

1939
CHHEDI
LAL
v.
BHARAT

indeed every section of chapter V of the Act, refers to debtors who were agriculturists at the date when the loan was contracted. "Creditor" is defined in section 2(7) as follows: "'Creditor' in chapter V means a person who, in the regular course of business, advances a loan as defined in this Act, and includes the legal representatives and the successors in interest, whether by inheritance, assignment or otherwise, of a creditor." Now the suits contemplated by section 33 of the Act are suits against "creditors", that is against persons who have advanced "loans" as defined in the Act. "Loan" as already observed is defined as "an advance to an agriculturist", that is a person who was an agriculturist at the time when the advance was made.

Upon a consideration of the provisions of section 33 and of the other sections in the Act above referred to we are satisfied that the plaintiff in the suit out of which this appeal arises was not entitled to prefer a claim under section 33(1). His suit was therefore rightly dismissed by the learned single Judge.

In the result the appeal is dismissed with costs.

Before Justice Sir Edward Bennet and Mr. Justice Verma

MUNICIPAL BOARD, MORADABAD, (DEFENDANT) v.
HABIB ULLAH (PLAINTIFF)*

1939
January, 5

Municipalities Act (Local Act II of 1916), sections 186, 321—Order for demolition ultra vires—Suit for injunction maintainable—"Instructions regarding Nazul entrusted to the management of Municipal Boards"—No force of law—Municipalities Act, sections 60, 61, 321—Notice of demolition issued by Executive Officer—Validity.

In order that section 321 of the Municipalities Act may be applicable it is necessary that the order or direction purporting to be made under sections 186 and 211 of the Municipalities Act should be made in accordance with the powers conferred

*Second Appeal No. 1435 of 1935 from a decree of Harish Chandra, District Judge of Moradabad, dated the 8th of August, 1935, reversing a decree of Mazhar Husain, Munsif of Moradabad, dated the 18th of January, 1935.

by these sections upon the Municipal Board. Where the order or direction is not in accordance with such powers but is *ultra vires*, a suit for an injunction against the Municipal Board is maintainable.

Where the plaintiff had made certain construction in accordance with the sanction granted by the Municipal Board and had not contravened any law or bye-law or done anything to bring the case under section 185 of the Municipalities Act, but by the direction of the Collector who was of opinion that there was an encroachment on Nazul land a notice purporting to be under sections 186 and 211 of the Act and requiring the plaintiff to demolish the constructions was issued by the Executive Officer of the Municipality:

Held (1) that the notice was *ultra vires*, and was none the less so because it was issued in obedience to the order of the Collector, in accordance with paragraphs 4 and 11 of the "Instructions regarding Nazul entrusted to the management of Municipal Boards". These "Instructions" are not rules made by the Government in exercise of the powers conferred by section 296 of the Act and do not have the force of law, and they do not authorise the Municipal Board to take any action which is beyond the powers conferred on it by the Municipalities Act.

(2) In view of the provisions of sections 60 and 61, and of the second schedule, of the Municipalities Act, the bar of section 321 to the maintainability of a suit cannot arise in a case where the notice purporting to be under section 186 or 211 has been issued by the Executive Officer.

Mr. *Mushtaq Ahmad*, for the appellant.

Mr. *Shah Jamil Alam*, for the respondent

BENNET and VERMA, JJ.:—This is an appeal by the defendant Board in a suit for a perpetual injunction restraining it from demolishing certain constructions of the plaintiff. The suit was dismissed by the trial court but the lower appellate court has decreed it.

The plaintiff respondent applied to the Municipal Board for permission to make certain constructions and the Board granted the application and sanctioned the erection of the building proposed by the plaintiff. It is common ground that the plaintiff in making the constructions has not done anything which can be said to be

1939

MUNICIPAL
BOARD,
MORAD-
ABAD
v.
HABIB
ULLAH

1939
MUNICIPAL
BOARD,
MORAD-
ABAD
v.
HABIB
ULLAH

in contravention of any directions made by the Board or in contravention of any provision of the law or of any bye-law. It is clear therefore that whatever the plaintiff respondent has done is not within section 185 of the Municipalities Act. It appears that some time after the plaintiff respondent had completed his constructions, correspondence ensued between the Municipal Board and the Collector of the district, and ultimately on the 14th of June, 1934, the Collector wrote to the Municipal Board saying that Habibullah had made an encroachment on "nazul land over a public well", and directed that the encroachment should be removed at once. On receipt of this letter a notice, purporting to be under sections 186 and 211 of the Act, was issued by the Executive Officer of the Board on the 20th of June, 1934, requiring Habibullah to demolish his constructions within four days from the receipt of the notice and saying that if Habibullah failed to comply with the notice, action would be taken under section 307 of the Act. Habibullah thereupon filed the suit which has given rise to this appeal. The lower appellate court has held that the Board having sanctioned the application for building made by Habibullah, and Habibullah having done nothing which was in contravention of the sections of the Act dealing with Building Regulations, the Board had no power to issue any notice under section 186. It has further held that the Board had no power to issue any notice under section 211 because here there was no "street" involved.

The argument of the learned counsel for the appellant before us is that the Board had to issue the notice in obedience to the order of the Collector and that therefore the suit was not maintainable against the Board. Reference is made to paragraphs 4 and 11 of the "Instructions regarding Nazul entrusted to the management of Municipal Bords" and it is argued that these paragraphs have the force of law. In our opinion the court below is right in holding that these "Instructions"

1939

 MUNICIPAL
 BOARD,
 MORAD-
 ABAD
 v.
 HABIB
 ULLAH

have not the force of law. It is clear that these "Instructions" are not rules made by the Government in exercise of the powers conferred by section 296 of the Act. That being so, the argument of the learned counsel has no force. The court below, in our opinion is right in holding that the plaintiff respondent is not bound by these "Instructions". They are merely departmental instructions and direct the Board to comply with the orders of the Collector. The Board, however, in complying with the order of the Collector, must act according to law and the "Instructions" do not authorise the Board to take any action which is beyond the powers conferred on it by the Municipalities Act. As an example of what the Board could do in accordance with law it may be mentioned that it was open to the Board to bring a properly framed suit in the civil court for the demolition of the constructions made by Habibullah and if the allegations made by the Board satisfied the court that the Board was entitled to a decree the suit would no doubt be decreed. The Board cannot, by issuing a notice which is not authorised by section 186 or by section 211 of the Municipalities Act, threaten to demolish the plaintiff's constructions. The notice issued by the Board being clearly *ultra vires*, the plaintiff was entitled to bring the suit claiming an injunction. It is well settled that the civil court has jurisdiction to entertain a suit of this character if it appears that the notice issued by the Board is illegal and *ultra vires*.

The next argument advanced by the learned counsel for the appellant is that the suit is barred by the provisions of section 321 of the Municipalities Act. In order that that section of the Act may be applicable, it is necessary that the order or direction made by a Board should be under the powers conferred upon it by section 186 or by section 211. As we have pointed out above, the order or direction in this case is not in accordance with the powers conferred upon the Board either by section 186 or by section 211. The suit cannot,

1939
 MUNICIPAL
 BOARD,
 MORAD-
 ABAD
 v.
 HABIB
 ULLAH

therefore, be barred by section 321. In our opinion, the decision of the lower appellate court on this point also is correct.

Further, it may be noted that the notice in this case has been issued by the Executive Officer. In view of the provisions of sections 60 and 61, and of the second schedule of the Municipalities Act, the bar of section 321 cannot arise in such a case. This point has been dealt with at length in our judgment in the case of *Municipal Board, Moradabad v. Hafiz Banne* (1). For this reason also we are of opinion that the suit of the plaintiff respondent was maintainable.

It has been argued that it was the duty of the plaintiff appellant to implead the Secretary of State for India in Council as a defendant to the suit. In our opinion there is no force in this argument. The notice complained of was issued by the Municipal Board and it was the Municipal Board that threatened to take action under section 307 of the Municipalities Act if the constructions in question were not demolished by the plaintiff within four days of the receipt of the notice. The plaintiff was therefore entitled to bring the suit impleading the Municipal Board alone as a defendant. It is hardly necessary to point out that if the Collector had desired to take any action himself, he could have filed a suit on behalf of the Secretary of State for India in Council.

For the reasons given above we dismiss this appeal with costs.

(1) S. A. No. 314 of 1935, decided on 23rd December, 1938.