
(1970) 06 CAL CK 0019
In the Calcutta High Court
Case No : A.F.O.D. No. 160 of 1964

Gowardhandas Rathi

APPELLANT

Vs

Corporation of Calcutta and Another

RESPONDENT

Date of Decision : 25-06-1970

Acts Referred:

Calcutta Municipal Act, 1951 — Section 586(1), 586(4)
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 2, 2(17), 80
Specific Relief Act, 1877 — Section 54

Citation : AIR 1970 Cal 539 : (1971) 1 ILR (Cal) 497

Hon'ble Judges : P.N. Mookerjee, J;Amiya Kumar Mookerji, J

Bench : Division Bench

Advocate : Satyendra Prosad Sen, for the Appellant; Dwijendra Narain Ghose, for the Respondent

Final Decision : Allowed

Judgement

P.N. Mookerjee, J.—This appeal is by the plaintiff. It is directed against a decree of the learned trial Judge, dismissing the plaintiff's suit on a preliminary issue. That issue was in these terms:

"Where notices u/s 586 of the Calcutta Municipal Act and u/s 80 CPC necessary before filing this suit ? If so, should the suit fail for want of the said notice ?"

This issue was answered by the learned trial Judge in the affirmative in both its parts, that is, against the plaintiff and, as a result thereof, the plaintiffs suit was dismissed.

2. Another issue was also discussed and decided by the learned trial Judge, namely, the issue of limitation, which was in the following terms:

"Is the suit barred by limitation ?"

The issue, however, was found in favour of the plaintiff but, as, on the other issue, the suit had to be dismissed according to the learned trial Judge, his

ultimate decree was a decree of dismissal. Against this decree, the present appeal has been filed by the plaintiff.

3. The point before us arises in the following manner:

4. The instant suit was a suit, in substance, for a permanent injunction against the defendants, the Corporation of Calcutta and Sri S. B. Roy, Commissioner, Calcutta Corporation, to restrain them, "their men, officers and agents from giving effect to an illegal order, dated May 12, 1960, and/or in " any way interfering with the plaintiff's right of property in respect of the disputed structures, namely, the C. I. sheds at Premises No. 33/2B, Wellesley Street, now known as No. 33/2B, Rafi Ahmed Kidwai Road, Calcutta.

5. The order, referred to above, namely, the order, dated May 12, 1960, was an order for demolition of the disputed structures. That order was challenged in the plaint as illegal, invalid and an abuse of the statutory powers, vested in the Commissioner, and, as such, unenforceable in law.

6. In the suit, there was a prayer for a declaration to the above effect, which was prayer No. 1 in the plaint, the prayer for permanent injunction, as noted above, being prayer No. 2.

7. In the suit, the two objections, which had been considered by the learned trial Judge, namely, of a preliminary nature, related to the question of service of notice u/s 586 oE the Calcutta Municipal Act and Section 80 of the CPC and the question of limitation.

8. The suit was dismissed by the learned trial Judge on the ground of want of the above notices, even though the question of limitation was decided by him in favour of the plaintiff. The learned trial Judge did not go into the merits of the suit but dismissed it on the above preliminary ground. The propriety of the said decision has been challenged before us on behalf of the appellant and Mr. Sen, arguing this appeal on behalf of his client, the appellant, has contended before us that the learned trial Judge was wrong on the question of both the above notices and his submission was that neither of the above two notices was necessary or a pre-requisite in law in the instant case.

9. It is an admitted fact that none of the above notices was served by the plaintiff. If, therefore, the learned trial Judge's view that the said two notices were necessary for maintaining the present suit or if even one of them be necessary for the said purpose, his decree of dismissal would have to be affirmed. If, however, it be held that neither of the above two notices was necessary in the instant case, the learned trial Judge's decree of dismissal would have to be set aside, his finding on the other preliminary question of limitation being, as already stated, in favour of the plaintiff, and the case will have to be sent back for further consideration in accordance with law.

10. We have, therefore, to address ourselves to the alleged requirement of the above notices or either of them in the instant case.

11. So far as Section 586 of the Calcutta Municipal Act is concerned, it is clear that the said Section would prima facie apply as the Corporation as also the Commissioner would come within the scope or purview of the same, so far as Sub-section (1) of the said Section is concerned. Mr. Sen, however, relies for his protection on Sub-section (4) of the said Section. If the instant suit is one, contemplated under the said sub-section, it would be outside the mischief of the earlier provisions. The question, therefore, is whether the instant suit can be held to be a suit, instituted u/s 54 of the Specific Relief Act (1877), which was in force at the date of institution of this suit. That Section, which corresponds to Section 38 of the new Specific Relief Act, to quote its relevant part, reads as follows:

"54. Perpetual injunctions when granted.--Subject to the other provisions, contained in, or, referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation, existing in favour of the applicant, whether expressly or by implication."

12. The above section is preceded by Section 53 of the old Act, corresponding to Section 37 of the new Act, which, in its relevant part, is in these terms:

"53.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff."

13. Reading the two sections together, it is clear that a suit for perpetual injunction, which is contemplated under the above two statutory provisions, or, more accurately, by the first-quoted provision, is a suit for the said relief, to be obtainable in the decree, made at the hearing and upon the merits of the suit. The merits of the suit would, obviously, involve determination of the plaintiff's alleged right or alleged commission of act by the defendant, which would be contrary to or violative of the rights of the plaintiff.

14. Clearly, also, for the grant of a perpetual or permanent injunction, the above requisites, namely, the existence of a right in the plaintiff and its threatened violation or the threatened commission of an act to injure the plaintiff's right would have to be found.

15. Every suit, therefore, for a perpetual injunction must involve a determination or a declaration to the above effect, or, in other words, such a declaration would be necessarily involved or implied in the case of every decree for perpetual injunction.

16. In the instant case, the invasion of the plaintiff's right or the commission of the act, contemplated above, would, presumably be the passing of the impugned order, which is challenged in the plaint as invalid, illegal and mala fide, and a finding, determination or declaration to that effect would, whether expressly or impliedly, be necessary for the grant of perpetual injunction to the plaintiff.

Indeed, in the instant case, there is an express prayer for such a declaration. That however, in our opinion, would not alter the substantive position. That prayer may well be regarded as ancillary to the main relief of perpetual or permanent injunction, --if not unnecessary as a prayer in the prayer portion of the plaint. The necessary allegation in the body of the plaint to enable the Court to come to a determination of the above basic question would be enough for the purpose of supporting the ultimate decree of perpetual injunction. In law, a declaration by implication or in ex-press terms would not make any difference in substance and, regarded from that point of view, it will not affect or alter the nature of the suit and, accordingly, the instant suit may well be regarded, as, in substance, it is, as a suit for perpetual or permanent injunction. In this view, we would hold that the instant suit would satisfy the test of a suit, instituted u/s 54 of the old Specific Relief Act, corresponding to Section 38 of the new Act. In that view, the instant case would be covered by the protective provision of Sub-section (4) of Section 586 of the Calcutta Municipal Act and, accordingly, would be outside the mischief of Sub-section (1) of the said section. The absence or want of a notice under the said statutory provision cannot, therefore, be fatal to the instant suit and the learned trial Judge's view to the contrary is not correct and must be set aside.

17. So far as the question u/s 80 of the CPC is concerned, it is clear that, for the application of that section and the requirement of notice under the same, it is necessary that the defendant must be a Public Officer. So far as the present case is concerned, this defence is limited to the case of defendant No. 2, as, obviously, the Corporation of Calcutta would not fulfil the description or definition of a Public Officer. As regards the said defendant No. 2, however, the matter, when judged under the relative statutory provision in Section 2(17) of the Code of Civil Procedure, which defines a "public officer" for purposes of the Code, the same can be attracted, if at all, under Clause (h) of the said section. That clause reads as follows:

"(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty."

The latter part of this clause would not, obviously, apply in the instant case as the Commissioner of the Corporation of Calcutta is not- remunerated by fees or commissions. The question then shortens itself to this: "Is he an officer in the service or pay of the Government?" For this purpose, it is necessary to consider the effect and implication of some of the provisions of the Calcutta Municipal Act. The Commissioner under the said statute, is appointed by the State Government on the recommendation of the State Public Service Commission and upon such terms and conditions as the State Government may determine and he shall not be a member of the Corporation. This is provided in Section 19(1) of the said Act, Sub-section (3) of the said section provides that "Notwithstanding anything contained in Sub-section (2) [which fixes the normal tenure of the Commissioner to a term of five years subject to renewal in appropriate cases to another term of

the same period], the State Government may, at any time, remove the Commissioner from office and shall do so if, at a special meeting of the Corporation, called for purpose, resolution for the removal of the Commissioner, in favour of which more than one-half of the total number of members of the Corporation give their votes, is carried." Power of appointment and removal therefore, so far as the Commissioner is concerned, undoubtedly, rests with the State Government. Sub-section (4) of the above section, again, provides that "The Commissioner shall not undertake any work unconnected with his office without the sanction of the State Government and of the Corporation."

18. The above statutory provisions indicate some kind of the State's control over the Commissioner but this is limited to his appointment, to the terms and conditions of the same, to his removal and to his functions outside the office of the Commissioner. They do not, in any manner, control or affect the discharge of his duties under his appointment as Commissioner and leaves him free in the matter and free from any interference or control of the State Government. In this state of things, it is difficult to maintain that the Commissioner of the Corporation is in the service of the State.

19. Indeed, this aspect would be clear, if we bear in mind the distinction between "serving under the Government" and "in the service of the Government", as explained by the Supreme Court in the case, reported in *Raja Bahadur K. C. Deo Bhanj v. Raghunath Misra* (1959) 2 SCA 168 : (AIR 1951 SC 589) where, for being in the service of the Government, two essentials of the relationship of the master and servant were held to be necessary. The servant must be under the duty of rendering personal service to the master or to others in his behalf and the master must have a right to control the servant's work, either personally or by another servant or agent. Neither of these two elements would be present in the instant case - in any event, the element of control, envisaged therein, would not be present -- the Commissioner qua Commissioner cannot be held to be in the service of the Government. The Commissioner also cannot be said to be in the pay of the Government, because as provided in Section 20 of the Calcutta Municipal Act, his salary is to be paid out of the Municipal Fund, which u/s 115 of the said Act, is made up of monies realised or realisable under the said Act (other than the fines levied by Magistrates) and, all monies otherwise received by the Corporation, This fund is certainly not any part of the Government or State Exchequer and cannot be said to be belonging to the State.

20. In the premises, the Commissioner would not satisfy either of the requisite tests of a Public Officer under the relevant Clause (h) or Section 2(17) of the Code of Civil Procedure, namely, of being in the service of the Government or in its pay.

21. Mr. Ghose, appearing for the Corporation of Calcutta, also drew our attention to Section 23 of the Calcutta Municipal Act for his contention that in the instant case, the Commissioner, Sri S. B. Roy, was in the service of the Government when he was appointed the Commissioner, or, in other words, that his services,

as Government Officer, as aforesaid, were lent to the Corporation for the post of the Commissioner and that, accordingly, he continued to be in the service of the Government. The basic assumption for this submission would be that Sri S. B. Roy was in the service of the Government at the time of his appointment as Commissioner and that his services under the Government were lent to the Corporation for filling up the post of the Commissioner. In support of that assumption, however, there are no materials on the present record and no such contention appears to have been raised in the court below, either in the pleading or in the argument there. In the circumstances, we are unable to proceed upon this assumption and, accordingly, without expressing any opinion on the merits of the above contention, we would reject this submission of Mr. Ghose for upholding the learned trial Judge's order in the instant case.

22. The above view would be in consonance with the opinion, expressed in *Metro General Traders Vs. The Commissioner, The Corporation of Calcutta and Others*, , differing or disagreeing, though tentatively at that stage, with the decision of this Court, reported in *Shivadhar Sukla v. Corporation of Calcutta* (1960) 64 CWN 60 and the earlier unreported decision, referred to therein. The decision of the Supreme Court, however, which has been referred above, appears sufficiently to indicate that the view, expressed on the point in the above two decisions, would not be supportable. We have, therefore, no hesitation in expressing one respectful disagreement with the same and taking the view, we have indicated above.

23. In the premises, we will allow this appeal, set aside the impugned decree of dismissal of the learned trial Judge and send back the case to him for further consideration in accordance with law and in the light of the observations, made in this judgment.

24. There will be no order for costs in this appeal. Let the records go down as quickly as possible.

Amiya Kumar Mookerji, J.

25. I agree.