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not any bearing on the case of a next friend or guardian *ad litem* not claiming charge of the estate of the minor."

The order of the Subordinate Judge, directing Bháskerráv, or whoever may be manager, to procure a certificate of administration under section 2 of Act XX of 1864, must be set aside. The manager to be allowed to proceed with the suit as next friend of the minor, with permission, if necessary, to amend the plaint accordingly. The costs of this application to be costs in the cause.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Birdwood.

April 28. GOSVA'MI SHRI PURUSHOTAMJI MA'HA'RA'J, BY HIS AGENT JUGALDA'S (ORIGINAL PLAINTIFF), APPELLANT, *v.* B. ROBB, MANAGER OF THE MOFUSSIL COMPANY, LIMITED (ORIGINAL DEFENDANT), RESPONDENT.*

Suit to levy a tax on cotton and cotton seeds purchased in, and exported from Broach—Act XIX of 1844*—Cess illegal—Agency—Trust—Agreements to defeat the object of an Act—Contract Act IX of* 1872, *Sec.* 23.

The plaintiff, manager and part proprietor of a Vallabhácháryá temple at Broach, sued the defendant to establish the right of the temple to levy a cess on cotton and cotton seeds purchased in Broach, and exported from it.

The defendant denied the plaintiff's right, and contended *(inter alia)* that, even if the right existed until 1844, it was then abolished by Act XIX of that year, which "enacted that, from the first day of October, 1844, all town duties, kusub viras, mohtarphás, baluti taxes, and cesses of every kind on trades and professions, under whatsoever name levied within the Presidency of Bombay, and not forming a part of the land revenue, shall be abolished."

Held, that Act XIX of 1844 applied to the cess claimed by the plaintiff. The expression "cesses of every kind" included the cess on cotton and cotton seeds, and absolutely put an end to the right, if any existed, of the Government or of any private individual of levying the same.

Held, also, the suit could not be regarded as a suit for money had and received by the defendant to the plaintiff's use, or as one to recover money received by the defendant as trustee or agent.

Held, also, an agreement to pay a tax prohibited by an Act of the Legislature would defeat the object of the Act, and was, consequently, void, and could not be enforced—Indian Contract Act IX of 1872, sec. 23.

* Second Appeal, No. 68 of 1883.

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THIS was a second appeal from the decision of S. Hammick, Assistant Judge (F. P.) at Broach, reversing the decree of Ráv Sáheb Chandulál Mathurádás, Subordinate Judge (Second Class) of Broach.

This action was instituted by the plaintiff—manager and part proprietor of the Vallabhácháryá Vaishnavite temple, called Shriji Mandir, at the town of Broach—to recover from the defendant, as manager of the Mofussil Company, a sum of Rs. 4,455-14-0. The plaintiff alleged that the former proprietors of the temple had from ancient times levied a *lágo*, or cess on all purchases of cotton and cotton seed for export from Broach, and that the defendant traded in cotton and cotton seed, and had paid the cess, except for the years 1875, 1876 and 1877. The plaintiff prayed that the above sum, being the amount of the cess due in respect of the defendant's purchases during those years, might now be awarded to him.

The defendant answered, amongst other things, that the cess had not been levied from time immemorial; that cotton and cotton seeds were not subject to any cess; that such cess, if levied, was not levied as of right, but as a species of black mail which the defendant was not liable to pay unless he chose, and that the alleged custom of levying the cess was illegal under Act XIX of 1884, and unreasonable.

It appeared that for a considerable period the plaintiff and his predecessors had been in the habit of levying the cess in question, and that the vendors of cotton and of cotton seeds at Broach in fixing the price of such goods had made an allowance to the buyers of the amount of the cess to be paid by them (the buyers), and had reduced the price accordingly. This allowance having been made to the defendant it was contended by the plaintiff that the defendant held the amount thereof as trustee or agent for him.

The Subordinate Judge found that the cess had been levied from time immemorial by the plaintiff's predecessors as of right; that cotton and cotton seeds were subject to the cess; that the levy was neither illegal nor void, and he awarded to the plaintiff Rs. 1,242-10-0.

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The Assistant Judge found that the plaintiff had of right levied from time immemorial a cess of annas 4 per candy of cotton and of pies 9 per *kalshi* of cotton seed purchased at Broach for export; but was of opinion that the cess in question had been abolished by Act XIX of 1844. He also held that the defendant did not hold the amount of the allowance made to him by the vendors as trustee or agent for the plaintiff.

The plaintiff appealed to the High Court.

Jardine (with him *Gokaldás Káhándás Párekh*) for the appellant.—The first question for consideration is whether Act XIX of 1844 is applicable. The Act says: "It is hereby enacted that from the first day of October, 1844, all town duties, kusub viras, mohturphás, baluti taxes, and cesses of every kind on trades or professions, under whatsoever name levied within the Presidency of Bombay, and not forming a part of the land revenue, shall be abolished." The expression "cesses of every kind" should be understood to mean cesses of a similar kind as those previously mentioned, and not any cesses whatever of any kind. The *lágo*, or cess, which is the subject of this suit, is not a town duty or tax on trades or professions. Act XIX does not prohibit any individual from giving any money to the temple, and the defendant having received money paid in the shape of *vartál*, or rebate, holds it as trustee or agent, and is liable to the *cestui que trust*. The custom held proved by the Assistant Judge is good notice to all concerned of the fact that the defendant holds for the temple.

Inverarity (with him *Payne*) for the respondent.—The case now set up, that the defendant collected for the temple, is different from that set up in the plaint. On the facts found, the defendant is entitled to succeed. The construction sought to be put on Act XIX of 1844 is inadmissible, as the various taxes which are specified, are all of a different kind, and the plain object of the Act was to abolish them all. The defendant is not a consenting party to the illegal tax. He resisted paying it in 1874. This was neither a case of trust nor agency. The tax was on the purchasers, if any, and not on the vendors. There is nothing to show that the vendors communicated with the temple, or gave

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notice that the defendant held money for its use—Addison on Contracts (8th ed.), 27; *Moore* v. *Bushell*[1]; *Hill* v. *Royds*[2]; *New Zealand and Australian Land Company* v. *Watson*[3]. The tax attempted to be levied, is clearly illegal, as it was abolished by Act XIX of 1844—*Nasarvánji Pestonji* v. *The Deputy Collector of Customs, Salt and Opium*[4].

The judgment of the Court was delivered by

KEMBALL, J.—The object of this suit, as exhibited in the plaint, was obviously to establish the right of the temple, of which plaintiff was the alleged proprietor, to levy a cess on all cotton and on all cotton seeds purchased in Broach and exported from it, though the claim was eventually treated in the Court of the Subordinate Judge as one for money had and received to the plaintiff's use, and the appeal before us on behalf of the temple has been argued on the footing of its being a suit by a *cestui que trust* against his trustee. It was contended, first, that the Act, XIX of 1844, upon which the lower appellate Court rejected the claim, was not applicable to the tax, the real subject-matter of the suit; and if applicable, secondly, that, even assuming the levy of the tax to be unlawful, the payment of it was not; and that as the defendant consented to receive, either as trustee or agent, the money paid by the vendors in accordance with immemorial custom, (which custom was evidence of notice to the temple of such payment,) he is liable to the temple.

The argument on the former of these two points is based on the principle of construction observed where generic words follow specific words, and we are asked to read the words "every kind" as if the Legislature had said "similar kind". But this principle applies only where the specific words are all of the same nature, and it is further subject to the proviso that there is nothing to indicate that a wider sense was intended. Now a very slight consideration of the specific words "town duties", "kusub viras", "baluti taxes", seems to us sufficient to show that they represent cesses or taxes of a very different kind; so that the meaning of the general words remains unaffected by them;

(1) 27 L. J. Ex., 3
(2) L. R. 8 Eq., 290.
(3) 7 Q. B. D., 374.
(4) 2 Bom. H. C. Rep., A. C. J., 75.

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and, moreover, the language used—plain and unequivocal in itself—shows, in our opinion, beyond all reasonable doubt that the paramount object of the Act was to prohibit the levy of town duties and of "any tax" which possibly might not "come within the words which had been before used." This was the view taken by Sir R. Couch, then a Puisne Justice of this Court, in *Nasarvánji Pestonji* v. *Deputy Collector of Customs, &c.* (1), and it has further the authority of long usage.

We, then, come to the second branch of Mr. Jardine's argument. No doubt there is nothing unlawful in the payment of a prohibited cess; but the question is, whether the law will enforce all agreements in respect of such cess. We think with the learned Assistant Judge that the circumstances of this case are such that it cannot be treated as a simple claim for money had and received to the plaintiff's use, and we fully concur in his view that "where the right to levy the *lágo* has ceased absolutely since the 1st October, 1844, there can be no right to recover the amount, based on justice and equity." The facts have been so fully stated and discussed in the able judgments of the Courts below that it is unnecessary to recapitulate them here. It is sufficient for our purpose to note that the *lágo* is paid, not by the vendor, but by the vendee, in consideration of the former charging less, by the amount of *lágo* claimed by the temple, for the cotton sold; that the payment of *lágo* was resisted by the defendant and other European cotton merchants during the year immediately preceding the first of the three years for which the *lágo* is now claimed; and that it was (in the words of the Senior Assistant Judge) "only after their trade had been stopped by the oppressive action of the native *mahájans*, who employed boycotting tactics, that they were induced to pay." No money, then, in point of fact passed from the vendors to the vendees; but assuming, upon the facts found, that the latter did impliedly assent to pay the difference (between the real price and the price taken) to the temple in the shape of *lágo*, it is obvious that the object of the agreement was of such a nature that, if permitted, "it would defeat the provision" of Act XIX

(1) 2 Bom. H. C. Rep., A. C. J., 75.

of 1844. The object was, therefore, unlawful, and the agreement consequently void—see section 23, Indian Contract Act. In other words, the object of the agreement, relied on, being to render its own enactment nugatory, the law will not enforce it. "The principle is" (see Maxwell on the Interpretation of Statutes, p. 91,) "that whenever it can be shown that the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they purposely caused, though they may have done it indirectly"—*per* Blackburn, J., in *Jefferies* v. *Alexander*[1].

For these reasons we confirm the decree of the Senior Assistant Judge, with costs.

Decree confirmed.

The plaintiff in the above suit brought a similar action against Greaves, Cotton and Company, Limited[2]. The second appeal in that case was heard at the same time as the above.

Farran (with *Shántárám Náráyan*) for appellants.

Inverarity (with *Payne*) for the respondents.

The following judgment was delivered by

KEMBALL, J.—The facts of this case are precisely similar to those in the case which we have just decided.

With regard to the question, whether the suit was properly constituted as regards parties, Mr. Inverarity, who appeared for the respondent, at once admitted that the view taken by the Senior Assistant Judge was not sustainable, so that the points in dispute are precisely those in Second Appeal 68 of 1883. In addition to what was urged on behalf of the appellants in that appeal, Mr. Farran contended that the decision in the second valume of the Bombay High Court Reports went only to show that Act XIX of 1844 applied to other than Government dues; that, as that Act encroaches on the right of the subject, it must be construed strictly; and that the cess under consideration resembled market tolls recognized by the English law. But, as we have already said, the intention of the Legislature, when using

(1) 31 L. J., Ch., at p. 14. (2) Second Appeal, No. 71 o 1883.

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the words "of every kind", "under whatsoever name levied", is too plain to admit of the restriction of the Act to any particular class of cesses; and though the learned Judges who first heard the appeal above referred to, were at issue on the question whether the Act prohibited the levy of cesses other than those which the Government had been in the habit of levying, still the opinion of Couch, J., on the point now under consideration was perfectly clear. With regard to Mr. Farran's argument, that the receiving of the cess was not illegal, we would observe that as no penalty was imposed by the Act, and the intention of the Legislature was simply to prevent the levy of the prohibited cess from being enforced, it is, no doubt, correct to say that an agreement to pay such cess and the performance of it, is not to be treated as illegal for any other purpose than that of creating a right of action; but, as we have already said in the appeal just disposed of, the object of the agreement sought to be enforced, was palpably to provide for the collection and payment of a cess which Act XIX of 1844 declared was no longer to be levied. This disposes of the argument that the circumstances under which the money was received, were such as to raise a trust in favour of the plaintiff; for, assuming with the Subordinate Judge that the defendant ought not, *ex æquo et bono*, to retain it, still the agreement, of which it was contended plaintiff had constructive notice, being in fraud of the policy of the law, the plaintiff is consequently without remedy—"*In pari delicto potior est conditio defendentis.*"

No doubt much valuable property was affected by the introduction of the Act, but still the object of that Act was to suppress public wrong and to promote the public good, and it must not be construed so as to furnish a means of evasion.

We confirm the decree of the Senior Assistant Judge, with costs.

Decree confirmed.