

(1946) 01 BOM CK 0013
In the Bombay High Court
Case No : Second Appeal No. 273 of 1945

Vithoba Babaji Narote

APPELLANT

Vs

Sholapur Municipality

RESPONDENT

Date of Decision : 15-01-1946

Acts Referred:

Bombay Municipal Boroughs Act, 1925 — Section 206
Civil Procedure Code, 1908 (CPC) — Section 80

Citation : AIR 1947 Bom 241 : (1946) 48 BOMLR 804

Hon'ble Judges : Weston, J; Sen, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sen, J.—This was a suit for an injunction brought by three plaintiffs against the Municipal Borough of Sholapur represented by its Chief Officer. The material facts are these. A piece of land, City Survey No. 9022, belonged to the Municipality which had allowed the plaintiffs to occupy the said land for residential purposes, according to the plaintiffs as the Municipality's tenants and according to the Municipality as their licensees. The plaintiffs erected houses on the said piece of land and had been in occupation thereof for ten or twelve years prior to the suit. The Municipality having started a town planning scheme gave notice to them to quit, the notice being dated August 21, 1942, and it being served on August 30. The plaintiffs did not leave the land. The procedure had been for the Municipality to allow the plaintiffs for successive periods of six months to stay on the land, payments being required to be made in respect of such occupation in advance for each period of six months. The plaintiffs applied to the District Magistrate claiming that they came under the provisions of an order made by the District Magistrate on April 80, 1942, under Rule 81(2)(bb) of the Defence of India Rules, 1939, whereby it had been provided, inter alia, that no tenant of any residential accommodation should be evicted if he paid the rent therefor. The District Magistrate replied that the said order did not apply to the plaintiffs. The plaintiffs thereafter applied to the Municipality on April 29, 1943, asking them to

reconsider the matter; and their application also contained a notice to the effect that if the matter was not reconsidered, suits would be filed against the Municipality. Thereafter on June 6, 1943, the Municipality passed a resolution to the effect that the plaintiffs (who were described as permit-holders) were to be evicted in accordance with the notice already given. A reply to the plaintiffs' application of April 29 was given in those terms on the next day, June 7, 1943. The suit was filed on July 1, 1943, wherein the cause of action was stated to have arisen on June 6, 1943. The plaintiffs contended that they were tenants of the Municipality and that as the District Magistrate's order of 1942 applied to them they were not liable to be evicted. The contention of the defendant Municipality was that the plaintiffs were not tenants but licensees of the Municipality and that, therefore, the District Magistrate's order did not apply to them. They further contended that the suit was barred u/s 206 of the Bombay Municipal Boroughs Act, 1925. That section, so far as it is material, is in these terms;

No person shall commence any suit against the municipality for any thing done or purporting to have been done in pursuance of this Act, without giving to such municipality two months' previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act complained of.

The Additional Civil Judge (Junior Division), Sholapur, who tried the suit, held that the plaintiffs were licensees of the Municipality and that, therefore, they were not entitled to the benefit of the District Magistrate's order. He further held that the suit was not barred u/s 206 of the Bombay Municipal Boroughs Act. Accordingly he dismissed the suit. On appeal by the plaintiffs the Assistant Judge, Sholapur, who heard the appeal agreed with the trial Court that the plaintiffs were licensees and, therefore, did not come under the District Magistrate's order. As regards Section 206 he held that if the cause of action was the notice which had been served on the plaintiffs on August 37 1942, though the plaintiffs had given two months' notice of the intended suit, the suit was not filed within six months of the cause of action, or in the words of the section, of the act complained of; and that if the cause of action was taken to be the Municipality's intimation of the resolution of June 6, 1943, two-months' notice had not been given before the suit had been filed and that the suit was, therefore, premature. Accordingly he dismissed the appeal.

2. I shall take the question of the applicability of Section 206 of the Act first. Mr. Moropanth on behalf of the appellants has contended that that section does not apply to the facts of this case as this was not a suit "for anything done or purporting to have been done in pursuance of the Act". According to him the notice given by the Municipality to the plaintiffs in August 1942 constituted no more than a threat to evict the plaintiffs and the Municipality cannot, in giving such a threat, be said to have done anything under the Act or in pursuance of the Act. In support of his contention he has relied on *Virji v. Karachi Municipality* [1920] A. I. R. S 9 *Municipality of Parola v. Lakshmandas Supadubhai* 2 Bom.

L.R. 837 and certain eases in vol. 22 of the ILR Bombay. In the Sind case, "which was decided by a single Judge, it was held that the expression "for anything done or purporting to be done" in Section 167 of the Bombay District Municipal Act, which corresponds to Section 206 of the Bombay Municipal Boroughs Act, indicates that the section applies where something has been done, and not where there is an apprehension only that something will be done, and that a suit, therefore, against a Municipality to restrain an apprehended injury is not bad merely because the notice required by the section was not given, as such notice is not necessary. The decision rested on a number of authorities including *Flower v. Local Board of Low Leyton* (1877) 5 Ch. D. 347; *Municipality of Parola v. Lakshmandas Supadubhai*; *Naginlal Ghunilal v. The Official Assignee, Bombay* 13 Bom. L.R. 900 and *The Secretary of State for India in Council v. Gulam Rami Gyasuan Kuwari* 18 Bom. L.R. 243 the last two cases being decisions on the applicability of Section 80 of the CPC to the facts of those cases. In *Municipality of Parola v. Lahshmandas Supadubhai* the plaintiffs sued a Municipality to obtain a declaration that a certain building erected by them had been built in accordance with, and not in contravention of, orders of the Municipality and to obtain an injunction restraining the Municipality from pulling it down. One of the defences of the Municipality was that no notice had been given of the suit as required by Section 48 of the District Municipal Act, which is in terms similar to those of Section 206 of the Bombay Municipal Boroughs Act. The Bombay cases that were referred to in that decision are *Nagusha v. The Municipality of Sholapur* I.L.R.(1892) 18 Bom. 19; *Kashinath Keshav Joshi v. Gangabal* I.L.R.(1896) 22 Bom. 283 ; *Manohar Ganesh v. Dakor Municipality* I.L.R.(1896) . 22 Bom. 289; *Shidmallappa v. Gokak Municipality* I.L.R.(1897) 22 Bom. 605 and *Harilal v. Himat* I.L.R.(1897) 22 Bom. 636 In *Nagusha v. The Municipality of Sholapur* it had been held that u/s 48 of Bombay Act II of 1884 the mere circumstance that an act done under the Act had rendered" the suit necessary would suffice to bring into operation the provisions of that section requiring notice before suit. This decision was questioned in *Kashinath Keshav Joshi v. Gangabai* and was definitely overruled in the full bench case of *Manohar Ganesh v. Dakor Municipality*, in which, though it was recognised that Section 48 might apply to suits other than suits for damages, it was held that it could not apply to actions of ejectment based on title. It was observed in *Lakshmandas*" case that the result of this case suggested that it was not sufficient that an act done under the statutory powers should have given occasion to the plaintiff to seek redress, but that it was further necessary that the redress sought, i.e., the action itself, should be for the act so done and for nothing further. In *Shidmallappa v, Gokak Municipality* it had been held that a suit for damages for the demolition of a wall by a Municipality in exercise of its statutory powers would require notice u/s 48 of Bombay Act II of 1884, but that to recover possession of the site and to obtain an injunction against interference therewith the plaintiff could sue without notice. In that judgment the ease of *Flower v. The Local Board of Low Leyton* was cited as showing that an injunction is merely ancillary to the ejectment suit in respect of which notice was unnecessary. In *Harilal Banchodlal v. Himat* the suit had

been for an injunction without any prayer for ejectment; and the Court observed that the suit was not for anything done in pursuance of the Act, and that the sections conversant with this subject had always been held not to apply to actions for an injunction. In Lakshmandas's case the principle stated in *Flower v. Local Board of Low Leyton* was particularly relied upon, namely, that the real object of the action was to prevent the continuance of an intolerable nuisance which plaintiff said he had suffered through the acts of the defendants-acts which apparently depended on the exercise of their statutory powers-and that the section (38 & 39 Vic. c. 55, Section 264) requiring notice for anything done or intended to be done or omitted to be done under the provisions of the Act was intended to apply to an action at law for damages, its object being to give an opportunity to a local authority to make payment or tender of compensation for the damage sustained, but that it could not be intended to apply to a case Where the local authority was improperly pulling down a house , for instance, or stopping up a sewer; if that was so, it was argued, it would amount to a license to every local board to do what injury they pleased while the notice was running. Accordingly, it was held in Lakshmandas's case that for the purposes of Section 48 what the Court has to look to was the real object of the suit and that the section required notice only when the suit was for an act already done or purporting to have been already done under the powers conferred. Their Lordships further observed (p. 150) :

It is impossible to hold that a mere notice, a requisition or a threat to do a thing in the future even though it be issued or made under the powers, is an act already done, or purporting to have been done.

Besides the cases in 22 Bombay referred to in this decision it may be useful to refer to two other cases in the same volume. *Patel Panachand Girdfaar v. The Ahmedabad Municipality* I.L.R.(1806) 22 Bom. 280 was a suit for an injunction to restrain a municipality from removing a certain building or construction and the objection as to notice was based, as in the other cases, on Section 48 of the Bombay District Municipal Act, 1884. It was held that a suit for an injunction to restrain a municipality from removing such a construction was not an action for anything done or purporting to have been done in pursuance of the Act within the meaning of Section 48. *Municipality of Faizpur v. Manalc Dulab* I.L.R.(1897) . 22 Bom. 637 was a suit for specific performance of a contract or for damages for breach thereof; and it was held that Section 48 did not apply to such a suit as the Act, though it might give the municipality power to make contracts, did not authorise them to refuse to perform them. It may perhaps be also useful to refer to two other cases in which the point was whether language similar to that used in Section 206 of the Bombay Municipal Boroughs Act to be found in the City of Bombay Municipal Act 1888 applied to certain suits brought against the Bombay Municipality. In *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay* 3 Bom. L.R. 158 the plaintiff sued for the refund of certain town duties which he had paid for importing grain and sugar and of which he claimed that he was entitled to a refund u/s 195 of the City of Bombay Municipal Act, III

of 1888. His claim had been rejected by the Municipality and he filed a suit against the Municipality more than six months after the act complained of. The question before the Court was whether Section 527 of the City of Bombay Municipal Act 1888 applied. That section provided that no suit shall be instituted against the Corporation or against the Commissioner or a Deputy Commissioner or against any Municipal officer or servant in respect of any act done in pursuance or execution or intended execution of the Act, or in respect of any alleged neglect or default in the execution of the Act until the expiration of one month next after notice in writing had been given in the manner prescribed nor unless it was commenced within six months next after the accrual of the cause of action. Jenkins C.J., after referring to the decisions in certain English cases, said. (p. 393) :

The result appears to me to be that the person seeking the protection of the Act cannot claim that his conduct has any relation to the "execution of the Act," if he knowingly and intentionally acts in contravention of its provisions;

and Section 527 was held not to apply, In Vishwanath Sadashiv Natu Vs. The Municipal Corporation of The City of Bombay, the question of the interpretation, of the same section again arose and it was held that in applying the said section of the Act one had to see whether the act complained of had been done pursuant to the direct requirements of the Act, or had been done under some contract which the Corporation had entered into under the powers conferred by the Act but which it had not been compelled to enter into; and as it was found that the wrongful action charged against the Corporation was not an action which was directly required by the statute it was held that Section 527 had no application to the case.

3. Mr. Chitale's answer to the lines of the reasoning in the abovementioned cases, so far as they may, apply to the present case, is that they have been overruled by the decision of the Privy Council in Bhagohand Dagadusa v. Secretary of State for India 29 Bom. L.R. 1227 where a similar question arose regarding the applicability of Section 80 of the Civil Procedure Code, the material words of which are " no suit shall be instituted against the Secretary of State for India in Council, or against a public officer, for any act purporting to be done by such officer in. his official capacity, until the expiration of two months next after notice in writing" given in the manner provided by the section. In that case, owing to rioting in the municipal district of Malegaon the Bombay Government in 1921 made an order under the Bombay District Police Act, 1890, Section 25, for the employment of additional police there, and an order u/s 25A for compensation for damage done, and directed that the expense in both respects should be recovered to a large extent from the Mahomedan weavers, who as a class were responsible for the rioting. By Section 25, sub-s.(4), a tax or rate in respect of additional police had to be recovered by the municipality, and on their default, by the Collector, who u/s 25A had to recover in respect of compensation. It was found impossible to recover from the weavers. Accordingly, by a

notification of June 6, 1923, the Government directed that the sums required for both purposes should be recovered by the Collector from the shopkeepers, who were in a position to pass the charge on to the weavers. The appellants, the shopkeepers affected, sued the Secretary of State, the Collector, and the District Magistrate, claiming a declaration that the notification was invalid and an injunction restraining executive action under it. The suit was instituted less than two months after notice of the intention to bring it. The question arose whether in the absence of compliance with Section 80 of the CPC the suit could not be maintained, either as to the declaration or as to the injunction. Their Lordships found that there had been a marked difference of opinion between the High Court of Bombay, on the one hand, and all the other High Courts in India, on the other, as to the true application of Section 50 of the Civil Procedure Code, 1908, and of Section 424 of the Code of 1882, which it superseded, in the case of suits against officials for acts purporting to be done in discharge of their duties, when part of the whole of the relief claimed was a perpetual injunction. The latter Courts were agreed in deciding that those sections were to be strictly complied with and were applicable to all forms of action and all kinds of relief. In *Secretary of State v. Gajanan Krishnarao Bom.* L.R. 273, *Naginlal Chunilal v. Official Assignee* and *Secretary of State v. Gulam Rasul*, which were suits to restrain by injunction the commission of some official act prejudicial to the plaintiff, it had been held that if the immediate result of the Act would be to inflict irremediable harm, Section 80 did not compel the plaintiff to wait for two months before bringing the suit, though, if nothing was to be apprehended beyond what payment of damages would compensate, the rule was otherwise and the section applied. According to their Lordships what appeared to have influenced the Judges of the Bombay High Court was their assumption as to the practical objects with which Section 80 had been framed and their anxiety not to expose a plaintiff to the risk of the execution of an invalid order without practical redress. The Bombay decisions purported to rest on the authority of certain English cases, particularly *Flower v. Local Board of Low Leyton* and *Attorney General v. Hackney Local Board* (1870) 2 Eq. 626. Those cases had turned on the construction then put on the Public Authorities' Protection Act, 1893, the Metropolis Management Amendment Act and the Public Health Act, 1875, and in *Hackney's* case the words "any act done or intended to be done" under the parliamentary powers had to be construed. In *Flower's* case counsel had hardly contested that an exception of "cases of necessity" must be understood. Their Lordships observed (p. 356):

A view, therefore, about a bill for an injunction "against serious and irreparable damage requiring the intervention of the Court", almost undisputed in the Court of Appeal, would not be any guide to the meaning of the Civil Procedure Code, where the clause applies to all officers of Government and to all their official acts, and where the words "in respect of, " a form going beyond " for anything done or intended to be done " show it to be wider than the statutes on which the English authorities were decided.

They held that Section 80 is express, explicit and mandatory and admits of no implications or exceptions and that it imposes a statutory and unqualified obligation upon the Court. They further observed (p. 357) :

...The contention that the "act purporting to be done by the Collector in his official capacity, in respect of which" the suit was begun, was his threatened enforcement of payment is fallacious also, since the illegality, if any, is in the order for recovery of the tax. If that was valid, there was nothing to be restrained. Hence, though the act to be restrained is something apprehended in the future, the act alone "in respect of which" the suit lies, if at all, is the order already completed and issued.

Mr. Chitale has contended that it has been recognised already by this Court that this decision by the Privy Council has overruled the decisions in ILR 22 Bom on which, Mr. Moropanth has relied. In *Municipal Borough of Dhulia v. Mahomed Isak Abdul Karim* (1934) 87 Bom. L.R. 1027 a suit had been brought against the Borough Municipality for an injunction restraining them from giving effect to a resolution passed by them in the matter of retention of the names of certain persons on the district electoral roll. The plaintiff having omitted to give to the Municipality notice of the suit u/s 206 of the Bombay Municipal Boroughs Act, the Municipality pleaded that the suit was barred. The lower Courts held that the suit was not bad for want of notice u/s 20G for the reason that the Privy Council ruling in *Bhagchand Dagadusa v. Secretary of State for India* did not apply to such a case. The second appeal was heard by N. J. Wadia J. sitting singly. In his judgment he pointed out that in two recent decisions of this Court, *Patel Mathurbhai Barladibhai v. Patel Ambalal Samaldas* (1980) L. P. Appeal No. 14 of 1029, decided by Madgavkar and Barlee JJ., on July 3, 1980" (Unrep.). and *Ganesh Shripad Chitnis v. The Belgaum City Municipality* (1933) S. A. No. 669 of 1930, decided by Murphy J., on September 26 of 1983- (Unrep.), the decision of the Privy Council had been held applicable to suits coming u/s 206 of the Bombay Municipal Boroughs Act and that in the first of those cases Madgavkar and Barlee JJ. had held that the decisions, in *Patel Fanachand v. The Ahmedabad Municipality* and in *Harilal v. Himat*, in so far as they purported to limit the necessity of notice to particular kinds of suits according to the relief claimed, could not now be supported. That decision being binding on the single Judge he decided the case accordingly. It seems to us, with respect, that this must be regarded as the correct view.

4. In the present case, by their notice of August, 1942, the Municipality (a) had purported to terminate their contract with the plaintiffs and (6) had attempted to evict them. It seems to us that as regards the termination of the contract, the Municipality was perfectly within its rights. The terms of the contract with the plaintiffs are to be found in the pavati exhibit 24, one of the terms of which was, "The permit-holder should vacate the site without any objection, whenever the Municipality requires it and without the notice being given to the permit-holder". Section 48(1) of the Act enables the Borough Municipality inter alia to enter into

and perform all such contracts as it may consider necessary or expedient in order to carry into effect the provisions and purposes of the Act. Under Clause (e) of Sub-section (2) of Section 63 all lands transferred to the Municipality by the Crown or otherwise-the land in suit must be such land-are vested in it, and the contract in the present case must be deemed to have been entered into u/s 48(1), and if it was terminated in accordance with one of its terms, the plaintiffs could have no real grievance, The termination of the contract was necessitated, according to the Municipality, because it was going to start town planning operations. Many, if not all, of those operations would mean carrying out duties imposed on the Municipality by Section 68 and the exercise of its discretionary powers u/s 71 of the Act. Thus there can be no doubt that the termination of the contract was done, or at least it purported to be done, in pursuance of the Act. But the notice also amounted to an attempt on the part of the Municipality to evict the plaintiffs, and this attempt the plaintiffs have sought to resist relying on the order of the District Magistrate of 1942. Here, again, there can be no doubt that the Municipality was dealing with property lawfully vested in it when it attempted to evict the plaintiffs. The question, therefore, arises whether the notice of August 1942 and the Municipality's subsequent resolution and the letter to the plaintiffs dated June 7, 1943, should not be regarded as acts done or purporting to be done in pursuance of the Act within the meaning of Section 206 of the Act, acts which according to the plaintiffs' contention were illegal in view of the District Magistrate's order. In *Bhagchand Dagadusa v. Secretary of State for India in Council* the act in respect of which the suit was held to lie was in their Lordships' opinion the Government order or Notification directing that the sums in question should be recovered by the Collector from the shopkeepers of Malegaon, Nothing beyond this had been done, and though their Lordships' decision was not based on the argument that the threatened enforcement of the same was the act that came under g. 80. of the Civil Procedure Code, it was based on the argument that the order of Government did so. The distinction, no doubt, is fine, but it is important to remember that no overt action by the Collector in pursuance of the Government Notification against the shopkeepers had yet been taken. It seems to me that in the present case also, the notice of August 1942, the resolution and the subsequent letter of the Municipality sent to the plaintiffs in June 1943 can be said, within the meaning of Section 206, to be acts done or purporting to be done in pursuance of the Act. It does not seem to me that there is any material difference as to the principle involved between the wordings of Section 80 of the CPC and Section 206 of the Bombay Municipal Boroughs Act which calls for interpretation on the point under consideration. Mr. Moropanth has, however, relied on *S.V. Mandlik v. The Borough Municipality of Jalgaon* (1948) 45 Bom. L.R. 1059 as showing that even after the Privy Council case this Court has held that in certain classes of suits against a Municipality the principle enunciated in *Rhagchand Dagadusa v. Secretary of State for India in Council* does not apply, and he has contended that the decisions of this Court followed in *Mandlik's* case, namely, *Manohar Ganesh Tambekar v. The Dakor Municipality*, *Ranchordas Moorarji v. The Municipal Commissioner for the City of*

Bombay and Vishwanath Sadashiv Natu v. The Municipal Corporation of the City of Bombay must, therefore, be regarded as still valid and operative. That, however, was a case of an intentional breach of contract on the part of a Municipality and it was held, relying on Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay and Yishwanath Sadashiv Natu v. The Municipal Corporation of the City of Bombay, that it would be difficult to say that, a Municipality or an officer of a Municipality committing a breach of a contract entered into by the Municipality does such act, or purports to do it, in pursuance of the provisions of the Act. Such a consideration cannot be said to arise in our present case, and we do not think that the decision in S. V. Mandlik v. The Borough Municipality of Jalgaon can be regarded as any guide in this case. That being our view, we must hold that Section 206 of the Bombay Municipal Boroughs Act applies to the facts of this case, and that, whether we take the cause of action as having arisen in August, 1942, or in June, 1943, the conditions required by that section to be satisfied have not been satisfied.

6. In this view of the case it is not necessary for us to decide the difficult question whether in this case the plaintiffs were lessees or the licensees of the Municipality. It seems, however, to us that the plaintiffs may have a good case on this point and that the principle of *The Indian Hotels Co, Ltd. v. Phiroq Sorabji Contractor* (1922) 25 Bom. L.R. 84 may apply. In that case it was held, relying on the distinction between a lease and a license as laid down in Halsbury's Laws of England, Vol. XVIII, p. 337, Article 770, and having regard to the language of Section 105 and Section 108 of the Transfer of Property Act, that in order to constitute a lease there should be a right to exclusive possession. The plaint, exhibit 24, shows that the land in question had been given to the plaintiffs under Rule 7 of the Municipal bye-laws, Clause 4 of which provides for land being given "for residential purposes". One of the conditions of the grant, however, was that the land was to be vacated whenever needed by the Municipality without notice. This condition prima facie conflicts with the definition of a lease to be found in Section 105 of the Transfer of Property Act, under which a lease is a transfer "made for a certain time expressed or implied," and does not appear to me to be an essential part of the contract and ought in my opinion to be regarded as something super-added to the contract which is essentially a lease. What the effect of the super-addition of such a term may be on the question of its validity we are not called upon to decide. Mr. Moropanth has also drawn our attention to an English case, *Glenwood Lumber Company v. Phillips* [1904] A. C. 405 where it was held that a licence granted by the Government in pursuance of certain provisions of the Consolidated Statutes of Newfoundland giving exclusive right of occupation of land, though subject to reservations or to restrictions as to its user, was in law a demise of land. However, it is not necessary for us to discuss this question further. In view of the conclusion we have arrived at regarding the applicability of Section 206 of the Bombay Municipal Boroughs Act we must hold that the suit as well as the plaintiffs' appeal in the lower appellate Court were rightly dismissed. Mr. Moropanth has attempted to rely on the provisions of

Section 51 of the Transfer of Property Act and has contended that his clients are entitled, under the said section, before they are evicted, to the value of the houses or structures erected by them on the land. We do not think that there is any possible scope for the application of that section to the facts of this case where, apart from there being no evidence as to the kind of structures erected, it is not possible to hold that the plaintiffs could in good faith have believed that they were absolutely entitled to the land. They have, besides, been in possession for over three years after the date of the notice and it cannot be said that there is any equity at all in their favour. In the result, this appeal fails and is dismissed with costs.