

(1939) 03 BOM CK 0005

In the Bombay High Court

Case No : Civil Revision Application No. 377 of 1938

Muljee Sicka and Co.

APPELLANT

Vs

The Municipal Commissioner of Bombay

RESPONDENT

Date of Decision : 17-03-1939

Acts Referred:

City of Bombay Municipal Council Act, 1988 — Section 217
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1939 Bom 471 : (1939) 41 BOMLR 984

Hon'ble Judges : Macklin, J; Lokur, J

Bench : Division Bench

Judgement

Lokur, J.—This is an application for the issue of a writ of certiorari in respect of the order passed by the Chief Judge, Small Causes Court, Bombay, in Municipal Appeal No. M|96 of 1937. The petitioner firm owns several buildings on the Vithalbhai Patel Road, and they are liable to the Bombay Municipal Corporation to pay a certain percentage of their rateable values as property taxes under Sections 139 and 140 of the City of Bombay Municipal Act, 1888. For this purpose, the Municipal Commissioner has to fix the rateable value of each building assessable to property tax in accordance with the provisions of Section 154 of the Act. According to that section, the rateable value of a building or land is the amount of the annual rent for which such building or land might reasonably be expected to let from year to year, minus a sum equal to ten per centum: of the said annual rent, to be deducted in lieu of all allowances for repairs or on any other account whatever. Subsection (2) of Section 154 says:

The value of any machinery contained or situate in or upon any building or land shall not be included in the rateable value of such building or land.

2. When the rateable value of one of the petitioners' buildings, known as the "Moolji Mahal," was fixed by the Municipal Commissioner, an appeal was presented by him to the Chief Judge of the Small Causes Court, Bombay, u/s 217 of the Act, complaining that in fixing that value the Municipal Commissioner

should have, but had not, excluded the value of the machinery, namely, three lifts and one pump, provided in the premises of the building. Mr. Chitre, who was then the Chief Judge, allowed the appeal and ordered the exclusion of the value of the lifts and pump and for that purpose he appointed an expert as a Commissioner to assess their value. The valuation of the other buildings was postponed during the pendency of the appeal ; but even after the appeal was decided in favour of the petitioners, the Municipal Commissioner ignored it and fixed the rateable value of two other buildings of the petitioners without excluding the value of the lifts and pumps with which they were provided. The petitioners again appealed to the Chief Judge, but this time Mr. Indranarayan, who had succeeded Mr. Chitre to that office, took a different view and held that although lifts and pumps might be "mainly or partly machinery", no deduction could be allowed from the annual rents of the buildings for the value or cost of the lifts and pumps under Sub-section (2) of Section 154 of the Act. He observed that in taking the rents reasonably expected to be received as the basis for assessment, the cost of the lifts as such had nowhere been in fact included. He, therefore, rejected the petitioners' request in that behalf, and it is against that order that the petitioners have applied for a writ of certiorari.

3. The original application of the petitioners asked for a revision of the order of the Chief Judge under the extraordinary and inherent jurisdiction of this Court and its power of revision and superintendence over the Courts subordinate to it. But, when this application was admitted, the petitioners obtained permission and added a prayer for the issue of a writ of certiorari, and it was practically conceded that as the Chief Judge was acting as a *persona designata*, and not as a Court in hearing the appeal, an application for revision u/s 115 of the: Civil Procedure Code, 1908, was not competent.

4. The first question that arises is Whether this Court has power to issue a writ of certiorari. No instances of any such writ having ever been issued by this Court have been brought to our notice, but there are numerous cases in which such writs have been issued by other High Courts, and we feel no doubt that we have power to do so in a proper case. The nature of this writ is thus described in Short and Mellor's Crown Practice (2nd edn.) (p. 14):

The writ of certiorari is the process by which the King's Bench Division, in the exercise of its superintending power over inferior jurisdictions, requires the Judges or officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings or for giving fuller or more satisfactory effect to them than could be done by the Court below.

5. Both the writ of prohibition and the writ of certiorari are of great antiquity in England, forming part of the powers by which the King's Courts restrained Courts of inferior jurisdictions from exceeding their powers. As observed by Atkin L.J. in *Rex v. Electricity Commissioners London Electricity Joint Committee Co.* (1920), *Ex parte* [1924] 1 K.B. 171:

restrains the tribunal from proceeding further in excess of jurisdiction ; certiorari requires the record or the order of the Court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

6. It is true that the Chief Judge of the Small Causes Court, Bombay, is not a Court when hearing municipal appeals, but acts as a persona designate, as the wording of Section 217 of the City of Bombay Municipal Act, 1888, shows. It has been so held in *Ahmed Suleman v. Municipal Commissioner, Bombay* ILR (1929) 54 Bom. 224 and the High Court is held to have no jurisdiction to interfere with his decision u/s 115 of the Civil Procedure Code, 1908.

7. In England also, originally no doubt the writ was issued only to inferior Courts, using that expression in the ordinary meaning of the word "Court", But, as observed by Bankes L.J. at p. 193 of the case cited above, "as statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies." The scope of the writ of certiorari is thus described by May C.J. in *The Queen v. Corporation of Dublin* (1878) 2 Ir. 371:

It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connexion the term "judicial" does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts." This passage is quoted by Lord Atkinson with approval in *Frome United Breweries Co. v. Bath Justices* [1926] A.C. 586.

8. When the Supreme Court of Judicature was established in 1823, Clause 5 of the Letters Patent invested it with such jurisdiction and authority as the Justices of the Court of King's Bench had and might lawfully exercise, within that part of Great Britain called England, as far as circumstances would admit. It is brought to our notice that Clause 55, which specifically refers to the writ of certiorari, mentions only the various Courts, Justices and Magistrates, and says

...the said Supreme Court of Judicature at Bombay is hereby empowered and

authorized to award and issue a writ or writs of Mandamus, Certiorari Procedendo, or Error, to be prepared in manner abovementioned, and directed to such Courts or Magistrates as the case may require, and to punish any contempt thereof, or wilful disobedience thereunto, by fine and imprisonment.

This clause is not intended to curtail the powers of the Supreme Court of Judicature conferred upon it by Clause 5, but only to specify some of those powers in express terms. It does not take away from it any of the powers exercised by the King's Bench in England. This is made clear by Abdur Rahim Officiating C.J. in the full bench decision of *In re Mrs. Besant* I.L.R.(1916) Mad. 1164 where he points out that while the powers of revision and control are available only over the proceedings of ordinary Courts, a writ of certiorari is issued not only to Courts, but to tribunals specially constituted and entrusted with duties of a judicial character. Thus, while Clause 55 specifies the powers; of the High Court with regard to certain Courts and Magistrates, the powers exercised by the King's Bench conferred upon it by Clause 5 are left untouched. When Act 1861, 24 & 25 Vic. c. 104, abolished the Supreme Court and the Court of Sudder Dewanny Adawlut and Suddar Foujdarry Adawlut, and established the High Court, Clause 9 of the Act transferred to them " all Jurisdiction and every Power and Authority whatsoever in any Manner vested in any of the Courts in the same Presidency abolished under this Act at the Time of the Abolition of such last mentioned Courts." Even in that Act the powers which the Supreme Court of Judicature possessed over all its subordinate Courts were specifically granted by Clause 15 without thereby intending to take away from them the other powers which are exercised by the King's Bench in England. All those powers were continued by the Amended Letters Patent granted on December 28, 1865. Interpreting the Letters Patent of the High Court of Bengal, which was similarly worded, their Lordships of the Privy Council held in (1883) ILR 10 109 (Privy Council) that the common law powers of the Court of King's Bench in England were vested in the Bengal High Court. That proposition was held to apply equally to this High Court by Shah J. in *Mahomedalli Allabux Vs. Ismailji Abdulali*, . Those powers were again continued by Section 106, Sub-section (I), of the Government of India Act, 1915, and the powers of superintendence over the Courts subordinate to it were conferred by Section 107. This power of superintendence is held to include the power to revise the orders of Subordinate Courts *Sholapur Municipality v. Tuljaram Krishnasa* ILR (1931) 55 Bom. 544. The corresponding Section 224 of the Government of India Act, 1935, however, contains a new clause which did not find place in Section 107 of the Act of 1915. Sub-section (2) of Section 224 runs as follows:

Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision.

This clause cannot have been intended to curtail any of the powers possessed by the High Courts before the Act of 1935 was passed. In fact Section 223

preserves those powers. All that Sub-section (2) of Section 224 means is that the High Courts cannot so interpret Sub-section (1) of that section as to usurp the powers "which they did not possess before. This is clear from the expression "not otherwise subject to appeal or revision". It is true that this clause may throw some doubt as to whether the remarks made in *Sholapur Municipality Mire v. Tuljaram Krishnasa* that though an order of a subordinate Court may not be subject to revision u/s 115 of the Civil Procedure Code, it can be revised in the exercise of the powers of superintendence conferred by Section 107 of the Government of India Act of 1915, can now hold good. All this discussion is more or less academical, since Section 224 of the Government of India Act of 1935 deals with the administrative functions of the High Courts, as the marginal note shows. It does not affect the powers conferred upon the High Courts by the Letters Patent and the Charter Act, powers co-extensive with those of the King's Bench in England, and, as I have already pointed out, the Court of the King's Bench has¹ power to issue a writ of certiorari in respect not only of the orders of subordinate Courts, but also of the proceedings of any tribunal or officer who, though not a Court, is yet acting judicially in those proceedings. It is not disputed that, although the Chief Judge of the Small Causes Court, Bombay, hearing an appeal u/s 217 of the City of Bombay Municipal Act, 1888, be not a Court, his decision is a judicial act, and if he acts without jurisdiction or in excess of his legal authority, his act can be controlled by this Court by a writ of prohibition or certiorari, as the case may be. It is no doubt true that Sub-section (1) of Section 219 of the Act provides that the decision of the Chief Judge upon any appeal u/s 217 against any such value or tax shall be final. But that only means that there are no further appeals, but it does not affect the power of this Court to issue a writ of certiorari. The Privy Council had to consider the effect of the insertion of such words in enactments in relation to the remedy by way of a writ of certiorari in *Rex v. Nat Bell Liquors, Ltd.*[1922] 2 A.C. 128 and their Lordships observe as follows (pp. 159-160):

Long before Jervis's Acts statutes had been passed which created an inferior Court, and declared its decisions to be "final" and "without appeal", and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by certiorari.

As remarked in Halsbury's Laws of England, 2nd Edn., Vol. IX, p. 861, para. 1455:

Certiorari can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be "finally determined" in the inferior court, nor by a proviso that "no other Court shall intermeddle" with regard to certain matters as to which jurisdiction is conferred on the inferior court.

9. It is thus clear that if the power to issue a writ of certiorari is vested in the High Court, then it is not, and cannot be, taken away by Section 219 of the City

of Bombay Municipal Act, 1888. We, therefore, hold that we have power to issue a writ of certiorari if a proper case is made out.

10. Having come to this conclusion, the next question that arises is whether the case before us justifies the issue of such a writ. The two objections which have been raised against the order of the learned Chief Judge of the Small Causes Court, Bombay, are that it is opposed to the principle of *res judicata*, and that the provisions of Sub-section (2) of Section 154 of the City of Bombay Municipal Act, 1888, have been misinterpreted. Mr. Thakor, the learned Counsel for the petitioners, did not seriously press the first objection as an adequate ground for the issue of a writ of certiorari. Even in an application for revision u/s 115 of the Civil Procedure Code, an erroneous decision on the question of *res judicata* is not regarded as sufficient to justify interference *Hari Bhikaji v. Naro Vishvanath* ILR (1885) 9 Bom. 432. It is, therefore, not necessary to consider whether the learned Chief Judge was bound by the decision given in another case by his predecessor, Mr. Chitre. Mr. Chitre was dealing with the rateable valuation of a different building and for a different year, and, although the learned Chief Judge might have taken into consideration the reasons given by Mr. Chitre in arriving at his conclusion, he was not bound to accept and follow his reasoning, and his refusal to do so cannot be regarded as a ground for issuing a writ of certiorari. The limits within which such a writ can be issued are clearly set out by Atkin L.J. in *Rex v. Electricity Commissioners : London Electricity Joint Committee Co.* (1920), Ex parte [1924] 1 K.B. 171 to which I have already referred, as follows (p. 205):

Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

This passage was quoted with approval by Lord Hewart C.J. in *Rex v. Minister of Health : Davis*, Ex parte [1929] 1 K.B. 619.

11. The law is summarized in Ryde's Law and Practice of Rating, 6th edn., at p. 702, thus:

If the court of quarter sessions refuses to exercise jurisdiction when it has it, the King's Bench will by mandamus compel that Court to hear and determine the appeal. And if the quarter sessions exercise powers in excess of their jurisdiction, or where they have none, the King's Bench will bring up the proceedings by a writ of certiorari and quash them for "there is inherent in the Court of King's Bench authority to bring before it by writ of certiorari, save where the writ is taken away by statutory enactment or charter, the proceedings of any Court of inferior jurisdiction, with a view to quash such proceedings. But this applies only where there is some defect of jurisdiction, or informality or defect apparent on the face of the proceedings." If the sessions have jurisdiction to hear an appeal and do so, but decide wrongly, the King's Bench will not interfere either by

mandamus or certiorari.

Thus, there are two conditions to be fulfilled before a writ can be issued, namely, that the tribunal or officer whose act is complained of must be acting judicially, and that the act complained of must be without jurisdiction or in excess of the legal authority of that tribunal or officer. An officer or tribunal having jurisdiction to decide a question cannot be said to have acted in excess of the legal authority if the decision happens to be wrong. This aspect has been fully discussed by Lord Sumner in *Rex v. Nat Bell Liquors, Ltd* [1922] A.C. 128. In that case it was held that a conviction by a Magistrate for a non-indictable offence cannot be quashed on certiorari on the ground that the depositions showed that there was no evidence to support the conviction, or that the Magistrate had misdirected himself in considering the evidence; and it was held that absence of evidence did not affect the jurisdiction of the Magistrate to try the charge. In the course of his judgment his Lordship observed (p. 151):

A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not.

Similarly, the Chief Judge of the Small Causes Court, Bombay, in this case, may have wrongfully interpreted Sub-section (2) of Section 154 of the City of Bombay Municipal Act and arrived at an erroneous conclusion; but in doing so, he was acting within his jurisdiction and not in excess of the powers conferred upon him by Section 217 of the Act. Mr. Thakor relied upon the ruling in *Nundo Lal Bose v. The Corporation for the Town of Calcutta* ILR (1885) Cal. 275 which was a case under the Bengal Municipal Act of 1876. In that case the Commissioners had based the rateable valuation of the buildings on a percentage of the estimated cost of the buildings in entire disregard of the principle laid down in the Act, namely, that it should be based on the gross annual rent at which any such house or land might reasonably be expected to let from, year to year. In issuing a writ of certiorari Garth C.J. observed (p. 281):

In this it seems to me they acted beyond their powers. They had no right whatever to make the assessment upon any other basis than that which the Act prescribes. The principle upon which they ascertained the annual value of the premises appears to me to have been obviously fallacious ; but whether it was so or not, it was an arbitrary test, and one which the law does not sanction.

12. Thus the method followed by the Commissioners in Calcutta in assessing the rateable value of the buildings was not warranted by the Bengal Municipal Act, and, in adopting some other method, they were held to be acting beyond their powers, But in this case the learned Chief Judge of the Small Causes Court has interpreted Sub-section (2) of Section 154 of the City of Bombay Municipal Act, and fixed the rateable value of the petitioners' buildings according to the

provisions of the Act in the light of his own interpretation. He had the power to interpret the sections of the Act, and if his interpretation be not correct, it does not justify the issue of a writ of certiorari.

13. It is argued that having held the lifts and the pump to be "mainly or partly machinery", the learned Chief Judge acted beyond his legal authority in including them in fixing the rateable value of the buildings. But that is not what he has actually done. In the previous appeal, Mr. Chitre had ordered the lifts and the pump to be separately valued and the value to be deducted from the rateable value of the buildings. Unfortunately, the wording of Sub-section (2) of Section 154 of the City of Bombay Municipal Act is unhappy, and the word "value" used at the beginning of the sub-section seems to have been intended to mean the rateable value. Even then the sub-section does not require that such value of machinery should be deducted from the rateable value of the buildings. What the sub-section says is that the value of the machinery "shall not be included in the rateable value of such building or land." Even assuming that the lifts and the pump are machinery attached to the building, it is difficult to see how their value is not to be included in the rateable value of the building or land, as they are amenities attached to the building for the convenience of the occupants. Sub-section (2) of Section 154 requires a Commissioner to find out the amount of the annual rent for which the building might reasonably be expected to let from year to year, and it is difficult to see how the annual rent can be estimated if the lift is altogether left out of consideration. That is what the learned Chief Judge has said in his judgment. He says:

In taking the rents reasonably expected to be received as the basis for assessment the cost of the lift as such has nowhere been, in fact included, and I do not see that such a basis offends in any way against the provisions of Section 154.

14. He is right in saying that no deduction can be allowed from the annual rent of the building under Sub-section (2) of Section 154 as Sub-section (2) does not provide for such a deduction ; but the learned Chief Judge has specifically stated that in assessing the reasonable rent of the building the cost of the lift has not been included. He was, therefore, acting within his jurisdiction, and we do not think that he has exceeded the legal authority vested in him by Section 154. This case is, therefore, not fit for the issue of a writ of certiorari.

15. In this view of the case it is not necessary to go into the question whether the interpretation placed upon Sub-section (2) of Section 154 of the City of Bombay Municipal Act by the learned Chief Judge is or is not correct. Unfortunately, that sub-section has been a source of fruitful litigation for several years past, and different Chief Judges have come to different conclusions in the light of their own interpretation of that sub-section. In Municipal Appeals Nos. M| 8 and M|9 of 1922 the learned Chief Judge held that the value of lifts and pumps was not to be excluded from the rateable value of the building u/s 154, Sub-section (2), of the Act. In Municipal Appeal No. M46 of 1936, Mr. Chitre took the

opposite view, and now in this case Mr. Indranarayan has gone back to the view taken in 1922. In *Haji Dawood Haji Elias Vs. The Municipal Commissioner for the City of Bombay*, electric fittings and fans were held not to have been shown to be "machinery" within the meaning of Section 154, Sub-section (2), of the Act. All this divergence of views is due to the unhappy wording of that sub-section, and to the fact that in 1888, when the City of Bombay Municipal Act was passed, it could not have been in the contemplation of the legislators that a machinery like an electric lift would be a necessary amenity for a storied residential building. Even in England, prior to the passing of the Rating and Valuation Act of 1925, there had been a sharp controversy as to the inclusion in the valuation of machinery and plant and the extent to which the valuation was to be effected. The Act of 1925 has now made it clear in Section 24 that in the valuation of hereditaments containing machinery and plant no account shall be taken of such machinery or plant except those mentioned in Schedule III to the Act. That Schedule includes, inter alia, lifts and elevators mainly or usually used by passengers. Section 154, Sub-section (2), of the City of Bombay Municipal Act, provides for the exclusion of "machinery" in the fixing of the rateable value of a building, without making any such exception. If it be intended that the value of such machinery as lifts and pumps should not be excluded from consideration, then the legislature must make it clean by suitably amending the sub-section and adding a schedule of exceptions as in the English Rating and Valuation Act of 1925. If the sub-section, as it stands, be strictly construed, it would lead to an absurd result as painted out in the judgment of the learned Chief Judge. According to the accepted canons of interpretation of statutes, a fiscal enactment imposing a burden on the subject will be strictly construed in favour of such subject, and hence the sooner the sub-section is amended so as to convey clearly what is really meant, the better it will be for the public and the Corporation. We do not, however, feel called upon to express our considered opinion regarding the correct interpretation of the sub-section, since, even if the order complained of be not correct, we hold that this is not a case in which a writ of certiorari should be issued.

16. On these grounds we discharge the rule with costs.

Macklin, J.

17. I agree not only that this Court has power to issue a writ of certiorari in suitable cases, but also that an order passed by a persona designata like the Chief Judge will be a suitable case if it can be shown that the learned Chief Judge has in any way exceeded his jurisdiction. But I agree with the reasons given by my learned brother in thinking that he has not exceeded his jurisdiction, and that it is not open to us to interfere with his order, whether that order be right or wrong. On that view of the case, it is not necessary for us to decide whether his order is right or wrong; and, speaking for myself, I am glad that it is not necessary for us to decide that point, since it would involve an interpretation of the very difficult language used in Sub-section (2) of Section

154 of the City of Bombay Municipal Act, 1888. To my mind, there are no less than three difficulties in that section. The word "value" (in the expression "value of any machinery") is capable of meaning either the capital value or the annual value. The word "machinery" may be intended to be used as it is used in ordinary parlance, or it may have some special meaning as it has in the English Rating Act. And, lastly, the words "shall not be included in the rateable value" are by no means easy of practical application?at any rate if the section said just the opposite, namely, that the value of the machinery was to be included in the rateable value, I do not quite know how the rating authorities would proceed to set about it. To my mind it is desirable that the point should be made clear since it is likely to be a source of difficulty in future, and it is obviously a point of considerable importance not only to the Municipality but to property owners also. I doubt even if the words as they stand in Sub-section (2) of Section 154 can be interpreted so as to correspond with the definition of "annual letting value" given in Section 3 of the Bombay Municipal Boroughs Act, 1925. It seems to me that it is a matter deserving the serious consideration of the legislature in order that their intention, whatever that really be, may be clearly expressed.

18. Per curiam. Rule discharged with costs. Costs will be on the appellate side scale.