(1978) 01 CAL CK 0038

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1916 of 1965

Brojobehari Sen		APPELLANT
	Vs	
Corporation of Calcutta		RESPONDENT

Date of Decision: Jan. 25, 1978

Acts Referred:

- Calcutta Municipal Act, 1923 - Section 131, 138, 139, 140, 140(1)
- Calcutta Municipal Act, 1951 - Section 586
- Civil Procedure Code, 1908 (CPC) - Section 80
- Specific Relief Act, 1877 - Section 54

Citation: (1978) 1 ILR (Cal) 7

Hon'ble Judges: Chittatosh Mookerjee, J

Bench: Single Bench

Advocate: G.P. Ghose, for the Appellant;Gopal Chandra Sen, for the Respondent

Final Decision: Allowed

Judgement

Chittatosh Mookerjee, J.

The present Appellant claims to be the recorded owner and the trustee in respect of 26B. Ashutosh Mukherjee Road. He brought a suit, out of which this second appeal arises, inter alia for declaration that the ex parte assessment order dated January 28, 1952, in respect of the said premises was illegal, void and without jurisdiction and not binding upon him. He also prayed for permanent injunction to restrain the Defendant Corporation of Calcutta and Sri B.K. Sen, the then Commissioner of Corporation of Calcutta and their agents and servants from giving effect to the said assessment order dated January 28, 1952. The learned Munsif, First Additional Court, Alipore, dismissed the said suit, inter alia upon the finding that the suit was not maintainable in the absence of the service of a notice u/s 538of the Calcutta Municipal Act, 1923 and also because of non-compliance with the provisions of Section 80 of the Code of Civil Procedure. The learned Munsif further found in the

facts and circumstances of the case that it could not be held that the Corporation did not follow the statutory provision in confirming the assessment of the suit premises by its order dated January 28, 1952. The said order, according to the learned Munsif, was neither illegal nor invalid.

2. The Plaintiff being aggrieved by the said decision preferred an appeal. The learned Subordinate Judge held that the notice u/s 140 of the Calcutta Municipal Act, 1923, was not served upon the Plaintiff in accordance with law and the learned Subordinate Judge did not agree with the contrary findings of the learned Munsif on the issue of the service of notice u/s 140. The learned Subordinate Judge, however, purported to rely upon the Division Bench decision of Harris C.J. and Bijan Kumar Mukherjee J. in Mst. Fatima Khatoon Bibi and Ors. v. The Corporation of Calcutta 4 D.L.R. 116 and held that the civil Court had no jurisdiction to go into the question of the validity or otherwise of the said increase of the valuation and assessment of municipal rates. The learned Subordinate Judge also disagreed with the view of the learned Munsif that the suit was bad because of non-service of any notice u/s 80 of the CPC upon B.K. Sen, the then Commissioner of the Corporation of Calcutta. In fact, B.K. Sen had ceased to be the Commissioner and his name had been expunged from the records. The learned Subordinate Judge was also of the view that the suit was hit by Section 538 of the Calcutta Municipal Act, 1923 and it did not come within the exception laid down by Sub-section (5) of Section 538 of the Act. Accordingly, the suit was held to be bad as against the Corporation of Calcutta because of the Plaintiff''s failure to serve the said notice.

3. Having given my anxious considerations to the matter, I am of the view that the learned Subordinate Judge erred in law in holding that the suit in question was not maintainable in the civil Court and that the suit was also hit by the provisions of Section 538(1) of the Calcutta Municipal Act, 1923. The decision of Harris C.J. and Bijan Kumar Mukherjee J. in Mst. Fatima Khatoon Bibi and Ors. v. The Corporation of Calcutta 4 D.L.R. 116 was clearly distinguishable on facts. The said Second Appeal before the Division Bench arose out of a suit brought by the Corporation of Calcutta claiming arrears of consolidated rates which had been increased without notice to the Defendant-Appellant owner. The Defendant in the said suit had denied the claim of the Corporation of Calcutta to recover the said consolidated rates on the ground that the said increased assessment was ultra vires because of the failure on the part of the Corporation of Calcutta to give any notice u/s 138 of the Calcutta Municipal Act, 1923. The Division Bench in Mst. Fatima Khatoon Bibi v. The Corporation of Calcutta Supra inter alia held that Section 138 of the Calcutta Municipal Act, 1923, did not require a notice to be given before a valuation could be made for the first time or the same could be increased. What it required was that a notice should be given stating that a first valuation had been made or that the existing valuation had been increased. According to the Division Bench, therefore, the giving of a notice u/s 138 was not a condition precedent to the making of a first valuation or to increasing an existing valuation. The valuation could be made and then a notice of course

should be given to the owner/occupier in order to have an opportunity to object. Therefore, when a valuation could be made without notice, the valuation would not be ultra vires because no notice was given u/s 138. The Division Bench also referred to the provision for appeal to the Small Cause Court u/s 141 against the order passed on the objection filed u/s 139. Accordingly, Harris C.J. and Bijan Kumar Mukherjee J. held that the civil Court could not go into the said matter of increase of valuation of a holding.

4. In the instant case, admittedly on September 30, 1950, the Plaintiff was served with a special notice u/s 138 of the Calcutta Municipal Act, 1923, stating that the annual value of the holding in question had been raised from Rs. 1,012 to Rs. 3,812 with effect from third quarter, 1950-51. On October 4, 1950, the Plaintiff had filed an objection u/s 139 of the Calcutta Municipal Act, 1923, to the said increase in valuation of the holding in question. But the substance of the Plaintiff''s case was that a Special Officer of the Corporation of Calcutta had disposed of his said objection u/s 139 without giving him any notice u/s 140(1) of the Calcutta Municipal Act, 1923. The records of the said objection case produced in the trial Court by the Corporation of Calcutta established that there were several attempts to serve the said notice u/s 140 of the Act of 1923, but it could not be served upon the present Appellant. On January 28, 1952, a Special Officer of the Corporation of Calcutta in spite of clear endorsement to the said effect in the order-sheet of the objection case (Ex. 2) passed an ex parte order confirming the said increased valuation. The Plaintiff-Appellant''s grievance in the present case was that his objection u/s 139 was determined without any notice to him u/s 140(1) and thereby depriving him of the opportunity of hearing as contemplated u/s 140(2) of the Calcutta Municipal Act, 1923. In fact, the lower appellate Court has found that no notice u/s 140(1) was served upon the Plaintiff. The Division Bench in Mst. Fatima Khatoon Bibi v. The Corporation of Calcutta Supra had no occasion to consider the effect of non-service of a notice u/s 140(1) and the validity of disposing of an objection to an increased assessment without notice and without opportunity of hearing to the objector concerned. The effect of non service of a notice u/s 140(1) and denial of opportunity of hearing under Sub-section (2) of the said section did not invalidate the increase in valuation made u/s 131. But the non compliance with the above provisions of Section 140 relating to the service of notice u/s 140 upon the Plaintiff and deprivation of opportunity of hearing him made the order dismissing the Plaintiff''s aforesaid objection u/s 139 of the Calcutta Municipal Act, 1923, null and void. The Special Officer, Corporation of Calcutta, in the instant case had acted in violation of the provisions of Section 140 which embodied the principles of natural justice audi alterem partem. The Special Officer exercising his powers u/s 140 was clearly required to act quasi-judicially and therefore, disposed of the Plaintiff''s objection in flagrant disregard of these provisions was void ab initio and the Plaintiff''s objection to the said increased valuation made with effect from third quarter, 1950-51, must be deemed to be still undisputed of and pending.

5. Section 164(1) of the Calcutta Municipal Act, 1923, provided that when an objection to a valuation had been made u/s 139, the consolidated rate shall, pending the determination of the said objection, be paid on the previous valuation. In other words, pending the determination of the objection filed u/s 139, the objector would continue to pay the consolidated rates according to the previous valuation. In the instant case, the Plaintiff''s objection to the increased valuation must be deemed to be still pending in the eye of law and awaiting determination. Therefore, the Corporation of Calcutta was not entitled to recover increased consolidated rates from the Plaintiff before determining the Plaintiff''s objection in question; it was to recover at the previous rates. Only after the said objection is determined, the Sub-section (2) of Section 164 as the case might be. But the Corporation in violation of Section 164(1) of the Act had threatened to recover the enhanced municipal rates from the Plaintiff. Hence the suit was filed. These questions never came up for consideration before the Division Bench in Mst. Fatima Bibi v. The Corporation of Calcutta Supra. Therefore, in my view, the lower appellate Court clearly erred in law applying the said decision to the facts of the present case.

6. It is settled law that exclusion of jurisdiction of civil Court is not to be readily inferred. It must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, 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. See Secretary of State v. Mask and Company 44 C.W.N. 709 : L.R. 69 IndAp 222 and Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, . In the instant case, the Special Officer while purporting to dispose of the Plaintiff''s objection did not act in conformity with the fundamental principles of a judicial procedure relating to service of notice upon the objector and giving him opportunity of hearing contained in Section 140of the Calcutta Municipal Act, 1923. In the instant case, the civil Court was not required to adjudicate the correctness of the quantum of the increase in the valuation made u/s 138 of the Act. I have already found that there had been no disposal of the Plaintiff''s objection to the increased valuation in question in terms of Section 140. In the result, the Plaintiff''s objection u/s 139 had remained pending. The Corporation of Calcutta could not lawfully recover from the Plaintiff consolidated rate on the basis of the increased valuation which was still under objection and without the disposal of the Plaintiff''s said objection u/s 139 of the Calcutta Municipal Act, 1923. The civil Court has ample jurisdiction u/s 54 of the Specific Relief Act, 1877, to enforce the said statutory obligation of the Corporation of Calcutta u/s 164 and to prohibit transgression of law by the said statutory authority.

7. In my view, the lower appellate Court was also wrong in holding that Section 538(1) of the Calcutta Municipal Act, 1923, was attracted to the facts of the present case. I have already held that the Plaintiff''s objection u/s 139 had not been determined u/s 140 and the purported order of the Special Officer dated January 28,

1952, confirming the increase of the valuation with effect from third quarter, 1950-51, being ultra vires and null and void, no declaration was required to be made or should be made. In fact, the said question relating to the legality or otherwise of the increase in valuation and assessment being pending, was premature and the civil Court need not go into the said question of increase made u/s 138. In the above view, in the instant case, the prayer for declaration contained in the plaint was a surplusage and in substance the suit was one for a perpetual injunction in terms of Section 54 of the Specific Relief Act, 1877. Such a suit would be clearly covered by Sub-section (5) of Section 538 of the Calcutta Municipal Act, 1923. This view finds support from the decision of Bose J. in Sitaram Gupta and Others Vs. Corporation of Calcutta, .

8. I respectfully agree with the following observations of P.N. Mookerjee and A.C. Sen JJ. in Messrs Metro General Traders v. The Commissioner, The Corporation of Calcutta and Ors. 69 C.W.N. 585 (586-87).

It is true that in every suit 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 the allegation, no existence in law and so does not require to be set aside.

9. P.N. Mookerjee and P. Chatterjee JJ. in Sree Sankar Oil Industries Vs. Harish Chandra Mukherjee and Another, again held that no notice u/s 586 of the Calcutta Municipal Act, 1951, would be necessary in a suit for permanent injunction in respect of a void order. The Supreme Court with reference to Section 487 of the Bombay Provincial Municipal Corporation Act, 1949, held that the benefit of the said section would be available to the Corporation only if it was held that act in question was done was purported to be done in pursuance or execution or intended execution of the Act. The levy was found not to be in pursuance or in execution of the Act. What is plainly prohibited by the Act cannot be claimed to be purported to be done in pursuance or intended execution of the Act. These observations with equal force may be applied in the instant case. I, accordingly, conclude that the suit brought by the Plaintiff-Appellant was not hit by Section 538 of the Calcutta Municipal Act, 1923.

10. In the result, I set aside the finding of the lower appellate Court that the suit was bad for non-service of notice u/s 538 of the Calcutta Municipal Act. I hold that the appeal must succeed in part and the Plaintiff''s suit should be decreed in the manner indicated below. I make it clear that the result of this decision is that the Plaintiff''s objection u/s 139 in respect of the impugned valuation still awaits

disposal u/s 140. I also record the submission of Mr. Ghosh, learned Advocate for the Appellant, that the Appellant at present is residing at Madan Mohan Dutta Lane, Calcutta-6. Therefore, a fresh notice, u/s 140 may be lawfully served upon the Plaintiff-Appellant at the said address. Notwithstanding the Plaintiff''s success in the present case, the Corporation of Calcutta would be entitled to again dispose of in accordance with law the Plaintiff''s objection filed u/s 139. Therefore, both parties will be entitled to proceed further in accordance with law.

11. I, accordingly, allow this appeal in part, set aside the judgments and decrees of the trial Court and the lower appellate Court. The Plaintiff is granted a decree for permanent injunction restraining the Corporation of Calcutta and its servants and agents from recovering consolidated rates on the basis of the increased valuation till the final determination of the Plaintiff''s objection made u/s 139 of the Calcutta Municipal Act, 1923. The Plaintiff, however, will be liable to pay during the pendency of the said objection on the basis of the previous valuation, if the sums still remain outstanding and after the said objection is determined both parties will be entitled to proceed in accordance with law in the matter of payment and recovery of the consolidated rates. In this judgment no observation has been made about any changes in the valuation of the holding in question for any subsequent period.

12. In the circumstances of the case both parties will bear their respective costs throughout.