
(1948) 04 AHC CK 0001
In the Allahabad High Court
Case No : First Appeal No. 254 of 1943

Mahadeo Prasad and others	Vs	APPELLANT
The Government, United Provinces and another		RESPONDENT

Date of Decision : 12-04-1948

Acts Referred:

Citation : (1948) 04 AHC CK 0001

Final Decision : Allowed

Judgement

Malik, C.J.—The main judgment in the case will be dictated by my brother, Bind Basni Prasad, but in view of the importance of the questions involved, I wish to say a few words on the points of law that have arisen before us. In the case of Municipal Board, Kanauj v. Manohar Lal, 1946 A.L.W. 245, I have already expressed my opinion that a Municipal Board is not entitled to assume the functions of a civil Court and decide contested matters relating to rights to property when an application for permission to build comes up before it. In that case I have probably expressed myself too strongly when I said that the Municipal Board was bound to grant an application if the proposed building was in accordance with the Municipal building bye laws. What I meant was that the Municipal Board as the custodian of the civic rights of the citizen must consider such applications on their merits and its decision must be a bona fide decision in the discharge of its duties as a body responsible for the health, sanitation, planning, etc. of the town. In every modern city, town-planning is an important aspect and the consideration of the question whether a proposed building should or should not be allowed to be constructed, according to the proposed plan, is one of the important functions of the Municipality which it has to discharge with due regard to its civic responsibilities. Such applications should not be disposed of on extraneous considerations which are not within the scope of the Municipal Board.

2. In the case before us, the Municipal Board has not considered the application on its merits, nor has it passed orders either refusing or granting it. All that it

has said is that the applicants should first move the District Magistrate and if the District Magistrate has no objection then the Board would consider the application on its merits. This, to my mind, was unjustified, and though this Court cannot issue a writ or mandamus asking the Municipal Board to do its duty, I have no doubt that the Board would reconsider the application on its merits or if a fresh application is filed it would consider the same.

3. It has been urged on behalf of the appellants that under S. 180 (3), Municipalities Act, if no order is received granting or rejecting the application within a certain time, it should be deemed that the sanction was granted. If that is the law, the appellants do not want a declaration from us to that effect. As the Board has not considered the application on the merits, I would prefer that the Board should do it now so that if there be any objection to the constructions which are proposed to be put up, the appellants may not be put to unnecessary loss or hardship later.

4. As for the order of the District Magistrate, in his statement under O. 10, R. 1, Civil P.C., it was admitted on behalf of defendant 1 that the order of the District Magistrate was passed under S. 144, Criminal P.C. Learned Junior Standing Counsel for the defendants concedes that an order passed under S. 144, can only be valid for two months and that even if it be taken that the order passed by the learned Magistrate could come under that section, the order is no longer operative. Learned counsel has, however, urged that the order may be taken to be an order under S. 34, Municipalities Act. Even under S. 34, the District Magistrate had no power to pass an order like the orders passed by Mr. Lambert and Mr. Finlay. Under S. 34, the District Magistrate is authorised to stay the execution of an order or a resolution of the Board under certain circumstances. He has forthwith to send a copy of his order to the Local Government which may accept the same and in that case pass final orders, or it may rescind the order of the District Magistrate. It is admitted that nothing of the kind was done in this case, nor had an occasion arisen for an order under S. 34, as there was no resolution or order of the board, the operation of which was being stayed by the District Magistrate.

6. The only other point is the question of the maintainability of the suit by reason of S. 321, Municipalities Act. I have already held in several cases that the jurisdiction of the civil Court would only be barred if the Municipal Board acts in accordance with the terms of the statute. The Municipal Board not having rejected the application or passed any order contemplated by the Municipalities Act, the plaintiffs could not take the matter in appeal to the District Magistrate under S. 321, Municipalities Act; The provisions of S. 321 not being applicable, I fail to see how it can be urged that the jurisdiction of the civil Court was barred. The plaintiffs' right to use their property according to law having been interfered with by an illegal action of the defendants, or either of them, the plaintiffs would have a right to come to the civil Court unless the jurisdiction of the civil Court is barred by any special statute. There is no statute which lays down that no order

of the Municipal Board, whether it is right or wrong, can be Questioned in a civil Court. The Municipal Board not having acted in accordance with the provisions of the Code, I am of the opinion that the civil Court has jurisdiction to entertain the suit.

6. In the result I would allow the appeal and give the plaintiffs a decree for declaration that the application for sanction to build filed by them on 9th November 1939 has not been dealt with according to law. I would further hold that the orders passed by Mr. Lambert on 8th November 1914 and 10th October 1915, and by Mr. Finlay on 8th March 1940, are illegal and void and the Municipal Board is not bound to wait for the sanction of the District Magistrate before it considers the application for permission to build filed by the plaintiffs on its merits. I would give the plaintiffs half their costs, against both the defendants, of this Court and the Court below. The defendants will bear their own costs.

Bind Basni Prasad J.

7. This is a plaintiffs' appeal from the judgment and the decree of the learned Additional Civil Judge of Benares in which the dispute is about the plaintiffs' right to make certain additions and constructions in a house. It is undisputed now that the house and the site on which it stands belong to the plaintiffs. There are two defendants, namely, the Government of the United Provinces and the Municipal Board of Benares. The house is near the famous Aurangzeb or Gyan Vapi Mosque of Benares. In the opinion of the successive District Magistrates of Benares if the plaintiffs are permitted to make the constructions which they desire, there will be occasions for friction between the Hindus and the Muhammadana leading to disturbance of peace. In November 1939, the plaintiffs sought the sanction of the Municipal Board, Benares, for the permission to make the disputed constructions and additions. Mr. Finlay, the then District Magistrate of Benares, intervened and on 8th March 1940, he sent the following letter to the plaintiffs :

Reference: our conversation this morning and your application to the Municipal Board for permission to construct a fourth storey on the "dharamshala" facing the Gyan Vapi Mosque. This proposal will undoubtedly give rise to objection and such constructions have been forbidden in the past. I am, therefore, unable to permit you to make it and if you insist on doing so I shall have to forbid constructions, under S. 144, Cr. P.C.

In view of this attitude of this District Magistrate, the Municipal Board also did not accord the sanction contemplated by S. 180, U.P. Municipalities Act, 1916. The U.P. Government has been impleaded because the District Magistrate as its agent stood in the way of the plaintiffs obtaining the sanction from the Municipality. The Municipal Board has been impleaded on the allegation that as the proposed additions and constructions complied with the bye-laws of the Municipality it was bound to accord the sanction. [8] Both the defendants contested the suit. A number of pleas were raised in defence and no less than nine issues were framed by the learned Additional Civil Judge. Excepting one, all

the issues were decided by the learned Additional Civil Judge in favour of the plaintiffs. The only finding against the plaintiffs was that, having regard to the provisions of Ss. 180, 318 and 321, U.P. Municipalities Act, 1916, the Municipal Board was competent to refuse to sanction the disputed additions and constructions on any ground and the validity or otherwise of the refusal could not be questioned by a civil suit. In the result the trial Court dismissed the suit.

9. We are not concerned with the issues decided in favour of the plaintiffs-appellants, for in this Court learned counsel for the respondents has not sought to support the decree of the learned trial Court by challenging the findings recorded in respect of them.

10. The sole question for determination in this Court, therefore, is whether the suit is barred by the provisions of S. 821, U.P. Municipalities Act, 1916.

11. The facts may now be set out in some detail. The building in suit is known as Dharamshala and is the private property of the plaintiffs. In 1912, the plaintiffs' ancestor, Shiva Dutta Rai, purchased this site together with some old buildings then standing. Subsequently in 1913-14, Shiva Dutta Rai, after obtaining the permission of the Municipal Board, raised a masonry three-storeyed building on the site with numerous doors and windows. In 1914 when the construction of the building was almost complete, Mr. Lambert, the then District Magistrate of Benares, passed an order to the following effect in the interest of law and order :

- (1) The two rooms on the third storey should be removed altogether.
- (2) No balconies can be allowed overhanging the road. No iron beams or "chhajjas" or indeed any portion of the building should project over the road.
- (3) The doors of the two rooms on the second storey should be bricked up and the existing windows (two in each room) can only be allowed on condition that they are fixed (with bars as at present) six feet above floor level. They will give the light and air at this height.
- (4) The four verandah doors on the second storey to be filled in by brick lattice work which will admit both light and air the openings not to be more than one (ordinary) brick square in size.
- (5) No shops can be allowed on the first storey and only the main entrance alongside the temple can remain open.

12. In October 1915, the above order was slightly modified by Mr. Lambert. It is the plaintiffs' case that their ancestor, Shiva Dutta Rai, submitted to the above order of the District Magistrate unwillingly, under pressure and coercion and complied with it. They assert that Mr. Lambert's orders were

wholly illegal, ultra vires and of no effect and carried with them no legal sanction whatsoever and are not in any way binding on the plaintiffs and were not passed by Mr. Lambert under any law or under any authority conferred upon him.

13. On 9th November 1939, the plaintiffs served the Municipal Board of Benaras with a notice under S. 178, U.P. Municipalities Act, 1916, accompanied by a plan seeking permission to make the additions and constructions in dispute. It was admitted by the learned counsel for the Municipal Board before the trial Court that the plaintiffs' application for making the disputed constructions was not in contravention of any provision of the Municipalities Act or any bye-laws framed thereunder. Not receiving any reply from the Municipal Board, the plaintiffs sent a letter to the Board calling its attention to the omission and intimating that if the omission or neglect continued for a further period of fifteen days then under sub-s. (3) of S. 180, U.P. Municipalities Act, the Board would be deemed to have sanctioned the proposed work absolutely. In the meantime, the plaintiffs had served the Collector with a notice under S. 80, Civil P.C., for the institution of the suit which has given rise to this appeal. On 12th May 1939, the District Magistrate sent a reply to the plaintiffs asking them not to make any innovations till the civil case was over, as it was likely to raise a communal dispute. On 15th December 1939, the District Magistrate wrote to the Chairman, Municipal Board, informing him that the matter was under inquiry and that no permission should be granted to the plaintiffs for making the proposed constructions until the inquiry was completed and the orders of the Government had been received. On 15th January 1940, the District Magistrate wrote to the plaintiffs that permission to make constructions in the Dharamshala had been forbidden in the past and that as the proposed construction was likely to give rise to a dispute, he would have to issue an order under S. 144, Criminal P.C., if they started the construction on 16th January 1940. After this, there was some interview between the Collector and one of the plaintiffs and then the District Magistrate wrote the letter, dated 8th March 1940, which has already been referred to above. On 21st March 1940, the plaintiffs received a letter from the Executive Officer of the Municipal Board saying in effect that unless the District Magistrate gave previous permission to make the constructions in the Dharamshala, the Board could not accord the sanction. The plaintiffs then brought the suit from which this appeal arises and claimed the following relief:

(a) A declaration that they are entitled to use and enjoy their house known as Dharamshala with all its doors and windows and appurtenances as they like and to make all constructions and additions to the said building as specified in the notice and plans attached thereto dated 9th November 1939 and 6th February 1940 and fully described at the foot of the plaint and that defendant 1 has no right whatsoever to interfere with the said user and enjoyment of or prohibit the making of constructions on or additions to the said building otherwise than in due accordance with law in this behalf.

14. The first question is whether the District Magistrate could legally prohibit the plaintiffs from making the additions and constructions in dispute. In the trial Court learned counsel for the U.P. Government stated that the District Magistrate issued orders in 1914 and 1915 under S. 144, Criminal P.C. Even if it be assumed that the District Magistrate could pass an order of this nature under S. 144 of the

Code--a point on which I express no opinion--such an order cannot in view of sub-s. (6) of S. 144 remain in force for more than two months, unless the Provincial Government by notification in the Gazette directs otherwise. It is not the respondents' case that any such notification was issued by the Provincial Government. If Mr. Lambert's orders be taken to have been passed under S. 144, Criminal P.C., they spent themselves out on the expiry of two months from the dates of those orders. The orders passed by the District Magistrate in 1940 do not purport to be under S. 144. In the letter, dated 8th March 1940 sent by the District Magistrate to the plaintiffs there was only a threat for an order under S. 144 and not an actual order under that section.

16. Mr. Gopalji Mehrotra, learned counsel for the respondents, has, however, sought to support the prohibitory orders of the District Magistrate on certain provisions of the U. P. Municipalities Act and not those of the Code of Criminal Procedure. Let us examine the powers of the District Magistrate under the U.P. Municipalities Act, 1916. Under S. 32 the District Magistrate has the power to inspect or cause to be inspected any immovable property used or occupied by a board, to call for and inspect any book or document in possession of the board, to require a board to furnish such statements, accounts, reports or copies of documents as he may think fit to call for and to record for the consideration of a board any observations he thinks proper in regard to the proceedings or duties of the board. It is manifest that the prohibitory orders passed in the present case cannot fall under S. 32.

16. Under S. 34 the District Magistrate may by order in writing prohibit the execution or further execution of a resolution or order passed or made under the Municipalities Act Or any other enactment by a board, if in his opinion such resolution or order

is of a nature to cause or tend to cause obstruction, annoyance or injury to the public or to any class or body of persons lawfully employed, or danger to human life, health or safety, or a riot or affray, and may prohibit the doing or continuance by any person of any act, in pursuance of or under cover of such resolution or order.

Sub-section (2) of this section requires the District Magistrate to forward forthwith to the Provincial Government a statement of the reasons for having made an order under sub-s. (1) and the Provincial Government has been given the power to rescind or modify the order. Sub-section (4) of S. 34 provides as follows:

Where the execution or further execution of a resolution or order is prohibited by an order made under sub-s. (1) and continuing in force, it shall be the duty of the board, if so required by the authority making the order under the said sub-section, to take any action which it would have been entitled to take, if the resolution or order had never been made or passed, and which is necessary for preventing any person from doing or continuing to do anything under cover of

the resolution or order of which the further execution is prohibited.

17. The corresponding provisions in the North Western Provinces and Oudh Municipalities Act, 1900 (U.P. Act I [1] of 1900), which Was in force at the time when Mr. Lambert passed the orders in 1914 and 1915, were contained in S. 183 which ran as follows:

183. (1) The Commissioner or the District Magistrate may, by order in writing, suspend within the limits of the division or district (as the case may be) the execution of any resolution or order of a municipal board or joint committee, or prohibit the doing within those limits of any act which is about to be done, or is being done, in pursuance of or under cover of this Act, if, in his opinion, the resolution, order or act is in excess of the powers conferred by law, or the execution of the resolution or order, or the doing of the act is likely to lead to a breach of the peace, or to cause injury or annoyance to the public or to any class or body of persons.

(2) When a Commissioner or District Magistrate makes any order under this section, he shall forthwith forward a copy thereof, with a statement of his reasons for making it, to the Local Government, which may thereupon rescind the order or direct that it continue in force with or without modification, permanently or for such period as it thinks fit.

18. Learned Junior Standing Counsel has relied upon *Bulaki Das v. The Secy: of State for India in Council*, 31 ALL. 371: (1 I.C. 896) in support of his contention that Mr. Lambert was justified under S. 183 of the old Municipalities Act to pass the orders which he did in 1914 and 1915. That was a case in which the plaintiff sued for a declaration that he was entitled to build a temple on a site. Some Muhammadans objected and in consequence the District Magistrate cancelled the order of the Board permitting the plaintiff to construct the temple. The District Magistrate purported to act under S. 183, Municipalities Act, 1900. His order was confirmed by the Local Government, It was held by this Court that the District Magistrate was competent to make that order under S. 183 and the decree of the Courts below dismissing the suit was upheld. In view of this authority, Mr. Lambert's power to pass the prohibitory orders which he did in 1911 and 1915 are beyond doubt. But there is this difference between the present case and the case just referred to that here Mr. Lambert never referred the matter to the Provincial Government under sub-s. (2) of S. 183 of the old Municipalities Act, whereas in the case just cited the reference was made to the Provincial Government. The District Magistrate had only emergent powers under that section and if he wanted to make his prohibitory orders permanent, it was incumbent upon him to obtain the direction of the Provincial Government in that behalf. As this was not done, Mr. Lambert's order cannot be permanently operative.

19. Coming now to the prohibitory orders passed by the District Magistrate on 15th January, 1940, and 8th March 1940, they do not fall within the purview of

S. 34, U.P. Municipalities Act, 1916. The section empowers the District Magistrate to "prohibit the execution or further execution of a resolution or order passed or made ... by a board." In the present case, on these two relevant dates the Board had passed no resolution or made any order permitting the plaintiffs to make the disputed constructions. The District Magistrate's jurisdiction arises only when the Board passes a resolution or makes an order. Mr. Finlay's orders, dated 16th January 1940 and 8th March 1940, were, therefore, premature. Moreover, Mr. Finlay also did not forward to the Provincial Government a statement of the reasons as required by sub-s. (2) of S. 34. Hence, even if it be assumed that Mr. Finlay could pass the orders as he did on 15th January 1940 and 8th March 1940, they cannot have a permanent effect. In none of his letters of these two dates did Mr. Finlay inform the plaintiffs that he had forwarded the statement of the reasons to the Provincial Government. It is true that in his letter, dated 15th December 1939 to the Chairman, Municipal Board, Mr. Finlay said that the orders of the Government were awaited; but this was in connection with the notice of the civil suit under S. 80, Civil P.C. which the plaintiffs had served upon the Collector and not in connection with any orders passed under sub-s. (1) of S. 34, U.P. Municipalities Act, 1916. Indeed, on 15th December 1939, he had communicated no prohibitory orders to the plaintiffs.

20. Section 86 confers certain extraordinary powers on District Magistrates in cases of emergency, but it provides for positive acts and not for any prohibitory orders. We have been referred also to S. 125, U.P. Municipalities Act, 1916, which inter alia provides for the payment of compensation to any person sustaining any damage by reason of the exercise of any of the powers vested inter alia in the District Magistrate under S. 34. It is argued that this provision in regard to the award of compensation shows that the intention of the Legislature was to place the considerations of law and order above that of loss to any individual. It is true that the District Magistrate can pass an order under S. 34 to avoid a riot, but he must act within its four corners and, as already shown above, he has not done so in the present case, inasmuch as he passed premature orders in 1940 and did not forward the statement of the reasons to the Provincial Government.

21. Section 318 constitutes inter alia the District Magistrate an appellate authority from orders passed by the board under S. 180(1). Mr. Finlay's orders, dated 15th January 1940, and 8th March 1940 were not passed under this section, as there was no appeal before him from any order passed by the Board under S. 180(1).

22. The position thus is that orders passed by Mr. Lambert in 1914 and 1915 have ceased to be operative. The orders passed by Mr. Finlay in 1940 cannot be regarded as under S. 34, U.P. Municipalities Act, 1916, and at any rate cannot have a permanent effect as the statement of the reasons were not forwarded to the Provincial Government. The scheme of S. 34 is to give emergent powers of a temporary nature to District Magistrate and to make his orders permanently

operative only if the Provincial Government has approved of it.

23. The second question is whether the Municipal Board was justified to refuse to sanction the proposed additions and constructions by the plaintiffs, because the District Magistrate did not agree to them. It has been argued on behalf of the plaintiffs that as the owners of the building the plaintiffs have a right to enjoy it in any manner they like and to make any additions or alterations in it, subject only to the provisions of the Municipalities Act and the bye-laws framed thereunder, and as it is admitted by the respondents that the proposed constructions did not contravene any provisions of the Act or the bye-laws, the Municipal Board was bound to accord the sanction. On the other hand, learned Standing Counsel argues that having regard to the wide terms of S.180 coupled with the provisions of S. 188, the Board has the power to refuse to accord the sanction to any work of which notice has been given under S. 178 even for reasons other than that the proposed work will contravene any of the provisions of the bye-laws.

24. Section 180 of the present Municipalities Act corresponds to S. 87, Municipalities Act, 1900. There is a difference between the provisions of the two sections. To sub-s. (1) of S. 87 of the old Act there was a proviso to the following effect:

Provided that the board shall not refuse to sanction the erection or re-erection of such building, except on the ground that its erection or re-erection would be in contravention of the provisions of any rule made under cl.(ss) of sub-s.(1) of S. 187 or prejudicial to the health, safety or convenience of the public, or of persons who dwell or occupy property in the vicinity, or that having regard to the locality, it is unsuitable in plan or design, or for other reasonable cause assigned.

25. No such proviso now appears in S. 180 of the present Act and it is argued that the board can refuse to accord the sanction even for reasons other than the contravention of the provisions of the Municipalities Act or of any bye-law framed thereunder. It is alleged that this argument finds support from S. 183 which provides:

Notwithstanding anything contained in S. 125, a person giving notice under S. 178 shall not be entitled to any compensation for damage or loss sustained by reason of an order passed by a board under S. 180, unless --

(a) the order is passed on some ground other than that the proposed work would contravene a bye-law or be prejudicial to the health or safety of the public or Any person.....

Section 183 would show that the board can pass an order under s. 180 on a ground other than that the proposed work would contravene a bye-law or would be prejudicial to health or safety of the public or any person.

26. In *Dhunde Chaudhri Vs. The Municipal Board and Others*, the Municipal Board refused to accord sanction to a proposed construction on the ground that the

land was in fact a street within the meaning of the Act. The plaintiff then brought a suit for an injunction to restrain the Municipal Board from interfering with his constructions. The suit was dismissed and it was held that the discretion exercised by the Board in refusing to accord the sanction could not be questioned in the civil Court. The distinction between the present case and the case just referred to is that while in the present case the reason for the refusal was the intervention of the District Magistrate in the other the reason was that the proposed construction would have encroached upon a street which vested in the Municipal Board.

27. In *Sheikh Jorhawan and Others Vs. Municipal Board*, it was held that under S. 180, U.P. Municipalities Act, 1916, the Municipal Board has a wider power to refuse the sanction for the erection or re-erection of a building than under S. 87, U.P. Act I [1] of 1900. Further, it was held that whether the refusal is proper or not it cannot be questioned in a civil Court. In that case the Board had refused to sanction the proposed construction on the ground that the land sought to be built upon was a part of a graveyard. According to S. 7(g), U.P. Municipalities Act, 1916, the maintenance and regulation of graveyards is one of the functions of Municipalities. Hence the refusal by the Municipal Board to accord the sanction in the case just referred to was within the purview of the statutory functions of the Board.

28. Learned counsel for the appellants argues that the Municipal Board can refuse to sanction a proposed construction only on the ground that it will contravene a bye-law or be prejudicial to the health or safety of the public and that it cannot refuse the sanction on the ground that the proposed construction would encroach upon the rights of others or would tend to a breach of peace. In this connection we are referred to Ss. 7 and 8 of the present Municipalities Act which lay down the duties and the discretionary functions respectively of the board. It is pointed out that the maintenance of law and order is not a concern of the boards.

29. There can be no doubt that the boards as such have no obligation cast upon them by the U.P. Municipalities Act 1916, to take into ; consideration questions relating to breach of peace when acting under S. 180. It is true that the powers of the board to refuse a work under S. 180 are wider than those under the corresponding S. 87 of the old Act. But where wide discretion is given to a statutory authority, it must be exercised bona fide and reasonably. In *The Queen v. The Vestry of St. Pancras*, (1890) 24 Q.B.D. 371, Lord Esher, M.R. observed that the vestry

must fairly consider the application and exercise their discretion on it fairly and not take into account any reason for their decision which is not a legal one. It people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

30. In *Short v. Poole Corporation* 1926-1 ch. D. 66 : (95 L.J. ch. 110), it was held that no public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any act purporting to be that of the body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative. Public bodies are established by statute for certain limited purposes and no act purporting to be that of the public body can be of any operation as such, if the individuals purporting to exercise the functions of the public body have, in performing the act in question, transcended the limits of the authority conferred upon it.

31. In *Mayor etc. of West Minister Corporation v. London & North Western Rly. Co. Ltd*, 1905 A.C. 426: (74 L.J. Ch. 629), it was held that the statutory authorities must use their statutory powers bona fide and reasonably, and if they so act their discretion as to the mode of acting cannot be interfered with.

32. Craies on Statute Law (Edn. 4) at p. 250 says that in deciding what should be done under statutory powers Courts of law will always take into consideration the objects for which the statutory powers have been conferred. The powers must be exercised within the spirit of the statute. When powers have been given to statutory authorities to interfere for certain purposes with the rights of private property the Courts, consistently with the ordinary principles on which they act, should keep such bodies strictly within the powers, and should prevent them, when the Legislature has given them power to interfere with private property for one purpose, from using their power for another purpose.

33. In *Abdul Qayum Khan Vs. City Board*, it was held that when enacting the U.P. Municipalities Act it was never the intention of the Legislature to invest the Municipal Boards or the appellate authority under the Act to pronounce decisions upon disputes relating to private property between private individuals or to unduly encroach upon the said rights except upon the grounds of public health, safety or convenience. To the same effect was the view taken in *Municipal Board Vs. Mohd. Zaki and Others*,

34. In refusing to accord the sanction to the plaintiffs, the Municipal Board in the present case cannot be said to have acted with any corrupt or bad motive. It had the letter, dated 15th December 1939, from the District Magistrate in which he asked the board not to permit the constructions until the inquiry in the case was completed. The District Magistrate too was actuated with no bad motive, but he had no statutory authority for the direction which he gave to the board or the orders which he communicated to the plaintiffs. As already stated above, it was only after the board had passed the orders under S. 180 that he could pass an order under S. 34. The question then arises whether the board was justified in taking into consideration the directions of the District Magistrate when dealing with the plaintiffs' application for making the constructions in dispute. The Municipalities Act, 1916, does not prescribe that the board should consult the District Magistrate or carry out his directions when dealing with such applications. The Board has to exercise its discretion independently and the

primary consideration before it when dealing with such applications is public health, safety and convenience or any matter relating to subjects mentioned in Ss. 7 and 8, U.P. Municipalities Act, 1916. It has nothing to do with private disputes or maintenance of peace. In fact it is provided by S. 184 that a sanction given under S. 180 shall not confer or extinguish any right or disability, or operate as an estoppel or admission, or affect any title to property or have any other effect whatsoever. It is the District Magistrate whose function it is to maintain law and order in the district, and if any resolution passed or order made by the board is likely to cause breach of peace, he can intervene under S. 34. Having regard to the scheme and the policy of the Municipalities Act and the purposes for securing which bye-laws may be framed under S. 298 in connexion with sanctioning of buildings, it is clear that the intention of the Legislature was not to arm the Municipal Board to refuse to sanction any work except upon the grounds of public health, safety or convenience or matters mentioned in Ss. 7 and 8, U.P. Municipalities Act. None of the objects laid down in Ss. 7 and 8 of the Act would have been contravened by sanctioning the proposed construction. I am of opinion that the Municipal Board took an extraneous matter into consideration in refusing to accord the sanction. It did not act in the spirit of the statute. It was not justified to refuse to sanction the constructions in dispute.

35. There was an argument that really the Municipal Board did not refuse the sanction but has only asked the plaintiffs to obtain firstly the permission of the District Magistrate. I am of opinion that this is tantamount to refusal, because it imposed a condition which the board knew the plaintiffs would not be able to fulfil. At any rate, the question is whether such a condition could be imposed by the board. There was no justification for imposing any such condition.

36. The last point is whether the suit is barred by S. 321, U.P. Municipalities Act, 1916. It provides:

No order or direction referred to in S. 318 shall be questioned in any other manner or by any other authority than is provided therein.

Section 318 mentions inter alia an order passed under S. 180. If the order passed in the present case by the board is held as one under S. 180, then of course S. 321 operates as a bar to the present suit. It has already been shown above that in the exercise of its discretion the board in the present case took into consideration an extraneous matter and that it did not act within the spirit of the statute. In the words of Lord Esher, M.R. in *The Queen v. The Vestry of St. Pancras*, (1890) 24 Q.B.D. 371, the order passed by the board cannot be deemed to be one under the law. It is really not an order passed under S. 180. Only those orders mentioned in S. 318 cannot be questioned which have been legally passed. If an order refusing sanction for any work has been passed on unlawful grounds e.g., in bad faith, with corrupt motives or on grounds which should not have been taken into consideration, then it is not an order passed under S. 180 (1). That being so, the bar of S. 321 does not operate in the present suit.

37. To sum up, the position is that the District Magistrate's orders are inoperative. The Municipal Board's refusal is also inoperative because it took into consideration the question of law and order which was beyond its purview. If the Municipal Board now sanctions the work, the District Magistrate can, if the situation has not altered, pass an order under S. 34, prohibiting the plaintiffs from proceeding with the constructions in dispute, and can regularise the whole matter by forthwith forwarding a statement of reasons to the Provincial Government. The question is whether in these circumstances a declaratory decree should be granted and, if so, in what terms. We do not know what the position in the locality now is. It may be that owing to changed situation the District Magistrate may not think of continuing his prohibitory order. To deny the plaintiffs a decree in the suit would be to deprive them of the possibility of the removal of the ban upon them. To give a decree in suitable terms would be to afford them an opportunity to enjoy their property as they desire.

38. The last question is in what terms the decree should be granted. The Court has a power to grant the decree in such terms as it thinks proper in the circumstances of a case. It has been held above that the condition imposed by the Municipal Board in its letter dated 21st March 1940, to the plaintiffs that the latter should first obtain the permission of the District Magistrate is illegal. A declaration should be given accordingly and the Board should be at liberty to reconsider the plaintiffs' application according to law. At the same time, proper safeguard should be made to enable the District Magistrate to take such action according to law after the Board has passed orders under S. 180 as he may think necessary in the interest of maintenance of peace.

39. I would, therefore, allow the appeal and set aside the decree of the learned Additional Civil Judge. I would grant a declaration that the condition imposed by the Board in its letter to the plaintiffs, dated 21st March 1940, that they should first obtain the permission of the District Magistrate for the proposed constructions in dispute is illegal and would further declare that the Board is at liberty to dispose of the plaintiffs' application uninfluenced by the orders of the District Magistrate in regard to the disputed constructions near about the Gyan Vapi Mosque. After the Board has disposed of the plaintiffs' application, the District Magistrate will be at liberty to take such action according to law as in his opinion may be necessary for the maintenance of peace. I would give the plaintiffs-half their costs, against both the defendants, of this Court and the Court below. The defendants will bear their own costs.

40. By the Court.--The decree of the trial Court is set aside and the plaintiffs' appeal is allowed only to this extent that it is declared that the order of the Municipal Board dated 21st March 1940 that the plaintiffs should first obtain the permission of the District Magistrate for the proposed constructions in dispute is illegal and the Municipal Board is not bound to wait for the sanction of the District Magistrate before it can consider the application for permission to build which was filed by the plaintiffs. In view of the fact that the plaintiffs' suit has

been decreed only in part, we allow the plaintiffs half of their costs in the trial Court and this Court. The defendants shall bear their own costs of both the Courts.