

(1982) 12 CAL CK 0031
In the Calcutta High Court
Case No : C.O. No. 2577 of 1982

Trustees For The Improvement of Calcutta	APPELLANT
Vs	
Shyamal Ghosh	RESPONDENT

Date of Decision : 07-12-1982

Acts Referred:

Bengal Municipal Act, 1932 — Section 535
Calcutta Improvement Act, 1911 — Section 156
Civil Procedure Code, 1908 (CPC) — Section 115, 80

Citation : (1982) 12 CAL CK 0031

Hon'ble Judges : Chittatosh Mookerjee, J; Amitabha Dutta, J

Bench : Division Bench

Advocate : P.K. Sengupta and Narayan Ch Roy, for the Appellant; B.N. Chakraborty Thakur and Dilip Kumar Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Chittatosh Mookerjee, J.—The plaintiff opposite party has instituted Money Suit No. 499 of 1980 against the defendant petitioner, the Trustees for the Improvement of Calcutta in the City Civil Court at Calcutta, inter-alia, for recovery of a sum of Rs. 26000/-. The plaintiff's case short is that he had entered into a contract with the defendant to execute certain construction works for a total estimated cost of Rs. 61852.90 P. He had deposited a sum of Rs. 1340/- as security towards the said contract. The plaintiff has alleged that he had completed the said works by early July, 1980. Against his dues he had drawn from the defendant a sum of Rs. 43711.57 P. Another sum of Rs. 6400/- although sanctioned for payment was not actually paid to the plaintiff. The plaintiff has claimed recovery of the balance sum of Rs. 11388/- and also the above sum of Rs. 6400/-. The plaintiff also claimed Rs. 6000/- as damages as the loss suffered by him for allegedly keeping his men and material idle because of the laches on the part of the defendant and its officers. He has claimed another sum of Rs. 1300/- for alleged additional works done. The plaintiff in the schedule of his plaint has given particulars of the total due of Rs. 26000/-

claimed by him. The defendant. Trustees, are contesting the said suit. They had denied, inter-alia, the claim of the plaintiff to recover the aforesaid sum. One of their defences is that the suit is barred u/s 156 of the Calcutta Improvement Act, 1911. The learned Judge, 6th Bench, City Civil Court, Calcutta has answered in favour of the plaintiff the Issue No. 2 framed by him by holding that the suit is not barred by section 156 of the Calcutta Improvement Act. Being aggrieved thereby, the defendant, Trustees, have filed this Revisional Application which has been heard with notice to the plaintiff opposite party. The Revisional Application is not hit by proviso to sub-section (1) of section 115 of the Code because if the order deciding the Issue No. 2 had been made in favour of the defendant, who has applied for revision, same would have disposed of the suit. We, however, held that the learned Judge of the court below did not commit any jurisdictional error in deciding that the suit was not barred by section 156 of the Calcutta Improvement Act, 1911.

2. Section 156 of the Calcutta Improvement Act, 1911 reads as follows :

No suit shall be maintainable against the Board, or any Trustee, or any officer or servant of the Board, or any person acting under the direction of the Board or of the Chairman or any officer or servant of the Board, in respect of any act purporting to be done under this Act or any rule made there under, until the expiration of one month next after written notice has been delivered or left at the Board's office or the place of abode of such officer, servant or person, stating the cause of action, the name and relief which he claims and the plaint must contain a statement that such notice has been so delivered or left.

3. Section 538 of the Calcutta Municipal Act, 1923 contained almost similar provision for notice of suit. Section 535 of the Bengal Municipal Act 1932 Section 586(1) of the Calcutta Municipal Act, 1951 also, inter-alia, lay down that no suit shall be instituted against the municipality its officers, servants, etc. in respect of any act purported to be done under the Act under any rule or bye-law until expiration of one month next after a written notice had been delivered. Mr. P.K. Sengupta, learned advocate for the petitioner, has correctly submitted that the object of such notices is to give opportunities to the authority concerned to reconsider its legal position and to make amends or settle the claim, if so advised without litigation. We do not propose to deal with the reported decisions on section 80 of the CPC because it is settled law now that such a notice to the Government must be given in all cases whatever the character of the suit may be. A notice u/s 80 of the Code to a public officer is to be given in those cases where the suit is in respect of any act purported to be done by such public officer in his official capacity (see Mulla's Code of Civil Procedure, Vol. I, 13th Edition, Paragraphs 12 and 13, page 264). But section 156 of the Calcutta Improvement Act, 1911 and the aforesaid provisions in the Bengal Municipal Act 1932, Calcutta Municipal Act, 1923 and the Calcutta Municipal Act, 1951 are not of universal application and the said provisions apply to certain kind and not all suits against the authorities mentioned in these provisions.

4. The courts of law have consistently interpreted the expression ""In respect of any act purported to be done under this Act" appearing in various municipal legislations as acts done or purported to be done In pursuance, execution or intended execution of the particular Act. When the plaintiff in a suit against the Municipal Corporation or the public authority alleges acts which are not done or covered by the particular statute or the rules made there under, no notice under the Act in question would be required.

5. No notice would be necessary when the act of the Corporations the authority concerned is alleged to be ultra vires or de hors the particular statute. Further, in case a suit against the Corporation or the authority is in respect of their obligation or liability under the general law of the land, the courts have not generally insisted upon service upon them of notice of suit The ratio of the reported decisions on almost similar provisions for notice in other cases ought to be applied for interpreting section 156 of the Calcutta Improvement Act, 1911. Therefore, no notice u/s 156 of the said Act would be necessary in case the suit does not relate to acts done under the Calcutta Improvement Act, 1911.

6. We may now refer to some of the reported decisions. Asutosh Mookerjee and Cuming, JJ., in the case of Trustees for the Improvement of Calcutta v. Chandra Kanta Ghosh ILR 44 Cal. 219=21 C.W.N. 8=24 C.L.J. 246, at pages 253-254 held that section 156 of the Calcutta Improvement Act did not apply to a suit for a declaration that the defendant, Trustees, had no power to acquire lands in suit and their acts in this behalf were ultra vires and illegal and also for perpetual injunction to restrain the Trustees and their servants and agents from interfering in any way with the plaintiff's possession and enjoyment of the lands in suit.

7. Rankin, C. J., and C. C Ghose, J., in Corporation of Calcutta Vs. Asoke Kumar De, , held that the limitation prescribed by section 538 of the Calcutta Municipal Act, 1923 did not apply to a suit brought by the son of an employee against the Calcutta Corporation for recovery of provident fund dues. In the case of Bando and Co. Ltd. Vs. Corporation of Calcutta, , the plaintiff claimed recovery of money from the Corporation of Calcutta for works done and materials supplied and in respect of retention money and security deposit under the contract and for compensation of loss and Lord Williams, J. held that section 538 of the Calcutta Municipal Act 1923 was not applicable. Upon a review of the decisions both under the English and Indian Law, Lord Williams, J. held that the said suit to enforce the contractual obligations was not for any act which the Corporation could justify under the powers conferred by the Calcutta Municipal Act, 1923 Section 538 of the Act did not apply to suits for money allegedly payable under the contracts for the works done and materials supplied and for compensation for breach of contracts.

8. Gentle, J. in Jatindra Nath pal v. Corporation of Calcutta A. I. R. 1945 Cel. 144, refused to apply section 538 of the Calcutta Municipal Act, 1923 to a suit by a servant of the Corporation of Calcutta for his alleged wrongful dismissal. The learned Judge at page 153 of the reports observed that a notice u/s 538 of the

Calcutta Municipal Act, 1923 would be required when the suit is in respect of an act purported to be done under the statute. According to the learned Judge, it was, therefore contemplated that some suits could be instituted in respect of the acts of the Corporation which are not done under the statute without notice having been given. The restriction in the statute is limited and not universal.

9. We may refer also to the decision of R. C. Mitter, J. in *Nirmal Chandra v. Municipal Commissioners of Pabna* 40 C. W. N. 1353, holding that section 535 of the Bengal Municipal Act did not apply to a suit for injunction and damages in respect of nuisance caused by a defective municipal hackney-carriage stand. Guha and Guha Roy, JJ., in *Ranendra Nath Pal Vs. Commissioners of Dhulian Municipal Office*, had followed the decision of P. N. Mookerjee, J. The Commissioner of Hooghly-Chinsurah Municipality v. Ekkari Ghose 58 C. W. N. 755 and held that section 535 of the Bengal Municipal Act, 1932 did not apply to a suits for money due from a municipality under a contract of work done and materials supplied.

10. The Supreme Court while dealing with similar provisions for notice in various other municipal acts have also held that the said provisions would be inapplicable in cases of acts which are allegedly to be ultra vires or when they have been done not in pursuance of the particular statute (vide *Poona City Municipal Corporation Vs. Dattatraya Nagesh Deodher, Amalgamated Electricity Co. (Belgaum) Ltd. v. Municipal Committee Agmir* AIR 1969 SC 227 *Municipal Corporation of Indore v. Niyamatulla* AIR 1971 SC 97).

11. The instant suit is for recovery of money allegedly due to the plaintiff from the defendant Trustees on account of a certain contract between the two parties and for compensation. The plaintiff has not instituted the instant suit against the Board in respect of any act purported to be under the Calcutta Improvement Act, 1911 and, therefore, no notice u/s 156 of the said Act was necessary. In substance the plaintiff has alleged breach of obligation of the defendant to perform the contract entered into with him. P. N. Mookerjee, J. with reference to nearly similar provisions for notice to the Municipality u/s 535 of the Bengal Municipal Act 1932 in *Commissioners of Hooghly-Chinsura Municipality v. Ekkari Ghose* (supra), held that no notice under the said provision was necessary in a suit instituted against the Commissioners of a Municipality for specific performance of a contract of sale of land. We respectfully agree with the following observations made by the learned Judge at page 756 of the reports :

The obligation, however, to perform the contract rests not upon the Municipal Law, but upon the relevant general law of the land, e.g., the Indian Contract Act, the Transfer of Property Act the Specific Performance Act, etc., and the failure or refusal to perform it would thus be an "illegal omission" or act under the said general law and not an act under or purporting to be done under the Municipal Law. There is also nothing to suggest that the appellants refusal to perform the disputed contract purported to have been made under the Bengal Municipal Act or any rule or bye-law made there under. There is thus no scope here for the

application of section 535 of the said Act.

We, therefore, dismiss this Revisional Application without costs. We express no opinion on the merits of the cases of the respective parties in the pending suit. The learned Judge of the court below is directed to expeditiously dispose of the remaining issues in the suit in accordance with law.