CALCUTTA HIGH COURT

Abdul Samad

Vs

Corporation of Calcutta

(Woodroffe and Mookerjee, JJ.)

03.11.1905

JUDGMENT

Woodroffe and Mookerjee, JJ.

1. The facts of this case are briefly these: On the 10th of January 1902 the petitioner obtained from the Corporation of Calcutta a sanction for an additional building in respect of premises Nos. 10 and 11 Damzen's Lane. Thereafter he commenced to make additions to these premises, but, as is admitted, he to a certain extent deviated from the sanctioned plan. The building, with such deviations, was completed in the month of August 1902. After that date the Municipal assessment of No. 10 Damzen's Lane, which had previously been a bustee, was raised from Rs. 381 to a sum of Rs. 2,700, which was on the petitioner's objection reduced by the Chairman of the Municipality to a sum of Rs. 2,187 : and the assessment of the premises No. 11 was raised from Rs. 1,080 to Rs. 1,564, the assessment having been increased in consequence of the improvements, additions and alterations which were made in respect of the premises.

2. Amongst the additions so made was a cooking-shed erected by the petitioner in the year 1903. An application was in that year made by the Chairman of the Corporation for an order for demolition under Section 449 of the Calcutta Municipal Act, and the petitioner was called upon to show cause why the cooking-shed, which was alleged to have been erected without permission, should not be demolished. Subsequently, however, with the consent of the petitioner an order was made under which he was directed to demolish half the length of the cooking-shed, and this order was finally carried out. Nothing was at this time said about the matter now complained of. Some two years after this another application was made by the Chairman of the Corporation, on the 20th February 1905, upon which a notice was issued to the petitioner by the Municipal Magistrate calling upon the petitioner to show cause why the unauthorized construction of the portions of the buildings, Nos. 10 and 11 Damzen's Lane, should not be demolished. The constructions referred to in that notice are the deviations from the original plan sanctioned in 1902, and which were made in that year. Upon this application the Municipal

Magistrate made the order, which is now complained of and which is dated the 5th of August 1905, by which he ordered the petitioner to remove the verandahs of both the stories on the south of Damzen's Lane, and to set back his building on the second story beyond 40 feet from the wider street, so as to conform to the sanctioned plan.

3. The petitioner thereupon obtained a Rule calling upon the Municipal Magistrate to show cause why the order complained against, dated the 5th August 1905, should not be set aside.

4. It has been contended on behalf of the petitioner that the order was not one, under the circumstances of the case, which it was proper for the Magistrate to make, having regard to the fact that the Magistrate's proceedings took place in the year 1905 in respect of a deviation, which was made in the year 1902, as also to the fact that since the deviation was completed in 1902 there have been two re-valuations of the premises by the Corporation, revaluations based upon the improvements including the portion of the premises now objected to, and further, having regard to the fact that in 1903, when proceedings were taken by the Corporation in respect of the unauthorized construction of the cook-shed, no complaint was then made in respect of the verandahs, which have now been ordered to be demolished and which form portion of both the premises to which we have referred.

5. It appears to us, having regard to the circumstances already stated, that assuming, as appears to be the case, that there are some deviations from the sanctioned plan of 1902, the order is not a proper or fair one to make.

6. It has been urged by the learned pleader, who appears on behalf of the Corporation, that this Court has no jurisdiction sitting in revision, to deal with the order that has been made.

7. He has further contended that it cannot be said that the order was, within the meaning of Section 435 of the Criminal Procedure Code, either incorrect, illegal or improper.

8. With the question of the propriety in fact of the order we have already dealt. The point now before us is whether or not we can, upon an application of this nature, set aside the order which the Magistrate has made. That order was passed under Section 449 of the Calcutta Municipal Act. Under that section, the General Committee, if satisfied "that the erection or re-erection of any building has been commenced without obtaining the permission of the Chairman, or (where an appeal or reference has been made to the General Committee) in contravention of any orders passed by the General Committee," then the General Committee may apply to a Magistrate and the Magistrate may make an order "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, as the case may require, or directing that the work done, or so much of the same as has been unlawfully executed, be demolished or altered by the Chairman at the expense of the owner of the building." It is to be observed that the word used both in

connection with the action of the General Committee and of the Magistrate is "may," not "shall ".

9. It has, however, been contended that, though the General Committee, if satisfied of the existence of the circumstances mentioned in Section 449, may or may not make an application to the Magistrate, yet that, once such application is made to the Magistrate, he has himself no discretion as to whether an order should be passed or not. Looking, however, to the language which is used in the section, we do not think that the contention is a sound one. This is not like the case of a prosecution under the Penal Code, in which imperative words are used rendering it obligatory upon a Magistrate to convict an accused, provided that an offence has been made out, but giving a discretion within certain limits as to the penalty which may be imposed. We are of opinion that it cannot be said, seeing that the same language is used in either case, that, if the General Committee have a discretion in the matter, the Magistrate himself has none upon the question whether an order should be made: although, if this is determined in the affirmative, the nature of the order is fixed by the Act, a circumstance which itself indicates the necessity of allowing that discretion to the Magistrate which the words of the section appear to give him. This being so, we think that, as the Magistrate had a discretion either to make or to refuse the order under Section 449, the discretion under the circumstances of this case has not been properly exercised.

10. We therefore make the Rule absolute and set aside the order of the Municipal Magistrate dated the 5th August 1905.