
(1939) 08 CAL CK 0005
In the Calcutta High Court

Sheikh Nizamuddin

APPELLANT

Vs

Corporation of Calcutta

RESPONDENT

Date of Decision : 01-08-1939

Acts Referred:

Calcutta Municipal Act, 1923 — Section 319, 363, 363(1)

Citation : AIR 1940 Cal 11

Hon'ble Judges : Narsing Rau, J; Narasing Rau, J

Bench : Division Bench

Judgement

Narasing Rau, J.—This appeal by the plaintiff arises out of a suit brought by him against the Corporation of Calcutta for certain declarations and for a permanent injunction against the Corporation, The plaintiff's allegations were briefly these : He is the owner of certain premises at 24 Allenby Road, Bhowanipore. He applied to the Corporation authorities for permission to construct a garage in the aforesaid premises. The permission was at first refused. Thereupon he preferred an appeal to the Building Standing Committee, of the Corporation which according to him was authorised to consider such appeals. On 25th March 1935, the Committee passed a resolution allowing the appeal, the resolution being duly confirmed at the first meeting of the next Committee on 13th June 1935. Thereafter he completed the construction of the garage. On 3rd September 1935, after the garage had been completed, he was served with a notice to show cause by 7th September 1935, why the garage should not be demolished. The notice intimated that, an appeal to the Building Standing Committee had been rejected on 28th June 1935. On these allegations he brought this suit praying : (a) that it be declared that the order of demolition was wrong and ultra vires; (b) that the resolution of the Building Standing Committee of 28th June 1935, if any, rejecting the appeal, which the Committee had previously allowed, be declared to be ultra vires and ineffectual; (c) that the garage be declared not liable to be demolished; and (d) that a permanent injunction be issued restraining the Corporation from demolishing the garage or causing it to be demolished. The Corporation in its defence stated inter alia that the suit was premature, inasmuch

as no demolition order had yet been passed, and further that the power to pass such an order was vested not in the Corporation, but in the Municipal Magistrate.

2. On the other allegations the defence was briefly this : The plaintiff began construction of the garage before getting express permission under the rules and before the resolution of the Building Committee passed on 25th March 1935 had been, confirmed. The resolution was inoperative without confirmation, which in this case took place on 13th June 1935. Meanwhile, the plaintiff was served with a notice on 21st May 1935 to stop construction. As he disregarded the notice, a police guard had to be posted on the premises on 27th May 1935 to prevent him from going on with the work. The guard was withdrawn on 30th May 1935 on the plaintiff giving an undertaking by a letter addressed to the City Architect, dated 28th May 1935, not to go on with the construction until formal sanction had been obtained. Ultimately on 5th September 1935, on the application of the Corporation u/s 363, Calcutta Municipal Act, the Municipal Magistrate served a notice upon the plaintiff to show cause against demolition of the construction. Plaintiff was given due notice that the Building Committee would rehear his appeal on 28th June 1935 and he purposely absented himself from the hearing on that date. The construction in question contravened the provisions of the law and the plaintiff was therefore not entitled to any relief.

3. On these allegations and counter-allegations various issues were framed. The trial Court decreed the suit with costs. On appeal the Third Subordinate Judge of Alipur set aside the decree and dismissed the suit. Hence this second appeal by the plaintiff. Before going into the details of the case it is necessary to set out the relevant provisions of the Calcutta Municipal Act, 1911. Section 319 of the Act, provides that No. piece of land shall be used as a site for the erection of a new building and no new building shall be erected otherwise than in accordance with (a) the provisions of Chap. XXI of the Act and of Schedule 17 and (b) any orders, rules or bye-laws made under the Act relating to the use of building sites or the erection of new buildings as the case may be.

4. Schedule 17 to the Act contains a number of rules regulating the erection of buildings. Rule 23 provides that the total area, covered by all the buildings on any site used for a dwelling house shall not (except in localities not relevant here) exceed 2/3rds of the total area of the site, provided that the Corporation may, for special reasons to be recorded in writing, at any time permit an excess area not exceeding 5 per cent, of the total area of the site to be covered in the case of a detached building. In the present instance, the garage in dispute stands on a site used for a dwelling house. The total area of the entire, site is apparently about 2019 square feet; 2/3rds of 2019 square feet works out to 1346 square feet. If the garage had been built, the total area covered with buildings would have been 1383 square feet, so that the area covered by buildings would have exceeded the permissible 2/3rds by 37 square feet. This would have meant an infringement of the rule, unless the Corporation for special reasons permitted the excess which, in this case, was within the 5 per cent,

margin allowed by the proviso to the rule. But no such special permission, for reasons recorded, has been alleged or proved here.

5. Rule 30 provides that 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, the minimum" width of the space being 10 feet. In the present instance the erection of the garage behind the plaintiff's "domestic building" would have led to a breach of this rule. It is true that Rule 31 empowers the Corporation to relax Rule 30 in certain circumstances, provided inter alia that not more than 2/3rds of the total area of the site shall be occupied by buildings. As already pointed out, the result of allowing the garage to be built in the present case would have been to cover more than 2/3rds of the total area by buildings, so that no relaxation of Rule 30 would have been permissible, even if the Corporation wished. Rule 52 requires every person who intends to erect a new building, other than a hut, to send to the Corporation an application for permission to execute the work together with plans and specifications. Rule 57(1) provides that within 15 days of the receipt of any application under Rule 52 or within 15 days after the Corporation have been satisfied that there are no objections to the grant of permission, the Corporation shall by written Order (a) either grant permission conditionally or unconditionally to execute the work; or (b) refuse on certain grounds to grant such permission. Rule 58 provides that if within the period prescribed by Rule 57, the Corporation have neither granted nor refused to grant permission to execute any work, such permission shall be deemed to have been granted; and the applicant may proceed to execute the work, but not so as to contravene any of the provisions of the Act or of any rules or bye-laws made thereunder. Rule 62 provides that subject to the provisions of Rule 58 the erection of a new building (other than a hut) shall not be commenced unless and until the Corporation have granted written permission for the execution of the work on an application sent to them under Rule 52.

6. It will be noticed that in all the provisions of the Act mentioned above, the various powers of receiving applications for permission to build, of granting permission, of refusing permission, of relaxing within limits some of the rules, and so forth, are expressed to be powers of the Corporation. Section 71 of the Act empowers the Corporation by a specific resolution to delegate any of its powers to Standing Committees. Similarly, Sub-section (1) of Section 12 of the Act empowers the Corporation by resolution at a special meeting to delegate to the Executive Officer any of its powers under the Act and Sub-section (2) empowers the Executive Officer by an order in writing to re-delegate to any Municipal Officer any of the powers delegated to him under Sub-section (1). Sub-section (4) implies that the delegations and the re-delegations may be subject to conditions and limitations.

7. So far as the powers, relevant in the present suit are concerned, neither party has produced anything at the trial to show how they have been delegated or re-delegated; but it does not appear to be disputed, and for the purposes of the

present case I shall assume it to be a fact, that by a series of valid delegations and re-delegations the power of granting or refusing to grant permission to erect new buildings has been lodged in the first instance in the City Architect," subject to the limitation that any order by him refusing permission shall be subject to an appeal before the Building Standing Committee. I shall further assume that by a valid delegation u/s 71 the Building Standing Committee has been empowered to grant permission by way of appeal in any case in which it has been originally refused by the City Architect.

8. I must now refer to Section 498 of the Act in the chapter relating to procedure. This Section provides inter alia that every written permission granted under the Act shall be signed by the Executive Officer and shall specify certain particulars. This must, of course, be read with Section 12 of the Act already alluded, to, Sub-section (3) of which authorizes the Executive Officer by order in writing to delegate to any Municipal Officer any of his powers under the Act. Once again, neither party at the trial produced anything to show whether the power or duty of signing written permissions, conferred or imposed upon the Executive Officer by Section 498 has been delegated by him to any other Municipal Officer u/s 12(3). It must be noticed that the delegation under this sub-section must be to a Municipal Officer and not to any Standing Committee. A fundamental feature of the present case is that no written permission signed by the Executive Officer or by any other Municipal Officer has been produced by the plaintiff.

9. Having now set out the relevant legal provisions I proceed to set out the facts proved. Ex. D shows that some time in November 1934 the plaintiff applied to the City Architect under Rules 52 and 53 of Schedule 17 to the Act for permission to build a garage. Ex. E shows that on 13th March 1935, the City Architect's Department rejected the application on the ground that the proposed construction would infringe Rules 23 and 30 of Schedule 17. The order of refusal intimated that any appeal against the order must be submitted to "this office" (presumably the Central Municipal Office) within fourteen days from the receipt of notice of the order. Ex. 1(a) shows that after hearing the party (presumably the present plaintiff) the Building Standing Committee, on 25th March 1935, allowed the appeal "against the refusal of the plans regarding No. 24, Allenby Road, District No. 4," This resolution of the Building Standing Committee was not confirmed, as will be seen presently, until 13th June 1935; but in this connexion Ex. 1(b) is relevant as showing that on 23rd March 1935 the Committee directed the City Architect to issue necessary water permits to allow the parties to go on with building construction in cases where the resolutions of the Committee sanctioning plans or allowing appeals against refusal of plans upto March 1935 have not yet been confirmed by the Committee.

10. It would appear from this resolution that the confirmation was regarded as a mere matter of routine which need not prevent parties proceeding with the construction of buildings whose plans had been sanctioned by the Committee.

Accordingly, the plaintiff appears to have begun construction of his garage. Thereupon one of his neighbours, Mr. H. Bose, protested to the Chief Building Surveyor, and later to the Chief Executive Officer, that the construction was illegal: Exs. A and A(1). Ex. 2 shows that on 13th May 1935, the District Engineer of District No. 4 granted to Dalmia & Co., (apparently plaintiff's contractors) a license to make an enclosure in the public street, & c. during the building or repairing of the premises No. 24 Allenby Road, for the period of one month, from 13th May 1935, to 12th June 1935, a sum of Rs. 5 being paid by the licensee on account of license fees. One of the Councillors on 16th May 1935, (vide Ex. E, apparently received by the Secretary to the Corporation on 29th May 1935) gave notice that at the next meeting of the Building Standing Committee he would move that the resolution of 25th March 1935, regarding premises No. 24 Allenby Road be rescinded and the case reconsidered. Meanwhile, on 21st May 1935, one of the Corporation Officials inspected the construction, which at that time had not been completed, and stopped the work in accordance with an order of the Chief Executive Officer: (Ex. G, G(1) & I).

11. On 13th June 1935, the Building Standing Committee for the year 1935-36 (the Committee is an annual one) vide Section 71(1) held its first meeting and as one of its first acts confirmed a large number of proceedings of the previous year's Building Standing Committee; amongst them, the proceedings of 25th March 1935, {vide Ex. 1). It is quite possible that this was done as a matter of routine and without special reference to the particular case of the garage now in dispute. For Ex. 1(1) shows that on 28th June 1935, the Committee passed a resolution

that the appeal regarding the plan of 24 Allenby Road be rejected and the department concerned be directed to take proceedings u/s 363 of the Act in respect of the work done without obtaining permission from the department.

12. The minutes record the fact that the owner (presumably the present plaintiff) was not present on the occasion, although he had been seen in Calcutta that morning by Mr. D.C. Mozumdar, of 9 Heysham Row. There is no dispute about any of these facts. The main question that I have to decide is whether on these facts the resolution of the Building Standing Committee passed on 28th June 1935 was ultra vires : (Prayer (b) of the plaint.) Now it is perfectly true that the Committee had on 13th June 1935, confirmed the proceedings of the previous Committee dated 25th March 1935, allowing the appeal of the plaintiff against the order of the City Architect's department refusing sanction to his application for building the garage; but two points have to be noticed. First, Rule 62 of Schedule 17 states, that subject to the provisions of Rule 58 the erection of a new building (other than a hut) shall not be commenced unless and until the Corporation have granted written permission for the execution of the work on an application sent to them under Rule 52. Rule 58 is of no avail in the present case, because although that rule empowers the applicant to proceed with his proposed construction in cases where the Corporation have neither granted nor refused to

grant permission within a certain specified period, he cannot proceed with the work "so as to contravene, any of the provisions of this Act." In the present instance the proposed construction has been found by the lower Appellate Court to contravene certain rules of this Schedule, notably Rules 23 and 30, beyond controversy. It follows that Rule 58 is of no avail to the plaintiff.

13. It further follows that by virtue of Rule 62 he had no right in the present case to commence the erection of the garage unless and until the Corporation had granted the written permission. "Whether the power to grant permission had been delegated to any extent to the Building Standing Committee or not, Section 498 of the Act requires that every written permission granted under the Act must be signed by the Executive Officer; presumably if there has been any delegation by the Executive Officer u/s 12(3), it will have to be signed by the Municipal Officer to whom the delegation has been made. In other words, the grant does not become effective until there is a properly signed written permission. The plaintiff has not produced any such written permission. If the Building Standing Committee discovered, after it had confirmed the proceedings of 25th March 1935, but before a written permission had actually issued over the signature of the proper officer, that the confirmation was in breach of the Act, there would appear to be nothing in the Act to prevent the Committee undoing the mistake and revoking the confirmation. Section 498(3) shows that even a written permission can be revoked in certain circumstances; it can therefore hardly be contended that a resolution which has not yet resulted in a written permission is irrevocable. A second point is this : even assuming that the confirmation of the proceedings of 25th March 1935 which took place on 13th June 1935 had the effect of a properly signed written permission the fact remains that it was a permission to do something which beyond controversy infringed certain provisions of Schedule 17. I am not aware of any provision in the Act, nor has my attention been drawn to any provision, to the effect that a written permission to erect a new building is in itself conclusive proof that all the requirements of the Act have been complied with in respect of that building. Indeed such a provision would be difficult to reconcile with certain provisions which do occur in the Act. Thus, Rule 23 of Schedule 17 contains a proviso enabling the Corporation to relax the rule to a limited extent in special circumstances.

14. There would be no need for such a proviso if by the mere grant of permission to erect a building the Corporation would in effect relax all the rules and relax them to an unlimited extent, as would be the case of the grant of permission carried with it a conclusive presumption that all the requirements of the Act had been complied with. Again, Section 363(1) contains three clauses; Clause (a) applies where a building has been commenced without obtaining permission of the Corporation; but Clause (c) applies where any new building is being carried on or has been completed in breach of any of the provisions of the Act. Thus, the mere fact that a building has been commenced on proper written permission does not protect the owner from attack under Clause (c), if the building is actually in breach of the provisions of the Act. It may perhaps be regarded as a

hardship that a person who has built after a proper permission should still be liable to have the building demolished" under Clause (c). The Legislature appears to have considered this aspect of the matter and in order to mitigate the hardship enacted Sub-section (2) of Section 363 providing that no proceedings thereunder shall be instituted in respect of any work which has been done more than five years before the institution of the proceedings. It is obvious that some such clause as (c) of Sub-section (1) is necessary if only to prevent contravention of the building regulations in cases where permission might be dishonestly granted. Section 493, Clause (c) appears to have been enacted for the same purpose. The citizen needs to be protected from the perils of dangerous or in sanitary buildings even where by accident or design the Corporation or a particular officer of the Corporation has granted permission for their erection.

15. All these provisions show that the mere fact in that permission has been granted for the erection of a particular building does not conclude the matter. If in fact the building in question infringes any of the requirements of the Act, the permission would appear to be a nullity in face of Section 319. Section 498(3) which provides that a written permission may be revoked if the grantee is convicted of a breach of any of the provisions of Act in any matter to which the permission relates, clearly implies that there can be no valid permission to erect a building in breach of the Act. To revoke a nullity can hardly be declared ultra vires. There can be no question of estoppel against the statute. This disposes of prayer (b) of the plaint. Prayer (a) appears to rest on a misunderstanding since there has not yet been any demolition order. Ex. K shows that the plaintiff has been served by the Corporation with a notice to show cause why(the Corporation should not apply to the Magistrate for a demolition order u/s 363. Such a notice is required u/s 363 before the Corporation can apply to the Magistrate. There has not yet been any actual order for demolition. Prayer (c) must be rejected for the reasons mentioned above in connexion with the rejection of prayer (b). As I have already found there was in this case no proper written permission and even if there were; the proposed building would come within Clause (c) of Section 363(1) of the Act. Prayer (d) for a permanent injunction must fail as a necessary consequence of the rejection of the other prayers.

16. This appeal must accordingly be dismissed. As regards costs however I must take into account the fact that the plaintiff may well have been misled by the resolutions of the Building Standing Committee on and before 13th June 1935. In these circumstances I direct that although he has lost his suit, he do get his costs in all the Courts from the Corporation. The case is a fit one for appeal under the Letters Patent.