

PETITIONER:
MUNICIPAL CORPORATION

Vs.

RESPONDENT:
SRI NIYAMATULLAI S/O MASITULLA

DATE OF JUDGMENT:
21/08/1969

BENCH:
RAY, A.N.
BENCH:
RAY, A.N.
HEGDE, K.S.

CITATION:
1971 AIR 97 1970 SCR (2) 47
1969 SCC (2) 551
CITATOR INFO :
RF 1976 SC1207 (102)

ACT:
Indore Municipal Act, 1909, s. 135-Suit declaring dismissal
illegal-Dismissal order without jurisdiction-Limitation
special plea not pleaded.
Limitation-Special plea, whether must be pleaded.

HEADNOTE:

The respondent--an employee of the appellant-Municipality filed a suit for declaring his dismissal illegal as the order of dismissal was not passed by the Municipal Commissioner as required by s. 13 of the Indore Municipal Act, but was made by one G, who was then acting in place of the Municipal Commissioner. The trial court accepted the respondents plea and decreed the suit. The District Judge in appeal set aside the decree holding that the suit was barred by limitation as under s. 135(2) of the Act a suit in respect of any act done under the Act by an officer of the Municipality had to be filed within six months of the actual of the cause of action. The special plea of limitation under s. 135(2) was not taken in the trial court, though in general terms a plea of limitation was raised. The High Court set aside the decree of the District Judge and restored that of the trial court. The High Court on the evidence came to the conclusion that no order of the Government was produced to show that G, was appointed to act in place of the Municipal Commissioner, and that the order of dismissal was passed by G, Dismissing the appeal, this Court,

HELD: On the findings. the dismissal order passed by G, was beyond his jurisdiction. The provisions contained in s. 135 of the Act will be applicable to things done under the Act. Since the order of dismissal passed by G was beyond his jurisdiction, it was, therefore, not an act done under the Act. [50 D---E]

If any special plea of limitation is a defence such a defence of limitation should be pleaded. In the present case the Municipal Corporation did not plead s. 135 of the Indore Municipal Act, 1909 as a defence. Such a plea was not taken in the pleadings or in the trial court and the

District Judge should not have entertained such a plea. [50 C D]

Bharat Kala Bhandar Ltd., v. Municipal Committee, Dhamnangaon, [1965] 3 S.C.R. 499, followed.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1733 of 1966.

Appeal by special leave from the judgment and decree dated March 30, 1966 of the Madhya Pradesh High Court, Indore Bench in Second Appeal No. 341 of 1964.

M.C. Bhandare and P.C. Bhartari, for the appellant.

S.K. Mehta, A.P. Tayal and K.L. Mehta, for the respondent

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The Judgment of the Court was delivered by

Ray, J. This is an appeal from the judgment dated 30th March, 1966 of the High Court of Madhya Pradesh (Indore Branch) allowing the appeal and setting aside the decree of the lower appellate court and restoring the decree of the trial court with costs.

The plaintiff's suit against the Indore Municipal Corporation was for a declaration that the dismissal of the plaintiff was illegal and that the plaintiff was still on the post of Removal Sub Inspector and a decree against the defendant for Rs. 7,488/- on account of salary at the rate of Rs. 104/- p.m. from 15th April, 1953 till the date of institution of the suit, viz., 15th April, 1959 and other reliefs. The trial court decreed the suit. The lower appellate court set aside the decree. The High Court restored the decree passed by the trial court.

The case of the plaintiff Niyamatulla was that the plaintiff was suspended by the order of the Municipal Engineer dated 15th April, 1953. One Shri Ghatpande who acted in place of the Municipal Commissioner in the month of May 1953 directed the dismissal of the plaintiff. The plaintiff contended that the dismissal could have been only under the orders of the Municipal Commissioner. The plaintiff further contended that there was no opportunity given to the plaintiff against the proposed dismissal.

The defence of the Municipal Corporation was that the plaintiff preferred a review petition to the Municipal Commissioner who rejected the same. The plaintiff thereafter preferred an appeal to the Appeal Committee of the Municipal Corporation which was dismissed. Thereafter, a revision petition against the order was heard by the Minister-in-charge of the Government of Madhya Bharat and the same was rejected in the month of September, 1955. It was, therefore, contended that the plaintiff had no right to file the suit. Another defence was that the suit was barred by limitation.

Counsel for the appellant canvassed three grounds. First, that the order of dismissal was valid and Shri Ghatpande had jurisdiction to pass the order of dismissal. Secondly, the suit was barred by limitation. Thirdly, the provisions of section 135 of the Indore Municipality Act was a plea in bar of the suit.

The authority of Shri Ghatpande to dismiss the plaintiff was based on the provisions contained in section 13 of the Indore Municipal Act, 1909. Section 13 of the Indore Municipal Act, inter alia, reads as follows:

"(1) The Municipal Commissioner for the City of Indore shall, from time to time, be appointed by the Government.

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(2) (a) Leave of absence may be granted to the Commissioner, from time to time, according to the Indore Civil Service Regulations.

(b) During such absence of the Commissioner the Government may appoint any person to act as Commissioner. Every person so appointed shall exercise the powers and perform the duties conferred and imposed by the Act or by any other enactment at the time in force, on the person for whom he is appointed to act, and shall be subject to the same liabilities, restrictions and conditions to which the said person is liable and shall receive such monthly salary as may be determined by the Government.

In order to rest the defence on section 13 of the Indore Act, it has to be first found out that there is an appointment by the Government of any person to act as Commissioner. The finding of fact by the High Court is that no order of the Government was produced to show that Shri Ghatpande was appointed to act in place of Shri Rao who was the then Municipal Commissioner. The further finding of the fact was that the order of dismissal was passed by Shri Ghatpande.

The defence of limitation pleaded by the Indore Municipal Corporation was in general terms that this suit was barred by limitation. The plaintiff in the plaint alleged that the cause of action arose on 15th April, 1953 and on 1st May, 1953 when the plaintiff was dismissed from service and on 11th January, 1954 when it was passed by the Appeal Committee of the Indore Municipality. At the trial the plaintiff contended that the suit was well constituted and was governed by Article 120 of the Limitation Act, 1908.

At the time of the hearing of the appeal before the District Judge, Indore, the Municipal Corporation, Indore contended that under section 135(2) of the Indore Municipal Act, 1909 a suit in respect of any act done or purporting to be done under the Act by an officer or servant of the municipality or by any person acting under the order of the Government was to be filed within six months from the date of the actual of the cause of action. The District Judge accepted the plea. The alternative contention on behalf of the Municipal Corporation before the District Judge was that Article 115 of the Limitation Act, 1908 will apply if the special period of limitation prescribed by the Act did not apply. The District Judge did not accept that contention on the reasoning that the plaintiff was not under any contract of service and Article 115 applied to compensation for breach of

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contract. The District Judge held that Article 14 of the Limitation Act, 1908 would apply when an order of an officer in his official capacity was set aside and no special period of limitation was prescribed.

In the High Court the Municipal Corporation repeated the plea under section 135 of the Indore Municipal Act, 1909. The High Court, however, repelled that contention by holding that Shri Ghatpande was not the Commissioner when he passed the order, and, therefore, the order being without jurisdiction, the provisions contained in section 135(2) of the Indore Municipal Act were inapplicable and the plaintiff's suit was governed by Article 120 of the Limitation Act, 1908.

The provisions of the Code of Civil Procedure enjoin that if any special plea of limitation is a defence such a defence of limitation should be pleaded. In the present case, the Municipal Corporation did not plead section 135 of the Indore Municipal Act, 1909 as a defence. Such a plea was not taken in the pleadings or in the trial court and the District Judge should have not entertained such a plea. The provisions contained in section 135 of the Indore Municipal Act will be applicable to things done under the Act. It is manifest that in the present case the order of dismissal passed by Shri Ghatpande was beyond his jurisdiction and is therefore not an act done under the Act.

Furthermore, section 8(1)(b) of the Indore Act says that the Council shall bear the name of the Municipal Council of the Indore City and be a body corporate and have perpetual succession and a common seal and by such name may sue and be sued. A distinction is to be noticed between suing the Municipal Council of the Indore City as contemplated in section 8(1)(b) of the Act and suits against the Commissioner or any officer or servant of the Municipality or any person acting under the direction of the Government or the Commissioner as contemplated in section 135 of the said Municipal Act. One of the purposes of section 135 of the Municipal Act is to, afford an opportunity to the persons mentioned in the section to make amends within the period of notice. The suit that was filed in the present case was not in respect of any act done or purported to be done under the Act.

This Court in the case of Bharat Kala Bhandar Ltd. v. Municipal Committee, Dhamangaon⁽¹⁾ examined the provisions of section 48 of the Central Provinces and Berar Municipalities Act, 1922 which was to the effect that no suit shall be instituted against any Committee or any member, officer or servant thereof or any person acting under the direction of any such committee, member, officer or servant for anything done or purporting to be done under the Act, until the expiration of two months next after notice

(1) [1965] 3 S.C.R. 499.

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in writing stating the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims. Section 48 of the said Central Provinces and Berar Municipalities Act further provided that every such suit shall be dismissed unless it was instituted within six months from the date of the actual of the cause of action. The appellant in that case contended that it was a case of recovery of an illegal tax and therefore a claim for its refund fell outside the provisions of section 48 of the said Act. The respondent, on the other hand, contended there that the collection of tax was not without jurisdiction but only irregular and therefore the suit would be in respect of a matter purporting to be done under the Act. This Court held that where power existed to assess and recover a tax up to a particular limit the assessment or recovery of an amount in excess was wholly without jurisdiction. To such a case, the statute under which action was purported to be taken could afford no protection. On logic and principle the same reasoning applies to the provisions contained in section 135 of the Indore Municipal Act, 1909 with the result that the suit in the present case is not within the mischief of section 135 of the Indore Municipal Act.

For these reasons, the appeal fails and is dismissed with costs.

y.p.

Appeal

dismissed.
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JUDIS