

(1979) 02 CAL CK 0023

Calcutta High Court

Case No: S.A. No. 1475 of 1971

Commissioners of Rishra
Municipality

APPELLANT

Vs

Anil Kumar Mustafi

RESPONDENT

Date of Decision: Feb. 13, 1979

Acts Referred:

- Bengal Municipal Act, 1932 - Section 149, 149A(2), 150, 330, 330(1)
- Civil Procedure Code, 1908 (CPC) - Section 9
- Specific Relief Act, 1963 - Section 4

Citation: 83 CWN 888

Hon'ble Judges: B.N. Maitra, J

Bench: Single Bench

Advocate: Sailendra Bhusan Baksi, for the Appellant;

Final Decision: Allowed

Judgement

B.N. Maitra, J.

The commissioners of Rishra Municipality instituted the present suit. The allegation is that with a view to erecting a construction on the Holding No. 92/2, N. K. Banerjee Street, the defendant had submitted a plan, which had been duly sanctioned. On 5.9.1966, the employee of the Municipality found on inspection that there had been a deviation from such sanctioned plan. The suit is for mandatory injunction to pull down such unauthorised construction and for a declaration that the construction in question was an illegal one. The defendant filed a written statement alleging inter alia that he erected the construction with the permission of the Chairman of the Municipality.

2. The learned Munsif accepted the plaintiff's version and decreed the suit. The defendant filed an appeal. The learned District Judge referred to the provisions of the section 4 of the Specific Relief Act and stated that according to that section,

specific relief could be granted only for the purpose of enforcing an individual civil right and not for the mere purpose of enforcing a penal law. He stated that the Commissioner's remedy was to file an application before the Magistrate according to the provisions of the section 330 of the Bengal Municipal Act and the Civil Court had no jurisdiction to try the suit. Hence this appeal by the plaintiff.

3. The learned Advocate appearing on behalf of the appellant has stated that section 4 of the Specific Relief Act is not a bar to the institution of the suit. The jurisdiction of the civil court, to try the present suit is not expressly or impliedly barred. Reference has been made to the cases in [Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh](#), , [Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon](#), and [Bata Shoe Co. Ltd. Vs. City of Jabalpur Corporation](#), . This Court should consider the scheme of the Act and arrive at a decision that the jurisdiction of the civil court is not ousted. No finality is attached to the Magistrate's order passed according to the provisions of the section 330 of the Bengal Municipal Act. The court should hold that the matter is triable by the civil court.

4. It is pertinent to point out that the plea of jurisdiction was not at all pleaded in the written statement or argued in the trial court. No such issue was, therefore, framed. That question was first raised before the learned District Judge.

5. Section 4 of the Specific Relief Act says that specific relief can be granted only for the purpose of enforcing individual civil right and not for the mere purpose of enforcing a penal law. This section clearly expresses what had been put in a negative form in the bid section 7 of the repealed Act. The word "mere is a pointer that enforcement of a penal law must not be the sole object of the suit. In this case, demolition was asked for by making the prayer for mandatory injunction. It has been, rightly contended on behalf of the appellant that demolition is not a penal provision, as stated by the learned District Judge. There are several sections in the Bengal Municipal Act, 1932, containing the penal provisions, such as, recovery of fine and the like. Hence a reference to the provisions of the section 4 of the Specific Relief Act is not appropriate.

6. In the case of Secretary of State v. Musk & Co. in 44 C.W.N. 709 P.C. at page 716, Lord Thankerton has stated that the exclusion of the jurisdiction of the civil court is not to be readily inferred. Such exclusion must either be explicitly expressed or clearly implied. Even if the jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. This principle has been followed by the Supreme Court in the case of [Laxman Purshottam Pimputkar Vs. State of Bombay and Others](#), at page 443 and in several other cases.

7. Section 9 of the CPC says that the court shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly

barred. In the famous case of [Dhulabhai and Others Vs. The State of Madhya Pradesh and Another](#), at pages 89 and 90, Hidayatullah, C.J., has laid down seven principles regarding the exclusion of the jurisdiction of the civil court. It has been stated that the court shall have to consider whether the statute gives a finality to the order of the special tribunal. Where there is adequate remedy to do what the civil court would normally do in a suit where there is an express bar, an examination of the scheme of the particular Act to find the adequacy of the remedies may be relevant but not decisive. Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the enquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all actions about the same shall be determined by the tribunal and if remedies normally associated with actions in civil courts are prescribed by the statute or not. The exclusion of the jurisdiction of the civil court is not readily to be inferred, unless the seven conditions laid down by the Supreme Court apply. Let us apply the principles of law to the facts of this case.

8. Reference has rightly been made on behalf of the appellant to the provisions of section 150 of the Act. That section says that no objection shall be taken to any assessment or valuation in any other manner than in the Act is provided, and no order passed under sub-section (4) or sub-section (6) of section 149 or section 149A(2) shall be called in question in any court.

9. In this connexion, it will be useful to refer to the provisions of section 330 and section 331 of the Act. The relevant portion of section 330 (1) says that if the Commissioners are satisfied that erection of any building has been made in breach of the provisions of the Act or in schedule VI or in any rules or by-laws or of any condition, modification direction or requisition lawfully given or made under the Act or schedule VI or under such rules or by-laws, then they may apply to a Magistrate and such Magistrate may make an order directing demolition of or alteration of the building. The relevant portion of section 331 (1) shows that in other case the Commissioners may apply to a Magistrate and the latter may make an order directing that the projection, building, portion of the building, block of building, verandah, fixtures, addition roof or wall or hut, as the case may be, shall be demolished. So, the question arises, whether such remedy is the only one provided for in the Bengal Municipal Act. Suffice it to say that there is no express bar in the Act excluding the jurisdiction of the civil court to try such suit. So, we shall have to consider whether there is any implied bar in this respect. It has already been pointed out that in both the section 330 and 331 the Legislature has deliberately used the word "may" and not "shall" in regard to the Commissioners and the Magistrate also. It is not obligatory for the Commissioners to go to the Magistrate alone to ask for demolition. The word "shall" was not to be used regarding the Magistrate's power to order demolition.

10. In the case of *Saraswati v. Chairman, North Barrackpore Municipality* in 62 C.W.N. 797 at page 798, it has been stated that the order of demolition may or may not be passed according to the circumstances of a particular case and the Magistrate may make an order for demolition or alteration of any offending structure in the interest of justice. This observation was made after construing the provisions of section 330 of the Bengal Municipal Act.

11. From the aforesaid discussions, it is clear that there is no bar in leaning in favour of the view that there is an existence of the jurisdiction of the civil court to try such suit. No finality has been given to the orders passed according to the provisions of the sections 330 and 331 of the Act, as we find with regard to an order passed in accordance with the provisions of section 150 of the Act. The present suit is of a civil nature. So, from a scheme of the Act, it is clear that there is no implied bar in this regard because that Act does not lay down that all actions in respect of such demolition shall be determined by the Magistrate alone and not by the civil court.

12. There is also a difficulty in this respect, because in a given case, a question may arise whether a particular construction appertains to a particular holding or not. Such question cannot be determined except by a local investigation. An appointment of a Pleader Commissioner will be necessary in such case and surely such local investigation can be made only by a civil court and not by a criminal court. Hence, the decision of the learned District Judge cannot be supported. It must be held that the jurisdiction of the civil court is not expressly or impliedly barred and the civil court has jurisdiction to try the suit.

13. The learned District Judge did not enter into the merits of the case because he was of opinion that the civil court's jurisdiction was ousted. Hence, the matter must be remitted to him for arriving at a decision on the merits of the case. The appeal be allowed. The judgment and decree appealed against be hereby set aside and the matter remitted to the learned District Judge for disposal according to law in the light of the observations made hereinbefore.

There will be no order as to costs.