

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice B. Tyabji.

RANCHORDAS MOORARJI, PLAINTIFF, v. THE MUNICIPAL
COMMISSIONER FOR THE CITY OF BOMBAY,

DEFENDANT.*

1901.

January 25.

Municipal Act, Bombay City (Bombay Act III of 1888), section 527—Notice of suit when necessary—Refund of town duties—Limitation—Limitation Act (XV of 1877), schedule I, article 2.

The plaintiff sued to recover certain town duties which he had paid on importing grain and sugar, but which under section 195 of the City of Bombay Municipal Act (Bom. Act III of 1888) he was entitled to have refunded on exporting them. He had applied for a refund in October, 1899, but his claim was rejected on the 21st February, 1900. The suit was filed on the 21st August, 1900.

Section 527 of the City of Bombay Municipal Act (Bom. Act III of 1888) prescribes that one month's notice shall be given of any suit intended to be brought in respect of any act in pursuance or execution or intended execution of the Act, or in respect of neglect or default in the execution of the Act, and article 2 of schedule II of the Limitation Act (XV of 1877) prescribes, as the period of limitation for such suit, ninety days from the date of the act or omission complained of. Due notice of the suit was therefore given, but the suit brought in pursuance of it was not filed until the 21st August, i.e. six months after the act complained of, viz. the refusal to refund. The defendant admitted the amount claimed and the plaintiff's right to be repaid it, but defended the suit on the ground that he, as Municipal Commissioner, had no authority to discharge a claim which was not legally enforceable, the suit being barred by limitation.

Held, (1) that section 527 of the Act did not apply and that no notice to the defendant of this suit was necessary. The defendant could not claim that his conduct had any relation to the execution of the Act if he knowingly and intentionally acted in contravention of its provisions. Here the amount payable by way of refund was ascertained and the plaintiff's right to recover it was admitted and the refusal to refund was a deliberate and conscious contravention of the provisions of the Act. In such a case it could not be held that the money was *bona fide* withheld in execution of the Act, and that being so, the defendant was not entitled to notice under section 527.

(2) That the suit was therefore not one of the class referred to in article 2, schedule II, of the Limitation Act (XV of 1877), and was not barred.

When it is provided in an Act that notice shall be given to the defendant of any suit intended to be brought in respect of an act done in pursuance or execution or intended execution of the Act or in respect of neglect or default in

* Small Cause Court Reference 11714 of 1900.

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its execution, such provision does not apply when the action is brought on a contract, for the conduct giving rise to the action is a wrongful act or omission under the contract as distinct from one in the execution of the Act.

CASE stated for the decision of the High Court under section 617 of the Code of Civil Procedure (Act XIV of 1882) by C. W. Chitty, Chief Judge.

"1. This is a suit brought by the plaintiff to recover from the defendant a sum of Rs. 68, being the amount of town duties, to the refund of which the plaintiff claims to be entitled under section 195 of the City of Bombay Municipal Act (Bom. Act III of 1888) and which refund has been refused by the defendant.

"2. The facts of the case are not in dispute, the only question being one of law, *viz.*, what period of limitation is applicable in such cases.

"3. Two applications were made by the plaintiff for refund of town duties: (1) No. 7268, dated 24th October, 1899, in respect of 514 bags of grain; and (2) No. 7463, dated 25th October, 1899, in respect of thirty bags of sugar. (Exhibits A and B.) The amounts due in respect of such refunds are Rs. 45-10-0 and Rs. 22 6-0, respectively, and it is admitted that, if plaintiff's claim is within time, he is entitled to payment of these amounts.

"4. The rules governing such refunds have been put in and will be found at page 39 of the book of Municipal Bye-laws. (Exhibit No. I.)

"5. The plaintiff's claim was rejected by the Municipal authorities on 10th February, 1900, but the rejection was not communicated to the plaintiff until the 21st February, 1900. It is conceded that the period of limitation, whatever it may be, will run from the latter date.

"6. The plaintiff, on the 21st July 1900, gave the defendant notice of his intention to file this suit. The notice was not received by the defendant until the 23rd July, 1900. The suit was filed on the 21st August, 1900.

"7. The question for their Lordships' decision will be—

(1) Whether this suit is barred by the provisions of the Limitation Act (XV of 1877), schedule II, article 2.

(2) Whether, under section 527 (1) (b) of the City of Bombay Municipal Act (Bom. Act III of 1888), notice was necessary before suit filed.

"8. I am of opinion (though not without doubt) that both questions must be answered in the negative. As to the first, I think that article 2 of schedule II of the Limitation Act could not apply at all to this case, being excluded by section 6 of that Act in favour of section 527 of the City of Bombay Municipal Act. That is a special local law of limitation which would oust the general law. As to the second, I think the case is governed by the principle laid down in the case of *Maneklal v. Municipal Commissioner*.⁽¹⁾ There seems to be no distinction between the obligation imposed on the Municipal Commissioner to pay the value of land under section 301 and the obligation to refund the amount of town duties imposed by section 195.

"9. I should mention that though the amount at stake in this suit is small, there are nine other suits pending for various amounts in which the same questions are involved. I am also told that the defendant has large sums in hand, the refund of which will depend on the decision of this case. I have stayed proceedings pending the return of this reference as required by section 618 of the Civil Procedure Code."

Section 527 of the Bombay Municipal Act (Bom. Act III of 1888) which requires notice of suit to be given is as follows:

"527. (1) No suit shall be instituted against the Corporation or against the Commissioner or Deputy Commissioner, or against any Municipal officer or servant, in respect of any act done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act—

(a) until the expiration of one month next after notice in writing has been given in the case of the Corporation, left at the chief Municipal office and in the case of the Commissioner or of a Deputy Commissioner or of a Municipal officer or servant delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney or agent, if any, for the purpose of such suit; nor

(b) unless it is commenced within six months next after the accrual of the cause of action.

(2) At the trial of any such suit—

(c) the plaintiff shall not be permitted to go into evidence of any cause of action except such as is set forth in the notice delivered or left by him as aforesaid;

(1) (1894) 19 Bom. at 194.

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(d) the claim, if it be for damages, shall be dismissed if tender of sufficient amends shall have been made before the suit was instituted, or if, after the institution of the suit, a sufficient sum of money is paid into Court with costs.

(3) Where the defendant in any such suit is a Municipal officer or servant, payment of the sum or of any part of any sum payable by him in or in consequence of the suit, whether in respect of costs, charges, expenses, compensation for damages or otherwise, may be made with the sanction of the Standing Committee from the municipal fund."

Article 2 of schedule II of the Limitation Act (XV of 1877) provides that for a suit "for compensation for doing or for omitting to do an act in pursuance of any enactment in force for the time being in British India," the period of limitation shall be ninety days from the date when the act or omission takes place.

If this clause applied to this suit, the plaintiff's claim was barred, the suit not having been filed until the 21st August, 1900, and the act complained of, *viz.* the refusal to refund, having taken place on the 21st February, 1900.

Scott (Acting Advocate General) for the Municipal Commissioner cited Bom. Act III of 1888; sections 195 and 527; Act XII of 1888; Limitation Act XV of 1877, sections 5 and 6 and schedule II, art. 2; *Maneklal v. Municipal Commissioner of Bombay* ⁽¹⁾; Maxwell on Statutes (2nd Edition), page 575; *Couch v. Steel* ⁽²⁾; *Wilson v. Mayor &c. of Halifax*. ⁽³⁾

Robertson for plaintiff cited *Chunder Sikhur v. Obhoy Churn* ⁽⁴⁾; *Poorno Chunder v. Balfour* ⁽⁵⁾; *Foat v. Mayor &c. of Margate* ⁽⁶⁾; *Flower v. Local Board of Low Leyton* ⁽⁷⁾; *Garton v. G. W. Railway*; ⁽⁸⁾ Addison on Contract, page 787; Limitation Act (XV of 1877), schedule II, art. 2; Starling's Limitation Act (4th Edn., 1900), pages 136, 137; *Mayandi v. McQuhae* ⁽⁹⁾; *Municipal Committee, Moradabad, v. Chatri Singh*. ⁽¹⁰⁾

(1) (1895) 19 Bom. 407 at p. 417.

(2) (1854) 3 Ell. & Bl. 402 at p. 411.

(3) (1868) L. R. 3 Exch. 114.

(4) (1880) 6 Cal. 8.

(5) (1868) 9 Cal. W. R. 535.

(6) (1883) 11 Q. B.D. 299.

(7) (1877) 5 Ch. D. 346.

(8) (1858-59) Ell. Bl. & Ell. 837-850.

(9) (1873) 2 Mad. 124.

(10) (1876) 1 All. 269, 271.

JENKINS, C.J.:—This is a case stated for our decision under section 617 of the Civil Procedure Code (Act XIV of 1882) by Mr. Chitty, the Chief Judge of the Small Causes Court.

The suit is to obtain a refund of town duties, and in defence the Municipal Commissioner has pleaded the bar of limitation and insufficient notice of action.

The facts might suggest the idea that the defence is technical, but I understand the defendant hesitates to discharge a claim not legally enforceable. Now the refund is claimable under section 195 of the City of Bombay Municipal Act, 1888, which provides as follows:—

“(1) When any article upon which town duty has been paid shall be exported from the city, the full amount of the duty so paid shall, subject to the provisions hereinafter contained, be refunded.

“(2) Such refunds shall be paid under such rules as the Commissioner, with the approval of the Standing Committee, shall from time to time frame in this behalf:

“(3) Provided that—

(a) no refund shall be paid on any article, other than timber or flour, not exported within six months, or on any timber not exported within twelve months, from the date of its exportation;

(b) a refund shall be claimable on all flour exported from the city without proof of the importation of the same into the city, equal to seventy-five per centum of the amount of the duty at the time being leviable on the grain from which such flour has been prepared;

(c) no refund shall be paid unless the same is applied for within one month from the date of exportation;

(d) no refund shall be made of any less amount than five rupees;

(e) no rule framed by the Commissioner under this section shall have effect unless and until it is confirmed by Government.”

Therefore the refund is only to be paid under such rules as the section indicates. There are rules and they are referred to in the case. On an examination of them it appears that the amount claimable as a refund is only repayable on the performance of certain conditions specified in clauses (a) to (g) of the rule relating to the refund on export by sea of goods other than grain.

The final step is that the Auditor will make out a return as per form H, “and on presentation of receipt (form E) to the Chief Accountant, the claim, after comparison with return H, is paid.”

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Now form H in this case has never been made out, so that there has not been the required comparison, and as a consequence the condition on which alone payment is to be made has not been performed. In strictness therefore neither of the referred questions arises, as the right to sue for the refund has not matured.

But then it is said on behalf of the defendant that this view of the case is not open, inasmuch as no such objection was or could be urged by the plaintiff, and that we ought to hear the case as though the preliminary conditions had been complied with. I am willing to dispose of the case on that footing, and, to ascertain what on that supposition would be the relative positions of the parties, it is necessary to see what would have been done if the assumption was in accordance with the fact. The plaintiff would have procured an examination of the goods; he would have calculated, formulated and carried in his claim: this claim would have been examined, the calculations checked, and ultimately the amount due to the plaintiff would have been settled and certified. The result would have been that there was an admission made by the person authorized in that behalf; that there was a definite sum due to the plaintiff and belonging to him: there would have been no uncertainty as to the amount payable or the plaintiff's right to be paid.

So we have to see whether under the circumstances notice would have been necessary. The section prescribing notice is 527, which is in these terms:—

[His Lordship read the section (*supra* page 389) and continued.]

Now it is well established that provisions of this sort do not extend to all suits against persons intended to be protected. This is amply illustrated by decisions of the English Courts on cognate provisions, which are a valuable guide to us in this respect. One principle of exception is thus stated by the late Lord Blackburn, while still a Judge of the Queen's Bench, in *Selmes v. Judge*,⁽¹⁾ where he says: "It has long been decided that such a provision as that contained in this section is intended to protect persons from the consequences of committing illegal acts, which are intended to be done under the authority of an Act

(1) (1871) L. R. 6 Q. B. 724 at p. 727.

of Parliament, but which by some mistake are not justified by the terms and cannot be defended by its provisions. . . . I agree that if a person knows that he has not, under a statute, authority to do a certain thing and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute." Again Mr. Justice Lush says (page 728-9): "It is clear they *bona fide* believed they were doing what the law allowed, and that is all that is needed to entitle them to the protection of the statute." Mr. Justice Hannen's remarks were to the same effect.

The result appears to me to be that the person seeking the protection of the Act cannot claim that his conduct has any relation to the "execution of the Act," if he knowingly and intentionally acts in contravention of its provisions. So here, if (as we have to assume) the amount payable by way of refund was ascertained and the plaintiff's right to receive it admitted, the refusal to refund would have been a deliberate and conscious contravention of the provisions of the Act. In such a case it would be impossible to hold that the money was *bona fide* withheld "in execution of the Act," and such conduct would fall precisely within the description given by Lord Blackburn as disentitling a person to notice. I do not say that this has actually been the conduct of the Municipal Commissioner; it has not; but it is what we have to attribute to him in acceding to the suggestion that we must treat this suit as though all the conditions precedent had been performed.

There is another mode of approaching this case. It is established that notice is not required where the action is brought on a contract: for the conduct leading to the action is a wrongful act or omission under the contract, as distinct from one in the execution of the Act; and it is the breach of a specific contract that is the occasion of the right to sue. On the other hand, the exemption from this requirement does not apply to all suits *in contract* as distinct from suits *on contract*. This is not a fanciful distinction; the rules of procedure have for historical reasons been so moulded that a tort may give rise to a suit in contract by the application of a fiction resulting in the implication of a contract, while in fact there was no contract. The reason why a suit of

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this class is not free from the condition of notice is, that the suit is not in respect of anything done in breach of a specific contract, but in respect of an act or omission in execution of the Act. The form of the procedure therefore is no guide to the character of the facts out of which the suit arises.

Having then arrived at these principles, I will consider whether on the required assumption it cannot be said that this would be suit on a contract. According to these required assumptions there would have been an examination and adjustment of the plaintiff's claim to refund and an admission of the amount due. This would have been such an admission and appropriation of the amount in question to the plaintiff's use as to support a suit on an account stated (cf. *Roper v. Holland* ⁽¹⁾), and it appears to me that such a suit would for the purpose I am now considering be undistinguishable from a suit on a specific contract, so that the requirement of notice would have no application (cf. *Garton v. G. W. Railway*).⁽²⁾

I have not overlooked the decision in *Shankar v. Mukta*,⁽³⁾ but that case as well as those on which it proceeds appear to me to be based on the special character of a *ruzukhata* and the inference to which it gives rise.

In the view I take, article 2 in the second schedule of the Indian Limitation Act, 1877, obviously cannot be a bar, and I therefore am of opinion that both the questions should be answered in the negative. I am glad that I can so hold, for it relieves the defendant of the unpleasant duty of refusing on a technical ground to discharge a claim to the payment of which (according to the stated case) the plaintiff is admittedly entitled.

TYABJI J.:—I concur.

Attorneys for plaintiffs:—*Messrs. Unwalla and Pavri.*

Attorneys for defendant:—*Messrs. Crawford, Brown & Co.*

(1) (1835) 3 Ad. & Ell. 99.

(2) (1858-59) Ell. B. & Ell. 837.

(3) (1896) 22 Bom. 513.