APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903. *August 5.*

ABAJI SITARAM MODAK AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* THE TRIMBAK MUNICIPALITY (ORIGINAL PLAINTIFF), RESPONDENT.*

District Municipal Act (Bom. Act II of 1884), sections 27 (2), (17) and 30 [1] *—Contract Act (IX of 1872), sections 2, 23, 25 and 63—Municipality—Special general meeting—President—Dispensation or remission—Promise—Contract by Corporation—Executed consideration.*

In order that a meeting of the Special General Committee of a District Municipality should be properly constituted, it must be called by the President under section 27 (2) of the District Municipal Act (Bom. Act II of 1884). If the meeting be not so called, the defect is not cured by section 27 (17).

Under section 63 of the Contract Act (IX of 1872) there can be dispensation or remission only by means of a promise. There must be a proposal of the dispensation or remission which is accepted.

Under section 10 of the Contract Act consideration is not an essential of an agreement. In the Act the word "agreement" refers both to "a promise" and a "set of promises forming the consideration for each other."

* Appeal No. 108 of 1901.

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[1] Sections 27 (2), (17) and 30 of the District Municipal Act (Bom. Act II of 1884):

27. The following provisions shall be observed with respect to the proceedings of a Municipality.

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(2) The President may, whenever he thinks fit, and shall, upon the written request of not less than one-fourth of the Commissioners, call a Special General Meeting.

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(17) No act of a Municipality, or of any Committee, or of any person acting as a Commissioner, or as a President, Vice-President, or Chairman, shall be deemed to be invalid by reason only of some defect in the appointment of such Municipality, Committee, President, Vice-President, Chairman or Commissioner, or on the ground that they, or any of them, were disqualified for the office of Commissioner, or that formal notice of the intention to hold a meeting of a Municipality, or of a Committee, was not duly given, or for any other such mere informality.

30. The President of a Municipality may, on behalf of the Municipality, enter into any contract or agreement in such manner and form as, according to the law for the time being in force, would bind him if such contract or agreement were on his own behalf: provided that the amount or value of such contract or agreement shall not exceed five hundred rupees.

Every other contract or agreement on behalf of a Municipality shall be in writing and shall be signed by the President and by two other Commissioners and shall be sealed with the common seal of the Municipality.

No contract or agreement not executed as in this section provided shall be binding on a Municipality.

Though a contract by a Corporation must ordinarily be made under seal, still, where there is that which is known as an executed consideration, an action will lie though this formality has not been observed.

APPEAL against the decision of C. D. Kavishvar, First Class Subordinate Judge of Násik, in Original Suit No. 197 of 1899.

Suit to recover a certain amount due on account of the *makta* (farm) of the right of collecting tolls and pilgrim taxes.

The plaintiff, the Trimbak Municipality, on the 12th August, 1896, granted to defendant 1 as principal and defendant 2 as his surety the right of collecting certain tolls and taxes for a period of fourteen months, from the 1st August, 1896, to the 30th September, 1897, from pilgrims visiting the holy place of Trimbak. Defendant 1 had, on account of this grant, agreed to pay Rs. 15,001 to the plaintiff by monthly instalments and had already paid Rs. 1,500 in advance. As many pilgrims did not visit Trimbak on account of the prevalence of famine and plague defendant 1 applied to the plaintiff for remission, stating that he had suffered loss owing to the collection of the revenue being less than was expected. The managing committee of the plaintiff Municipality, thereupon, resolved, on the 31st October, 1896, that the matter as to the remission should be considered at the end of the year or the term of the *makta* (agreement to farm); but subsequently a Special General Committee, assembled on the 17th June, 1897, passed a resolution to the effect that, taking into consideration, the adverse circumstances, such as the prevalence of plague, famine, cholera and other things and the fact that the *maktadár* (farmer) was likely to suffer loss, it was proper to remit Rs. 7,000 and that the sum should be remitted out of the sum agreed to be paid by the *maktadár*. The resolution was passed by the Chairman and five members. Neither the President nor any official member was present at the time. This resolution was subsequently set aside at the meeting of the general body, which, on the 11th January, 1898, held unanimously that the resolution remitting Rs. 7,000 to the *maktadár* was passed without considering the condition and income of the Municipality and that it should be cancelled. This resolution of the general body was approved of by a later Special General Committee assembled on the 25th March, 1898,

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which was presided over by the Collector President and which contained two members more than the previous meetings. This Special General Committee, however, resolved to give remission of Rs. 1,000 *plus* interest Rs. 200, in all Rs. 1,200, provided the defendants paid the balance of the contract money within thirty days of the receipt of the resolution. The defendants having failed to comply with the above resolution, the plaintiff in the year 1899 brought the present suit to recover from the defendants Rs. 9,630 and interest Rs. 2,723-5-6, in all Rs. 10,853-5-6, the balance due under the *makta,* alleging that the resolution to remit Rs. 7,000 was a hasty and illegal resolution passed without sufficient and proper cause and that it was cancelled by the approval of the President.

Defendant 1 contended (*inter alia*) that as the plaintiff had passed a resolution remitting Rs. 7,000 out of the sum due under the *makta,* owing to the prevalence of plague, famine, cholera and distress which occurred during the period of the contract and had communicated that resolution to him, the plaintiff was bound by the resolution and consequently the suit could not be maintained and that there was some misunderstanding as to the levy of the toll-tax.

Defendant 2 answered in addition that as the fulfilment of the contract became impossible by acts of God and Government (who prevented pilgrims from visiting Trimbak), the defendants were in no way liable to the claim and that his liability as surety came to an end under sections 133 and 135 of the Indian Contract Act (IX of 1872) inasmuch as the plaintiff without his consent gave time to defendant 1 for the payment of certain instalments which had already fallen due and further that the plaintiff entered into a compromise with defendant 1 on the 25th March, 1898, without his (defendant 2's) consent and agreed to remit Rs. 1,000.

The Judge found that the plaintiff was not bound to remit Rs. 7,000 on account of the resolution of the 17th June, 1897; that the defendants were not exempted from the fulfilment of the contract on the ground of the occurrence of the plague and famine, and Government officers passing certain rules and orders as to the plague and preventing pilgrims from going to Trimbak;

that defendant 2 was not absolved from liability as a surety; that there was a misunderstanding as to the levy of the toll-tax; that defendants were entitled to have Rs. 2,000 and interest thereon deducted from the amount claimed, and that the plaintiff was not entitled to recover interest. He, therefore, allowed the claim to the extent of Rs. 7,900.

The defendants having preferred an appeal, it came on for hearing before *Jenkins*, C. J., and *Batty*, J., on the 16th October, 1902, when the following issues were sent down for findings:—

(1) Had notice been given to the members of the Municipality of the business to be transacted at the meeting of the Special General Committee of 17th June, 1897, and did the proposed remission of Rs. 7,000 form part of such business?

(2) Was the meeting of the Special General Committee of 17th June, 1897, a properly constituted meeting?

(3) Had that meeting authority to pass the resolution for remitting Rs. 7,000?

(4) Was this resolution communicated to defendant 1, and, if it was, when?

The Judge found on issues Nos. 1, 2 and 3 in the affirmative and on issue No. 4 he found that the resolution was communicated to defendant 1 on or about the 24th June, 1897.

Scott (Advocate General, with *D. A. Khare*), for the appellants (defendants).

Raikes (with *Ráo Bahádur V. J. Kirtikar*), for the respondent (plaintiff).

JENKINS, C. J.:—The plaintiff Municipality has brought this suit to recover a sum of Rs. 10,853-5-6 from the defendants, alleging that this sum is due from defendant 1 as the person to whom the right of levying and collecting certain tolls and taxes had been granted, and that defendant 2 was a surety for defendant 1.

The defence is that the Municipality had by a meeting on the 17th June, 1897 passed a resolution, subsequently communicated to defendant 1, which had the effect of dispensing with, or remitting the performance by him of so much of his obligations as give rise to the present suit, and the surety relies on the

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provisions of Chapter VIII of the Indian Contract Act as entitling him to a discharge from liability. The case was heard by the First Class Subordinate Judge at Násik with the result that he passed a decree for the plaintiff Municipality for Rs. 7,900. It came on appeal to this Court, and as it was by no means clear that the constitution of the meeting of the 17th of June, 1897, had been properly and thoroughly investigated, the following issues were sent down:—

(1) Had notice been given to the members of Municipality of the business to be transacted at the meeting of the Special General Committee of 17th June, 1897, and did the proposed remission of Rs. 7,000 form part of such business?

(2) Was the meeting of the Special General Committee of 17th June, 1897, a properly constituted meeting?

(3) Had that meeting authority to pass the resolution for remitting Rs. 7,000?

(4) Was this resolution communicated to the defendant 1, and, if it was, when?

The finding on the 1st, 2nd and 3rd issues was in the affirmative; the finding on the 4th was that the resolution was communicated to defendant 1 on or about the 24th June, 1897, *i.e.*, about a week after it was passed.

With those findings the case has now come back to us.

Now from the facts which have been elicited it is clear, and indeed it is conceded on both sides, that the meeting of the 17th of June was an adjourned meeting, and a continuation of that called for the 12th June, so that if the meeting of the 12th June was not properly convened, then that of the 17th is equally defective. The mode of calling meetings is prescribed by Bombay Act II of 1884, which in sub-section (2) of section 27 provides that "the President may, whenever he thinks fit, and shall, upon the written request of not less than one-fourth of the Commissioners, call a Special General Meeting."

The first question, therefore, that we have to ask ourselves is this: Was the meeting called by the President? We are clearly of opinion that it was not; and however anxious we may be to overlook technicalities, it seems to us impossible for us to treat this meeting as one called by the President within the meaning

of that section. But then it is argued by the Advocate General that even if that be so, still the defect is cured by sub-section 17; but we think that is not so; in the circumstances of this case the omission is not one that can be thus got over. But even were this not so, the defence, it is contended, must fail, as there had been no remission or dispensation within the meaning of section 63 of the Contract Act, first because there was no communication of the resolution and, secondly, because the provision of section 30 of Bombay Act II of 1884 has not been observed. In the view that we take of the case, it is unnecessary to consider whether there was a communication of the resolution, and we will at once proceed to the other objection. Now section 30 provides that "the President of a Municipality may, on behalf of the Municipality, enter into any contract or agreement in such manner and form as, according to the law for the time being in force, would bind him, if such contract or agreement were on his own behalf: provided that the amount or value of such contract or agreement shall not exceed five hundred rupees." Then it goes on to provide (and it is with this part of the section that we are concerned, and with this part alone) that "every other contract or agreement on behalf of a Municipality shall be in writing, and shall be signed by the President and by two other Commissioners and shall be sealed with the common seal of the Municipality." Therefore we have to ask ourselves whether a dispensation or remission under section 63 is a contract or agreement.

Now we must first turn to section 2 of the Contract Act, which provides how certain terms are to be interpreted. We are told in clause (*a*) what amounts to a "proposal" and a "promise." According to clause (*b*), "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise." Then in clause (*f*) it is provided that "promises which form the consideration or part of the consideration for each other are called reciprocal promises."

Clause (*e*) says that "every promise and every set of promises, forming the consideration for each, is an agreement." It is only by means of a promise that there can be a dispensation or remission within the meaning of section 63; there must be a proposal

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of the dispensation or remission, which is accepted. But a promise as we read clause (e) is an agreement; for the words "forming consideration for each other" in clause (e) cannot qualify the words "every promise"; they relate to the words "every set of promises." Moreover, we think, it involves no straining of language to speak of a promise as an agreement; for an agreement does not necessarily (as was argued) imply consideration.

In support of the contention that consideration is an essential element of an agreement, we were referred to section 10 of the Contract Act; but the section does not (in our opinion) suggest that inference, for it is there provided that "all agreements are contracts if" (among other things) "they are for a lawful consideration." But when we turn to section 25 of the Act, it is made clear beyond doubt that consideration is not an essential part of an agreement, because we have a provision that "an agreement made without consideration is void" *except* in the cases there indicated. We think that the word "agreement" was selected in the interpretation clause as a compendious mode of referring both to "a promise" and "a set of promises forming the consideration for each other," in the Act. Therefore we hold that assuming there was a legal resolution, and that it was communicated as alleged, still inasmuch as a dispensation or remission under section 63 requires an agreement or contract, the resolution was of no legal effect since the provisions of section 30 of Bombay Act II of 1884 have not been observed.

This discussion leads us to consider a point, which was raised before us for the first time, and then only as a result of investigations made in the course of the hearing before us. It appears that the contract under which defendant 1 became entitled to levy and collect the tolls was not under seal, and so failed to comply with section 30 to which I have already alluded. The Advocate General, relying for this purpose on section 23 of the Indian Contract Act, has asked us to hold that there was no contract at all under which the plaintiff Municipality can claim. Apart from the fact that this is travelling outside the pleadings of the parties, we think, there is another reason why we cannot give effect to the contention. It is well recognised law in

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England that though a contract by a corporation must ordinarily be under seal, still where there is that which is known as an executed consideration, an action will lie though this formality has not been observed. Notwithstanding section 23 of the Indian Contract Act, we see no reason for not adopting the same view of the law here. For we think when, regard is had to the principle on which the English Courts have proceeded, it is clear we do not run contrary to any provision of section 23 of the Contract Act in holding that in this country too, as in England, where there is an executed consideration, a suit will lie even in the absence of a sealed contract. And on the facts of this case we hold that there has been an executed consideration. It is, however, at the same time manifest that the doctrine we have here applied would on the facts in no way assist the defendant's contention that the performance of his promise has been legally dispensed with or remitted.

It now only remains for us to consider the position of the defendant 2, who pleads that he, as a surety, is discharged from liability on the ground that either there has been a variation of the contract within the meaning of section 133 of the Indian Contract Act or there has been a contract between the creditor and the principal debtor within the meaning of section 135. But the answer appears to us to be a very short one. There has been no variation and no contract. A variation, in the circumstances with which we have to deal, implies a contract: and there has been no contract binding on the Municipality for the reason that provisions of section 30 of the Bombay District Municipal Act II of 1884 have not been observed, nor to this phase of the case has the doctrine of executed consideration any application.

For these reasons we think the decree of the lower Court must be confirmed with costs.

Decree confirmed.