

(1952) 04 AHC CK 0024
In the Allahabad High Court
Case No : First Appeal No. 23 of 1949

Mohd. Ishaq and Another	Vs	APPELLANT
Administrator Municipality of Lucknow the Executive Officer		RESPONDENT

Date of Decision : 18-04-1952

Acts Referred:

Uttar Pradesh Municipalities Act, 1916 — Section 211, 265(1), 318, 321, 60(1)

Citation : AIR 1952 All 849 : (1952) 22 AWR 314

Hon'ble Judges : Malik, C.J.;V. Bhargava, J

Bench : Division Bench

Advocate : Mohd. Husain, for the Appellant; Mohd. Ahmed and B.K. Dhaon, for the Respondent

Final Decision : Allowed

Judgement

Malik, C.J.—Sm. Batulan filed a suit against the Municipal Board, Lucknow, for a permanent mandatory injunction prohibiting the defendants from demolishing a staircase appurtenant to a house mentioned in the plaint.

2. Batulan died during the pendency of this appeal and her legal representatives have now been brought on the record. The plaintiff had a house in Aminabad and it was the plaintiff's contention that in certain circumstances detailed in the plaint she had constructed a staircase. A notice was given by the Executive Officer, Municipal Board, Lucknow, to the husband of the plaintiff on 17-11-1942 that the construction having been built without permission it was liable to demolition and directing that the constructions be demolished within three days.

It was further mentioned in the notice that an appeal could be filed before the Municipal Board, within the period allowed, in case it was urged that the constructions were not liable to demolition. The husband of the plaintiff filed an application before the Executive Officer setting out certain grounds why the staircase should not be demolished. Thereafter on 4-8-1948, the Municipal Board sent an Overseer and some labourers to demolish the staircase. The plaintiff

prevented the demolition and filed the suit, out of which this appeal has arisen, on 13-8-1948.

3. Among other pleas taken in defence the Board pleaded that the suit was not maintainable in the civil court by reason of the provisions of Section 326 of the U. P. Municipalities Act (NO. of [2] of 1916). In the oral pleadings the pleader appearing for the Municipal Board stated that the validity of the notice, Ex. A2, could not be questioned in a civil court and on that account also the suit was not maintainable.

4. The trial court decided to try the preliminary issue of jurisdiction and framed the following issue:

"Is the suit not maintainable as alleged in para. 17 of the written statement and the oral pleadings ?"

5. As regards the failure to give notice, Sub-section (4) of Section 326 of the Municipalities Act provides that where the only relief claimed is a mandatory injunction, of which the object would be defeated by the giving of notice, no such notice would be necessary. This was clearly a case where giving of two months' notice would have defeated the object of the suit. The trial court did not decide this point and dismissed the suit on the other ground taken in the oral pleadings that the suit was barred by Section 321, Municipalities Act.

Section 321 lays down that :

"No order or direction referred to in 8. 318 shall be questioned in any other manner or by any other authority than is provided therein."

Section 318 relates to an order or direction made by a board under the powers conferred upon it under certain sections mentioned in that section including Section 211. If, therefore, the board had issued a notice u/s 211, the plaintiff's suit would have been barred as was held by the lower court. We find, however, from the notice itself that it was not issued by the board u/s 211 but by the Executive Officer in exercise of the authority given to him u/s 60 (I) (d). Section 60 mentions the functions of the Board that the Executive Officer can discharge and includes the powers conferred by the section or sub-sections specified in the first column of Schedule II.

A reference to column 1 of Schedule II shows that the Executive Officer has been given the power to issue a notice u/s 211, Municipalities Act for the removal of projection in a case where no compensation is payable. u/s 61 an appeal lies to the Municipal Board against the order of the Executive Officer passed u/s 60. From the notice itself it is clear that the Executive Officer, in the exercise of the authority given to him under S. 60, issued the notice u/s 211 and mentioned in it that an appeal could be filed before the Board against his order issuing the notice. Section 321, Municipalities Act does not apply to an order made by an Executive Officer as that section attaches finality only to an order passed by a board in the exercise of its powers under any of the sections mentioned in

Section 318 and appealable under that section. Section 321, therefore, did not bar the suit.

The point is covered by a Full Bench decision of this Court in Dr. Brij Behari Lal Vs. Emperor, . As a matter of fact Sri Dhawan, learned counsel for the Board, has not relied on Section 321 in support of his plea that the jurisdiction of the civil Court was barred. Learned counsel has relied on Section 265 (I) (f). This section relates to wilful obstruction to the free passage of any street. In the notice given by the Executive Officer it was not claimed that there was any wilful obstruction to the free passage of any street nor did the notice purport to be u/s 265 nor was any notice u/s 265 (I) (f) at all necessary. The notice purported to be a notice u/s 211 and was clearly a notice under that section for demolition of an unauthorised construction. Section 265 (I) (f) has no application.

Further, Section 265 (I) (f) does not require any notice to be issued by the Board or the Executive Officer. It only contemplates a criminal prosecution. In this case, there was no prosecution u/s 265 (I) (f). All that was done was to issue a notice which could only be u/s 211. This is another reason why Section 265 (I) (f) does not bar this. suit which has been brought in a competent court. In any case, this plea was not raised in the court below and as it raises a mixed question of law and fact, it cannot be allowed to be taken here at this stage.

6. The result, therefore, is that this appeal must be allowed, the decree passed by the lower court is set aside and the case is sent back to that court for decision according to law. Costs of this appeal must be paid by defendant 1 to the plaintiff-appellants. The other costs shall be costs in the cause.