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[526] PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Sir B. Peacock and Sir R. Couch.

[On appeal from the High Court of Bombay.]

SHRI KALYANRAIJI AND ANOTHER *Plaintiffs v. THE MOFUSSIL COMPANY, LIMITED, BY THEIR MANAGER, B. ROBB (Defendants)*
[18th March and 25th April, 1890.]

Construction of Act XIX of 1844, abolishing cesses on trades.

On a question whether a cess of 2 annas per candy on all cotton bought in, and exported from, Broach, paid by the buyer, according to usage from time immemorial, to a temple in that town, was abolished by Act XIX of 1844 :—

Held, that it was a cess of a mixed kind local and indirect, upon the trade of a cotton buyer, carried on in Broach, attaching when he bought cotton in that town for exportation, and that it fell within the meaning of that Act, so that the right to claim it had been thereby abolished.

[Appr., 5 Bom.L.R. 703.]

CONSOLIDATED appeals from two decrees (28th April, 1884) of the High Court, affirming two decrees (23rd October, 1882) of the Senior Assistant Judge of Broach reversing two decrees (29th June, 1880, and 21st November, 1881), one of the Subordinate Judge of Broach and the other of the Subordinate Judge of Surat.

In 1877 a suit was brought by the late manager and proprietor of a Vallabhacharya temple in Broach, Gosvami Shri Purushotamji Maharaj, now represented by the appellants, against the Mofussil Company by their Broach agent, Mr. B. Robb, to recover a sum of Rs. 4,455. Another suit was brought by the same plaintiff against Messrs. Greaves & Co., by their agent, Mr. J. R. Greave, on a similar cause of action, *viz.*, that the temple was entitled to a *lago*, or cess, on all purchases of cotton made by the defendants for export, which cess had not been paid for the years 1875, 1876 and 1877, three years before suit brought. The first of these suits was transferred to the Court of Surat, the second remained in Broach. The proceedings in both are reported in *Gosvami Shri Purushotamji Maharaj v. B. Robb* (1), where the judgments of the High Court (Kemball and Birdwood, JJ.), on second appeal, are given.

[527] The Subordinate Judge found that the payment had been made from time immemorial on all cotton sold in Broach. In the first suit Rs. 1,242 were decreed; in the second, Rs. 1, 907.

It appeared at the hearing that, by the usage in Broach, the seller of cotton allowed a sum of one rupee per candy to remain in the hands of the purchaser which was called the "*walthar*". In fact, while a sum was named as the price of each candy, the vendor accepted a sum less by one rupee, without any thing being said to the purchaser as to the appropriation of the latter. The effect of this formed a secondary question on this

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appeal; the primary one being whether the cess fell within, and was abolished by Act XIX of 1844.

In each case there was an appeal and cross-appeal to the Assistant Judge at Broach, who found as follows:—"The plaintiff has for one hundred years claimed and received a *lago* or cess of 4 annas per candy on all cotton bought in and exported from Broach, and this cess has been paid by all castes and creeds alike." He dismissed both suits on the same ground, *viz.*, that the cess had been abolished under Act XIX of 1844; holding that the right claimed was neither more nor less than to levy a fee, or cess, on every trade transaction in Broach by which cotton was brought for export. As regards the effect of the allowing "*walthar*" to the defendant at the sale, as to which plaintiff, in his cross-appeals, insisted that the claims should not be limited to cases where "*walthar*" had been paid, the appellate Court was of opinion that Act XIX of 1844 would have been an answer to the claim, even if rested on the ground of the purchasers having been entrusted with the money; and no trust for the temple had been accepted.

The plaintiff appealed from both decisions, on the ground that the cess had not been abolished; and he also relied on the "*walthar*" as supporting his claim. The High Court, whose judgment is reported at length in the report above referred to, affirmed the decision of the lower appellate Court.

On this appeal, Mr. *J. B. Finlay, Q.C.*, and Mr. *C. W. Arathoon* appeared for the appellant.

[528] Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the respondent.

For the appellant, it was argued that, the main question being as to the effect of Act XIX of 1844, passed "for abolishing town duties and mookauts, and all taxes upon trades and professions, within the Presidency of Bombay," it was questionable whether purchasing cotton for export was such an act of trading as fell within the scope of the Act. The cess claimed was not a tax upon a trade, nor was it a "town duty." It was a sum payable by custom to a local institution. Reference was made to a notification of Government of 7th September 1844, which was as follows:

"Whereas Act XVI of 1844, which raises the tax on salt within the Presidency of Bombay from eight annas to one rupee per Indian maund, has in view the abolition of town duties and other cesses, which from unavoidable circumstances was not promulgated simultaneously with the said Act; and whereas the delay in this abolition renders the subjects of this Government at present liable to the payment of both the increased tax on salt, and the said town duties and cesses, the Honourable the Governor in Council is pleased, in order to afford relief from this double taxation, to suspend, pending the decision of the Government of India, the collection of all town duties, kusab veeras, mohturfā, bulota and all other taxes on trades and professions, which form a part of the general revenue of the State, and are not appropriated by law or custom to municipal purposes."

And to another of 27th January, 1848:—

"In conformity with the provisions of s. III of Act XX of 1839, notice is hereby given that on Act XIX of 1844 becoming law, the levy was prohibited of all haks, fees, and shares of every description derivable from the items of revenue thereby abolished."

A cess like this affecting indirectly a trade could not be held to be a cess upon a trade, within the meaning of the Act. *Nasarvanji Pestanji v. The Deputy Commissioner of Customs, Salt and Opium* (1) was distinguishable, the right there claimed having originated in the ruling authority. The allowance, by the [529] seller, of the rupee to the purchaser was sufficient, under the circumstances, to show that the purchaser acted upon the understanding that the allowance was for the temple dues. In connection with this, reference was made to *Umedsangji v. The Collector of Surat* (2), where the fact was that the *haks* forming the subject of suit had been collected; and they were, therefore, held payable.

Counsel for the respondents were called upon only as to the construction of Act XIX of 1844. They contended that the words of the Act were wide enough to include the cess in question.

In reply, Mr. J. B. Finlay, Q. C., gave the meaning of the special terms used in the Act, and in the notification of 1844, referring to H. H. Wilson's Glossary; and contending that these words showed the kind of cesses at which the Act XIX of 1844 was aimed. And inasmuch as the present one was not precisely analogous to any of them, while the scope of the general words was applicable to similar cesses, the Act did not, upon its strict construction, include it.

On a subsequent day, 25th April, 1890, their Lordships' judgment was delivered by:—

JUDGMENT.

LORD MACNAGHTEN.—The late appellant, who was plaintiff in the two suits which have been consolidated, was the managing proprietor of a temple in Broach, known as the Shriji Mandir. In that capacity he claimed to be entitled to a *lago*, or perquisite, or tax, of 2 annas per bale on all cotton bought in and exported from Broach. The present appellants are his representatives.

It must be taken for the purposes of this case that from time immemorial, before and up to the year 1844, this *lago* was claimed and received as of right by the managing proprietor of the temple for the time being, and it may be assumed that the claim had a legal origin, and that, but for an Act of the Legislature passed in 1844, it would still be enforceable in a Court of law.

The Act on which the question turns is Act XIX of 1844. It is in these terms:—

[530] "It is hereby enacted that from the 1st day of October, 1844, all town duties, kusab veeras, mohturfas, ballootie 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.

There was an earlier Act No. XX of 1839, to which reference was made during the argument. It empowered the Governor in Council of Bombay to issue orders prohibiting the levy of *haks* and fees of every description, and customs, whether by land or sea, enjoyed by holders of rent-free lands or other persons. Orders so issued were not to be questioned, and persons levying any prohibited *haks* or fees were to be punishable for undue exaction as if they had been revenue officers guilty of extortion. No order, however, under this Act affecting the question raised in the present case was issued, at any rate before the

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passing of the Act of 1844. The Act of 1839 was referred to mainly for the purpose of showing that the abolition of *haks* and fees without compensation was not inconsistent with the course of legislation in India at that time.

In dealing with the Act of 1844, it was contended by Mr. Finlay, that the *lago* now in question does not come under the head of "town duties." In this their Lordships are disposed to agree, although it seems clear that the expression is not to be confined to duties "appropriated by law or custom to municipal purposes" (to use the words of a Government proclamation of the 7th of September, 1844, which was referred to during the argument), but extends to duties or cesses on goods brought into or carried out of a town, although levied by private persons. The learned counsel for the appellants then proceeded to point out that the expression "*kusab veera*" or *kasab vero* is explained in Wilson's Glossary to be "a tax on occupations and crafts," and that, according to the same authority, "*mohiturfa*" seems to be a poll-tax, while a "*ballootie* tax" or a "*balute-patti*" is defined to be "a cess or tax upon the shares or claims of village servants;" and he argued that the expression "cesses on trades and professions" having regard to the expressions found in the immediate context, ought to be confined to cesses in the nature of license duties for carrying on trades or professions.

[531] Owing to its brevity the Act is not free from obscurity. But their Lordships think that there is no sufficient reason for giving the expression "cesses on trades and professions" the restricted meaning to which the appellants desire to confine it. The Act abolishes cesses "of every kind" on trades "under whatever name levied." The appellants would limit the abolition to one kind, and one kind only. Is this *lago* a cess or tax on a trade? Mr. Finlay argued that though it was a tax affecting trade, it could not fairly be described as a cess upon a trade. Their Lordships, however, think that it properly comes within that description. It is a cess of a mixed kind, local and indirect, upon a particular trade—the trade of a cotton buyer carried on in Broach—attaching when the article of merchandise in which the trader deals is bought in Broach and exported from Broach.

Upon the main point, therefore, their Lordships are of opinion that the appeal fails.

It was then said that, although the Act of 1844 may have done away with the *lago* as an impost capable of being enforced in a Court of law, yet such a payment was not thereby made illegal, and it was urged that, by virtue of some thing loosely described as "an understanding," the buyers of cotton in Broach had come under some sort of obligation in the nature of a trust which made them liable as trustees or agents to the claim of the plaintiff.

It seems to have been the practice for the native cultivators selling cotton in Broach to allow a *walthar* or rebate of one rupee for every candy or two bales. There can be no doubt that this *walthar* was originally intended to meet or cover certain charges or allowances, of which the *mandir's lago* was one; and it was said on behalf of the appellants that the native cultivators would naturally be disposed to take this burthen on themselves, because they were interested in maintaining the worship of Shriij. From these premises it was argued that the plaintiff was entitled to enforce his claim directly against the cotton buyers as his trustees, or as having received moneys for his use for which they were accountable to

him. The Subordinate Judge accepted this view. The District Judge of Broach and the Division Bench at Bombay [532] rejected it, but apparently upon the ground that payment of the *lago* was prohibited by the Act of 1844, and therefore illegal, and that the Court would not be instrumental in carrying out a contract designed to defeat the intention of the Legislature. The Act, however, simply abolished cesses on trades. If the parties who before the Act were legally liable to the payment had chosen to continue it afterwards as a voluntary contribution, they would have been quite at liberty to do so. The real answer to this part of the argument is that there is nothing whatever in the nature of a trust to be found in the transaction or to be inferred from the course of business. There is not the slightest evidence that the respondents accepted the position of trustees for the plaintiff, or consented to receive moneys for his use. The cotton sellers may or may not have a valid claim against the cotton buyers in respect of so much of the *walthar* as may appear to be attributable to, or connected with, the *lago*; but such claim, if valid, cannot give any right to the representatives of the plaintiff against persons who undertook no obligation towards the plaintiff.

Their Lordships, therefore, will humbly advise Her Majesty that these appeals ought to be dismissed.

The appellants will pay the costs of the appeals.

Solicitors for the appellants: Messrs. T. L. Wilson & Co.

Solicitors for the respondents: Messrs. Payne and Lalley.

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ORIGINAL CIVIL.

Before Mr. Justice Farran.

KAIKHUSRU NAOROJI KABRAJI (Plaintiff) v. JEHANGIR
BYRAMJI MURZBAN AND ANOTHER (Defendants).*

[9th and 10th June, 1890.]

Defamation—Defamatory statement made by one newspaper copied into another and commented upon as untrue—Repetition of libel—Malice.

A certain newspaper called the *Rajya Bhakta* published a false and defamatory statement of the plaintiff. More than a month afterwards the defendants published an article in their newspaper, the *Jam-e-Jamshed*, calling attention to the statement made in the *Rajya Bhakta* and repeating it. The article, however, declared that the said statement was "evidently [533] false." It pointed out that the defendants were the first to raise an outcry against it; that they had expected the plaintiff to take notice of it, but that as he had not done so they published that intimation to the public. The plaintiff sued the defendants for libel. He alleged that he had not taken any notice of the original statement in the *Rajya Bhakta*, as that paper was an obscure print not generally read in the Parsi community to which both he and the defendants belonged. He complained that the defendants had maliciously repeated and called attention to the libel in their paper for the purpose of giving it a wide circulation, and that their assertion of its untruth was made merely in order to protect themselves. The defendants pleaded that the article in their paper was not defamatory, and denied malice.

* Suit No. 579 of 1889.

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