

Lalit Mohan Mitra and ors. Vs. Samirendra Kumar Ghosh and ors.

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Court : Kolkata

Decided On : Jan-13-1977

Reported in : AIR1977Cal174,81CWN870

Judge : N.C. Mukherji and ;B.C. Ray, JJ.

Acts : Calcutta Municipal Act, 1951 - Section 388; ;Calcutta Municipal Rules - Rules 23 and 30; ;[Specific Relief Act,1963](#) - Sections 38 and 39

Appeal No. : S.A. No. 1582 of 1968

Appellant : Lalit Mohan Mitra and ors.

Respondent : Samirendra Kumar Ghosh and ors.

Advocate for Def. : Manindra Nath Ghosh, Adv.

Advocate for Pet/Ap. : Gopal Chandra Mukherjee, Adv.

Disposition : Appeal allowed

Judgement :

N.C. Mukherji, J.

1. This is an appeal by the defendants against the judgment and decree passed by Sri. M. Roy, Additional District Judge, 13th Court at Alipore in Title Appeal No. 1854 of 1966 dated 29th September 1967 affirming the judgment and decree

dated 30th September 1964 passed by Sri N. C. Mahanty, 2nd Court Munsif, Sealdah in Title Suit No. 16 of 1963.

2. The facts of the case may briefly be stated as follows:-- Premises No. 4/1, Jadu Mitra Lane, Calcutta, belonged to two brothers Lalit (defendant No. 1) and Pramatha. The above premises comprised an area of about 5 cottas and odd. To the adjacent of the above premises is the residential premises of the plaintiffs. Formerly there was a back space of 10 feet in respect of the joint premises of the two brothers at 4/1', Jadu Nath Mitra Lane. The joint premises was constructed in terms of the sanctioned plan of the Calcutta Corporation in 1932. Sometime in 1933 the defendant No. 1 tried to make an unauthorised pucca construction in the above back space without a sanctioned plan. This was immediately objected to by the plaintiffs and it was found by the Corporation that the defendant No. 1 constructed in accordance with the sanctioned plan. According to the plaintiffs they noticed once again attempts by the defendant No. 1 at laying a foundation of third storied building in the above back space. On enquiry the plaintiffs came to know that the defendant No. 1 in collusion with the officers of the Corporation managed to obtain previously a separate premises being No. 14/1-A, Radhakanta Jew Street out of the former premises at 4/1, Jadunath Mitra Lane. Premises No. 14/1', Radhakanta Jew Street was shown as a separate unit in respect of which it was alleged by the plaintiffs that the defendant No. 1 managed to obtain a sanctioned plan for the proposed third storied building in the back space of 4/1, Jadu Nath Mitra Lane. It is the case of the plaintiffs that the proposed plan was in violation of the statutory rules of the Calcutta Municipal Act, 1951. In such circumstances, the plaintiffs brought the suit praying for a perpetual injunction against the defendant No. 1 from constructing any structure on the basis of the said plan. The Corporation of Calcutta and the Commissioner of Calcutta Corporation were made parties. It was prayed that they be directed to cancel the said plan sanctioned by them. The plaintiffs also prayed for a mandatory injunction to demolish the structure already raised.

3. The defence was that by a partition deed of 1949 between the two brothers Lalit and Pramatha the premises at 4/1, Jadu Nath Mitra Lane was divided into two parts. The northern portion of the said premises was allotted to Lalit, the defendant

No. 1, which was adjacent to the plaintiffs' premises at 16, Radha Kanta Jew Street. The southern portion was allotted to Pramatha who was not made a party in the present suit. After the partition deed was effected, the defendant No. 1' Lalit enjoyed the southern half of the above premises as a separate unit and mutated his name in the Calcutta Corporation. The said premises was numbered as 14/1-A, Radha Kanta Jew Street In 1960 the defendant No, 1 obtained a sanctioned plan of a three storied building. The defendant relied upon the Corporation tax bills which showed that the other brother Pramatha enjoyed the separate premises at 4/1-A, Jadu Nath Mitra Lane. On behalf of the Corporation of Calcutta it was asserted that the plan was legally sanctioned by them and there was no violation of the rules of the Calcutta Municipal Act. The learned Munsif held that the building plan was in violation of the statutory building rules and the defendant No. 1 was not entitled to construct in terms of such plan. In that view of his finding the learned Munsif decreed the suit. Being aggrieved, the defendant No. 1 preferred an appeal. The learned appellate Court below agreed with all the findings of the trial Court and dismissed the appeal. Being aggrieved, this present appeal has been filed by the defendants.

4. On a previous occasion this appeal was heard by M. M. Dutt, J. and his Lordship after hearing the matter for sometime was of the opinion that important points of law are involved in this appeal and in that view of his finding his Lordship referred the case to the Division Bench.

5. Mr. Gopal Chandra Mukherjee, learned Advocate appearing on behalf of the appellant, challenges the judgment passed by the Courts below on several grounds. In the first place he submits that ordinary rules relating to the back space of a premises will not apply to the facts of the present case inasmuch as the back space of the original premises is no longer in existence as the original premises was divided into two parts--each forming a separate unit. There is nothing known in the Calcutta Municipal Act as 'mother premises' and as such the back space of the original premises cannot be said to exist even after the original premises is divided into two separate parts and each is treated as a separate premises. In support of his contention Mr. Mukherjee refers to a decision reported in (1964) 68 Cal WN 1049, (Kanai Lal Paul v. Corporation of Calcutta). This case was cited by

Mr. Mukherjee to show that in the Municipal Act and the Building Rules contained therein there is no such thing as a 'mother premises'. In that case prior to the partition decree, the disputed premises formed a part of the larger premises Nos. 67 and 69, Simla Street, which belonged to common owners. His Lordship observed:

'If we take the whole premises as if then stood, it would form a corner premises, situated at the intersection of Simla Street and Vivekananda Road. In other words, notwithstanding partition which took place by decree passed on 4-2-1918, and notwithstanding the division of the original premises into different units by allotting different premises Nos. and notwithstanding the fact that the respondent No. 13 is the owner only of premises No. 57/3/A, Simla Street which does not abut either on Simla Street or on Vivekananda Road, it should be considered as a corner premises at the intersection of Simla Street and Vivekananda Road, because many many years ago it formed part of a larger premises which was a corner premises, facing the intersection. In my opinion, this is an absurd argument. In the Municipal Act and the Building Rules contained therein there is no such thing as a 'mother premises.' The unit of computation under the said Act and the rules is a (holding numbered as premises. When a plan is submitted for the sanction of the construction or reconstruction of a building, in a particular premises, the building rules must be applied to the plan in connection with the said premises. There is no scope for deeming the said premises to be a part of a larger premises, which it formed in the past, but which now has been divided and renumbered as different premises and belongs to a different owner'.

In the present case the fact that the original premises was divided into two parts and belonged to two different owners is admitted. It is also the admitted position that the plan was sanctioned in respect of the new portion which belonged to the defendant No. 1. That being so, the principles laid down in the case referred to above apply with full force to the facts of the present case.

6. In the next place Mr. Mukherjee contends that the defendant has obligation only to the Corporation and not to the plaintiffs. If the defendant makes construction in violation of the sanctioned plan then it is for the Corporation to start action against

the defendant. The plaintiff cannot come to Court only for the simple reason that the plan has not been sanctioned properly by the Corporation and the defendant is making construction in violation of the plan. In support of the contention Mr. Mukherjee refers to a decision reported in : AIR1952 Cal74 , (Nandalal Ladia v. Provudayal Tikriwalla). In this case on the facts it was held that 'Where the plaintiffs and the defendants are adjoining owners, the plaintiffs have no right to pray either for a mandatory injunction or a perpetual injunction merely on the ground that certain proposed construction on the defendants' land may be in breach of Municipal Rules and bye-laws. There is no obligation contractual or otherwise, on the part of the plaintiffs towards the defendants which requires that the defendant should construct on his own land in accordance with the Municipal Rules and Regulations.' Mr. Mukherjee submits that in the present case also there is no contractual obligation between the plaintiffs and the defendant and as such even assuming that there was violation on the part of the defendant, the plaintiffs cannot only for that bring an action against the defendant and pray for injunction. Mr Mukherjee also refers to another decision reported in : AIR1952 Cal364 , (Sm. Parul Bala Roy v. Srinibash Chowmal). In this case it was held 'In order to entitle the plaintiff to obtain an injunction, there must be an invasion or threatened invasion of the plaintiff's right to or enjoyment of property. Simply because the enjoyment of the plaintiff is rendered less beneficial that would not entitle him to obtain an injunction unless he can show that there is a legal duty on the part of the defendant towards him and that by non-performance of that legal duty the enjoyment of his property is materially affected'. Mr. Mukherjee contends that in this case it cannot be said that there was any legal duty on the part of the defendant towards the plaintiff and that as there was a breach of that duty the plaintiff can start an action praying for injunction.

7. Mr. Mukherjee puts forward another argument to the effect that even assuming that the plan was not sanctioned strictly in accordance with the Rules even then the Commissioner can under the provisions of the Act make relaxation in any particular case. It is further contended that even in respect of matters which involve violation of unrelaxable building rules, the Commissioner has discretion not to order demolition if the violation is not of serious nature. That discretion must be used bona fide stating reasons therefor. In support of this argument Mr. Mukherjee

refers to a decision reported in : AIR1972 Cal459 , (Purusottam Lalji v. Ratan Lal Agarwalla) which is a Full Bench decision.

8. Mr. Mukherjee's last point is that even assuming that by proposed construction there will be some diminution of light and air as enjoyed by the plaintiff even then the plaintiff is not entitled to get an order of injunction unless the defendant's action amounts to actionable nuisance. In support of this contention Mr. Mukherjee refers to a decision reported in 41 IA 180 = (AIR 1914 PC 45), (Paul v. Robson). In this case it was laid down 'The owner or occupier of a tenement in respect of which an easement of light has been acquired by prescription is entitled to a quantity of light the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement, according to the ordinary notions of mankind. The actual user will neither increase nor diminish the right. The question, in an action for obstruction, is whether the obstruction amounts to a nuisance'. It is not the case of the plaintiff that the proposed obstruction will amount to nuisance. No issue was framed in this respect in the Court below and though the number of witnesses have been examined by the plaintiff no evidence has been laid to this effect.

9. Mr. Manindra Nath Ghosh, learned Advocate appearing on behalf of the respondents relies on a decision reported in : AIR1965 Cal148 , (Krishna Kali Mallik v. Babulal Shaw). In this case it was held 'Under the Calcutta Municipal Act there is a duty to construct buildings in accordance with the terms of the statute and a duty not to construct buildings in violation of the statute. The purpose of the statute as also the terms thereof will show that building rules have been designed for the protection of rights and interests of persons who are the adjoining owners. It is indisputable that infraction of light and air or any other kind of actionable nuisance will give rise to a right of action against infringing landowner or owner of the building. We have gone through the judgment carefully and we do not find how the principle laid down in this case helps the plaintiffs rather it supports the contention advanced by Mr. Mukherjee that unless the defendant's act amounts to actionable nuisance the plaintiffs cannot start an action.

10. Mr. Ghosh refers to a decision reported in 31 Cal WN 32 = (AIR 1927 Cal 1), (Brojendra Kishore Roy Chaudhuri v. Mohim Chandra Bhattacharji) to show that if there is evidence on record the High Court in a second appeal can determine not only any issue of fact which has not been determined by the lower appellate Court but also such issue which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as referred to in Sub-section (1) of Section 100. In this connection Mr. Ghosh also refers to decisions reported in 34 Cal WN 951 = (AIR 1931 Cal 129 (2)), (Sm. Kshirodamoyi Dasi v. Kashi Lal Seal) and : AIR1961 Cal359 , (A. E. G. Carapiet v. Derderian). We have gone through the evidence on record carefully and we do not find that the evidence is such from which a conclusion can be drawn that by the proposed construction the defendant made and the further construction which defendant may make it has amounted to or will amount to actionable nuisance so as to entitle the plaintiff to start an action and pray for injunction. For all the reasons stated above we are of the opinion that there has been no violation of the statutory rules and that the plaintiff has no cause of action.

11. In the result, the appeal succeeds. The judgment and decree passed by the Court below are set aside. The plaintiff's suit is dismissed. There will be however no order as to costs in this appeal.

B.C. Ray, J.

12. I agree.