

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Nanabhai Haridas.

JOSHI KALIDAS SEVAKRAM, PLAINTIFF, v. THE DAKOR
TOWN MUNICIPALITY, DEFENDANTS.*

Bombay District Municipal Act (VI of 1873), Sec. 11, Cl. 1; Secs. 21 & 86—Notice of meeting—Provision imperative, not merely directory—Illegal tax—Notice of action for refund—Time within which to bring suit—Limitation—Jurisdiction of Civil Court.

1883
April 5 & 6
& May 3.

On the 18th of March, 1880, the Dakor Town Municipality, acting under the powers conferred upon them by the Bombay Act VI of 1873, convened a meeting at which it was resolved to impose a house-tax on the town; and also another meeting on the 2nd of April, 1880, at which a classification of the houses was made, and the rates fixed. The Revenue Commissioner, N. D., on behalf of the Government, sanctioned the resolutions on the 2nd of June, 1880. Notice of the meeting of the 18th of March, 1880, was not served on three of the commissioners, they being absent at the time from Dakor, and no notice specifying the business to be transacted therein was posted up at the *kacheri*, as required by sec. 11, cl. 1 of the Act. K., a householder, sent a notice to the municipality on the 25th of January, 1881, impeaching the legality of the tax. On the 3rd of June, 1881, he paid the tax, namely Rs. 2. for which he had been rated, and on the 6th of January, 1882, he sued for a refund of the said sum from the municipality.

Held that the suit was not brought too late to satisfy the requirements of sec. 86 of the Act. When the notice of the 25th of January, 1881, was sent by K., he had no cause of action against the municipality for anything done; no notice, therefore, such as is contemplated by sec. 86, was ever sent by K., and, consequently, there could be no final order on such notice from which the three months prescribed by that section would run.

The provisions of sec. 11, cl. 1, as to notice of meeting are not directory, but obligatory; and notice to all the commissioners of the meeting of the 18th of March, 1880, being a material part of the machinery provided by the Act for imposing a legal tax, was a condition precedent to the validity of that tax. Consequently, the resolution come to on the 18th of March, 1880, was not legal, and, whether sanctioned or not by the Government, it always retained its inherent defect.

Section 21, which enables the Government to dispose of objections made to a tax by the inhabitants of a town, is quite consistent with the well-established jurisdiction of the Civil Court to decide as to the validity of any fresh tax or impost, and affords no sufficient ground for the conclusion that the intention of the Legislature was to take away that jurisdiction.

Quære—Whether section 86 of the Bombay Act VI of 1873 applies to an action for money had and received.

* Civil Reference, No. 7 of 1883.

1883

JOSHI
KALIDAS
SEVAKRAM
v.
THE DAKOR
TOWN MUNI-
CIPALITY.

THIS case was referred for the opinion of the High Court by Rav Saheb R. K. Desai, Second Class Subordinate Judge of Umreth, under section 617 of the Code of Civil Procedure (Act X of 1877).

The municipality of Dakor was originally established under Act XXVI of 1850, but subsequently it was created into a town municipality, consisting of official and non-official commissioners, under the Bombay District Municipal Act (Bombay Act VI of 1873), with power to impose and levy taxes on the inhabitants of that town. The following are the sections of that Act material for the purposes of this case :—

Section 10, Cl. 1.—In town municipalities the power and responsibility for carrying out the purposes of this Act shall be vested in the president finally, and in the vice-president subject to appeal to the president either by the other commissioners, or by the public, or any individual considering himself aggrieved : provided that, in the event of the president or vice-president differing on any matter from a majority of the commissioners, he shall record in writing his reasons for overruling their opinion.

Section 11, Cl. 1.—Every municipality shall hold four quarterly general meetings in every year, on or about January 1st, April 10th, July 1st, and October 1st, at which the commissioners shall meet for the transaction of general business. The president, and in town municipalities the vice-president also, may, whenever he thinks fit, and shall, upon a written requisition signed by not less than one-fourth of the whole body of commissioners, call a special general meeting. Seven clear days' notice of quarterly general meeting and three days' clear notice of a special general meeting, specifying the time and place of such intended meeting, and the business to be transacted thereat, shall be circulated to the commissioners, and posted up at the municipal office, or local *kacheri*, or other public place.

Section 21, Cl. 1.—Every municipality desiring from time to time to impose any tax, toll, or other impost, for the purposes of this Act, shall give notice of such intention, and shall in such notice define the nature of the tax, toll, or other impost, the class of persons or property to be made liable thereto, and the amount to be imposed.

Cl. 2.—Any inhabitant of the municipal district objecting to such tax, toll, or impost, may, within a fortnight from the date of the said notice, send his objection in writing to the municipality, and the municipality shall take such objection into consideration, and report their opinion thereon to the Governor in Council.

Cl. 3.—When a fortnight from the date of the said notice has expired, if no such objections have been sent as aforesaid, or (where such objections have been sent in) if in the opinion of the Governor in Council they are insufficient, the Governor in Council may approve of the provision for the said tax, toll, or impost in the rules, and such tax, toll, or impost shall be imposed accordingly.

Cl. 4.—The above provisions of this section shall not be applicable, in the first instance, to municipalities formed under Act XXVI of 1850 which the Governor

in Council may have constituted as municipal districts under this Act. In all such cases the taxes, tolls, or other imposts which may have been in force under Act XXVI of 1850 shall continue in force until altered or abolished.

Section 86.—No action shall be brought against the municipality, or any of their officers, or any person acting under their direction, for anything done, or intended to be done, under this Act, until the expiration of one month next after notice in writing shall have been delivered, or left at the office of the municipality, or at the place of abode of the intended defendant, stating with reasonable particularity the cause of action, and the name and place of abode of the intended plaintiff; and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action, except such as is stated in the notice so delivered; and, unless such notice be proved, the Court shall find for the defendant; and every such action shall be commenced within three months next after the passing of the final order by the municipality, or officer having power to pass such order, and not afterwards; and if any person to whom any such notice of action is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.

On the 14th of March, 1880, a circular notice was sent round to the commissioners by the secretary of the municipality, requiring them to attend a special general meeting on the 18th of March, 1883. The notice reached all the commissioners except three, who were at that time absent from the town, their whereabouts being unknown. The notice did not specify the business to be transacted at the meeting, and the same was not posted up at the local *kacheri* or other public place.

On the 18th of March, 1880, all those who had received the notice attended at the meeting, at which a resolution was passed that a house-tax should be imposed on the inhabitants of Dákor. On the 2nd of April, 1880, another meeting, after due notice to all the commissioners except one, was held. It was attended by all who had notice, including two of the three commissioners who had been absent at the meeting of the 18th of March, 1880. The remaining commissioner was still absent from the town, and could not, therefore, be served with notice of the meeting.

The following resolutions, among others, were then passed :—

- (1). That five classes should be made of all the houses liable to the tax for 1880-81 :—

First class to pay Rs. 5 on each house.

Second „ „ „ 3 „ „

1883

JOSHI
KALIDAS
SEVAKRAM

THE DAKOR
TOWN MUNI-
CIPALITY.

1883

JOSHI
KALIDAS
SEVAKRAM
v.
THE DAKOR
TOWN MUNI-
CIPALITY.

Third class to pay Rs. 2 on each house.

Fourth „ „ „ $1\frac{1}{2}$ „

Fifth „ „ „ $\frac{1}{2}$ „

- (2). That the sum fixed for the last three classes of houses should be payable on the 1st of December, 1880.
- (3). That a list of the houses in detail was to be prepared by the vice-president and three other commissioners.

The plaintiff's name was placed in the third class as liable to pay a tax of Rs. 2 in respect of his house No. 101.

On the 16th of April, 1880, the vice-president published a notification, whereby, after setting out the aforesaid resolutions of the two meetings, he invited those of the inhabitants of the town who objected to the imposition of the tax to send in their objections in writing within fifteen days from the date of the notification.

The objections received from some of the inhabitants, as well as the opinions of the dissenting commissioners, together with the proceedings of the two meetings, were all forwarded to the Revenue Commissioner, N. D., who, after considering the same, gave his sanction by a minute dated the 2nd of June, 1880, for the levy of the tax. A public notification was posted in different parts of the town, announcing that the tax had been sanctioned by the Revenue Commissioner.

On the 7th of January, 1881, the secretary forwarded a letter to the plaintiff, informing him that his house, No. 101, was placed in the third class, and that in respect of it Rs. 2 had become payable on 1st December, 1880, as house-tax for 1880-81, and that the same should be paid within four days therefrom. In default of payment he was informed that legal measures would be taken.

The plaintiff in reply sent a notice, dated the 25th of January, 1881, to the municipality, in which he stated that the resolutions and proceedings before mentioned were illegal and unauthorized, and the tax unnecessary; that the notice to him of the 7th of January, 1881, was contrary to law, and the levy of the tax illegal. He called upon the municipality to withdraw their notice of demand, or he would bring an action against them for the purpose of getting the said notice and the resolutions cancelled, and get-

ting back the money which might be levied under colour of the said resolutions and notice.

On the 3rd of June, 1881, he paid the tax, Rs. 2, and brought an action against the municipality in the Subordinate Judge's Court at Umreth for refund of the said sum. Among other things he alleged that the said tax was illegal, and that the sanction of the Revenue Commissioner to the resolutions of the municipality was obtained without the knowledge of the people of Dákor.

In their written statement the municipality alleged that the tax was imposed by them in pursuance of the resolutions come to at two meetings, duly held, after notice, on the 18th of March and the 2nd of April, 1880, respectively, and that the said resolutions were in due course sanctioned by the Government. They further urged that the plaintiff's notice of the 25th of January, 1881, was irregular, and that his claim for a refund was barred by section 86 of the Act, inasmuch as it was not brought within three months from the date of his notice.

The Subordinate Judge raised a number of issues, most of which he found for the plaintiff. He found, so far as is material for the purposes of this case, that the special general meeting of the 18th of March, 1880, in which the house-tax was resolved upon, was irregularly convened, and that section 86 did not apply to a suit for a refund of the tax. The judgment then proceeded as follows :—

“Considering that the suit, being one for money had and received by the defendants for the plaintiff's use, is cognizable by a Court of Small Causes ; that, being one for a sum less than Rs. 50, it comes under my jurisdiction as a Small Cause Court Judge, and, as such, my decision on it is final ; and that some of the points involved in it are not free from doubt ; I deem it necessary to refer the following points, under section 617 of the Civil Procedure Code, 1882, for the decision of the High Court :—

“(1.) Whether the irregularities in the procedure of the defendants, as found above, in the imposing and the levying of the house-tax in the town of Dákor are sufficient to entitle the plaintiff, an inhabitant of that town, to claim to recover

1883

JOSHI
KALIDAS
SEVAKRAM
v.
THE DAKOR
TOWN MUNI-
CIPALITY.

1883

JOSHI
KALIDAS
SEVAKRAM
v.
THE DAKOR
TOWN MUNI-
CIPALITY.

back the amount levied from him as the house-tax for his house ?

“(2.) If so, is the claim barred by the provisions of section 86 of the Bombay Act VI of 1873 ?”

He found in favour of the plaintiff's claim, subject to the opinion of the High Court upon these two points.

The case was argued on these two points on the 5th and 6th of April, 1883.

Vidaji and Ráv Sáheb V. J. Kirtikar, for the defendants.—The Bombay Act VI of 1873, sec. 86, bars the suit. The three months after the “final order” within which the suit is to be brought ought, in the events which have happened, to be counted from the date of the Government sanction, *i.e.* from the 2nd of June, 1880; and the plaint was filed on the 6th of January, 1882. The Subordinate Judge erroneously held that the section did not apply to a suit for money had and received. The latest case on the point is that of *Waterhouse v. Keen* (1), which decides that actions in *assumpsit* for the recovery of illegal tolls must be brought within the time limited by the Statute under which the tolls were levied. As to the validity of the tax, the question depends entirely on the construction of section 11 of the Act. It is directory, and not imperative. There are no “nullifying words” in that section, *i.e.* words stating, in effect, that the tax would be void in case the notice for convening the meeting, which imposed the house-tax, did not reach each and all the commissioners—*Pearse v. Morrice* (2); *The Queen v. Ingall* (3). See also *In re Union Hill Silver Company, Limited* (4). The meeting of the 18th of March, 1880, was duly notified to all such commissioners as were in the town at that time. Three had left, and their addresses were not known; therefore they could not be served. Two of the three did, in fact, attend the subsequent meeting of the 2nd of April, 1880, and voted for the levy of the tax without any objection. Moreover, whatever defect there might have been in the service of the notice, was cured by the subsequent sanction of Government, whose power to impose the tax was not taken away by the Act.

(1) 4 B. & C., 200.

(2) 2 A. & E., 84.

(3) L. R., 2 Q. B. D., 199.

(4) 22 L. T. N. S., 400.

Farran, with *G. K. Parak*, for plaintiff.—Section 86 applies to actions in torts and trespass only. It does not apply to actions in *assumpsit*—*Irving v. Wilson*(1); *Wallace v. Smith*(2). The tax having been levied under compulsion, article 12 of the Limitation Act (XV of 1877) applies. Section 11 as to notice of meeting is obligatory, and must be strictly complied with—*Howard v. Bodington*(3). Due notice was a condition precedent to the validity of the resolutions come to at the meeting of 18th of March—*The Queen v. Chorlton Union*(4); *King v. Newcomb*(5); and *Sibbald v. Roderick*(6).

Cur. adv. vult.

On the 3rd May the following judgment was delivered by

SARGENT, C. J.—The questions referred to the Court arise out of a plaint filed by a householder of the town of Dakor, seeking to recover from the municipality of that town the sum of Rs. 2, which he alleges to have been levied from him in payment of a house-tax illegally imposed on the inhabitants. The first question is, whether the plaint is barred by section 86, Act VI of 1873, under which Act the tax was imposed and levied. That section provides that no action shall be brought against the municipality for anything done, or intended to be done, under the Act, until the expiration of one month after a notice in writing stating with reasonable particularity the cause of action; and every such action shall be commenced within three months next after the passing of the final order by the municipality or officer having power to pass such order, and not afterwards. It appears that the plaintiff, on receiving a bill from the secretary of the municipality demanding payment of Rs. 2 in respect of the house-tax in question, sent a notice to the municipality on the 25th January, 1881, stating that the house-tax was illegal, and that if the Rs. 2 were levied from him, he would sue the municipality for a refund; but it was not until the 3rd June, 1881, that he was compelled to pay the Rs. 2. No subsequent notice was sent. The present suit was filed on the 6th January, 1882. Now, the above dates show that when the notice of the 25th January, 1881, was sent by the plaintiff, he had no cause of action against the municipality for anything done

1883

JOSHI
KALIDAS
SEVAKRAM
v.
THE DAKOR
TOWN MUNI-
CIPALITY.

(1) 4 T. R., 485.

(2) 5 East., 115.

(3) L. R., 2 P. D., 203.

(4) L. R., 8 Q. B., 5.

(5) 4 T. R., 368.

(6) 11 A. & E., 38.

1883

JOSHI
KALIDAS
SEVAKRAM
v.
THE DAKOR
TOWN MUNI-
CIPALITY.

and that, therefore, no notice, such as is contemplated by section 86, was ever sent by the plaintiff, and that, consequently, there could be no final order on such notice from which the three months would run within which the present suit should have been brought. Nor is there anything in the case to show that it was agreed between the parties that the notice of 25th January, 1881, and the letter of the vice-president in February, 1881, directing the secretary to enforce payment of the bills, should be treated as a notice and final order for the purposes of section 86. The defendants cannot, therefore, establish their plea that the suit was brought too late, even assuming that the present action fell within section 86, as to which the authorities are very conflicting, although they might well have pleaded that the proper notice required by section 86 had not been given them.

Passing to the merits, the question to be determined is, whether the house-tax was legally imposed. The principal ground of objection is that notice of the meeting of 18th March, 1880, was not served on three of the commissioners who were absent at the time from Dakor, and that no notice, mentioning the business to be transacted, was posted up at the *kacheri*, as required by section 11, cl. 1. It is not in dispute that the above irregularities were committed in convening the meeting of the 18th March, 1880; but it was contended that the provisions of that section were only directory, and that the non-observance of them did not invalidate the tax, and that, in any case, the tax could not be impeached after it had been sanctioned by Government. As to the latter contention, section 21 doubtless gives an inhabitant an opportunity of objecting to the tax, and having that objection disposed of by the Governor in Council, whose approval is indeed required in all cases before the tax can be entered in the rules, as provided by section 14, cl. 2. But such a provision (even if it be not thought to be confined to deciding as to the wisdom and advisability of imposing the tax) is quite consistent with the well-established jurisdiction of the Civil Court to decide as to the validity of any fresh tax or impost, and affords no sufficient ground for supposing that the intention of the Legislature was to take away that jurisdiction.

In *Attorney General v. Southampton*⁽¹⁾ the Court held that the power given to the poor law commissioners, by statute, to determine the propriety of the application of the poor rates, did not prevent the Court of Chancery from issuing an injunction to restrain their misapplication; and so in *Shaftesbury v. Russell*⁽²⁾ it was held that an Act, which provided that any question arising upon a distress should be determined by a commissioner of taxes, would not thereby take away the jurisdiction of the superior Court to try an action of illegal distress. Passing to the question whether the provisions of section 11 are directory or obligatory, we cannot do better than refer to the remarks of Lord Penzance in *Howard v. Bodington*⁽³⁾: "There may be many provisions in Acts of Parliament, which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the Legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed; otherwise the whole proceedings that subsequently follow must come to an end. Now, the question is, to which category does the provision in question in this case belong?"

Now, in the present case, the Act provides a certain machinery by section 21 by which a legal tax can be imposed on the community; and as Mr. Justice Holloway remarks in *Leman v. Domodarya*⁽⁴⁾: "There is no provision for taxing at all otherwise than by the prescribing of the machinery." It follows, therefore, that such machinery must be applied, at any rate in all its essential particulars; and can any one doubt that notice to all the members of the local public body, in whom the power of taxing the community is vested, of the meeting at which such power is intended to be exercised, as provided by section 11, cl. 1, is a material part of such machinery, and a condition precedent to the validity of the tax. In other words, no legal resolution was come to on the 18th March, 1880, by the commissioners, which, on receiving

1883

JOSHI
KALIDAS
SEVAKRAM
".
THE DAKOR
TOWN MUNI-
CIPALITY.

(1) 17 Sim., 6.

(3) L. R., 2 P. D. at p. 210.

(2) 1 B. & C., 666.

(4) I. L. R., 1 Mad. at p. 162.

1883

JOSHI
KALIDAS
SEVAKRAM
v.
THE DAKOR
TOWN MUNI-
CIPALITY.

the sanction of the Governor in Council, would, by section 11, cl. 3, acquire the force of law. Whether sanctioned or not by the Government, it retained its inherent defect.

*Scadding v. Lorant*¹⁾, where the Queen's Bench quashed a poor rate, is a good illustration of the strictness with which the Court requires the machinery provided by the Act to be complied with. It was said, indeed, that although such a provision as to notice might, under ordinary circumstances, be material, it ought not to be so regarded in the Act of 1873, which gives power, by section 10, to the president and vice-president to overrule the majority of the commissioners. This was not done on the present occasion; but in any case it would be impossible, we think, to hold that such power could be legally exercised until the provisions of the Act had been complied with for determining the wishes of the majority. However, two of the absent commissioners were present at the special meeting on the 2nd April, and took no objection to the resolution. But the business to be transacted at that meeting was not the question whether a tax should be imposed, but the classification of houses, and the fixing the amount of rate, in execution of the resolution come to at the previous meeting. We must, therefore, hold that the tax was illegally imposed, and that the plaintiff's suit was not barred. Defendants to pay plaintiff his costs of this reference.

(1) 13 Q. B., 687.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

KASHINATH MORSHETH, APPLICANT, v. RAMCHANDRA
GOPINATH, OPPONENT.*

1883

June 29.

Res judicata—Attachment, application to remove—Removal of attachment unknown to applicant—Failure of application—Second attachment—Second application to remove—New cause of action.

The plaintiff, mortgagee in possession of certain property, applied for the removal of an attachment placed on it by the defendant in execution of a decree against a third party. In default of payment of court fees by the defendant the attachment was removed, but in ignorance of this fact the plaintiff's application was proceeded with, and ultimately rejected. The plaintiff then brought a suit

* Extraordinary Civil Application, No. 71 of 1882.