

(1964) 09 CAL CK 0002

Calcutta High Court

Case No: A.F.O.D. No. 62 of 1963

Metro General Traders

APPELLANT

Vs

The Commissioner, The
Corporation of Calcutta and
Others

RESPONDENT

Date of Decision: Sept. 28, 1964

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, Order 7 Rule 1, 80

Citation: AIR 1965 Cal 442 : (1965) 1 CALLT 155 : 69 CWN 660

Hon'ble Judges: P.N. Mookerjee, J; A.C. Sen, J

Bench: Division Bench

Advocate: Lala Hemana Kumar, Mohanlal De and B.M. Seth, for the Appellant; Noni Coommar Chakravorty, Bhabani Sankar Bagchi, Jasoda Kumar Roy and Kanika Banerjee, for the Respondent

Final Decision: Allowed

Judgement

N. Mookerjee, J.

This is the plaintiffs appeal, directed against the dismissal of its suit by the Court below on a technical ground. The suit was brought for permanent injunction to restrain demolition of premises No. 212, Jamunalal Bazaz Street (Old Cross Street) under an order of demolition, alleged to have been passed on September 17, 1958, by Sri P. C. Majumdar, the then Commissioner of the Corporation of Calcutta, under Rule 5(4), Schedule XVII, of the Calcutta Municipal Act, 1951. The plaintiff claims to be a tenant in occupation of a portion of the above premises No. 212, Jamunalal Bazaz Street (old Cross Street).

2. In the plaint, the allegation is made that the above order is ultra vires and without jurisdiction, it having been made in contravention of the relevant statute. The suit was filed on January 16, 1961 and, to the suit, were made parties the Commissioner

or the Corporation of Calcutta as defendant No. 1, the Corporation of Calcutta as defendant No. 2, these being the principal defendants, and the plaintiff landlord was made pro forma defendant No. 3 so that the point involved, which concerned him as well to a certain extent might be decided in his present.

3. In the suit, the defendants entered appearance and one of the preliminary objections, taken by the first two defendants, was to this effect that the suit was not maintainable in its present form, as, in law, the Commissioner, Corporation of Calcutta, could not be sued except in the individual name of the person, holding the said post. This objection was founded on a decision of this Court, reported in [P.B. Shah and Co. and Others Vs. Chief Executive Officer and Others](#), . For meeting this objection, the plaintiff sought to amend the plaint by adding Sri P. C. Majumdar, who was the Commissioner, who passed the impugned order of demolition, and also by adding the then Commissioner of the Corporation of Calcutta in his individual name. This application, however, was opposed and, eventually, the learned trial Judge found that, on the above decision of this Court, reported in AIR 1982 Cal 283, supra, the Commissioner, Corporation of Calcutta, could not be sued by the title and the individual, holding the said post, had to be impleaded, and, secondly, that the amendment, sought for, was not permissible, as it would offend Section 586 of the Calcutta Municipal Act, barring a suit of the present type, if it was sought to include therein any prayer for a declaration that the impugned order of demolition was invalid or for setting aside the said order and such prayer would also be barred under Article 14 of the Indian Limitation Act against any person, sought to be added now this latter on the ground that the Commissioner, according to the other decision of this Court, reported in Shivadhar v. Corporation of Calcutta 64 Cal WN 60 was an officer of the Government, however much he may be holding the post of the Commissioner of the Corporation of Calcutta. The learned trial Judge, accordingly, dismissed the plaintiff's suit as, in his view, upon the above authority of this Court, [P.B. Shah and Co. and Others Vs. Chief Executive Officer and Others](#), if the defendant No. 1 had to be deleted in accordance with that decision and the amendment could not be allowed, the suit would be liable to be dismissed on the ground of absence of necessary parties and the presence of the other two defendants would not be sufficient to protect the same. From this decree of dismissal, the present appeal has been filed by the plaintiff.

4. In our view, neither of the above two decisions would apply in the instant case for throwing out the plaintiff's suit at the present stage. The records show that, when the suit was instituted, Sri P. C. Majumdar, who had passed the impugned order of demolition, was continuing as the Commissioner and, actually, the written statement on behalf of the Commissioner (defendant No. 1) and the Corporation (defendant No. 2) had been signed by him. If that is so, at the date of the suit, the said Sri P. C. Majumdar as Commissioner could easily have been impleaded and to such a course no objection could possibly have been taken. In the circumstances, he having actually entered appearance, the amendment for impleading him would be

more or less a formal amendment.

5. We may add, at this stage, that, on the plaint, as it stands now, notice u/s 80 of the CPC is stated to have been served on the then Commissioner who would be no other person than Sri P. C. Mujumdar above-named. In the circumstances, no objection on the ground of want of notice u/s 80 of the Code of Civil Procedure, even assuming that the decision in that respect in 64 Cal WN 60, is correct, would stand in the way of the aforesaid amendment and, if, thereafter, a later incumbent has to be impleaded, no question of any notice u/s 80 of the CPC would arise, as such notice would be required only for the institution of the suit and not for any later stage. The learned trial judge's view that Article 14 of the Indian Limitation Act would affect the proposed amendment is not also, according to us, correct in law. The instant suit is a suit for permanent injunction. It is true that every suit for permanent injunction necessarily involves some sort of implied declaration that the impugned Act or omission is illegal. That, however, does not prevent a party from instituting a suit for permanent injunction and he is not compelled, in every instance, to seek for any other relief, unless, of course, it be the position in a particular case that, without setting aside the particular order or some such substantive relief, he cannot get the relief of permanent injunction. In a case, where the allegation is that the impugned order is illegal or without jurisdiction or in other words, a nullity, it has, on that allegation, no existence in law and so does not require to be set aside. That has been the uniform trend of decisions under the established authorities and, in that view Article 14 would be no bar to the making of the proposed amendment.

6. Although, in the above view, it may not be necessary for us to consider the correctness or otherwise of either of the above two decisions [P.B. Shah and Co. and Others Vs. Chief Executive Officer and Others](#), , Following the un-reported decision of G. K. Mitter J. in Suit No. 3662 of 1953 (Cal) Central Glass Industries Ltd. v. Commissioner Corporation of Calcutta of this Court, we may make it clear that, as, at present advised, we are not inclined to agree with any of the aforesaid decisions. Broadly speaking, the decision in [P.B. Shah and Co. and Others Vs. Chief Executive Officer and Others](#), , proceeds upon the authority of the Bombay decision, reported in Sheriff of Bombay v. Hakamji Motaji and Co.. AIH 1927 Bom 521 which purported to distinguish some of the English Cases, cited therein, but could not distinguish, at least, one English authority. In our view, this single authority of the English Court, which could not be distinguished in the Bombay case cited, shows sufficiency that, even where the statute does not expressly make a particular title holder a corporation sole, there may be the necessary intendment in the particular statute to lead to the same effect and as a matter of fact, in the said Bombay case itself, it is noted that suits in this country.--at least, in the mofussil, have been freely brought against the Collector-and if we only add, have succeeded up to or before the Privy Council,--without naming any individual person or the particular occupant of the post at the time. Any other view if we only (may?) say so with respect is bound to lead to serious complications and difficulties indeed, it has to be remembered in this

connection that the idea of a Corporation Sole is a flexible one, introduced as a fiction by the English law and it does not always require a supporting statute, although, usually, this characteristic is emphasised by the particular statute in question.

7. With regard to the other decisions, namely, 64 Cal WN 60, and the unreported decision of G. K. Mitter, J. all we need say, at the present stage, is that the Commissioner, under the statute, in spite of the provisions, pointed out by their Lordships, may not satisfy the test of being in the service of Government, as laid down by the Supreme Court in [Raja Bahadur K.C. Deo Bhanj Vs. Raghunath Misra and Others](#), where their Lordships pointed out and emphasised the distinction between holding an office under the Government, serving under the Government and being in the service of the Government.

8. The above decisions, therefore, may well require further consideration before any firm conclusion can be reached on the point and unless the Commissioner can be held to be in the service of the Government, he would not come within the description of a public officer under the definition contained in Section 2(17) of the Code of Civil Procedure. As, however, it is not necessary for us to consider the correctness or otherwise of the above decisions for our present purpose, we would not pursue this matter further but would keep the point open and the plaintiff, as it is, with liberty to the plaintiff to amend it by impleading as defendant Sri P. C. Majumdar, who was the Commissioner of the Corporation of Calcutta, at the date of the impugned order and who passed the impugned order and who was also the Commissioner at the date of institution of the present suit, and also the present incumbent, holding the said post. After such amendment, the suit will proceed in accordance with law and, if necessary, at the final hearing, the Court will decide ultimately the propriety or otherwise of impleading defendant No. 1, the Commissioner, Corporation of Calcutta, by its title.

8a. In the above view, we allow this appeal, set aside the judgment and decree of the learned trial judge and send the matter back to him so that the case may proceed there in accordance with law in the light of the observations, hereinbefore made.

9. Costs of this appeal will abide the final result of the suit.

A.C. Sen, J.

10. I agree.