TARACHAND v. MUNICIPAL COUNCIL OF COLOMBO

COURT OF APPEAL
ABDUL CADER J. & L. H. DE ALWIS J.,
C.A. (S.C.) NO. 352/72(F),
D.C. COLOMBO NO. 2056/Z,
OCTOBER 7, 1980.

Municipal Council Ordinance, section 235(1) – Waiver.

In terms of section 235(1) of the Municipal Council Ordinance, the Municipal Council, Colombo, entered the assessment for 1968 of premises described in paragraph 2 of the plaint in the assessment book and gave public notice thereof. The Council is required to give notice to the occupier of the premises under section 235(3) in the forms set out in the third schedule.

The learned District Judge held that this notice was not served on the occupier, namely the plaintiff in this action or left at the premises.

The plaintiff however participated at the inquiry into assessment, but did not at that inquiry raise the question that the Council failed to serve individual notice on him.

Held :

(1) Compliance with section 235(3) of the Municipal Council Ordinance, is imperative (*Don Gerald v. Fonseka* 71 NLR 457 followed.)

(2) Participation at the inquiry does not take away the right of the plaintiff to claim relief on the ground that there was non-compliance with section 235(3).

Cases referred to:

(1) *Don Gerald* v. *Fonseka* 71 NLR 457
(2) Rajakaruna v. *de Silva* 73 N*LR 274*
(3) *Durai Appu* v. *Fernando* 69 NLR 269
(4) *Ridge* v. *Baldwin* 1964 AC 40

APPEAL from Judgment of the District Court of Colombo.

H. W. Jayewardena, Q.C. with *M. Mahendrarajah* for the appellant.

J. W. Subasinghe for respondent.

Cur adv vult.

7th November, 1980
ABDUL CADER, J.

In terms of section 235(1) of the Municipal Council Ordinance, Chapter 252, the defendant entered the assessment for 1968 of premises described in paragraph 2 of the plaint in the assessment book and gave public notice thereof. The Council is required to give notice to the occupier of the premises under section 235(3) in the form set out in the third schedule. The learned District Judge held that this notice was not served on the occupier, namely, the plaintiff in this action or left at the premises. Before us, Counsel for the respondent did not challenge that finding.

Counsel for the appellant pointed out that this requirement of service on the occupier is an imperative provision on the failure of which the assessment should be declared void. He pointed out further that if such notice had been served on the plaintiff, the plaintiff would have had an opportunity to object to that assessment and if his objection was rejected, he would have been entitled to institute an action, objecting to the assessment in the District Court, under section 236(1). As a result of the failure to give notice to the plaintiff, not only the plaintiff had been denied the opportunity to file objection, but also that when the plaintiff came to know that the assessment had been enhanced, he was precluded from filing an action in the District Court under section 236(1) for the reason that the only evidence that he can place before that court is his written objection to the assessment (s.236(3)) and such written objections do not exist for the reason that the plaintiff had been deprived of the opportunity of lodging an objection. He urges that the Court should view this failure even more seriously than otherwise as the premises have been taken out of rent control by the new assessment and the tenant is now entirely at the mercy of the landlord. Therefore, he urged that the failure to serve notice in terms of section 235(3) is fatal and voids the assessment that had been made by the defendant-Council.

The learned District Judge held that since the plaintiff had participated at the inquiry into the assessment and did not at that inquiry raise the question that the defendant failed to serve individual notice on him, the plaintiff had waived his rights to notice under section 235(3). The landlord had taken objection to the assessment and wanted the assessment enhanced. The defendant-Council fixed that matter for inquiry and gave notice to the plaintiff of that inquiry and the plaintiff participated through an Attorney-at-Law who made a

statement of the rents paid by the plaintiff to the landlord. The Commissioner then enhanced the assessment. It is the participation at this inquiry that the District Judge called a waiver of notice. In the first place, at that inquiry proceedings of which are marked D5, it is true that the Attorney-at-Law did not take any objection on the ground that notice had not been served on the plaintiff in terms of section 235(3). But it is difficult to hold for that reason that the plaintiff had waived his rights to a notice in terms of this section. There is also no doubt that the Attorney-at-Law had given information about the various rents collected by the landlord, but that, too, was done in consequence of a statutory duty cast on the plaintiff. Further, as Mr. Jayewardene pointed out, the question of waiver was not raised in the issues. Mr. Jayewardene submitted that the waiver is one form of estoppel and unless it is expressly pleaded and put in issue, it was wrong on the part of the Court to have denied judgment to the plaintiff on the ground of waiver. In any event, I am disposed to take the view that the participation at the inquiry does not take away the right of the plaintiff to claim relief on the ground that there was non-compliance with section 235(3). By such participation, the plaintiff was, no doubt, heard. But the fact yet remains that the plaintiff had lost the opportunity to file action under section 236(1) as a result of the defendant's failure to give him notice. That compliance with this requirement is imperative is further enhanced in that it is this notice that intimates that written objections will be received in the Council office. Section 235(4) stated that notice to the occupier shall further intimate that written objections to the assessment will be received at the Municipal Council office within one month from the date of service of notice.

Counsel for the respondent pointed out that the assessment book was available for inspection after public notice was given and if the plaintiff wished to check the assessment, it was open to him to have done so and lodge his objection without awaiting a personal notice under section 235(3). Although this is true, we are all aware that no tenant takes the trouble to inspect this assessment book unless he comes to know that there is some revision of assessment contemplated and almost always he comes by that knowledge only when he receives personal notice. There is no reason why an occupier should inspect the books when the law requires the Council to give personal notice to him.

In the case of *Don Gerald v. Fonseka*,[1] H. N. G. Fernando, C.J. held "that section 235 clearly imposes on a Council the duty to serve a notice of assessment at the premises assessed. Thus, the object of

section 235 is to ensure that notices are received by occupiers. Section 235 also provides for the making of objections against an assessment within thirty days from the date of the service of the requisite notice." This authority is also important as he went on to say:–

"The failure of the Council in the present case to serve on the occupier's premises a notice has deprived the petitioner of an opportunity to object to that assessment. This has had particularly serious consequences because the assessment actually made has deprived the petitioner of the protection of the Rent Restriction Act."

Counsel also cited the case of *Rajakaruna v. de Silva*[2] and submitted (1) that the Municipal Council had no right to increase the annual value of premises as while section 236(5) makes provisions for excess taxes collected to be returned to the party aggrieved, there is no provision for payment of additional taxes to the Municipality by the tax payer; (2) that the distinction between a voidable and a void assessment made by Samarawickrame, J. following the decision in *Durai Appa v. Fernando*[3] is no longer valid in view of several subsequent decisions. He referred us to the case of *Ridge v. Baldwin*[4] and submitted that the distinction between a void and voidable transaction is a principle known to contract law and should not be extended to other provinces of the law. It is not necessary for me to go into either of these propositions which Mr. Jayewardene has submitted for the reason that I am of the opinion that what Samarawickrame, J. wished to say in that case was that so long as the assessment remains without being declared void by a court of law or any other tribunal of competent jurisdiction that assessment would bind the parties and to have that assessment annulled, it would be necessary that a proper action should be filed against the Municipality and a declaration to that effect be obtained through the court of law. In that case, the landlord was seeking to eject a tenant on the ground that the tenant had failed to pay rent on the basis of an increased assessment and the tenant raised the question of failure to give notice to him without making the Municipality a party to the proceedings or without filing a separate action against the Municipality to have the assessment annulled. In this case, the Municipality is the defendant and paragraph A of the prayer to the plaint is a prayer for such annulment.

Mr. Subasinghe pointed out that this Court cannot grant the relief prayed for in paragraphs B and C of the plaint, and Mr. Jayewardene readily conceded it. Issues 4 to 19 had been tried at an earlier trial

and the judgment and answers to issues in that case at the first trial were not canvassed before us. The appellant before us was concerned only with the answers to issues 1 to 3. There was no dispute before us in respect of issues 1 and 2 which the learned District Judge has answered "no" and "yes" respectively. Learned District Judge has answered issue No. 3 in the negative. We are of the opinion that he should have answered that in the affirmative.

In the result, we set aside the judgment of the learned District Judge and enter judgment for the plaintiff as prayed for in paragraph A of the plaint. Paragraphs B and C of the prayer to the plaint are dismissed.

The plaintiff is entitled to costs of both courts.

L. H. DE ALWIS, J. – I agree.

Appeal allowed.