

A RATUL MAHANTA
V.
NIRMALENDU SAHA
(Civil Appeal No. 4627 of 2021)

B AUGUST 10, 2021

[HEMANT GUPTA AND A. S. BOPANNA, JJ.]

Municipal Corporation:

Guwahati Municipal Corporation Act, 1971: ss. 341, 246,

- C *247 and 248 – Bar of jurisdiction of civil court – Issue relating to a common drain between two private individuals residing within the limits of the Municipal Corporation – Held: Is not an issue regarding which a specific bar is contemplated against approaching the civil court for relief – ss. 246, 247 and 248 though referred to the ownership and the manner in which the drains connected to a municipal drain are to be used and the Commissioner is given the authority to compel the owner of a drain to permit another property owner to use the same, the said provisions cannot be considered either as an express or an implied bar on the civil court to entertain a suit relating to the declaration of an existing right to use of the*
- D *drain – On facts, appellant is asserting about a right which existed and is seeking to safeguard and continue to exercise such right – Case pleaded is not to the effect that any of them own the drain but that the respondent is seeking to alter that position and thus, be restrained – Such relief is to be considered in the suit based on the evidence that would be tendered – Thus, such relief is not barred under any law - High Court wrongly rejected the plaint, when in the instant facts there is neither express nor implied bar under any law, whereas Munsif was justified in passing the order holding the suit to be maintainable – Thus, the order passed by the High Court is set aside.*
- E *Allowing the appeal, the Court*

HELD: 1.1 A bare perusal of Section 9 CPC indicates that the courts shall have jurisdiction to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Though in the instant case, the issue had not

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arisen before the Munsif while considering an application under Order VII Rule 11(d) of CPC, taking note of the fact that the High Court has invoked the said provision to consider as to whether the suit is barred and has thereafter held that the civil court has no jurisdiction and ordered rejection of plaint. The perusal of Order VII Rule 11(d) CPC would indicate that there would be a bar for the civil court to entertain the suit, if such suit is barred either expressly or impliedly by any law. Further, Order VII Rule 11(d) contemplates that from the statement contained in the plaint the suit should appear to be barred by any law, in which case the plaint shall be rejected. [Para 7][99-F-H; 100-A-D]

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1.2 On perusal of the contents of Section 341 of the Guwahati Municipal Corporation Act, 1971, it indicates that no civil court shall have jurisdiction to settle, decide or deal with any question which is under that part wherein Section 341 is placed and is required to be settled, decided or dealt with by the Commissioner. The Part VI under which a bar is imposed relates to Land, Buildings and Streets. Therefore, on the face of it, it indicates that the issue relating to a common drain between two private individuals residing within the limits of the Municipal Corporation is not an issue regarding which a specific bar is contemplated against approaching the civil court for relief. [Para 11][101-E-G]

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1.3 The GMC Act no doubt makes provision to empower the Commissioner under certain circumstances to regulate the manner in which the use of the drain connected with the municipal drain is to be used. The provisions to that effect are contained in Sections 246, 247 and 248, in Part V of GMC Act. Perusal of the said provisions would indicate that the Commissioner is empowered by granting the authority under GMC Act to compel the owner or joint owner of a drain to permit a person who is not the owner of such drain to use that drain. In effect, the Commissioner is given the authority to create a right in favour of the property owner to drain out the water through the drain owned by any other property owner. In the instant case the appellant is not seeking for creation of such right. The case as pleaded and noticed indicates that the appellant is asserting about a right which

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- A existed and is seeking to safeguard and continue to exercise such right. The case pleaded is not to the effect that any of them own the drain but it is contended that it existed as the western boundary of all the properties in the vicinity and the respondent is seeking to alter that position and is therefore to be restrained.
- B Whether the appellant will succeed or not will depend on the evidence that will be produced to support the pleading. [Para 12, 13][101-G-H; 102-G-H; 103-A-B]

- 1.4 It is seen that Sections 246, 247 and 248 of the GMC Act though referred to the ownership and the manner in which the drains connected to municipal drain are to be used and the Commissioner is given the authority to compel the owner of a drain to permit another property owner to use the same, the said provisions cannot be considered either as an express or an implied bar on the civil court to entertain a suit relating to the declaration of an existing right to use of the drain. [Para 16][106-E-F]

- 1.5 In fact, the existence of a drain as claimed by the appellant in the plaint as on the date of purchase of the property and the same being used throughout is an issue which is to be proved based on the evidence that would be tendered in the suit.
- E The provisions contained in Section 246, 247 and 248 of the GMC Act would be the provisions which would come to the aid of the appellant if ultimately the respondent establishes his ownership right over the drain, despite the appellant proving the existence of the drain. No doubt, the appellant could have also filed an application to the Commissioner seeking the relief to which the Commissioner could exercise his authority but that would have arisen only if the appellant had conceded to the position that the respondent is the owner of the drain. Even in such circumstance, if relief was not made available to the appellant by the Commissioner and if he was dissatisfied with the manner in which such authority was exercised by the Commissioner it would still have been open to approach the court for relief. The Advocate for respondent has in this regard contended that an appeal is provided under Section 438 of GMC Act. However, it is not considered as an alternate and efficacious remedy in a case of the present nature. The relief sought in the instant suit is in the H

nature of declaratory relief in an *inter se* dispute between the parties. The consideration by the statutory authority as provided under GMC Act is of summary nature. Further, the appeal provided is in respect of any notice issued or action taken or proposed to be taken by the Commissioner, which in effect provides the appeal remedy only to the owner of the drain against whom action is proposed. [Para 17][106-F-H; 107-A-D]

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1.6 In the instant case, the averments contained in the plaint and the prayer made would disclose that the appellant is not seeking for creation of a right over the drain owned by the defendant nor is any issue raised with regard to the drain of GMC. But the case as put forth is that the property of the appellant, SD and the defendant are contiguous to one another which are shown as suit schedule ‘A’, ‘B’ and ‘C’ properties and on the western side of the property starting from the appellant’s property, there is a drain, which is shown as the boundary and it facilitates the water to flow into the GMC drain. Such relief is to be considered in the suit based on the evidence that would be tendered. Therefore, such relief is not barred under any law. [Para 18][107-D-F]

1.7 It is clear that the High Court without taking note of these aspects of the matter has wrongly invoked the provisions contained in Order VII Rule 11 (d) CPC to reject the plaint, when in the instant facts there is neither express nor implied bar under any law. On the other hand, the Munsif was justified in passing the order holding the suit to be maintainable. The order passed by the High Court is set aside. [Para 19, 20][107-F-H]

Shiv Kumar Chadha v. Municipal Corporation of Delhi and Others (1993) 3 SCC 161 : [1993] 3 SCR 522; Ramesh Gobindram v. Sugra Humayun Mirza Wakf (2010) 8 SCC 726 : [2010] 10 SCR 945 – referred to.

Case Law Reference

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[1993] 3 SCR 522	referred to	Para 15
[2010] 10 SCR 945	referred to	Para 16

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- A CIVIL APPELLATE JURISDICTION: Civil Appeal No.4627 of 2021.

From the Judgment and Order dated 06.06.2014 of the High Court of Gauhati at Guwahati in C.R.P. No.128 of 2014.

- B Parthiv K. Goswami, Ms. Diksha Rai, Ms. Ragini Pandey, Advs. for the Appellant.

Arunabh Chowdhury, Karma Dorjee, Ms. Barnali Chowdhury, Mrs. Pragya Baghel, Ms. Samtan Doma, Advs. for the Respondent.

The Judgment of the Court was delivered by

- C **A. S. BOPANNA, J.**

1. The appellant instituted title suit No.334 of 2011 in the Court of learned Munsif No.2, Kamrup Guwahati against the respondent herein seeking for a declaration that on the western boundary of the suit Schedule properties A, B and C there is a common public drain which can be used

- D by the plaintiff. A declaration is also sought to the affect that the public drain on the boundary of the suit Schedule ‘C’ property of the defendant, connected to the plaintiff’s property cannot be obstructed by the defendant at any point of time. As an ancillary relief, the appellant has also sought for permanent injunction against the defendant so as to allow free flow of water in the said drain upto the main GMC drain.

E 2. The respondent having appeared, disputed the claim put forth by the plaintiff on merits. In addition, the respondent raised the issue of jurisdiction for the civil court to entertain the suit in view of the provisions contained in the Guwahati Municipal Corporation Act, 1971 (‘GMC’ Act for short). In the said suit, since the appellant had also prayed for temporary injunction, on consideration it was granted by the trial court, of course without reference to the objection regarding jurisdiction. The respondent had therefore assailed the order of injunction by filing an appeal before the Lower Appellate Court under Section 96 (1) read with Order 43 Rule 1 of the Civil Procedure Code (‘CPC’ for short).

- F In the said appeal, the respondent herein who was the appellant had contended that the order dated 30.09.2011 passed by the learned Munsif was not justified since the issue relating to the maintainability of the suit vis-a-vis the provisions of the GMC Act barring the jurisdiction of the civil court goes to the root of the case. It was contended that the same was required to be considered and decided, before considering any other relief prayed
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in the suit. The lower appellate court in the said miscellaneous application No.33/2011 through its order dated 21.09.2012 arrived at the conclusion that the jurisdiction aspect is to be decided at the outset by the learned Munsif. Therefore, without going into the merits, the lower appellate court remanded the matter by setting aside the order impugned in the said appeal for deciding the question of jurisdiction before considering grant of any other relief.

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3. The appellant herein claiming to be aggrieved by the said order preferred revision petition in CRP No.260/2013 before the Gauhati High Court. The learned Judge while taking note of the rival contentions, through its order dated 29.08.2013 had agreed with the decision of the lower appellate court that the jurisdiction of the civil court to entertain the suit was to be decided at the outset. The revision petition was accordingly disposed of. The parties were allowed to urge their contentions in the court of the learned Munsif.

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4. Pursuant thereto the learned Munsif has considered the issue relating to jurisdiction and has by its order dated 16.11.2013 arrived at the conclusion that the bar contemplated under the GMC Act does not apply to the fact situation, keeping in view the nature of the relief prayed. Accordingly, the learned Munsif has held that the civil court has jurisdiction to try the suit between the parties. The respondent herein claiming to be aggrieved by the said order dated 16.11.2013 preferred revision petition in CRP No.128/2018 before the Gauhati High Court. The learned Judge, through the order dated 06.06.2014 has held that the jurisdiction of this civil court would stand ousted by implication and the party can claim relief under the procedure prescribed under the GMC Act only. In that background, the order dated 16.11.2013 impugned in the revision petition was set aside, the suit was held not maintainable and liberty was reserved to the appellant to ventilate his grievance under the relevant provisions of the GMC Act, if so advised. Accordingly, the plaint in title suit No.334/2011 was ordered to be rejected. The appellant therefore claiming to be aggrieved by the order dated 08.04.2014 passed by the Gauhati High Court is before this Court in appeal.

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5. Mr. Parthiv K. Goswami, learned counsel for the petitioner while assailing the order impugned has contended that the lower appellate court in the first instance and the High Court in the present round have erred in arriving at the conclusion that the suit is not maintainable. It is contended that the reasoning adopted by the High Court to consider the

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- A present case to be covered under Order VII Rule 11(d) of the Civil Procedure Code and to bar the civil suit is not justified. It is contended that there is no bar contemplated to approach the civil court for the nature of relief sought in the suit, either under the GMC Act or under any other law for the time being in force. In that regard, the learned counsel has referred to section 341 of the GMC Act which contemplates
 - B for a bar of jurisdiction and would point out that the same is restricted to the relief under the part to which the bar is made applicable. In that regard, reference is made to Part VI of the Act to contend that if at all, a civil suit is barred, it is only in respect of the nature of activities which are stated in section 322 and the other provisions which appear in Part
 - C VI of the Act. It is argued that the relief sought in the instant suit is in respect of a drain which had existed on the western side of the suit Schedule Properties and to protect the right of free flow of water which had been enjoyed from the time the plaintiff had purchased the property. Such right sought to be protected is within the domain of the civil court.
 - D It is contended that even though the provisions contained in section 246, 247 and 248 of the GMC Act, refer to the power of the Commissioner, any right available to the plaintiff under the said provisions can only be in aid of the relief to be sought by the plaintiff, but in any event cannot be construed as a bar to maintain the suit. It is therefore contended that the order passed by the High Court is not sustainable and the suit should be
 - E allowed to be proceeded on its merit.
6. Mr. Arunabh Chowdhury, learned counsel for the respondent seeks to sustain the order passed by the High Court. The contention is that the GMC Act contemplates a bar against the civil court entertaining the matters relating to the facilities which are to be considered by the
- F Commissioner, under the Act. Even assuming that section 341 of GMC Act contemplates an express bar only in respect of Part VI, the provisions contained in section 246, 247 and 248 of the GMC Act provide the forum to a property owner seeking for right relating to drain to approach the Commissioner, who shall decide the said issue. In that context, it is
 - G contended that though section 341 is not made applicable to Part V, by necessary implication, the suit would stand barred. It is his contention that in this case the plaintiff is seeking for a right in respect of the public drain and in such circumstance when the remedy is provided under the Act, the consideration of the same under the Common law does not arise. He contends that the High Court was justified in invoking the
 - H provision contained in Order VII Rule 11(d) of the Civil Procedure Code

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to hold that the civil court did not have jurisdiction to entertain the instant suit. In that view, the rejection of the plaint ordered is justified. The appellant is not left without a remedy and the alternate forum is allowed to be invoked. In such circumstance, the order impugned does not call for interference.

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7. In the background of the above contentions, the nature of the suit and the relief prayed for therein requires to be noticed only to the limited extent to arrive at a conclusion as to whether the civil court had jurisdiction to proceed with the suit or as to whether a bar with regard to jurisdiction as provided in the GMC Act will apply. Before advertiring to that aspect, it is necessary to take note of the contents in para 9 of CPC which provides for exercise of jurisdiction by civil court. It reads as hereunder: -

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“9. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

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Explanation I-

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A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

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Explanation II.-

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For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.”

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A bare perusal of the same indicates that the courts shall have jurisdiction to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred. In that background, though in the instant case, the issue had not arisen before the learned Munsif while considering an application under Order VII Rule 11(d) of CPC, taking note of the fact that the High Court has invoked the said provision to consider as to whether the suit is barred and has thereafter held that the civil court has no jurisdiction and ordered rejection of plaint, it would be appropriate to take note of the provision contained in Order VII Rule 11(d) which reads as hereunder: -

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“Order VII Rule 11”

Rejection of plaint - The plaint shall be rejected in the following cases: -

(a) xx xx xx xx

B (b) xx xx xx xx

(c) xx xx xx xx

(d) where the suit appears from the statement in the plaint to be barred by any law.

C (e) xx xx xx xx

(f) xx xx xx xx “

The perusal of the above noted provision would indicate that there would be a bar for the civil court to entertain the suit, if such suit is barred either expressly or impliedly by any law. Further, Order VII Rule

D 11(d) contemplates that from the statement contained in the plaint the suit should appear to be barred by any law, in which case the plaint shall be rejected.

8. In that backdrop, a perusal of the plaint in the instant suit would disclose that the case pleaded by the appellant is that he along with one

E Mr. Dhan Chandra Mahanta purchased ‘schedule ‘A’ property measuring 15 lessas on 08.12.1997 from Mr. Sailendra Medhi and others. Mr. Dhan Chandra Mahanta relinquished his right in favour of the appellant. The appellant has thus become the sole owner of the suit schedule ‘A’ property. It is contended that the sale deed indicates that the last part of the western boundary contained a water exhaust drain which was also passing along

F the western boundary of the property belonging to Ms. Suwola Devi and would join the public drain maintained by Guwahati Municipal Corporation (“GMC” for short). Another adjacent land owner purchased Schedule ‘B’ property under sale deed dated 08.12.1997 wherein also the western boundary traverses through the water drain which connected the public

G drain of GMC.

9. It is further averred in the plaint that the respondent who owns the property on the southern side of the appellant’s property, had purchased the extent of 13 lessa under sale deed dated 24.04.1984 wherein the western boundary is shown as public drain. Though the said common

H drain had existed at the time of purchase and was being used, the

defendant is alleged to have blocked the same by dumping RCC material and therefore the water had overflowed into the appellant's property. It is in that light, the appellant had prayed for the relief to declare that the western boundary of Schedule A, B and C properties contained a common public drain which can be used and the further prayer made in the plaint indicates that, injunction sought is for the peaceful enjoyment of the drain facility to allow the free flow of water upto the main GMC drain.

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10. The question therefore is as to whether the nature of the relief prayed in the plaint falls exclusively within the domain of the GMC Act and as to whether the case put forth and the relief prayed is barred by any provision contained in the GMC Act so as to disentitle the civil court to entertain the suit as contemplated under Section 9 of the CPC, if so, whether a plaint of the present nature was liable to be rejected as envisaged under Order VII Rule 11(d) of CPC.

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11. At the outset it is necessary to take note of Section 341 of the GMC Act which provides for the bar of jurisdiction of civil court which reads as hereunder: -

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"341- Bar of jurisdiction- Save as otherwise expressly provided no civil court shall have jurisdiction to settle, decide or deal with any question, which is by or under this part required to be settled, decided or dealt with by the Commissioner."

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On perusal of the contents, it indicates that no civil court shall have jurisdiction to settle, decide or deal with any question which is under that part wherein Section 341 is placed and is required to be settled, decided or dealt with by the Commissioner. The Part VI under which a bar is imposed relates to Land, Buildings and Streets. Therefore, on the face of it, it indicates that the issue relating to a common drain between two private individuals residing within the limits of the Municipal Corporation is not an issue regarding which a specific bar is contemplated against approaching the civil court for relief.

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12. The GMC Act no doubt makes provision to empower the Commissioner under certain circumstances to regulate the manner in which the use of the drain connected with the municipal drain is to be used. The provisions to that effect are contained in Sections 246, 247 and 248, in Part V of GMC Act. The said provisions read as hereunder:-

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"246. Obligation of owner or joint owner of drain to allow the uses of it to other: - Every owner of a drain connected with

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- A a municipal drain or other place set apart by the Commissioner for drainage shall be bound to allow the use of it to other persons, or to admit other persons as joint owners, thereof, on such terms as may be prescribed under section 248.
- 247. How right of use of a drain may be obtained by a person other than the owner:-** Any person desiring to drain his premises into a municipal drain through a drain of which he is not an owner may make a private arrangement with the owner for permission to use his drain, or may apply to the Commissioner for authority to use such drain.
- 248. Commissioner may authority person other than the owner of a drain to use the same or declare him to be a joint user thereof:-** (1) Where the Commissioner is of opinion whether on receipt of an application or otherwise, that the most convenient means by which the owner or occupier of any premises can drain such premises is through a drain belonging to some person other than the said owner or occupier the Commissioner shall, give the owner of the drain a reasonable opportunity of stating his objection thereto, and if no objection is raised or if the objection appears to him invalid or insufficient, may, by an order in writing authorise the said owner or occupier to use the drain or declare the said user to be a joint owner thereof on such conditions as may appear to him equitable with regard to the payment of rent or compensation and to connecting the drain of the said premises with the communicating drain and to the responsibilities of the parties for maintaining, repairing, flushing and clearing the joint drain. (2) In respect of the execution of any work under sub-section (1) the person in whose favour the Commissioner's order is made shall be subject to the same restriction and liabilities as are specified in sub-section (4) of section 245.”
- 13. Perusal of the above noted provisions would indicate that the Commissioner is empowered by granting the authority under GMC Act to compel the owner or joint owner of a drain to permit a person who is not the owner of such drain to use that drain. In effect, the Commissioner is given the authority to create a right in favour of the property owner to drain out the water through the drain owned by any other property owner. In the instant case the appellant is not seeking for creation of such right.
- H The case as pleaded and noticed above indicates that the appellant is

asserting about a right which existed and is seeking to safeguard and continue to exercise such right. The case pleaded is not to the effect that any of them own the drain but it is contended that it existed as the western boundary of all the properties in the vicinity and the respondent is seeking to alter that position and is therefore to be restrained. Whether the appellant will succeed or not will depend on the evidence that will be produced to support the pleading.

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14. The point for consideration is as to whether the existence of such provision in GMC Act would impliedly bar a civil suit. For answering the said question, it would be appropriate to refer to the decision in the case of *Shiv Kumar Chadha v. Municipal Corporation of Delhi and Others* (1993) 3 SCC 161 which in fact was also taken note by the learned Munsif. The relevant consideration made therein is as hereunder:-

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“11. In the olden days the source of most of the rights and liabilities could be traced to the common law. Then statutory enactments were few. Even such enactments only created rights or liabilities but seldom provided forums for remedies. The result was that any person having a grievance that he had been wronged or his right was being affected, could approach the ordinary civil court on the principle of law that where there is a right there is a remedy — *ubi jus ibi remedium*. As no internal remedy had been provided in the different statutes creating rights or liabilities, the ordinary civil courts had to examine the grievances in the light of different statutes. With the concept of the welfare State, it was realised that enactments creating liabilities in respect of payment of taxes, obligations after vesting of estates and conferring rights on a class of citizens, should be complete codes by themselves. With that object in view, forums were created under the Acts themselves where grievances could be entertained on behalf of the persons aggrieved. Provisions were also made for appeals and revision to higher authorities.

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12. Then a question arose as to where a particular Act had created a right or liability and had also provided a forum for enforcement of such right or for protection from enforcement of a liability without any authority in law, whether a citizen could approach a court. It may be pointed out that many statutes have created certain rights or liabilities and have also provided the remedial measures in respect thereof. But such statutes have not touched the common

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- A law rights of the citizen. But there are some statutes, which in public interest affect even the common law rights or liabilities of the citizen, which were in the nature of existing rights. The distinction between the two types of rights or liabilities is subtle in nature but at the same time very vital.
- B 23. With the increase in the number of taxing statutes, welfare legislations and enactments to protect a class of citizens, a trend can be noticed that most of such legislations confer decision making powers on various authorities and they seek to limit or exclude court's power to review those decisions. The result is that the power of the court under Section 9 of the Code is being denuded and curtailed by such special enactments, in respect of liabilities created or rights conferred. This Court in the judgments referred to above has upheld the ouster of the jurisdiction of the court on examination of two questions — (1) whether the right or liability in respect whereof grievance has been made, had been created under an enactment and it did not relate to a pre-existing common law right? (2) Whether the machinery provided for redressal of the grievance in respect of infringement of such right or imposition of a liability under such enactment, was adequate and complete? The ouster of the jurisdiction of the court was upheld on the finding that the rights or liabilities in question had been created by the Act in question and remedy provided therein was adequate.
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- H “It was pertinently added that this exclusion of the jurisdiction of the civil court would be subject to two limitations. First, ‘the Civil Courts have jurisdiction to examine into cases where the provisions

of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. The second is as regards the exact extent to which the powers of statutory tribunals are exclusive'. The question as to whether any particular case falls under the first or the second of the above categories would depend on the purpose of the statute and its general scheme, taken in conjunction with the scope of the enquiry entrusted to the tribunal set up and other relevant factors."

It was held that a suit for declaration that the decision of the Settlement Officer/Tribunal holding certain properties to be an 'estate' under Section 3(2)(d) of the 1908 Act was void, was maintainable on the ground that the suit property was not an 'inam village'. In *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [(1960) AC 260] the appellants sought a declaration of their common law right to quarry their land without the need to obtain planning permission under the Town and Country Planning Act, 1947. In that connection it was said:

"The appellant-company are given no new right of quarrying by the Act of 1947. Their right is a common-law right and the only question is how far it has been taken away. They do not uno flatu claim under the Act and seek a remedy elsewhere. On the contrary, they deny that they come within its purview and seek a declaration to that effect."

25. In spite of the bar placed on the power of the court, orders passed under such statutes can be examined on "jurisdictional question". To illustrate: a special machinery has been provided for removal of the encroachments from 'public land' under different enactments in different States and the jurisdiction of the court has been barred in respect of the orders passed by such special tribunals or authorities constituted under such Acts. Still a suit will be maintainable before a court on a plea that the land in question shall not be deemed to be a public land within the meaning of the definition of 'public land' given in the Act in question, and as such provisions thereof shall not be applicable."

15. Further, this Court in the case of ***Ramesh Gobindram vs. Sugra Humayun Mirza Wakf*** (2010) 8 SCC 726 while examining the bar of civil court as contemplated under Section 85 of the Wakf Act,

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- A 1995 had drawn a distinction that such power would apply only in respect of the issues arising under certain provisions of Act i.e., Section 6, 7 and 83 of the Wakf Act, 1995 and had held that a suit before a civil court would be maintainable for other reliefs notwithstanding the creation of the Wakf tribunal under the Act, unless the dispute falls within the four corners of the powers vested in the Tribunal. Therefore, despite there being the bar of jurisdiction of the civil courts under the Act, as noted, except for the disputes arising to the limited extent all other issues were held to be maintainable before the civil court. The relevant consideration is as hereunder: -
- C "8. Wakfs and matters relating thereto were for a long time governed by the Wakf Act, 1954. The need for a fresh legislation on the subject was, however, felt because of the deficiencies noticed in the working of the said earlier enactment especially those governing the Wakf Boards, their power of superintendence and control over the management of individual wakfs. Repeated
- D amendments to the 1954 Act, having failed to provide effective answers to the questions that kept arising for consideration, Parliament had to bring a comprehensive legislation in the form of the Wakf Act, 1995 for better administration of wakfs and matters connected therewith or incidental thereto."
- E 16. In the above circumstance, while adverting to the present case it is seen that sections 246, 247 and 248 though referred to the ownership and the manner in which the drains connected to municipal drain are to be used and the Commissioner is given the authority to compel the owner of a drain to permit another property owner to use the same, the said provisions cannot be considered either as an express or an implied bar on the civil court to entertain a suit relating to the declaration of an existing right to use of the drain as asserted in the plaint.
- G 17. In fact, the existence of a drain as claimed by the appellant in the plaint as on the date of purchase of the property and the same being used throughout is an issue which is to be proved based on the evidence that would be tendered in the suit. The provisions contained in Section 246, 247 and 248 of the GMC Act would be the provisions which would come to the aid of the appellant if ultimately the respondent establishes his ownership right over the drain, despite the appellant proving the existence of the drain. No doubt, the appellant could have also filed an application to the Commissioner seeking the relief to which the

Commissioner could exercise his authority but that would have arisen only if the appellant had conceded to the position that the respondent is the owner of the drain. Even in such circumstance, if relief was not made available to the appellant by the Commissioner and if he was dissatisfied with the manner in which such authority was exercised by the Commissioner it would still have been open to approach the court for relief. The learned Advocate for respondent has in this regard contended that an appeal is provided under Section 438 of GMC Act. However, we do not consider it as an alternate and efficacious remedy in a case of the present nature. The relief sought in the instant suit is in the nature of declaratory relief in an *inter se* dispute between the parties. The consideration by the statutory authority as provided under GMC Act is of summary nature. Further, the appeal provided is in respect of any notice issued or action taken or proposed to be taken by the Commissioner, which in effect provides the appeal remedy only to the owner of the drain against whom action is proposed.

18. Further as already noted, in the instant case the averments contained in the plaint and the prayer made would disclose that the appellant is not seeking for creation of a right over the drain owned by the defendant nor is any issue raised with regard to the drain of GMC. But the case as put forth is that the property of the appellant, Ms. Suwola Devi and the defendant are contiguous to one another which are shown as suit schedule ‘A’, ‘B’ and ‘C’ properties and on the western side of the property starting from the appellant’s property, there is a drain, which is shown as the boundary and it facilitates the water to flow into the GMC drain. Such relief is to be considered in the suit based on the evidence that would be tendered. Therefore, such relief is not barred under any law.

19. In view of the above, it is clear that the High Court without taking note of these aspects of the matter has wrongly invoked the provisions contained in Order VII Rule 11 (d) of the Civil Procedure Code to reject the plaint, when in the instant facts there is neither express nor implied bar under any law. On the other hand, the learned Munsif was justified in passing the order dated 16.11.2013 in T.S. No. 334/2011 holding the suit to be maintainable.

20. In the result, the order dated 06.06.2014 passed by the Gauhati High Court at Guwahati in CRP No.128/2014 is set aside. The plaint in title suit No.334/2011 is restored to the file of the learned Munsif No.2

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A Kamrup Guwahati. The parties herein shall appear before the learned Munsif on 01.09.2021 as the first date for appearance without further notice, whereafter the suit shall be considered on its merits.

21. The appeal is accordingly allowed with no order as to costs.
22. Pending applications, if any, shall stand disposed of.

Nidhi Jain

Appeal allowed.