

(1924) 08 BOM CK 0021
In the Bombay High Court

Nur Mahomed Beg Mahomed

APPELLANT

Vs

G. Monteath District Magistrate

RESPONDENT

Date of Decision : 14-08-1924

Acts Referred:

Cantonments (House Accommodation) Act, 1923 — Section 7

Citation : AIR 1925 Bom 162 : (1925) ILR (Bom) 152

Hon'ble Judges : Marten, J;Fawcett, J

Bench : Division Bench

Judgement

Marten, J.—This is an appeal from the judgment of the District, Judge of Poona dismissing the plaintiff's suit for an injunction to restrain the District Magistrate from "evicting him from his bungalow. The matter arises under the Cantonments (House-Accommodation) Act, 1923, which is an Act of the Imperial. Legislature, and is not a Bombay Act as is inaccurately stated in the Memo, of Appeal.

2. Shortly stated, the plaintiff claims that the Cantonment authorities had no jurisdiction to issue a notice u/s 7 of the Act. requiring him to vacate and to execute a lease in favour of the Military Authorities, because u/s 10(c) the house in question is "occupied by the owner," namely, the plaintiff. In the present case two notices were given on the 14th May, Exhibit 25 and Exhibit 26. On June 12, the District Magistrate gave notice in effect that he might be obliged to enforce the surrender of the house u/s 12 of the Act; and on June 14, this suit was filed.

3. So far as the merits of the case are concerned, the matter, turned in the Court below on whether the plaintiff could be said to be in occupation as owner, although he was not actually in residence at the time when the notice was given. It was common ground that he had been in actual residence for the Poona Racing Season of 1923, and had not given up his residence until sometime in October 1923. It was further common ground that he actually lived in the house for a day or two in April and May 1924, and it was alleged by the plaintiff that extensive repairs to the house had been made by him during or up to those months.

4. The learned District Judge decided first of all on issue No. 1 that the Court had no jurisdiction to entertain the suit because the District Magistrate was protected by Section 38 of the Act from having any suit brought against him inasmuch as he had acted in good faith. Then in an answer to issue No. 2 the learned Judge held that the District Magistrate might be sued just like any other Government official. But that issue of course must not be confused with issue No. 1. The learned Judge was there considering this issue quite irrespective of the effect of Section 38 of the Act. Then when he came to what I will call the merits of the case, viz., issue No. 4, he held that on the true construction of the Act and in the events which had happened the plaintiff was not in occupation of the house when the notice was issued. Accordingly he dismissed the plaintiff's suit with costs.

5. Before us in addition to the point of jurisdiction raised in the Court below, viz., the one u/s 38 of the Act, a further point of jurisdiction has been raised. This is that under Sections 30 and 32 a remedy is provided for an aggrieved owner, viz., to appeal to the Officer Commanding the District, and that the decision on such appeal is directed by the Act to be final and is not to be questioned in any Court on any ground otherwise than on the ground that the house is situate in a Cantonment or part thereof in which the Act is not operative.

6. I prefer to take this second point first, and the fact that it was not taken in the Court below is in my opinion immaterial this being a question of jurisdiction. Now in the first place one has to bear in mind what this particular cantonment actually is. The history and legal position of the Poona Cantonment was considered by their Lordships of the Privy Council in *Kaikhusr Aderji v. Secretary of State* (1911) 36 Bom. 1 and in effect after considering the history of the cantonment they held that the plaintiff in that case was not an owner in the ordinary acceptance of the word, but was merely a licensee. At page 20 Lord Robson in delivering the judgment of the Board said:

These circumstances tend to show that the appellants' predecessors-in-title did not regard the property as differing in its tenure and terms from other property in the cantonment.

Their Lordships are of opinion that the appellants are mere licensees, and that the land in question has been lawfully resumed by the Government, and they will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

7. The result, therefore, is that we must not approach the present question in the way that we would do if the land was not inside a cantonment. In an ordinary case one requires a clear provision to show that an owner in fee simple of land is to be ousted by any outside authority. But if one remembers that this cantonment is primarily a military area, and that the ordinary members of the public are only there as it were on sufferance and subject to the main object of the cantonment, which is for the benefit of the military and for military use, then I think that certain provisions in the Act which might otherwise appear to be

rather harsh, assume quite a different aspect, when one realises what WAS in the mind of the Legislature.. One also has to bear this in mind that the Act we are dealing with is one of 1923 and accordingly was passed by-what may be styled Popular Assemblies. Similarly the Cantonments Act now regulating the Cantonments; generally is not an old Act, but is a recent Act.

8. Turning then to the scheme of the 1923 Act, one finds in Section 3 that the Local Government with the previous sanction of the Governor-General in Council may declare the Act to be operative in any cantonment or part of a cantonment situate within the province-otherwise than within the limits of a Presidency Town. Then Section 5 provides that every house situate in a cantonment is liable to appropriation by the Government on a lease in the manner and subject to the conditions thereafter provided. Next as a result of Sections 6 and 7 if the Commanding Officer of the cantonment is satisfied that the house is required for military occupation and is suitable as such, then he may, with the previous sanction of the Officer Commanding the District, require the owner to execute a lease of the house for a certain period, and require the existing occupier if any to vacate the house. Then there are various provisions which follow on that. Next, Sections 9 and 10 contain certain exceptions in favour, for instance, of hospitals and trade or business premises and so on. One of these exceptions is Section 10(c) which is in effect that no notice shall be issued u/s 7 if the house is occupied "by the owner".

9. Then follow numerous other sections for carrying out the main purpose of appropriation Section 15 gives power to the owner to have the matter referred to a Committee of Arbitration under the Act if he is not satisfied, for instance, with the rent offered him. Then in Chapter IV, Sections"19 to 28, there are provisions for this Committee of Arbitration, and Section 28(3) provides that save as provided in this Act, the decision of a Committee of Arbitration shall be final and shall not be questioned in any Court",

10. Next we come to Chapter V which deals with appeals Section 29 gives a right of appeal from a Committee of Arbitration to the "principal civil Court having ordinary original civil jurisdiction in the cantonment, and the decision of such Court shall be final". Then in Section 30 we have it expressly that the owner...of a house in respect of which a notice has been issued u/s 7 may appeal to the Officer Commanding the District or, if that officer is the Commanding Officer of the cantonment, to the General Officer Commanding-in-Chief, the Command, against the decision of the Commanding Officer of the cantonment to appropriate the house Section 32 provides. that "the decision on any such appeal of the Officer Commanding the District or of the General Officer Commanding-in-Chief, the Command, as the case may be, shall be final, and shall not be questioned in any Court otherwise than on the ground that the house is situate in a cantonment, or part of a cantonment in which this Act is not operative". The proviso to the section expressly enacts that the appellant is to be given a reasonable opportunity of being heard in person or through a legal practitioner.

Then lastly, we get Section 38 Which provides that "No suit or other legal proceeding shall lie against any person for anything, in good faith done, or intended to be done, under this Act or in pursuance of any lawful notice or order issued under this Act".

11. Now the argument of the appellant here is that Section 30 does not apply because the notice u/s 7 was an illegal notice, and consequently Section 30 only applies to legal notices and not to illegal ones. Stopping there for a moment, these are not the words of the Act The words are, tailing them shortly, that the owner may appeal against the decision of the Commanding Officer to appropriate the house. On what particular ground such an appeal may be based, or on what particular ground the original decision to appropriate was made, would appear to be immaterial, if one only takes the mere words of that section. It would be sufficient if there was a decision to appropriate. There would then be a remedy to the owner against this decision of the Commanding Officer of the Cantonment, viz., to appeal to the Officer Commanding the District,

12. This view is, I think, made quite clear by the exception to Section 32; for that exception expressly applies to a case where the objection is that the Louse is situate in a part of the cantonment in which the Act is not operative. Therefore Section 33 contemplates that the notice u/s 7 referred to in Section 30 may itself be an illegal notice because it has been given in respect of a house to which the Act does not apply. In other words, Section 32 contemplates a final decision in all cases u/s 7 whether the notice was a legal notice or an illegal notice, except in the one case where the allegation is that the house is situate in a cantonment or part of a cantonment where the Act is not operative at all.

13. In our opinion, therefore, the plaintiff's proper remedy was the one provided by the Act, viz., to appeal u/s 30, and not to take proceedings in the local civil Court. It was argued on his behalf that the remedy given by the Act was only permissive. It was. urged that the words were "may appeal" not "shall appeal", and that consequently the plaintiff's remedies in, the ordinary civil Courts of the land were not excluded. That argument to my mind is wholly unsound. It has been laid down in India, as well as in England, in many cases that where the Legislature provides a particular remedy for a particular act, then speaking generally an aggrieved person must first follow that remedy before he takes other proceedings. This is specially so when you find particular powers or a particular special jurisdiction conferred or established under certain Acts.

14. Thus in *Bhaishankar v. The Municipal Corporation of Bombay* (1907) 31 Bom. 604, a question arose under the City of Bombay Municipal Act as to whether the High Court had jurisdiction to entertain any suit questioning the decision of the Chief Judge of the Small Cause Court on the validity of a contested election. There Sir Lawrence Jenkins came to the conclusion that the jurisdiction of the Court was impliedly excluded. At p. 609 he said:

But u/s 33 the Chief Judge has jurisdiction to determine the validity of a

contested election, and so ho is the tribunal appointed by the Act for that purpose.

But where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those question is exclusive.

It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any; there is no change of the old order of things; a new order in brought into being.

Here not only is this Chief Judge appointed the tribunal, but it also is expressly provided that his order shall be conclusive, and that every election not called in question in accordance with the provisions of Section 33 shall be deemed to have been to all intents and purposes a good and valid election.

15. No doubt that particular case is distinguishable on the facts, but it is useful for reference on the question of principle. In the present case having regard to the fact that we are dealing with a cantonment, I think we have an area which is subject to extremely special conditions and where the rights of the lay occupants within that area are only those which are given by the Legislature. Accordingly, under all the circumstances I am of opinion that the plaintiff's proper remedy was to appeal u/s 30, and that, not having done so, he cannot bring any suit in the ordinary civil Courts of the land.

16. Under these circumstances it is unnecessary to consider whether this Court would have any and, if so, what power to see that the matter was properly determined by the Commanding Officer of the District u/s 32 of the Act. But in case it should be thought that I am in any way casting any doubts on his powers or suggesting that any interference by this Court on say, a point of law would be easily obtained, I may refer for the general principles governing such interference in England to two cases in the House of Lords, viz., Board of Education v. Rice [1911] A.C. 179 and the observations there of Lord Loreburn at p. 182; and Local Government Board v. Arlidge [1915] A.C. 120 where Lord Haldane at pages 132 and 133 indicated the limited interference which the English Courts in certain cases would make supposing that the Tribunals appointed under the Act declined in effect to carry out the judicial or semi-judicial duties imposed on them by the Act.

17. In the view then which I take this suit must be dismissed on the ground I have already mentioned. Under these circumstances it becomes unnecessary for this Court to give a definite decision on the other point of jurisdiction, viz., u/s 38, as to whether the District Magistrate would in any event be protected inasmuch as his acts were admittedly done in good faith. This raises a question on the construction of the Act which has given rise to considerable argument,

and personally I do not propose to give any opinion on it. But it must not be understood that in deciding this case on the first ground, I necessarily imply that the judgment of the learned trial Judge could not also be sustained on the second ground of jurisdiction.

18. Then there is one further point which I may briefly mention, and that is the question of the merits of the suit. Naturally as we have only heard counsel on the question of jurisdiction, the merits of the case have not been gone into. But it is only, I think, fair to the Military Authorities to point out that there is in evidence in this suit a letter from the plaintiff, dated May 27, 1920. Exhibit 34, in which the plaintiff, when he obtained the sanction of the Military Authorities to the transfer to himself of the suit property, stated as follows: I undertake that the bungalow will always be available for occupation by a military officer on duty in the station, and that if so required, I will not, as owner, claim to reside in it.

19. It was strongly contended by Sir Chimanlal Setalvad for the plaintiff that no issue was raised on this letter, and that various defences or answers might have been made to it in the Court below, if any such issue had been raised. But this letter is in evidence, and if we had to go into the merits of the case, the matter of this letter would have to be considered along with the other points urged on his behalf by counsel for the plaintiff. After all he is seeking an equitable remedy, viz., an injunction. But injunctions are not usually granted to assist a man in breaking his own written undertaking. He who seeks equity must do equity.

20. In the result, therefore, we arrive at the same conclusion as the learned District Judge did, though on different grounds. Accordingly the appeal will be dismissed with costs. The interim injunction granted by myself on July 12 will be dissolved. On that occasion the appellant's solicitors gave the usual undertaking in damages as on the Original Side. That is contained in Rule 329 of the Rules of the High Court on the Original Side which runs as follows:

A party to whom an interim injunction has been granted shall, before it is issued, unless the Judge otherwise directs, give an undertaking in writing, or through his advocate, to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such injunction.

21. Accordingly in the event of the parties being unable to agree on the amount of damages payable under this undertaking, the point in dispute will be determined by the District Judge, and we will refer that back to him accordingly. The costs will of course include the costs of the Rule for interim injunction. The premises to be vacated within seven days peremptorily from today.

Fawcett, J.

22. My learned brother has dealt so clearly and fully with the main question before us that I have little to add.

23. The plaintiff is no doubt the owner of the house in suit. But as already

pointed out by my learned brother the conditions surrounding that ownership are very different to those of an ordinary ownership of a house in a town or village. The learned Counsel for the appellant in the course of his argument contended that the observations of Sir Lawrence Jenkins in *Bhaishankar v. The Municipal Corporation of Bombay* (1907) 31 Bom. 604 would not apply in the present instance, because the plaintiff's right to remain in undisturbed possession or occupation of his house was not a right which is a creation of the particular Act under consideration, viz., the Cantonments (House-Accommodation) Act, 1923, and that therefore the rule about the ouster of the jurisdiction of the ordinary Courts, which is discussed in that case, does not apply to him, and that his right is one entirely outside the Act. I think that contention is clearly erroneous. First of all, taking the Act as it stands, its main provision is the general statement contained in Section 5 of the liability of every house in a cantonment or part of a cantonment, to which the Act applies, to appropriation in the manner and subject to the conditions mentioned in the Act. The right of the plaintiff, if any, to exemption from that particular liability is one which is created by the Act itself in Section 10, Sub-clause (c), and so far as he has a right to get out of the liability, it is one which is expressly created by the Statute.

24. Apart from this, I happen to know a good deal about the old Cantonment Regulations, especially those applicable to the Poona Cantonment, and about the history of the legislation on this subject which started, with the Cantonments (House-Accommodation) Act of 1902. In connection with the litigation which resulted in the decision of the Privy Council in *Kaikhusr Aderji v. Secretary of State* (1911) 36 Bom. 1 I had as Remembrancer of Legal Affairs to go a great deal into questions of this kind. Consequently I know that the old regulations, which applied to the Poona Cantonment among others in the Bombay Presidency from very early days, contained a provision under which houses in the cantonment were subject to a liability of the same kind as that now provided for in this Act of 1923. I may refer in this connection to the recitals which are contained in the preamble to Act II of 1902. This runs as follows:

Whereas various conditions, rules, regulations and orders have from time to time been laid down by, or by the authority of, the Government in regard to the grant of land and the occupation of land and houses in cantonments, with the object of securing, amongst other things, that houses built on such land should be made available when required for the accommodation of military officers; And whereas, notwithstanding the said conditions, rules, regulations and orders, difficulties have frequently been experienced in obtaining house-accommodation in cantonments for military officers, and it is expedient to make better provision for that purpose; It is hereby enacted as follows:

25. I am also aware that in these old regulations there was no exception in favour of the owner of a bungalow, such as is now contained in Section 10 of the Act of 1923. This exception was first enacted in the corresponding Section 11 of 1902. That was a special privilege given to the owner for the first time.

Previously to that, all that the owner of a house could ask for was that his house should be bought under an option of the kind mentioned in Section 14 of the Act of 1902 and Section 13(1) of the Act of 1923. Therefore I entirely deny that the plaintiff's right is one which is not a creation of the Statute under consideration. I also think that, as my learned brother has pointed out, Section 32 is conclusive against the contention that an appeal u/s 30 lies only with regard to subsidiary questions such as the suitability of the house for occupation by a military officer or a military mess, and the necessity for enforcing the liability, and that Section 30 does not apply to a case where the legality of the notice is disputed.

26. I agree, therefore, that the rule to which my learned brother has referred, clearly applies in the present case, and that accordingly the civil Courts have no jurisdiction to grant the injunction which the plaintiff seeks in this suit. It is obvious that the plaintiff cannot, merely by his omission to appeal, be in a better position than if he had appealed and got a decision against him under Chapter V of the Act of 1923.

27. In regard to the other question u/s 38, I think (without deciding the question) that there is considerable force in the contention of the learned Advocate General that the District Magistrate (the defendant in this case) is protected under the first part of that section, so long as his threat was made in good faith, and that it is not necessary to show that the notice or order was a "lawful" one, inasmuch as his authority to enforce the surrender of the house is conferred upon him by the direct enactment in Section 12 of the Act, and is not merely derived from a notice or order issued u/s 7 of the Act. I am inclined to think, without deciding the point, that the second part of the section about acts "in pursuance of any lawful notice or order" is intended to apply to cases where the only authority for a person's action is such notice or order, e.g., if he does something that he is required to do by a notice, or if he, being a person not directly authorised under the Act to carry out a notice, does so in pursuance of an order from the Military Authorities. But Section 12 gives direct authority to the District Magistrate, or his nominees, to enforce the surrender of the house on the occupier failing to vacate in pursuance of a notice issued u/s 7. If it was intended that the District Magistrate should only be protected, when there is no possible question as to the legality of the notice, it would have been easy to insert the word "lawful." before "notice" in Section 12; and it seems to me improbable that the Legislature intended that the District Magistrate, in exercising his powers u/s 12, should only be protected, if the notice is shown to be not open to any doubt as to its legality. However, it is not necessary to decide this point, and I agree with my learned brother that it should be left open for subsequent decision, if that may be found necessary.

28. I concur in the orders proposed by my learned brother.