

(1910) 11 CAL CK 0004
In the Calcutta High Court

Khagendra Nath Mitter

APPELLANT

Vs

Bhupendra Narain Dutt

RESPONDENT

Date of Decision : 07-11-1910

Acts Referred:

Citation : (1911) ILR (Cal) 296

Hon'ble Judges : Holmwood, J; Fletcher, J

Bench : Division Bench

Judgement

Holmwood, J.—This was a Rule calling upon the Municipal Magistrate to show cause why his order, dated the 30th July 1910, should not be set aside on the ground that it was passed without jurisdiction. The order is in respect of a wall nearly forty feet high, which has been erected by the petitioner between his premises and the adjoining premises of the complainant, 79 and 80, Bechu Chatterjee's Street. There was a wall to mark the boundary on approximately the same site before, but this was only a low wall; and met with no objection. It is contended by the complainant that the new wall has partly encroached on his land, but with this we have nothing to do, as that, like many other questions K that have been discussed in this case, is a purely civil matter.

2. I may say, at the outset, that I most strongly deprecate the use of the Municipal Act for the purpose of interfering in any way with the rights of private ownership beyond those limited powers which the Corporation have obtained by statute for the necessary protection of the public and the enforcement of proper sanitation. A great deal has been said in this case about the distinction between a public and private nuisance. A public nuisance is one that affects the King's subjects at large, or a considerable portion of them, such as the inhabitants of a town. A private nuisance, on the other hand, is one that affects only one person, or a certain determinate number of persons, and is only amenable to the civil law. But in Section 632 of the Municipal Act (Bengal, III of 1899), the Chairman, or any person who resides in Calcutta, is empowered to complain to a Magistrate of the existence of any nuisance, and this must be taken to be any

nuisance under the Act as denned in Section 3, Clause (29). Now, under that section, "nuisance includes any act, omission, place or thing which causes, or is likely to cause, injury, danger, annoyance or offence to the sense of sight, smell or hearing, or which is, or may be, dangerous to life, or injurious to health or property." This definition is wider than the Common Law definition of "public nuisance," but does not certainly extend to the inclusion of all private nuisances as was sought to be argued on the authority of *Bhagwan Das v. Rank Behari Mullick* 14 C.W.N. 637. I do not think that the learned Judges who decided that case intended to lay down any such general proposition as that which has found its way into the head-note of the case, of course without the revision of the learned Judges themselves. They are, dealing with a particular case, where an act of private ownership, primarily only creating a private nuisance, produces results which bring it within the definition of a nuisance in Section 3 of the Act. The word "includes" shows that such acts are rendered amenable to Municipal Law as opposed to Penal Law over and above what is generally understood as a "public nuisance." The acts themselves are in the nature of public nuisances, but they may only affect the lives and property of individuals or denned bodies of persons resident in a specified area. The smallest infant residing in" its parents" house within the jurisdiction of the (Corporation of Calcutta has a right to have its life and health protected against any act of any person which is, or may be, a danger to it, and the distinction between a "private" and "public nuisance" becomes m this view of the matter purely academical.

3. The question is, has a nuisance been created by any act of the petitioner that falls within the definition as given in the statute. If it has, the Municipal Magistrate clearly has jurisdiction under Clause (2) of Section 632 to make such inquiry as he thinks necessary, and, if he sees fit, to direct the Chairman to exercise any of the powers vested in him by the Act, or to take such measures as to such Magistrate may seem reasonable and practicable for preventing, abating, diminishing or remedying such nuisance.

4. Now the building of a wall, however high, on a man"s own property, for the purpose of preventing his neighbour from acquiring rights of easement over his land is not in itself a nuisance under" the Act. That is a question for the Civil Courts, and I wish to carefully guard myself from being thought to derogate in any way from the private rights of ownership in these matters, on the mere averment that a private nuisance has been created.

5. But the findings in this case go beyond that, and bring the case strictly within the definition of a quasi-public nuisance, as it is defined in the Act. Passing over certain findings, which do not concern the question of nuisance as defined in the Act, but are purely civil matters, I find that it has been found, as a fact, on the evidence of the Health Officer of Calcutta and of one of the leading Presidency Surgeons, whose testimony is wholly independent and unimpeachable, that the wall in question is, or may be, injurious to health, and as it is likely, in their opinion, to propagate the seeds of consumption and typhoid fever, it is

unquestionable that it creates a plague spot KB in the midst of a populous area which, commencing with the inhabitants of the adjoining tenements, including the petitioner himself and his family, may become a very serious menace and nuisance to the public inhabiting that neighbourhood.

6. This being so, the wall clearly falls within the definition of a nuisance, as defined in Section 3 of the Act, and we may pass over the further finding that it affects the security of the complainant's building, although that also finds some support from the testimony of Mr. Johnstone, who was called as an expert by the defence.

7. On this ground alone, I am unable to find that the Magistrate had no jurisdiction to deal with the matter. But the further question arises whether he has exercised that jurisdiction properly. The only matter which causes the wall to be a nuisance, within the meaning of the Act, is not its height, but the accumulation of filth and want of space to clear the drainage between it and the opposite party's house. Now, this might conceivably be remedied by other action short of pulling down the wall to a height of 12 feet, and, indeed, it is difficult to see how the reduction of the wall to such a height gets rid of the nuisance actually found to exist under the Act. It is clear that arches in the lower part of the wall would serve the purpose of cleaning the space behind it, and would not interfere with the petitioner's screening off his premises from the opposite party's observation, which he is legally entitled to do. I, therefore, think that the case must go back to the Municipal Magistrate for further consideration and for passing such an order as will abate the nuisance, which is found to exist at the foot of the wall and behind it, without interfering with the petitioner's right to screen off his premises.

8. With reference to the insanitary irregularities in the surface of the wall, he must further consider whether the petitioner's offer to plaster and whitewash the surface of the wall opposite the objector's premises will not sufficiently meet the necessities of the case. With these remarks, the case is remanded to the lower Court for passing a reasonable and proper order for abating the nuisance.

Fletcher, J.

9. Concurred.