

**(1979) 08 OHC CK 0015**  
**In the Orissa High Court**  
**Case No : Second Appeal No. 278 of 1977**

Shyam Sundar Das

APPELLANT

Vs

Municipal Council, Baripada and Another

RESPONDENT

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**Date of Decision :** 06-08-1979

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 102  
Orissa Municipal Act, 1950 — Section 344  
Provincial Small Cause Courts Act, 1887 — Section 15(1)

**Citation :** AIR 1980 Ori 145 : (1979) 48 CLT 471

**Hon'ble Judges :** J.K. Mohanty, J

**Bench :** Single Bench

**Advocate :** R. Ch. Mohanty and B. Ch. Mohanty, for the Appellant; S.C. Mohapatra, for the Respondent

**Final Decision :** Allowed

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## Judgement

J.K. Mohanty, J.—This is a plaintiff's appeal arising out of a suit for recovery of compensation for damages suffered by the act of the defendants.

2. Plaintiff-appellant is the owner of plot No. 3290, in khata No. 1101/3/318 in Ward No. 9 of Baripada Municipal area. Close to the west of his site, his brother had constructed a building in or about the year 1960. The plaintiff had got a plan for construction of a building sanctioned by the Executive Officer on 14-10-1974, vide Ext. 3. He had already constructed boundary walls on three sides of his site and was constructing the boundary wall to the western side before starting the construction of his building. On 1-3-75, at about 2.50 p. m. a notice was served by the Municipality through the Executive Officer to stop the work of the compound wall. By then the plaintiff had already raised the wall to a height of four feet. Again on that day at about 5.00 p. m. another notice was served on him under the signature of the Executive Officer, Baripada Municipality to demolish the said compound wall within 24 hours, but before completion of 24 hours, at about 10.00 a. m. on 2-3-75, the Executive Officer with his staff

demolished the wall which was 60 feet in length, 4 feet in height and 15 inches thick. So the plaintiff filed the suit for recovery of Rupees 750/- --Rs. 500/- for demolition of the compound wall and Rs. 250/- for mental agony caused by the defendants.

The case of the defendants is that under the Municipal Act and Rules and also according to the plan and sanction order, the plaintiff was required to leave three feet space in between his site and the site of his brother, but without leaving such space, the plaintiff went on constructing his building which was reported to the Chairman of the Municipality on 27-2-1975, for which the Chairman visited the spot and verbally instructed the plaintiff not to proceed with the construction. In spite of such instruction, the plaintiff proceeded with the construction. So a notice was served on him to stop the construction, but when he did not care and proceeded with the construction, another notice was issued to demolish the said construction. Since the plaintiff did not do so, the Executive Officer was directed to demolish the construction and, in fact, he did so. The defendants further stated that the wall said to be a compound wall was not a compound wall, but was a wall of a room. They have further claimed that the action of the Chairman and of the Executive Officer of the Municipality was legal and valid and the plaintiff was not entitled to any damages.

3. The learned Munsif, Baripada, who heard the suit, decreed the suit in part and directed the defendant No. 1 to pay Rs. 500/- to the plaintiff towards compensation, but disallowed the claim of the plaintiff for Rs. 350/- towards mental agony. Against the judgment and decree of the learned Munsif, the defendants filed an appeal before the Subordinate Judge, Baripada, who allowed the appeal and set aside the judgment and decree of the learned trial court. Along with this appeal, plaintiff, appellant also filed Civil Revision No. 5/78 before this Court for abundant caution, which was dismissed as withdrawn.

4. At the time of admission of the second appeal, this Court was satisfied that the case involved a substantial question of law, namely, as to whether the said construction can be said to be in violation of the provisions contained in Rule 534-E of the Orissa Municipal Rules, 1953, and in the event it is held to be so whether the Municipality had still power to demolish the said construction in exercise of its power u/s 344 of the Orissa Municipal Act, and admitted the appeal. There was a further order that the question of maintainability shall be considered at the time of hearing.

5. Mr. Mohapatra, learned counsel appearing for the respondents, raised a preliminary objection that this appeal is not maintainable. His contention is that as the damages claimed were to the extent of Rs. 750/- and the suit was one of the nature cognizable by the Court of Small Causes, no second appeal would lie in view of Section 102 Civil P. C. In my view, such an argument is untenable. Section 15(1) of the Small Cause Courts Act provides.

"A Court of Small Causes shall not take cognizance of the suits specified in the

second schedule as suits excepted from the cognizance of a Court of Small Causes",

Clause 35 (j) of the second schedule which is quoted below for reference is relevant for the purpose of this case:

"35. a suit for compensation --

XXX XXX XXX (j) for illegal, improper or excessive distress, attachment or search, or for trespass committed in, or damage caused by, the illegal or improper execution of any distress, search or legal process."

The present suit has been filed by the plaintiff for compensation for damage caused by illegal execution of a legal; process. In this case the plaintiff has claimed compensation on the allegation that he suffered damage because of illegal execution of the legal process. As the suit is not cognizable by a Court of Small Causes, in my view, it has been rightly instituted by the plaintiff in the court of the Munsif. Therefore, the second appeal is maintainable and the preliminary objection raised by Mr. Mohapatra fails. The above view finds support from a decision reported in Town Area Committee and Others Vs. Prabhu Dayal and Another, .

6. Coming to the merits of the case, it is evident that the lower appellate court has completely misdirected itself. The claim was on the basis of damage caused to the plaintiff by an act of the defendants. The plaintiff can only succeed if he proves to have suffered injury because of an illegal act of defendants and not otherwise. In this case the following facts, as concurrently found by both the courts below, are not disputed.

(1) That the wall which was constructed by the plaintiff and was demolished by the defendants was a boundary wall.

(2) That no permission is necessary for construction of a boundary wall, (not exceeding 10 feet in height), And,

(3) That the construction of the wall was demolished before the expiry of the time (24 hours) given in the notice, vide Ext. 2.

7. Mr. Mohanty, learned counsel appearing for the appellant, assailed the following finding of the learned appellate court which is quoted below:--

"Power u/s 344 of the Act has been exercised by the Chairman. The plaintiff did not deserve 24 hours time or any time because as already found, in spite of the notice and the notice to demolish, not only he did not stop construction, but went on constructing the boundary wall. Thus, any time that would have been given to him, would have been meaningless and the Municipality had to bear further loss in demolishing the construction and the plaintiff also would have been put to further loss if such demolition would have taken place after full construction and the construction would have been completed soon, the way and manner in which the plaintiff was progressing. Thus, in any view of the matter, no damages could

be awarded against the defendants".

According to him, the above finding is absolutely illegal and against the provisions of the Municipal Act and Rules. He further argues that Section 273-A of the Orissa Municipal Act, 1950, has no application to this case as for construction of a compound wall no permission of the Municipal authorities is necessary; that the powers conferred u/s 344 of the Orissa Municipal Act has no application to this case and even assuming that Section 344 of the said Act is applicable, demolition before the expiry of the time given is illegal; that Rule 534-E of the Orissa Municipal Rules has no application to this case; and that the rule only requires that three feet space should be left from the building, but it is not the case of the defendants that the plaintiff has not left three feet space from the building.

In reply, Mr. Mohapatra submitted that Section 273-A of the Orissa Municipal Act has application to this case and the demolition has been done after due service of notice; that assuming that Section 273-A has no application, Section 344 of the Orissa Municipal Act applies to this case; that a request was made to the plaintiff by the Chairman not to proceed with the construction and the plaintiff agreed to do so, but in spite of this, he having proceeded with the construction, the Municipal authorities were bound to demolish the same; that the Executive Officer has acted in good faith; and that in view of Section 349 (4) of the Orissa Municipal Act, no suit is maintainable.

8. The contention of Mr. Mohapatra that Section 273-A of the Act has application has no merit as admittedly the plaintiff was constructing the boundary wall, but not a building. Section 273-A applies for unlawful construction of a building. The learned appellate court has also found that Section 273-A of the Act has no application. If Section 273-A has application, the defendants will be put to a very disadvantageous position as in Clause (2) of Section 273-A the Executive Officer was to serve a copy of the provisional order made under subsection (1) on the owner of the building together with a notice requiring him to show cause within a reasonable time to be mentioned in such notice why the order shall not be confirmed. Section 273-A (2) of the Act says that a person against whom the action is being taken should be given a chance to show cause within a reasonable time and before that no action should be taken. Coming to the next argument that Section 344 has application to this case it may be convenient to quote the section which is as follows:--

"344. Time for complying with notice, order, and power to enforce in default:--  
(1) Whenever by any notice, requisition or order under this Act, or under any rule or regulation or by-law made under it any person is required to execute any work or to take any measures or do anything, a reasonable time shall be named in such notice, requisition or order within which the work shall be executed, the measures taken or the thing done.

(2) If such notice, requisition or order is not complied with within the time so

named, the Chairman of the Municipal Council concerned may cause such work to be executed or may take any measure or do anything which may, in his opinion, be necessary for giving due effect to the notice, requisition or order aforesaid.

XXX XXX XXX

Section 344 provides that reasonable time shall be named in such notice and subsection (2) of that section provides that if such notice, requisition or order is not complied with within the time so named, the Chairman of the Municipal Council concerned may cause such work to be executed or may take any measures or do anything which may be necessary for giving due effect to the notice, requisition or order. In this case, as it is seen from Exts. 1 & 2, no section has been mentioned in the notice. Assuming that Ext. 2 was a notice u/s 344 of the Act, demolition was made by the Executive Officer under the direction of the Chairman, The action having been taken before expiry of the time of 24 hours given, in the notice, the Executive Officer acted illegally in demolishing the construction. The object of giving reasonable time is to enable the person against whom the action is being taken to approach the competent authorities and to satisfy them that the construction has been done not in violation of any of the provisions of the Orissa Municipal Act or Rules etc. So in view of the fact that the demolition was effected before the expiry of the time provided in Ext. 2, the action of the defendants is thoroughly illegal and without jurisdiction. The argument that the action of the Executive Officer is bona fide and as such no suit will lie is also not tenable. The plaintiff has come to this Court for claiming compensation as he suffered injury due to the act of the defendants and it having been proved that the action of the defendants is illegal, in my view, the plaintiff is entitled to compensation.

9. Considering the facts and circumstances of the case and the arguments of both sides, I am of the view that the plaintiff is entitled to compensation of Rs. 333/- as has been found by the appellate court instead of Rs. 500/- found by the trial court

10. In the result, therefore, the judgment and decree of the lower appellate court is set aside and that of the trial court is restored subject to the modification that the plaintiff would be entitled to compensation of Rs. 333/- instead of Rs. 500/-. In the circumstances, parties to bear their own costs.