

In Re: Sm. Lakshmimoni Dassi

In Re: Sm. Lakshmimoni Dassi

SooperKanoon Citation : sooperkanoon.com/875334

Court : Kolkata

Decided On : Jun-10-1940

Reported in : AIR1941Cal391

Appellant : In Re: Sm. Lakshmimoni Dassi

Judgement :

Ameer Ali, J.

1. The Corporation of Calcutta like municipalities and public bodies in other parts of the world have important functions in respect of buildings; functions perhaps more important in this climate where a city comprising some millions of souls is in itself a menace. Generally speaking, these functions are provided for in Chapter 21 of the Act itself, and in Schedule 17, which contains what are called the building rules, i. e., the bye-laws. It is common ground that the matter of passing plans of proposed buildings is dealt with in the first instance departmentally, that is, by permanent officials, and in the last resort by way of what has been called an appeal to the Corporation itself. This appellate or quasi appellate jurisdiction has been delegated to the buildings committee. Presumably, this appellate or quasi-appellate jurisdiction has been provided for the protection of the citizens against a possible unsympathetic attitude on the part of the officials. It may be supposed, and will be seen from a study of the rules, that this task of checking the plans with the rules and bye-laws from their complicated nature is both arduous, embarrassing and ungrateful. Yet such is the degree of public spirit in this city, that

so far as one is aware, there is no difficulty in finding persons ready to fulfil it. But that is not all. Mr. Sett in a phrase, which I always expect from him, in opening the case said: 'Your Lordship will be astonished,' and I, as usual, replied that after nearly a generation of work in Calcutta my capacity for astonishment no longer existed. But I am relieved to find that I am still able to be astonished, for never have I seen, either individually or in the aggregate, such a display of kindly feelings, such an overflow of the milk of human kindness as is to be found from the evidence before me in the members of the Buildings Committee of the Calcutta Corporation.

2. They have been finally vested, as appears from the schedule of powers delegated, with the power to relax provided in Section 331 of the Act and it will shortly appear that the capacity of the Buildings Committee to relax surpasses possibly the laws of nature and certainly the laws of man as represented by the bye-laws of the Calcutta Corporation. Such an exhibition of relaxation, as may be gathered from the printed proceedings before me, will, I suppose, never yet have been seen. I shall deal in greater detail with the facts, although they are hardly in dispute except as to their consequences, than with the law which is in dispute, because the latter can, if necessary, be more fully discussed hereafter. As regards the facts, the plans are not wholly illuminating, and I should have liked to have seen a site plan, but the applicant has produced excellent models which, it is agreed, are substantially correct, and which can be used at any rate to illustrate the points in issue. I have allowed them to be exhibited on that basis. The premises of the applicant are 21, Jadulal Mullick Lane, an old house built apparently in the old style. The premises in respect of which sanction for plans of a proposed building is in question is plot No. 13, scheme No. 26 of the Calcutta Improvement Trust, immediately to the south of the applicant's building. I shall refer to the northern building as No. 21, and to the proposed building to the south as no. 13. The most important area to be considered is the passage which comprises the whole length of the southern portion of No. 21. Roughly, according to my measurements, the western portion of this passage for a length of about 33 ft. is 1 ft. wide. At all material times it was covered for this length. The eastern portion of the passage for about 22 ft. was and is open and is about 5 ft. 6 in. wide. The road to the west is Ganganath Dutt Lane, a narrow lane, and the road to the east, a wide road,

Jadulal Mullick Road.

3. Ratni Bai, the owner of No. 13, submitted her plans for a six storeyed building on 4th August 1939. In September 1939 the department refused to pass them. On 13th October the appeal to the Buildings Committee was allowed. I proceed entirely upon the printed record of the proceedings, which although not entirely clear, is sufficient for our purpose. On 13th October a notice, which I desire to see, was issued to the owner of the adjacent building No. 21, and on 13th October 1939 somebody on her behalf was present and made some representation. But the appeal was allowed on condition that a free gift of a strip of 5 ft. wide along the western border of No. 13 was made to the Corporation. There were two motions by two members of the Buildings Committee tabled for reconsideration of the matter. Both were withdrawn upon what in the affidavit filed on behalf of Ratni Bai is described as the mover's, 'discovery of the true facts.' The process by which truth dawned is not indicated, but from the names, one being a Mahomedan gentleman and the other a Bengali gentleman and the owner of No. 13 being I think of another province, it must have been through some force of universal application operating as the phrase goes 'irrespective of caste or creed' the motions were withdrawn. On 12th December 1939, unfiltered water was supplied or allowed to be obtained by No. 13, and this apparently has some recondite legal effect.

4. An appeal by the owner of no. 21 was made to the Mayor, and the Mayor, although admittedly the matter was not in his hands, recommended the Buildings Committee to consider the matter further, and on various dates what was taken to be some kind of proceedings for revision took place before the Buildings Committee. Opinions of very learned Counsel were put before them, and ultimately on 19th March 1940 the Buildings Committee decided against their own jurisdiction in revision on the ground principally of 'water-permission.' This application was moved on 4th April 1940, and an interim order was obtained.

5. Referring now to the plans for plot No. 13 the building was to be six-storeyed, and the matters in respect of which the Corporation was bound to scrutinize the plans, and if contrary to the bye-laws to reject them, may be summarized as

follows :

(1) Open Space : This showed on the plan 513 sq. ft. as against 1052 sq. ft. required by the rules, i. e., one-third space to be left open (see Rule 23 of Schedule 17). This proportion is varied by the inclusion of the gift of 5 ft. strip of land, but is still far from compliance with the rule. Some other provision, if I remember rightly, enables the Corporation to allow a variation to the extent of 5 per cent. provided reasons in writing are given. The variation is more than 5 per cent., and I need hardly say that the Buildings Committee have not stooped to record their reasons.

(2) Court-Yard Angle: Rule NO.

29. According to the report of the permanent officials, this was cut above the second storey. I shall not give much attention to this matter, because as open space is primarily for the benefit of the general public, court yard angle is primarily, I take it, for the benefit of the occupants of the house proposed to be built.

(3) Road angle is the next. Rule

3. Even with the condition of the 5 ft., I understand that this building on the west should not have exceeded two or two and a half storeys, and the last model shown to me substantially indicates the result of the report of the Corporation permanent officials as to the manner and the height to which on the west the new house could be built in order to comply with the bye-laws. Now, road angle is not only important to the general public, but it is also especially important to the owners of premises on the other side of the street, and also in certain cases to adjacent owners.

(4) Next, is side space, and here we come to matters of still greater importance to adjacent owners. Rule

32.

(5) Last, para. 5, attachment. Attachment and side space go together because it seems to follow that if you attach you can have no space, and vice versa, and indeed in Rule 32, Schedule 17, the two matters are treated as one. To this rule I

shall have to give greater attention.

6. First of all, it is necessary to ascertain the meaning of 'building.' Section 3 (7) excludes a mere boundary wall under 10 ft. in height. I would like to know the height of the western portion of the boundary wall. It seems to me that the effect of Rule 32 is as follows : First of all, the boundary line should be accurately ascertained. Without this the Corporation cannot fulfil its functions in respect of this rule. The permanent officials in their report pointed out that the boundary line in this case had not been ascertained. Then what is done or should be done is to see that there is a space between the two buildings, that is to say, the two main buildings for the entire length irrespective of the actual boundary. If the one building, say 21, is within 2 ft. of the boundary, the other building No. 13 must stand back for 6 ft. If the building 21 is more than 2 ft. from the boundary, the other building No. 13 need only stand back 4 ft. As I understand it, that is the practical effect of the rule, but space there must be, and it is because of this provision for space that the question of attachment comes into existence. In my opinion, the proviso in Rule 32 (1) does not give any power to allow attachment. It is in fact, although the language is not entirely clear an additional restriction to the effect that even if the space is left, you may not without the permission of the Corporation attach to any wall or building other than the main building. In point of fact, the Corporation before me stated that this is not a declared area and therefore we are not concerned with the proviso.

7. In my opinion, as regards attachment we are relegated to Rule 32 (3), and the meaning of this is as follows, again taking the example of No. 21 and No. 13. If No. 21 stands as much as 24 ft. from the road and not less than 10 ft. from the boundary wall, No. 13 may be attached to the boundary wall for a length not exceeding 24 ft. There is no question here of the conditions allowing the attachment under Sub-section (3) existing. There are further conditions, namely, that the attachment will not be allowed if, as I read it, there might subsequently be objection to a building attached to the boundary on premises No. 21. According to the report of the Engineer, such objection has already been made and upheld by the Corporation. But it is not necessary to consider this circumstance. The attachment allowed by the Buildings Committee is clearly not permissible by the

bye-laws, for the power to relax in Rule 94 is severely circumscribed, not only by the condition as to the health and amenities of the adjacent building which appears in Section 331 but in the rule itself, and Mr. Ghose who has appeared for the Corporation, with proper discrimination, did not seek to contend that the rules, to which I have already referred, could be relaxed by the Committee. It should further be noted that this limited discretion to relax is to be exercised for special reasons to be recorded in writing. In the printed record, as I have said, no reasons are to be found. The position on these facts taken up by the Corporation before me is as follows. There is an affidavit by the Buildings Inspector, that is to say, by the permanent staff. It does not contend that the Committee acted within their jurisdiction. It is admitted that no written permission has yet been issued. There is a suggestion that the passing of the plans for No. 13 caused no injury to No. 21. This view I reject upon the evidence. It is true that No. 21 has no rights of easement over No. 13, but that No. 21 will not be extensively injured by a building put up in disregard of the bye-laws is, I think, on the facts absurd, and my finding is to the contrary.

8. The Corporation, I infer, upon the excellent advice of Mr. Ghose, rely upon points of law, which may be summarised as follows. First that permission cannot be in itself an injury. For this Mr. Ghose relies upon a view expressed incidentally by Blackwell J. in *Bai Basantibai v. Municipal Commissioner of Bombay* : AIR1931 Bom173 . It does not appeal to me. (2) Existence of other remedies. For this Section 18, Municipal Act, is relied upon. It has for obvious reasons not been argued that the statutory duty of the Corporation is for the special benefit of the adjacent owner, and that therefore there is remedy at law. This point is not taken for the obvious reason that the main contention of the Corporation, and the only one with which I shall deal in detail, is that the granting of permission is not an invasion of such a legal right as warrants the exercise of the special jurisdiction under Section 45. But before I come to that point I express quite briefly the opinion that the right given to Government to interfere under Section 18, and I presume the implied right of the public or the individual to move the Government in some way or another, is not such an alternative remedy as will deprive the individual of the right to apply for mandamus.

9. A second point relied upon by Mr. Bose, who appeared for the owner of No. 13, but I think tactfully ignored by Mr. Ghose, who appeared for the Corporation, is that the Court will not interfere where a public body has bona fide exercised its powers on the principle that where there is a certain jurisdiction given to a body this Court will not substitute its own opinion for the opinion of that body. There are several authorities to that effect to be found in the English reports, some of which I have read. The one which I have in mind is *King v. Chiswick Council* (1908) 72 J P 163 in which there had been no refusal to consider the matter on behalf of a public body and the public body having expressed an opinion, though possibly not the correct one the Court refused to substitute its own. I realize that the principle may even be extended to a case where a body makes a bona fide mistake as to the scope of its jurisdiction. Mr. Bose hinted at such a mistake and used perhaps a not wholly fortunate expression. 'Supposing they made' he said 'a horrible mistake on that point, the Court would not interfere.' I do not attribute to the Buildings Committee any mistake, 'horrible' or otherwise. There is a Calcutta ruling on this point which was not cited to me, *Prosad Chandra v. Corporation of Calcutta* ('15) 2 AIR 1915 Cal 31, in connexion with our Corporation. On the evidence before me (and we need not go, as I have said, beyond the printed record of the proceedings), we cannot attribute to the members of the Buildings Committee any sort of mistake. They have had the courage of their opinions. Bye-laws have, we might say, gone with the wind which the Corporation is supposed to allow us to enjoy. They have gone down the drain that the Corporation is supposed to clean. With poetical finality they have drowned their book: with divine omnipotence they have disregarded time and space, especially the latter. Rules are made for slaves, and with royal prerogative they have determined to disregard them. Why, in such a case, give written reasons? Indeed, it would appear that the Buildings Committee were so pleased with the candour of the appellant who gives no grounds for his appeal other than that the land in the locality is highly valuable, from which it follows that it is a highly congested area, that they decided it immediately in his favour. Now, having thus cleared the ground, I come to the main point ably argued, as usual, by Mr. Ghose. Mr. Bose contends upon the authorities and in particular upon *Napier's case* (1852) 18 Q B 692 and the text books which quote that case with approval, that there must be in favour of the applicant for

mandamus 'a specific legal right.' He contends that in the matter of building plans and building rules, the Corporation owes, no doubt, a duty to the general public. Violation of the rules therefore and failure to perform its duty, may give a right to the public in appropriate proceedings, either through the Advocate-General or otherwise, to obtain relief. He concedes and is bound to concede that in favour of an individual seeking to have his plans passed, there is a special duty and therefore a special right, indeed a 'specific legal right' which may be supported by mandamus.

10. He contends however that there is no legal duty and therefore no corresponding right, in favour of the adjacent owner, to prevent plans being passed contrary to the bye-laws so that injury to the adjacent owner may be avoided; or, in other words to prevent the adjacent owner being deprived of the benefit of the building restrictions. This in old English, is 'a nice point.' The point seemed to me, and still seems to me, to turn upon whether the Corporation owes the adjacent owner a duty different in degree or in quality, or sufficiently different in degree or quality to give that adjacent owner an individual right on the ground that the performance or non-performance of the duty is of greater importance to the individual complaining because it inflicts upon him a greater injury or an injury of a different nature. Mr. Bose and Mr. Ghose contend that the applicant must show that his proprietary right has been injured, that he has no right either by contract or by law, and that no right in his favour can be inferred from the statute itself. Now it seems to me that this question of the quantum or quality of the legal right required, is a delicate one. To use the phrase 'legal right' begs the question. A very cursory reference to the English cases shows how easy it is for the Court to come down on one side or the other of the line. Compare *Reg. v. Lewisham Union* (1897) 1 Q B 498 relied upon by the Corporation, with *Rex v. Manchester Corporation* (1911) 1KB 560, of use to the applicant, and *Queen v. Cotham* (1898) 1 Q B 802.

11. Clearly the existence or otherwise of this element called 'legal right' depends upon the facts of each case; and on the facts of this case I propose to hold that the Corporation owed such a duty to the adjacent owner, and that there was in the adjacent owner such a legal right within the meaning of the cases, as to found an application for mandamus. No. 21, as I have found, was injured as to light, air,

health and amenities by the breach of restrictions, by reason of its particular situation. The question is whether, where the provision is primarily in favour of the general public but in the nature of things the breach of it must injure the specific individual to quite a different degree, such a right can be assumed in the specific individual. In my opinion, though again depending on the facts of each case, yes. In this case, the position of the adjacent owner is stronger, for, in my opinion. No. 21 has been injured by the breach of conditions specially designed to prevent injury to adjacent owners. Rule 32 is especially directed to the relative positions, visa-vis each other, of No. 21 and No. 13. It is the duty of the Corporation to see that Nos. 21 and 13 do not steal a march on each other. It is their duty, to the extent of the bye-laws, to see that one does not interfere with the health or amenities of the other.

12. The most obvious matter is that of attachment, but, as already indicated, attachment is only part of the general bye-law that space must be left. The Corporation, in certain cases, issue notices to adjacent owners; whether in all cases, I do not know. In this case a notice was received by the owner of No. 21 on a printed form, and the proposed attachment is mentioned. I have no hesitation in holding that, as regards Rule 32, the case rests not merely upon the fact that general duties have caused a special injury, but that provisions and restrictions especially designed for the benefit of the adjacent owner, have been disregarded so as to cause the adjacent owner that damage which it was intended to prevent. In my view, the order of mandamus should be made absolute, but possibly not in the form asked for. I should, perhaps, have at some stage indicated that we are not in India concerned, directly at any rate, with any difference between prerogative writ of summons and action for mandamus; nor have I concerned myself with that question. Nor have I ruled, nor must it be implied from my ruling, that I have considered the question whether there is in the owner of No. 21, except for the purposes of my decision, any other legal right. No point has been taken that an order cannot now issue on the facts of this case, permission having been granted. Some discussion as to the phrase 'written permission' and to the rules, 52 and so forth of Schedule 17, took place; but the Corporation have admitted that no written permission has yet been issued, and this seems also to appear from the printed record. So far as the discussion before me is (Concerned, I am not

satisfied that the provision as to written permission in the Act and Rules, is satisfied by the passing of the resolution itself, with or without the support of unaltered water.

13. I proceed to make the order, on the basis indicated in my judgment, that the Corporation have, on the evidence before me, refused to carry out their statutory duties. They have not dealt with the plans, and have refused to deal with the plans according to their own Act. I propose therefore subject to anything which may be said, to make an order on the Corporation to deal with the plans in respect of plot No. 13 submitted by Ratni Bai, in accordance with the Municipal Act and in accordance with the rules in chap. 17, which it has hitherto refused to do. I propose to allow the interim order to continue. There remains the question of costs. If the Corporation wish to have an opportunity of addressing me on the point, I shall hear them, but failing that, I must make an order for costs against the respondents, including the Corporation, which means in effect, as I have pointed out before, the costs are paid by Mr. Sett and myself, amongst others. It affords me no satisfaction. My judgment and the order made by me does not preclude the Government from taking any action under Section 18, and it may be that I shall cause a copy of my judgment to be sent to the proper quarter.

14. It is not for me, and I shall not request any newspaper to publish this judgment but I take the liberty of expressing the view that it is not in the interests of the public that the facts of cases like this, and the decisions whether they be right or wrong, should not be brought to the notice of the public. Mr. Bose will be at liberty to address the Court on the question of costs and the form of the order. The injunction will continue pending the defendant Corporation dealing with the matter according to law. An order upon the defendant Corporation to deal with the plans submitted for No. 13 in accordance with the Municipal Act and the rules. Costs as of a hearing, limited to one day, against both defendants; certified for two counsel.