

# **Haji Ahmad Raza And Ors. vs Municipal Board on 18 March, 1952**

**Equivalent citations: AIR1952ALL711**

**Author: Raghubar Dayal**

**Bench: Raghubar Dayal**

## **JUDGMENT**

Bind Basni Prasad, J.

1. This suit which was originally instituted before the learned Civil Judge of Allahabad has, by an order of the Court, been removed to the extraordinary original side of this Court. It came up for hearing before a Division Bench which recorded the statements of learned counsel for the parties, framed issues and took down evidence which was concluded on the 10th December, 1951. On the 11th December, 1951, it directed the case to be laid before the Hon'ble the Chief Justice for constituting a Full Bench to decide it as it raised questions of general importance in this State. The case then came up before this Full Bench on the 18th January, 1952, when at the request of the learned counsel for the defendant the following issue was added:

"Is the suit bad for want of notice under Section 326 of the U. P. Municipalities Act?"

Learned counsel for the plaintiffs requested for time to argue on this new issue and this was granted to him. It may be mentioned that in para. 11 of the written statement the defendant had already raised the plea that the suit was not maintainable without a notice.

2. The plaintiffs are three in number and they have brought this suit under Order 1, Rule 8, of the Code of Civil Procedure representing the butchers and the hide merchants of city of Allahabad. Plaintiffs 1 and 2 are butchers by profession and plaintiff 3 is a hide merchant. The defendant is the Municipal Board of Allahabad. At first the State of Uttar Pradesh was also impleaded as a defendant but subsequently it was exempted.

3. It is common ground of the parties that in this Municipality bye-laws in respect of slaughter houses have been in existence since 1916. By a notification published in the U. P. Gazette, dated the 31st March, 1951, these bye-laws were amended and the following was inserted as Clause (iii) of bye-law No. 1 :-

No bull, bullock, cow, calf (both male and:

female) shall be slaughtered in any slaughter house or "in any other place."

4. The plaintiffs' case is that the said amendment is not warranted by the provisions of Section 298 of the U. P. Municipalities Act, that it infringes their fundamental right conferred by Sub-clause (g) of Clause (1) of Article 19 of the Constitution and that the Municipal Board have no right to place an absolute bar of prohibition against such slaughter, especially prohibiting such a slaughter "in any other place".

5. The relief claimed by the plaintiffs is to the following effect:-

By means of a permanent injunction the defendant be restrained from prohibiting absolutely the slaughter of bull, bullock, cow, calf (both male and female) in any slaughterhouse established by the Municipal Board of Allahabad or any other place as contemplated by the void and 'ultra vires' new bye-law No. 1 sub-bye-law No. 3 published in the U. P. Gazette of March 31, 1951."

6. The defendant raised a number of pleas and as many as 11 issues were framed by the Division Bench. It is unnecessary however, to set them out. If the suit fails on the preliminary ground of want of notice it is futile to enter into a discussion of the other issues. I proceed, therefore, to determine the issue added by this Court, viz. whether the suit is maintainable without a notice under Section 326 of the U. P. Municipalities Act, 1916. Sub-sections (1), (3) and 1(4) of this section are relevant for the purposes of our discussion. They run as follows:-"326. Suits against board or its officers: (1) No suit shall be instituted against a board, or against a member, officer or servant of a board, in respect of an act done or purporting to have been done in its or his official capacity, until the expiration of two months next after notice in writing has been, in the case of a board, left at its office, and, in the case of a member, officer or servant, delivered to him or left at his office or place of abode, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending, plaintiff, and the plaint shall contain a statement that such notice has been so delivered or left.

(2) .....

(3) No action such as is described in subsection (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action.

(4) Provided that nothing in Sub-section (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by giving of the notice or the postponement of the commencement of the suit or proceeding."

Admittedly the plaintiffs did not send any notice contemplated by Sub-section (1) of Section 326. In para. 11 of the plaint they stated:

"That no notice of the present suit has been tendered to the defendant, as the object of this suit will be defeated by giving the notice and the postponement of the commencement of the suit, which is one for injunction."

7. Although this was the case in the plaint, in arguments learned counsel for the plaintiffs has taken an additional ground. He has contended that according to Sub-section (1) of Section 326 the notice is required to be given to the Board where the suit is "in respect of an act done or purporting to have been done in its official capacity" and the passing of a resolution to amend a bye-law is not an "act". I am unable to agree with this. A Municipal Board is a corporation and it can act only by the passing of a resolution by those who for the time being are entrusted with its administration. The passing of a resolution, the making of a bye-law, its publication in the Gezzette and all steps taken to implement those bye-laws are all "acts" of the Municipal Board.

8. The second contention on behalf of the plaintiffs is that a notice under Sub-section (1) of Section 326 is necessary only when the tortious act has been done by the Municipal Board and not when the cause of action arises out of a contract and in this connection the learned counsel has referred to the 'MUNICIPAL BOARD, AGRA v. RAM KISHAN', 1933 All L J 1414; 'JAGANNATH v. MUNICIPAL BOARD, SORON', 1939 All L J 168 and 'AMBIKA CHURN v. SATISH CHUNDER', 2 Cal W N 689. It is argued that there was an implied contract between the butchers and the hide merchants on the one hand and the Municipal Board of Allahabad on the other according to which there was to be no interference with their profession and trade. In the first place a perusal of the plaint will show that the suit is not based upon any such contract. Secondly, I am unable to agree that in framing the new bye-law the Municipal Board has contravened any implied contract between it and the plaintiffs. It has purported to frame the bye-law in the exercise of the delegated legislative powers vested in it under Section 298 of the U. P. Municipalities Act. Where a local authority makes a law, the basis of that law is the power conferred upon it by the Act constituting it and not any implied contract, as alleged on behalf of the plaintiffs. If the plaintiffs' contention were to be accepted then all restrictive bye-laws would be a breach of contract.

9. There is divergence of opinion as to the scope of Section 326 of the U. P. Municipalities Act. One series of cases lay down that the section applies only to suits based on tortious acts of the Board or of its officers and not to those based on contracts. Another series lay down that it applies also to suits based on contracts. This conflict has been set at rest by the recent Full Bench decision of this Court in 'DARGAHI LAL NIGAM v. THE KANPUR MUNICIPAL BOARD'. 1952 All L J 122 (FB). The case law on the subject has been exhaustively discussed by it. It is unnecessary to discuss them in the present case. The Full Bench has held that Section 326 applies alike to claims based upon contracts or tortious acts.

10. The crucial point for determination is whether the object of the suit would be "defeated" by the giving of the notice or the postponement of the commencement of the suit. If the answer is, in the affirmative then no notice was necessary, but if it is in the negative then the suit must fail for want of notice. No doubt, the plaintiffs would have been inconvenienced by a delay of two months in the institution of the suit, but it cannot be said that the object of their suit would have been "defeated" by such delay. If the impugned bye-law is illegal the plaintiffs and all members of their community

can be amply compensated by damages. It is only in cases where the loss cannot be adequately compensated by damages that the provisions of Sub-section (4) of Section 326 of the Municipalities Act are attracted.

An example of such a case would be where a Municipal Board in the purported exercise of the powers vested in it under the U. P. Municipalities Act proposes to demolish a building. It has got such powers, for instance, under Sections 186 and 263 of the Act and the aggrieved party may then bring a suit for an injunction to restrain the Board from demolishing the building. A delay of two months in such a case would defeat the purpose, because by that time the building would have been already demolished. The word "defeated" in Sub-section (4) of Section 326 is much stronger than the word "inconvenienced". If the plaintiffs' contention were accepted then it would mean that in every suit for an injunction there is no need of any notice, because in every such case a delay in the institution of the suit is bound to cause inconvenience to the plaintiff. It will be noticed that Sub-section (4) of Section 326 does not dispense with the requirement of notice in all suits for an injunction. It is only in those suits for an injunction in which the object would be "defeated" by the giving of the notice or the postponement of the commencement of the suit that this requirement has been dispensed with.

11. Sri Ambika Prasad, learned counsel for the plaintiffs has argued that the number of butchers and hide merchants is so large that it would be difficult for each of them to bring a suit for damages against the Municipal Board. P. W. Muhammad Naim has stated that there are 200 or 300 families of butchers in Allahabad who do various kinds of business out of the slaughtered animals. I can see no insuperable difficulty in 200 or 300 persons bringing separate suits for damages against the Municipal Board. if the bye-laws are held to be ultra vires. We had several crops of such cases. When the Zamindari Abolition Act was passed by the State Legislature there were several thousands of applications under Article 226 of the Constitution. When the Debt Acts were passed in this State thousands of cases for the redemption of mortgages under Section 12 of the U. P. Agriculturists' Relief Act were instituted. A distinction must be drawn between the words "defeated" and "inconvenienced". The former is a much stronger word.

12. For the reasons given above, I am clearly of opinion that the object of this suit would not have been defeated by the giving of the notice. The provisions of Sub-section (4) of Section 326 do not apply to the present case, and that being so a notice under Sub-section (1) of that section was essential. The suit must, therefore, fail for want of such a notice and I would dismiss it with costs.

Harish Chandra, J.

13. I agree that the suit should be dismissed with costs for want of notices under Section 326 (1) of the U. P. Municipalities Act and have nothing to add.

Raghubar Dayal, J.

14. I agree with my brother Bind Basni Prasad that this suit should be dismissed with costs as it was instituted without the plaintiffs' having served a notice on the Municipal Board as required under

Section 326 of the U. P. Municipalities Act of 1916.

15. I do not agree with the contention for the plaintiffs that Section 326 (1) applies to such suits only which are suits in tort and, therefore, it does not apply to the present suit. The two cases relied upon do not support the contention. In 'MUNICIPAL BOARD, AGRA v. RAM KISHAN', 1933 All L J 1414, the point decided was that Section 326 of the Municipalities Act was not intended to apply to a suit on contract. In the course of the judgment it was, however, observed: "In our view Section 326 is intended to cover wrongful acts done by a Municipal Board or by officers or servants of that Board." This simply means that suits in tort come within the mischief of Section 326 and does not necessarily mean that suits which are not suits in tort are not affected by the provisions of this section.

Similarly in 'JAGANNATH v. MUNICIPAL BOARD. SORON', 1939 All L J 168, which was a case of a suit for a declaration that a certain bye-law passed by the Municipal Board was illegal and for the issue of a permanent injunction restraining the Municipal Board from taking proceedings for attachment or sale against the plaintiffs for the recovery of the amount in question, it was held that the declaration prayed for led to a recurring cause of action as long as the bye-law existed and that Section 326 (3) did not bar the suit. It was argued for the plaintiffs appellants that Section 326 (3) had no application to a suit of that nature and that in a case of that character the plain-tiffs had a recurring cause of action.

The learned Judges referred to the case of 'AMBIKA CHURN v. SATISH CHUNDER', 2 Cal W N 689 and remarked:

"We agree with the decision in that case and are of opinion that the contention of the learned counsel is correct. The word 'act' which has been used by the legislature in Sub-section (1) of Section 326 of the U. P. Municipalities Act occurs also in the corresponding section of the Bengal Municipal Act namely Section 363, and the learned Judges in their judgment in the case cited have observed that the word 'act' refers to tortious acts. We agree with the opinion expressed in the judgment."

What was observed in the Calcutta case was:

"It has been held in a series of cases that the word 'act' used in the section refers to tortious acts and not to any act arising upon a contractual or quasi contractual basis as in the present case."

It would appear, therefore that these observations in the Calcutta case and in this case cannot be taken to mean that it is only to suits in tort that the provisions of Section 326 of the Municipalities Act would apply.

16. I am of opinion that the provisions of Section 326 Sub-section (1) of the Municipalities Act would apply to all suits which are against the persons specified in that section and are in respect of acts done or purporting to have been done by the defendant in official capacity. There appears to me to

be nothing in the provisions of this sub-section which should lead to a restriction in its application to cases in tort only. Similar expressions are used in Section 80, C. P. C. and it was observed in 'BHAGCHAND v. SECRETARY OF STATE', AIR 1927 P C 176 at p. 184:

"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."

Later it was observed in 'REVATI MOHAN v. JATINDRA MOHAN', AIR 1934 P C 96 at p. 97:

"In their Lordships' opinion such a suit is not within the ambit of Section 80 and no notice of suit was required. The learned Subordinate Judge held that the section had no application to suits in contract, and this dictum was rightly repelled by Mukerji, J. who delivered the judgment of the High Court. Having regard to the decision of this Board in 'BHAGCHAND v. SECRETARY OF STATE', AIR 1927 P C 176, their Lordships think that no such distinction is possible."

The mere fact that this sub-section requires a clear statement of the amount of compensation claimed in the plaint need not mean that every plaint must claim compensation. If compensation is claimed its amount is required to be specified. The bye-law in suit passed by the Municipal Board, confirmed by the Commissioner and published in the Gezette gave sufficient cause of action for the suit to the plaintiffs and the conduct of the Municipal Board in passing the bye-law and publishing it amounted to an act within the meaning of Section 326 (1) of the Municipalities Act. I, am, therefore, of opinion that the provisions of Section 326 (1) of the Municipalities Act apply to the present suit.

17. The plaintiffs claimed advantage of Sub-section (4) of Section 326 of the Municipalities Act. This sub-section is:

"Provided that nothing in Sub-section (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the commencement of the suit or proceeding."

I do not agree with this contention. The relief claimed by the plaintiffs is:

"(a) By means of a permanent injunction the defendants be restrained from prohibiting absolutely the slaughter of bull, bullock, cow, calf (both male and female) in any slaughter house established by the Municipal Board of Allahabad or any other place as contemplated by the void and ultra vires new bye-law No. 1 sub-bye-law No. (3) published in the U. P. Gazette of March 31, 1951."

The Municipal Board had already prohibited the slaughter of bull etc. by enacting the bye-law in suit. The object of the suit, which was simply to restrain the Municipal Board from prohibiting such slaughter, could no more be defeated by the delay in the institution of the suit as a result of giving a notice to the Municipal Board and waiting for the statutory period before the institution of the suit. Further the object of the suit was to obtain a perpetual injunction, and a perpetual injunction could have been granted in a suit instituted two months later. The delay could not have deprived the plaintiffs of the relief they claimed in this suit. The suit could not have been in-fructuous. The mere fact that the plaintiffs might have been put to irreparable loss of trade or business on account of the delay, even if it be accepted is to my mind immaterial as this was not a suit with respect to such loss and when, whatever, the loss, could have been compensated in a proper suit if the plaintiffs were entitled to such compensation.

18. I am, therefore, of opinion that this suit should fail.