, 1923 (Case No. 2575-B of 1949).

4. In or about February, 1950 the petitioners filed a suit in this Court against Ladhuram Tapuria, being Suit No. 615 of 1950 for his eviction as a tenant on the ground that the portion occupied by him was required for the purpose of building and rebuilding. That suit is still pending.

5. On March 14, 1950 the petitioners were convicted by the Municipal Magistrate, Calcutta, for non-compliance of the requisition made by the Corporation and were sentenced to pay a fine of Rs. 200/-.

6. On or about November 14, 1950 Ladhuram Tapuria was directed by the learned Municipal Magistrate to vacate the premises in his occupation within a fortnight.

7. Thereafter, orders were made by the learned Municipal Magistrate against the petitioners for the payment of a daily fine for non-compliance with the requisition of the Corporation. The petitioners moved this High Court in its Criminal Revisional Jurisdiction and the conviction and sentences were set aside and the case remanded to the learned Magistrate for decision according to law. Upon the remand the learned Magistrate acquitted the petitioners.

8. I now come to a stage with which we are more immediately concerned in this case. On or about November, 16, 1953 a notice was served upon the petitioners under Rule 5 (1) of Schedule 17 of the Calcutta Municipal Act, 1951. A copy of the notice is Annexure "D" to the petition. The petitioners were required by the

Corporation, within 15 days from the service of the notice, to demolish the fourth-storey on the north "as the same lies in a dangerous condition."

9. On November 17, 1953 a notice under Rule 5 (2) of Schedule 17 of the Calcutta Municipal Act, 1951 (hereinafter referred to as the "Act") was served on the said Ladhuram Tapuria. A copy of this notice is Annexure "E" to the petition. The wording of the notice is important and is set out below:

"Notice under Rule 5 (2) of Schedule 17 of Calcutta Municipal Act, 1951. To Owner or occupier or other inmates of premises No. 37, Armenian Street.

Please take notice that you are hereby required by the Commissioner of Calcutta under Rule 5 (2) of Schedule 17 of Calcutta Municipal Act, 1951 to vacate the fourth-storey on the north which is in a dangerous condition, within 7 days from date hereof, failing compliance, the provisions of the said Act will be enforced.

If you have any objection to the notice you should prefer the same in writing within 2 days from service hereof.""

It is not denied that the Commissioner was himself satisfied, that the premises was in a dangerous condition and he himself swore an affidavit to that effect dated February 27, 1954 in connection with Matter No. 97 of 1954 D/-24-8-1955 (Cal) (A).

10. Upon receipt of the notices under Rule 5 (2) of Schedule 17, Ladhuram Tapuria raised an objection and the objection was placed before the Standing Building Committee as is required u/s 561 of the Act. The Standing Building Committee by a resolution dated December 15, 1953 authorised its Chairman and the City Architect to inspect the premises and make a report

11. On or about December 22, 1953 the Standing Building Committee rejected the objection put forward by Ladhuram Tapuria as aforesaid and upheld the order of demolition and the requisitions issued under R, 5 (1) and (2) of Schedule 17 of the said Act, it also proceeded to say "that the Commissioner should refer the matter without delay to the Municipal Magistrate to proceed in accordance with law." The said Ladhuram Tapuria caused a Motion to be tabled before the Standing Building Committee against its decision, but this Motion was also rejected on December 29, 1953. On or about July 22, 1954 Ladhuram Tapuria moved this Court under Art. 226 of the Constitution against the said notices under Rule 5 (1) and (2) of Schedule 17 of the said Act This was the Matter No. 97 of 1954 D/- 24-8-1955 (Cal) (A), to which I have referred to above.

12. This matter came up for hearing before me on August 24, 1955 when the Rule was discharged. I think that a part of what I said there will bear repetition; it is as follows:

"So far as the respondents are concerned, they cannot be blamed for taking the action which they proposed to take. All attempts to make the owners or the occupier to carry out the necessary repairs have failed. Years have passed by and

a situation has now arisen where patch repairs will not be sufficient. It is not to the benefit of the parties that the premises should be left in a dangerous state while series of litigation continue. This is not the first time that a tenant has attempted to cling desperately to a premises which is in a dangerous state of disrepair. Want of accommodation in the city of Calcutta is notorious, but that in my view ought not to be an excuse for leaving dangerous structures standing which might at any moment endanger the safety of not only the inmates but even of innocent persons passing by or residing in other parts of the building. In my opinion, the sooner the structure comes down and is rebuilt the better, and no case has been made out for postponing the same."

In spite of this, it may be said that until now the matter has not advanced any further. The next thing that the tenant did was to file a suit in this Court being Suit No. 2704 of 1956 (Ladhuram Tapuria v. Benoy Kumar Sen and Ors.). The plaintiff therein sued the defendants for a perpetual injunction restraining them from enforcing the notices dated November 16, 1953 and November, 17, 1953 issued under Rule 5 of Schedule 17 of the Act and for other reliefs. No application was ever made or granted for an interim injunction against the defendants. It is in the background of these facts that this application came to be made and the Rule was issued on December 21, 1956.

13. The complaint of the petitioners who are the landlords is as follows :

14. They say that notices under Rule 5 of Schedule 17 of the Act have been issued and now stand confirmed. That it is the statutory duty of the Commissioner now to proceed to evict the tenant and to carry out the demolition. It is complained that he is not carrying out his statutory duty but on the other hand is continuing with the prosecution before the learned Municipal Magistrates. The result is that the petitioners find themselves again in the predicament to which they were put at an earlier stage of the proceedings. They cannot carry out the necessary repairs with Ladhuram Tapuria occupying the premises and yet the Commissioner will not do his statutory duty of putting him out and at the same time will go on with the prosecution of the landlords for not doing repairs. In this application they have come to this Court for the issue of a Writ in the nature of Mandamus directing the Commissioner to do his statutory duty.

15. The Commissioner and the Corporation have appeared before me and an affidavit has been filed by Sisir Kumar Gangoly the District Building Surveyor District No. II (2) affirmed on May, 6, 1957, in which a somewhat surprising stand has been taken. Reference has been made to the filing of Suit No. 2704 of 1956 mentioned above, and it is said that the respondents Nos. 1 and 3 will be able to take all further steps for the said demolition or removal as and when the said suit is dismissed. I have already mentioned the fact that no application was made and no order obtained for an interim injunction and the position taken up is entirely untenable. I am glad however to say that at the hearing learned counsel appearing on behalf of the Respondents Nos. 1 and 3 has not taken up

that position. The arguments before me turned entirely on a point of law that was taken on behalf of Ladhuram Tapuria the respondent No. 5. The learned counsel appearing on behalf of Tapuria submitted that the Act did not empower the Commissioner or the Corporation to compulsorily evict the occupier of the premises even though notice had been served under Rule 5 (2) of Schedule 17 of the Act. Learned counsel argued that the only steps that could be taken for that purpose are contained in Section 575 of the Act by which the owner could make an application in the Court of Small Causes, or by the Commissioner under the amendments affected in Rule 5 of Schedule 17, that is to say, under Sub-rules (4) and (5) of Rule 5 of Schedule 17 introduced by the amendment. If, of course, this argument is sustained, the application must fail. The ultimate stand taken on behalf of the respondents Nos. 1 and 3 is that they are waiting for an authoritative pronouncement of their rights in the matter and upon this being done action will be taken accordingly.

16. Mr. Mukherjee appearing on behalf of Tapuria has taken the following point:

(1) The Standing Building Committee by its resolution dated December 22, 1953 directed that the matter be referred to the Municipal Magistrate. It is argued that the Commissioner can only proceed with the reference before the Municipal Magistrate and has no power to take any other steps.

(2) That the Act including the Schedules thereto do not empower the Commissioner or the Corporation to enforce any notice that might be given under Schedule 17, Rule 5 (2) by forcefully evicting the occupier. The only steps that can be taken are as provided in Section 575 of the Act by the owner, or by the Commissioner under Rule 5 (4) and (5) of Schedule 17 of the Act.

17. I shall now deal with the first point. I have already mentioned that notice was issued by the Commissioner under Rule 5 (2) of Schedule 17 of the Act. This notice required the occupier, in this case Ladhuram Tapuria, to vacate the fourth storey on the north of premises No. 37, Armenian Street within 7 days from the date of the notice. It is plain that the provisions of Section 560 at once applied. This provision lays down that when any requisition order is made under the Act or under any Rule or bye-law made thereunder by a written notice then a reasonable period shall be prescribed in that notice for carrying out such requisition order and written objections must be entertained. Sub-rules (2) and (3) are important and are set out below:

(2) "If in any case not otherwise provided for under this Act or under any rule or bye-law made thereunder, such requisition or order or any portion thereof is not complied with within the period prescribed in clause (a) of Sub-section (1) the Commissioner may subject to the provisions of Section 501, and subject to such rules as may be made by the Corporation for the purpose take such measures, or cause such work to be executed or such thing to be done, as may, in his opinion, be necessary for giving due effect to the requisition or order so made;

(3) The Commissioner may take any measures, execute any work or cause

anything to be done under this section whether or not the person who has failed to comply with the requisition or order is liable to punishment, or has been prosecuted, or sentenced to any punishment under this Act or under any rule or bye-law made thereunder for such failure."

Section 561 follows it up by providing how the objection is to be submitted. Every such objection is to be placed before the Standing Committee, that is to say, the Standing Committee in this case, for determination. The provisions of Sub-section (3) of Section 561 are important and are set out below:

(3) "The Standing Committee shall after hearing the objector or any person authorised by him in writing in his behalf (if the objector or such person appears on the date fixed for hearing of which notice shall be given to the objector) and after considering the circumstances of the case pass such order as he thinks fit confirming modifying or cancelling the notice."

Under Sub-section (4) the Standing Committee may, if it thinks fit, fix the time within which the notice confirmed or modified shall be complied with. Sub-section (b) lays down that where such a time has been fixed and the notice as confirmed or modified is not complied with within such time, the Commissioner shall cause measures to be taken, work to be executed or things to be done in accordance with the notice as confirmed or modified.

18. In this particular case there was a notice under Rule 5 (2) of Schedule 17 of the Act requiring the occupier Ladhuram Tapuria to vacate the premises in his occupation. He made objection u/s 561 to the Building Standing Committee which confirmed the order of the Commissioner. The resolution of the Standing Committee is very unfortunately worded because it proceeds to state that the Commissioner should refer the matter to the Municipal Magistrate. It is sought to be construed so as to mean that the Standing Building Committee held that no other step need be taken excepting referring the matter to the Municipal Magistrate. In my opinion this is an entirely wrong construction. u/s 561 (3), the Standing Committee could only confirm, modify or cancel the notice, it could do nothing else. In this case it has neither modified nor cancelled the notice and hence must be taken to have confirmed the same. So far as the proceedings before the Municipal Magistrate are concerned, it is obvious that he could only deal with an offence under the Act and impose the penalties laid down u/s 537 of the Act. If the respondent No. 5 has committed an offence under the Act, he would be liable to punishment by the learned Municipal Magistrate as laid down under the Act. But that does not absolve him from the liability of complying with the notice served upon him, nor does it absolve the Commissioner from the statutory liability of enforcing the notice. In my opinion, there is nothing in the order or in the requisition of the Standing Building Committee which prevents the Commissioner from proceeding to evict the occupier, that is to say, enforce the notice under Rule 5 (2) of Schedule 17 of the Act, provided of course that he has the power of doing so. There can be no doubt that if he has a power to do so, he has a corresponding statutory liability to perform it. It may be discretionary to

issue a notice under Rule 5 of Schedule 17, but having issued it, he can do one of the two things. If he considers that it is no longer necessary to implement the notice or that for any reason the expediency has ceased, then he can withdraw the notice, or cancel the notice. But while the notice is in force, he has a statutory duty to exercise his powers for its enforcement. He cannot be heard to say, on the one hand, that he will prosecute the owner for not effecting the demolition or repairs and, on the other hand, sit down and not take any steps for evicting the occupier, without whose eviction it would be impossible for the owner or the Commissioner to carry out the demolition. I am glad to say that so far as respondents Nos. 1 and 3 are concerned, learned counsel has not contested this proposition. Therefore the whole thing hinges on a decision of the second point taken, namely, as to whether the Act endows the Commissioner with the power of compulsorily evicting the occupier in enforcement of the said notice under Rule 5 (2) of Schedule 17 of the Act. In my opinion, the Act does provide the necessary power to the Commissioner for compulsorily evicting the occupier, that is to say, to enforce the said notice. I have already set out above the provisions of Sub-section (2) of Section 580. It enables him to take such measures, or cause work to be executed, or such things to be done as may, in his opinion, be necessary for giving due effect to the requisition. Although it has not expressly stated that he can remove the occupier by force, that is clearly implicit. Sub-rule (3) makes it quite clear that this action on the part of the Commissioner is not dependent on whether the occupier is being proceeded against by way of prosecution for having committed an offence in disobeying the said requisition. The Commissioner has been given the power to take police help. This is provided for in Section 596 of the Act. u/s 596(2)(ii) it is the duty of every police officer in or outside Calcutta to assist the Commissioner or any municipal officer or servant reasonably demanding his aid for the lawful exercise of any power vesting in the Corporation, or the Commissioner or any municipal officer or servant under the Act or under any rule or bye-law. As a matter of fact, this is what is invariably done in such cases and in many applications that have come up before me, I have found that the Commissioner has taken the help of police to evict the occupier in respect of dangerous premises. Reference may also be made to Section 557, where the Commissioner has been given the power to enter upon any premises, with or without assistants or workmen, inter alia, to execute any work which is authorised by the Act or any rule or by-law. In my opinion, therefore, the power is quite implicit. u/s 560 (2) the Commissioner can take measures or cause work to be executed or things to be done as are necessary for giving due effect to the requisition which has been made asking the occupier to vacate the premises. For that purpose, he can make a forcible entry u/s 557 and he can requisition police help u/s 596. In the circumstances I find no impediment in his exercising such powers.

19. It is said that the only steps that can be taken are u/s 575 or under Rule 5 (4) and (5) of Schedule 17 of the Act. Coming to Section 575 we find that the owner of any land or building may, if he is prevented by the occupier from

complying with any provision of the Act or any rule or by-law made thereunder or with any requisition made under the Act in respect of such land or building, apply to the Court of Small Causes having local jurisdiction, and the Court, on receipt of any such application, may make a written order requiring the occupier of the land or building to afford all reasonable facilities to the owner for complying with the said provision or requisition. After eight days from the date of any such order, the occupier shall afford all such reasonable facilities to the owner for the purpose aforesaid and in the event of his continued refusal to do so, the owner shall be discharged, during the continuance of such refusal, from any liability which he would otherwise incur by reason of his failure to comply with the said provision or requisition. It is argued that when an occupier fails to comply with a notice to vacate a premises in dangerous condition, the only step which can be taken is for the landlord to proceed under this section. It is argued that the Court of Small Causes will make an order for eviction and this could be executed as a decree for ejectment. I find no such indication in the section itself. This section only enables the owner to avoid liability. As to why in the present case the owners have not taken this remedy and so avoided prosecution is more than I can say. But that does not prevent the Commissioner from proceeding to do his own duty. In my opinion, Section 575 merely enables the Court of Small Causes to make an order requiring the occupier to afford all reasonable facilities to the owner for complying with the provision or requisition made, but there is nothing indicated in the section whereby an eviction order can be made which may be executed as a decree for ejectment. If the order made under Sub-rule (2) of Section 575 is disobeyed, it is difficult to say off-hand as to what the remedy would be. That may be tested in an appropriate case. But I am certain that this does not prevent the Commissioner from exercising his own power.

20. So far as Schedule 17, Rule 5 is concerned, the argument advanced by Mr. Mookerjee is as follows. The relevant provisions are really Rule 5 (4) (a) and (b) which are set out below :

"(a) Notwithstanding anything contained in the foregoing sub-rules the Commissioner may, forthwith or with such notice as he thinks fit, demolish, repair or secure or cause to be demolished, repaired or secured, any such wall or building or things affixed thereto on the report of the City Architect of the Corporation certifying that such demolition, repair or securing of the wall or things is necessary for the safety of the public or the inmates of the building.

(b) In any such case, the Commissioner may cause the inmates of the building to be summarily removed from the scene or such portion thereof as he may consider necessary."

21. Mr. Mookerjee argued that u/s 560 we have found that there is no express mention of removal. If, however, the power to remove was implicit, then it was not necessary to mention it expressly in Rule 5 (4) (b). In other words, it is because there was no such power implicit u/s 560 that it was necessary to indicate it as Rule 5 (4) (b) in Schedule 17. In my opinion, this argument is not

sound. The provisions contained in the Act prior to the amendment of Rule 5 in Schedule 17 relating to the demolition of premises which were in an unfit condition for human habitation or in ruinous state, all require prior notice to be given. It was found, however, that in the case of certain buildings in a ruinous state, where there was an imminent danger of collapse, it was necessary to confer power upon the Commissioner to demolish or cause it to be demolished summarily, that is to say, without spending any time in the giving of notices or hearing objections. It is this particular contingency that is provided for in the amended sub-rules of Rule 5 of Schedule 17. As will appear from the provisions of Rule 5 (4) (b) set out above, the removal in this case is not the kind of removal that is contemplated either u/s 560 or Rule 5 (1) or (2) of Schedule 17. This is a power of summary removal. The scope and incidence of this power granted by the amending sub-rules has been dealt with by me in the case of Ajoy Kumar Ghose Vs. Corporation of Calcutta and Others, . In this particular case the Commissioner has not proceeded under the amending sub-rules of Schedule 17, Rule 5, and consequently there is no question of acting under Rule 5 (4) (b).

22. In my opinion, the position, therefore, is as follows :

1. It is discretionary for the Commissioner to issue a notice under Schedule 17, Rule 5 (1) or (2). Such notice is of course subject to the provision of Section 560 and an opportunity must be given to the occupier to prefer his objection u/s 561. But where the notice is confirmed or confirmed as modified and still requires the occupier to vacate the dangerous premises, then the Commissioner has a statutory duty to enforce the notice and to take steps for getting the occupier to vacate the premises in conformity with the notice.

2. He has ample power under the Act to do this Section 560 (2) gives him the power to take such action. Section 557 gives him the power of entry by force, subject of course to the restrictions imposed therein, and if there is any difficulty he can always take police help u/s 596 (2) (ii).

3. Section 575 of the Act enables the owner served with a requisition to make an application to the Court of Small Causes if the occupier makes it impossible for such requisition to be carried out. The Small Cause Court can direct the occupier to give all reasonable facilities to the owner for complying with such requisition. But I find no provision therein for passing a decree for ejectment or an order which can be executed as a decree for ejectment. Assuming, however, that the Small Cause Court has such power, it does not absolve the Commissioner from exercising his statutory duty, nor does it take away from the Commissioner power conferred upon him by the Act to do so.

4. The provisions of Schedule 17, Rule 5 (4) (a), (b) are intended to serve a different set of circumstances. They are appropriate for enforcement incases where there is an imminent danger of a building in a ruinous state, collapsing or falling down. The power of summary removal contained therein has nothing to do with the power the Commissioner is called upon to exercise in the facts and

circumstances of the present case.

23. In the circumstances, I think that the Commissioner should be directed to carry out his statutory duties and until he is able to get the tenant to vacate the premises, the prosecution before the Municipal Magistrate of the owners ought to be stayed because it is no fault of theirs that they cannot comply with the requisition, which, indeed, is impossible for them to comply" with, unless the premises are vacated.

24. The Rule is accordingly made absolute and there will issue a writ in the nature of mandamus directing the respondent No. 1, the Commissioner of the Corporation, to do his statutory duty and implement, or cause to be implemented, the notices issued under Rules 5 (1) and 5 (2) of Schedule 17 of the Calcutta Municipal Act. 1951 and a writ in the nature of mandamus directing the respondent No. 5 not to prevent, the respondent No. 1 from doing so, and also a Writ in the nature of mandamus directing the respondents to forbear from proceeding before the Municipal Magistrate against the petitioner in Criminal Case No. 717B of 1954 in the petition mentioned until the premises in question is vacated or caused to be vacated by respondent No. 5.

25. In my opinion respondent No. 5 should pay the costs of the petitioner of this application.

26. No other order as to costs.