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are manifestly abusing their powers.....the Court will say it is not a fair and honest judgment, and will not allow it." These cases define with clearness what discretion a public body may use and at what point the interference of the Courts is justifiable. In the present case, the Courts below have found that the order of the commissioners was not an unreasonable one. That is a question of fact rather than of law; but we concur in the view taken by the Courts below, and we do not think that the authority of the commissioners was in any way affected by the circumstance that the proposed erection might be an encroachment on private rights subjecting the plaintiff to an action by the persons injured.

As to the balcony proposed to be thrown out over the street, the section (17) of the Act which vests "streets" in the Municipality, though it gives perhaps only a limited estate, yet gives not merely the bare surface of the ground, but so much above [496] and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes (see *Coverdale v. Charlton* (1) and *Lord Bramwell* cited by Brett, M.R., in *Wandsworth Board of works v. United Telephone Company* (2)). It is obvious that if the column of space standing over a street were occupied by projections, the interception of air and light would greatly impair the use of the area as street. So far, therefore, the column of space is vested as part of its property in the Municipality, and the commissioners were justified in forbidding the plaintiff to occupy it with his balcony, and thus begin a series of encroachments which might cause serious mischief.

For these reasons we confirm the decree of the District Court, with costs of the Municipality as against the plaintiff.

*Decree confirmed.*

12 B. 496.

APPELLATE CIVIL.

*Before Mr. Justice Nanabhai Haridas and Mr. Justice Jardine.*

ZIAULNISA BEGAM AND ANOTHER (*Original Defendants*), *Appellants*  
v. MOTIRAM AND ANOTHER (*Original Plaintiffs*), *Respondents*.<sup>\*</sup>  
[12th January, 1888.]

*The Nawab of Surat Act XVIII of 1848, s. 1—"Sue forth," meaning of—Construction—Sanction obtained after suit filed.*

The expression "sue forth" in s. 1 of Act XVIII of 1848 does not mean to sue for and to obtain so as to make the consent of the Governor a condition precedent to the institution of a suit.

Accordingly where the granddaughter of the Nawab of Surat was sued along with her husband without previously obtaining the required consent, and it was contended that the suit was irregularly instituted, and the proceedings thereunder void.

*Held*, that the suit was rightly instituted, such a consent not being a condition precedent to the filing of the suit.

[R., 21 B. 351 (364).]

THESE were second appeals from the decision of E. M. H. Fulton, Acting District Judge of Surat.

<sup>\*</sup> Second Appeals Nos. 395 and 664 of 1884.

(1) L. R. 4 Q. B. Div. 104.

(2) L. R. 13 Q. B. Div. 913.

[497] The plaintiffs sued to recover the sum of Rs. 755-7 from the first and second defendants, or, in the alternative, from the third defendant. The first defendant was the granddaughter of the Nawab of Surat, and the second defendant her husband. The third defendant was the agent of the first and second defendants alleged to have been authorized by them to carry on pecuniary dealings on their behalf.

The plaintiffs presented their plaint on the 23rd September, 1882, without previously obtaining the consent of Government. On the 30th November following they filed the consent embodied in Government Resolution No. 5593 of 21st November 1882, and a summons was subsequently issued to the first defendant. Some doubt having been entertained as to the sufficiency of the consent so filed, another one was obtained and filed on the 19th January, 1883.

The suit was then proceeded with.

At the outset it was contended (*inter alia*) for the first defendant that the Court had no jurisdiction to receive the plaint on the day it was filed, as the institution of the suit without the previous consent of Government was tantamount to "suing forth a writ or process" within the contemplation of the provisions of s. 1 of Act XVIII of 1848 (1), and that the subsequent sanction had no retrospective effect.

Both the lower Courts disallowed the contention, and awarded the plaintiffs' claim as against the first and second defendants.

The defendants preferred a second appeal to the High Court.

*Shantaram Narayan*, for the appellants.—The institution of the suit was bad for want of consent of Government. On the day on which it was filed the suit had long been barred. The Subordinate Judge let it remain pending till the consent was filed and did not proceed with it, and so the plaint remained [498] pending before a Court which had no jurisdiction, and it was barred when the consent was filed. The expression "sue forth" in s. 1 of Act XVIII of 1848 means to sue for and obtain, and, therefore, before the plaintiffs could legally sue the defendants they were bound to obtain the consent. The subsequent consent had no retrospective effect, and the whole procedure is *ab initio* void.

*Gokuldas Kahandas*, for the respondents.—It has been held by the Division Bench of this Court in appeal No. 68 of 1884, decided on the 4th May, 1887, that no previous consent is necessary under the provisions of s. 1 of Act XVIII of 1848. The expression "sue forth" does not mean to sue for and obtain, as contended for the appellants, but bars the issue of any process or writ without such consent. The summons in this case was issued subsequently to the filing of the consent. The proceedings in the suit are good.

#### JUDGMENT.

PER CURIAM.—The contention raised in the present case is as to the meaning of the expression "sued forth" in s. 1 of Act XVIII of 1848.

(1) Section 1.—No writ or process shall be sued forth or prosecuted against the person, goods or property of the several persons \* \* \* \* unless with the consent of the Governor of Bombay in Council first obtained \* \* \* and any writ or process sued forth or prosecuted against the person, goods, or property of the said several persons or any of them without such consent as aforesaid, shall be utterly null and void.

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That section provides that no " writ or process shall be sued forth or prosecuted \* \* \* unless with the consent of the Governor of Bombay in Council first obtained." The expression "sued forth," it is contended, means "to sue for and to obtain," and that, therefore, the institution of the suit in its inception was void, and the consent subsequently obtained did not cure the defect. The construction thus sought to be put upon the expression "sued forth," so as to make the consent a condition precedent to filing a suit, is, in our opinion, not correct. In similar enactments where such a condition is made precedent, the Legislature has clearly expressed their intention. Act XVII of 1873 (Nawab Nazim's Debts) bars by s. 11 "suits" and "process" against the person or property of person for whose benefit it has been made, unless with the consent of the Governor-General in Council. Similarly does Act XX of 1873, s. 2 (The Prince of Arcot's Act) (1). Had the intention of the Legislature been that such consent should be previous to filing a plaint under the Act, instead of the expression "sued forth," "sued for" [499] would have been used. The same interpretation on the section has been put by the Division Bench of this Court (2). In the present case the consent, though it was obtained subsequently to the filing of the plaint, did not, in our view of the section, vitiate the proceedings. We must, therefore, confirm the decree with costs.

12 B. 499.

APPELLATE CIVIL.

Before Mr. Justice Nanabhai Haridas and Mr. Justice Jardine.

VISHNU VISHWANATH (*Plaintiff*) v. HUR PATEL AND OTHERS  
(*Defendants*).<sup>\*</sup> [9th February, 1888.]

*Civil Procedure Code (Act XIV of 1882), s. 257 A—Decree—Havala or undertaking by a third party to pay decreed debt for the judgment debtor—Agreement incorporating the havala, in substitution of the decree, capable of execution at the date of the agreement—Suit on such agreement.*

The plaintiff obtained a money decree against the defendant Hur Patel, and in execution thereof attached his property. Thereupon, at Hur Patel's request, five persons gave a *havala* or oral undertaking to pay the amount of the decree, and the attachment was removed. It appeared that some payment was made under the *havala*. Subsequently Hur Patel and the defendants Nos. 2 and 3 executed a bond to the plaintiff reciting the *havala*, the payment thereunder, and agreeing to pay the amount of the decree with interest. Neither the *havala* nor the bond was brought to the notice of the Court for sanction, and the decree, which was capable of execution, was then destroyed. The plaintiff now sued to recover the debt due under the bond. The District Judge was of opinion that the part of the bond which contained a promise to pay interest was void, but that in respect of the principal amount of the decree it was not void. On reference to the High Court,

*Held*, that the whole bond was void. The *havala* was an agreement such as is contemplated in paragraph 1 of s. 257A of the Civil Procedure Code (Act XIV of 1882), and was void for want of sanction of the Court under that section. The bond, regarded as one in consideration of the *havala* or as an agreement for satisfaction of the decree, was also void under paragraph 2 of the same section for a similar reason.

<sup>\*</sup> Civil Reference No. 45 of 1887.

(1) See Broughton's Civil Procedure Code, p. 60 (ed. 1877).  
(2) Appeal No. 68 of 1884 decided on 4th May 1887.