

## CRIMINAL REVISION.

*Before Mr. Justice Mitra and Mr. Justice Holmwood.*

CHUNI LAL DUTT

v.

CORPORATION OF CALCUTTA.\*

1906  
Oct. 31.

*Calcutta Municipal Act (Bengal Act III of 1899) ss. 449, 450, 452 and  
579—Discretion of Magistrate—Fine and demolition—Limitation.*

The Municipal Magistrate should exercise the discretion vested in him under sections 449, 450 and 452 of the Calcutta Municipal Act (Bengal Act III of 1899) with due regard to those rules, which guide Courts of Equity in granting injunctions, with this difference that he has also to consider whether or not a building ought to be demolished on the ground of its being a danger or obstruction to the public.

The discretion is to be used after receiving evidence and hearing the defence.

*Abdul Samad v. The Corporation of Calcutta* (1) referred to.

The fact that in respect of the same deviation from the sanctioned plan of a building, the Corporation instituted two different proceedings at different times, one under s. 579 and another under s. 449, does not deprive the Magistrate of his discretion under s. 452 of the Act.

The Calcutta Municipal Act does not prescribe any period of limitation for an action under s. 449 or s. 450, but the Court should, in directing a demolition, consider how far the delay in the institution of the proceedings would affect the action.

On the 21st January 1905, the Municipal Corporation sanctioned the construction of a room according to a plan submitted by the petitioner. The petitioner however slightly altered the position of a wall in the construction of the room. The petitioner was thereupon prosecuted for the deviation under sec. 579 of the Calcutta Municipal Act and on the 15th November was fined Rs. 40. The Magistrate also gave certain directions as to alterations to be made in the room by the petitioner. The alterations having been made, the building was revalued for the purpose of assessment of rates on the ground of improvement of

\* Criminal Revision No. 1085 of 1906, made against the order passed by Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated July 30, 1906.

(1) I. L. R. 33 Calc. 287; 10 C. W. N. 182.

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the building. The assessed value was raised and the petitioner paid the increased rates for one quarter. Later on the General Committee applied to the Magistrate under sec. 449 of the Act for the demolition of the room. The present prosecution for demolition of the room was commenced in June 1906 and the order of the Magistrate directing the demolition was made on the 30th of July. The petitioner moved the High Court for having the order set aside on the ground that the Magistrate had based his order wholly on a finding that the room was built in deviation of the plan sanctioned by the Corporation and in contravention of rule 50 of Schedule XVII of the Municipal Act, without a trial and determination of the question how far the order was justifiable on the other facts of the case.

*Babu Aghore Nath Seal* appeared on behalf of the petitioner.

*Babu Monmotho Nath Mukerjee* appeared on behalf of the Corporation.

MITRA AND HOLMWOOD JJ. In this case the defendant in an action under section 449 of the Calcutta Municipal Act 1899, asks the Court to reverse an order of the Municipal Magistrate by which he has directed the demolition of a room in a building. The error complained of is that the learned Magistrate has based his order wholly on a finding that the room was built in deviation of the plan sanctioned by the Municipal Corporation and in contravention of Rule 50, Sch. XVII of the Act without a trial and determination of the question how far the order is justifiable on the other facts proved in the case.

In other words, the contention is that the Magistrate has not given a judicial consideration to facts, which would lead to an altogether different order.

The contention appears to us to be correct. There is nothing in the decision of the Magistrate to indicate that he judicially considered any grounds for the exercise of the discretion vested in him by the law.

Section 449 of the Act enables the General Committee of the Municipal Corporation to apply to a Magistrate on the

grounds specified in sub-sections 1, 2 and 3 for an order for the demolition or alteration of a building constructed in deviation of a sanctioned plan or in breach of the rules prescribed by the Act. The Magistrate may, on such application, make an order (i) directing that the work done or so much of the same as has been unlawfully executed, be demolished by the owner of the building or altered by him to the satisfaction of the Committee; or (ii) directing that the same be done by the Chairman of the Corporation at the expense of the owner of the building. The section further provides that no such order should be made by the Magistrate, without giving the owner and occupier full opportunity of adducing evidence and of being heard in defence.

In *Abdul Samad v. The Corporation of Calcutta* (1), the Court held that it was discretionary with the Magistrate to make or not an order under section 449. In this view we entirely concur. The word "may" in the section has obviously no compulsory force; it invests the Magistrate with a discretion to be exercised after receiving evidence and hearing the defence.

There is further reason in this particular case why the exercise of the discretionary power by the Magistrate must be held to be imperative. The defendant was fined Rs. 40 under section 579 of the Act for the same deviation from the sanctioned plan and breach of the building regulations. Later on the General Committee applied to the Magistrate under section 449 of the Act for the demolition of the room. Though the two proceedings were not simultaneous, we think section 452 of the Act applies. The Corporation cannot be allowed to institute, on the same cause of action, two different proceedings, one under section 579 and another under section 449 at two different times and thus prevent the exercise of his discretionary power by the Magistrate, a power expressly conferred by section 452 of the Act. The Municipal Magistrate was thus bound to exercise his judicial discretion in the matter, and he has not; and we need scarcely say that a mere arbitrary exercise of discretion is no exercise of discretion.

The order of the Magistrate must accordingly be set aside.

Then comes the question—Should we deal with the case here?

1) (1905) I. L. R. 33 Calc. 287; 10 C. W. N. 182.

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The materials on the record are sufficient and we have ample power under section 439 of the Code of Criminal Procedure to exercise the functions of an Appellate Court; and this we think, is a fit case for the Court to exercise its appellate functions and direct whether the room constructed by the defendant should be demolished or not, and thus make a final order without a remand.

The facts are these:—On the 21st January 1905, the Municipal Corporation sanctioned the construction of the room according to the plan submitted by the defendant. The defendant, however, slightly altered the position of a wall, in the construction of the room. The defendant was thereupon prosecuted under section 579 of the Act for the deviation, and on the 15th November, 1905 he was fined Rs. 40 and the then Municipal Magistrate gave certain directions as to the alterations that the defendant should make in the room. The defendant paid the fine. After the completion of the building with the suggested alterations, the whole building was revalued for the purposes of the assessment of rates on the ground of improvement of the building and the assessed value was raised. The defendant paid the increased amount of tax for one quarter. The present prosecution was commenced in June 1906. It does not also appear that the deviation from the sanctioned plan has to any appreciable extent affected the sanitary conditions of the locality.

Now, if a person asks a Court for a mandatory injunction for the demolition of a building erected by his neighbour on the ground of an infringement of the former's right, the Court is not bound to grant such injunction, notwithstanding such infringement of right. The Court exercises its discretion, not arbitrarily, but according to certain well established principles.

Waiver and acquiescence on the part of the plaintiff are some of the grounds for consideration. They operate as estoppel. If a person quietly and without protest in proper time allows his neighbour to spend money on an erection or himself takes advantage of the erection, he cannot be allowed the privilege, which his legal right would otherwise entitle him to. The doctrine of estoppel operates fully against a person, who takes the benefit of an action, though such action is a legal wrong.

The Municipal Act does not prescribe any period of limitation for an action under section 449 or 450, but the Court in directing a demolition should consider how far the delay in the institution of a proceeding would affect the action.

Again the wrong done may be disproportionately small to the loss which the wrong-doer would suffer by an order in the nature of a mandatory injunction. In such a case the Court would not pass a decree for injunction, but would saddle the wrong-doer with a decree for damages, the measure of damages being the amount that would compensate the wronged party for the wrong. The Court would consider in such a case a decree for damages adequate relief.

If again the infraction of a right is merely a legal injury, *injuria sine damno*, the Court would only pass a decree for nominal damages, an injunction being out of the question.

We ought, however, to add that there is a clear distinction between the Municipal law and ordinary proceedings in equity, and that is that the Municipality has a duty to demolish and ought to get demolished any building, which is a danger or obstruction to the public. Such a consideration should also guide the Magistrate in exercising his discretion, where the deviation is found to be very great. No such consideration can however be said to arise in the present case.

A Municipal Magistrate should in our opinion, exercise the discretion vested in him under sections 449, 450 and 452 of the Act with due regard to the rules indicated above and similar rules, which guide Courts of Equity in granting injunctions and we need scarcely say that orders under sections 449 and 450 of the Act are orders in the nature of mandatory injunctions. The Municipal Corporation stands, unless the law expressly directs, in practically the same position as a private individual wronged by a tortuous action.

Applying these rules to the present case we have no hesitation in pronouncing that the order for demolition passed by the Municipal Magistrate is erroneous. The defendant was fined and such a fine had the same effect as a decree for damages. The law, it is true, enables the Municipal Corporation to demand an additional penalty—demolition of the building or any part

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of it, but sections 452 puts a limitation to the right by giving the Magistrate a discretion. The fine realized from the defendant was, however, sufficient in the present case for the deviation caused by him. The Corporation of Calcutta also acquiesced in the erection and obtained an increased tax for it. The very fact again that it was considered to be an improvement goes against the idea of demolition.

We therefore make the rule absolute and set aside the order complained of.

*Rule absolute.*

S. C. B.