APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

1915. *August* 31.

MANILAL GANGADAS DESAI AND OTHERS (ORIGINAL DEFENDANTS NOS. 3 TO 7 AND 9 TO 12), APPELLANTS *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Bombay District Municipalities Act (Bombay Act III of 1901), section 42† —Liability of Councillors for misapplied funds—Misapplication by Secretary and accounts clerk of the Municipality—'Misapplication,' interpretation of—Suit by the Secretary of State for India in Council.

The Secretary of State for India in Council sued to recover a sum of money from the defendants, the first two of whom were the Secretary and Accounts Clerk of a Municipality, the rest being the Councillors thereof. The sum claimed was the Municipal money embezzled by defendants Nos. 1 and 2. The liability of the remaining defendants (defendants Nos. 3 to 12) was based upon section 42 of the Bombay District Municipalities Act (Bombay Act III of 1901). Defendants Nos. 3 to 12 contended that section 42 was not applicable inasmuch as the embezzlements by the paid servants of the Municipality would not amount to misapplication of the Municipal funds within the meaning of the section. The lower Court overruled the contention and decreed the suit. The defendants Nos. 3 to 12 having appealed to the High Court:—

Held, confirming the decree, that the operation of section 42 of the Bombay District Municipalities Act (Bombay Act III of 1901) was not restricted to misapplications made by any Councillor or Councillors; but it applies to any misapplication by whomsoever made.

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*First Appeal No. 21 of 1913.

†The section runs as follows:—

"Every councillor shall be personally liable for the misapplication of any fund to which he shall have been a party, or which shall have happened through, or been facilitated by, gross neglect of his duty as a councillor, and may be sued for recovery of the moneys so misapplied as if such moneys had been the property of Government:

"Provided that no councillor shall be personally liable in respect of any contract or agreement made, or for any expense incurred, by or on behalf of the Municipality; the funds at the disposal of each Municipality shall be liable for, and be charged with, all costs in respect of any such contract or agreement and all such expenses."

Per BATCHELOR, J.:—"The context in which the word 'misapplication' occurs indicates that the word is employed rather in the broad and popular sense than in the narrow or etymological sense. There is no requirement that the misapplication must be by the Councillors themselves or by any specified persons whatsoever, and the use of the passive word 'happened' seems to suggest also that the scope of the section extends to a misappropriation of the Municipal funds by a Municipal employee, provided only that the misappropriation was facilitated by the Councillors' gross neglect of their duties."

Per HAYWARD, J. :—"Any diversion of funds however caused from their proper purposes would be covered by the wide term 'misapplication' and it is in that wide sense that the term has been introduced into section 42 of the Act. It has purposely not been restricted to a 'misapplication to which a Councillor shall have been a party,' but has been applied expressly to a 'misapplication' which shall have happened through or been facilitated by gross neglect of duty by a Councillor, that is to say, which has happened by any other agency through the gross neglect of a Councillor."

APPEAL from the decision of B. C. Kennedy, District Judge of Ahmedabad.

Suit to recover a sum of money.

The amount in suit was embezzled by defendant No. 1 who was the Secretary of the Kaira Municipality and defendant No. 2, who was the accounts clerk of the Municipality. It consisted of three items of Rs. 200, Rs. 81-13-6 and Rs. 425, which were falsely debited in the account books of the Municipality as having been paid to a contractor named Yasin. The defalcations complained of occurred from December 1903 to February 1904. About this period the defendants Nos. 3 to 12 were Councillors of the Municipality composing the Managing Committee, and some of them were appointed auditors.

The Kaira Municipality was superseded by Government on the 22nd May 1909, under section 179 (1) of the Bombay District Municipalities Act (Bombay Act III of 1901). It was re-constituted on the 16th August 1912.

1915.

MANILAL GANGADAS v. SECRETARY OF STATE FOR INDIA.

In the meanwhile, on the 24th August 1910, the Secretary of State for India in Council filed the present suit to recover the amount embezzled with interest from the defendants. The liability of defendants Nos. 3 to 12 was based upon the provisions of section 42 of the Municipalities Act.

The defendants contended *inter alia* that the plaintiff had no right to sue; that the suit was barred under section 167 of the Bombay District Municipalities Act, and article 36 of the Limitation Act, and that the rules imposing upon the Managing Committee or its Chairman the duty of checking the accounts or controlling the Secretary were *ultra vires*.

The District Judge held that the suit was not barred under article 36 of the Limitation Act or section 167 of the Municipalities Act; that the rules were not *ultra vires*; that the defendants Nos. 1 and 2 had misappropriated the amount in suit; and that the misappropriation was facilitated by the gross neglect of duty by defendants Nos. 3 to 12. The learned Judge further held that the plaintiff was entitled to bring the suit, on the following grounds:—

To clear the way it may be said that there is no evidence at all that the corporator-defendants or any of them were at all accomplices in the frauds perpetrated by defendants Nos. 1 and 2.

The suit as regards the corporator-defendants is brought under section 42 of the Municipal Act which renders every Councillor liable personally for the misapplication of any fund which shall have been facilitated by gross neglect of his duty as a Councillor.

I find that the corporator-defendants were bound to exercise the powers conferred on them by the rules, that they and in particular defendant No. 3, the chairman, and defendant No. 8, the acting chairman, and defendants Nos. 4, 5 and 10, the auditors from time to time did entirely neglect to perform their duties under the rules, and I find that such neglect was very gross and I find that if such neglect had not been, these frauds would probably not have been committed, or if committed, would have been earlier detected and brought to

the notice of the general body and that recovery might have bean made which is now impossible.

As regards the title given by section 42, the affair is as it was. but as regards the section 179 and the rights conferred thereunder, matters have much changed. The suit is of a two-fold nature, against the servants of the Municipality and against individual corporators. The suit against individual corporators is brought under section 42, but this gives no right of suit against servants of the Municipality. Government's right of suit against the servants, that is against defendants Nos. 1 and 2, depended on the right of the Municipality to sue its servants for malfeasance, which right I hold vested in Government after the suspension of the Municipality. If that suspension ends, the right again vests in the Municipality and Government ceases to possess it. The words in section 179 are "during the period of suspension" and there is no provision in the Act for Government's retaining any of the property, which had vested in the Municipality previous to suspension, in its hands subsequent to reconstitution. Now the Kaira Municipality has been reconstituted by order of the Government with effect from 16th August 1912, *vide* Government Resolution No. 3580 of 1st June 1912.

I think, then, that Government cannot get a decree against defendants Nos. 1 and 2, though as a fact I have found that these defendants were guilty of embezzlements laid.

Accordingly, the suit was decreed only against defendants Nos. 3 to 12.

Defendants Nos. 3 to 12 appealed to the High Court.

G. N. Thakor, for the appellants.—I contend that the present suit cannot lie at the instance of Government. The liability is sought to be fixed under section 42 of the Bombay District Municipalities Act, (Bombay Act III of 1901). The section makes every Councillor liable "for the misapplication of any fund," under certain conditions. The Councillor can be sued for the recovery of moneys "so misapplied." The terms "misapplication" and "misapplied" are not defined; but sections 51 and 52 indicate how Municipal property and funds are to be applied. Any application of the funds contrary to or inconsistent with the purposes of the Act would be a

1915.

MANILAL GANGADAS v. SECRETARY OF STATE FOR INDIA.

misapplication. Misapplication necessarily implies application. If that 'application' is wrongful, or illegal, or unlawful, or unauthorized, it becomes a 'misapplication.' There must be a conscious application of the fund which must turn out to be wrongful or unauthorized. Theft by a servant or clerk or Secretary from the Municipal safe could be no application of the fund, and, therefore, not a misapplication. The thief may not apply the money to any purpose at all. The clerk or servant either steals or misappropriates the moneys. Misapplication as used in the section is different from misappropriation. An individual Councillor committing or abetting the commission of theft or criminal breach of trust misappropriates but does not misapply. The body of Councillors voting Municipal funds for the *wadi* belonging to a caste or for an object not contemplated or authorized by the Act can be said to 'misapply' the funds. See *Reg.* v. *Mayor of Norwich*[1]; *Attorney-General* v. *West Ham Corporation*[2]; and *Vaman* v. *Municipality of Sholapur*[3]; statute 45 & 46 Vic. c. 50, sections 117 and 124. The meanings of the term as given in Webster's Dictionary support my contention: "to apply wrongly"; "to use for a wrong purpose" and "to misapply public money."

Bahadurji (acting Advocate General) with *S. S. Patkar*, Government Pleader, for the Secretary of State (respondent No. 1):—The wording of section 42 is to be construed in reference to the object and the purpose for which the section was enacted. Section 50, clause (2) renders the Councillors express trustees; and the Municipal property and funds are to be held and applied by them as such trustees. Their liability as

(1) (1882) 30 W. R. 752 (Eng.).

(2) [1910] 2 Ch. 560.

(3) (1897) 22 Bom. 646.

trustees is not confined to acts done by them alone. As such trustees they are liable for any acts or omissions on their part which are in the nature of breach of trust. Gross neglect will render them liable if it results in any loss to the Municipality. The public in their ignorance cannot be trusted to sue the Councillors for neglect of duty or breaches of their obligations as trustees. Section 42 has therefore been enacted to protect the public against the consequences of neglect of duty on the part of the Councillors. In view of this object, the word 'misapplication' was used deliberately to cover and include misapplication or misappropriation by others. The latter part of the sub-clause shows that the Councillors need not be parties to such misapplication. Any misapplication which shall have happened through, or been facilitated by, Councillors' gross neglect will render them liable to a suit. See *Parr* v. *The Attorney-General*;[1] *Attorney-General* v. *The Corporation of Lichfield*;[2] *The Attorney-General* v. *Aspinall*.[3] The word 'misapplication' is used in its broadest sense: see Murray's Dictionary and *The Attorney-General* v. *The Corporation of Leicester*.[4] The Councillors-defendants being trustees they are liable for any kind of misappropriation which is occasioned by their neglect. The latter part of the section gives the right of suit to the Government.

Thakor, in reply:—The cases cited have no bearing. Councillors are constituted as trustees by section 50. Their liability under the general law was sufficient and no section was needed to define their liability as trustees. But it was thought necessary to vest the right to sue in Government as regards particular kinds of breaches of trust. These kinds have been restricted

(1) (1842) 8 C. & F. 409.
(2) (1848) 11 Beav. 120.
(3) (1837) 2 My. & C. 613.
(4) (1844) 7 Beav. 176.

1915.

MANILAL GANGADAS v. SECRETARY OF STATE FOR INDIA.

to a wrongful application of Municipal funds by the Councillors as a body. The defendants are not sued as Councillors, but as members of the Managing Committee. Section 42 does not apply to them.

Further, the suit is time-barred. Article 36, and not article 149, of the Second Schedule of the Indian Limitation Act, applies. See *Srinivasa Ayyangar* v. *Municipal Council of Karur*[1] and *Sivachidambara Mudaliar* v. *Kamatchi Ammal*.[2] Even if section 42 applies, the Government has instituted the suit on behalf of the Municipality. The right of the Municipality to bring the suit was barred under section 36: and a suit by Government cannot get over the bar: *The King* v. *Morrall*.[3] See also *Gunga Gobind Mundul* v. *The Collector of the 24 Pergunnahs*[4]; and *Pullanappally Sankaran Nambudri* v. *Vittil Thalakat Muhamod*.[5]

Next, the rules of the Municipality were *ultra vires*. They were framed under the old Municipal Act, and are inconsistent with the present Municipal Act.

T. R. Desai, for the heirs of appellant No. 3.—The liability of appellant No. 3 who was the auditor of the Municipality, being in tort, ceased at his death. His estate in the hands of his heirs is not liable: *Chunilal* v. *Secretary of State*;[6] *Phillips* v. *Homfray*[7]; *United Collieries, Limited* v. *Simpson*[8] and Broom's Legal Maxims, p. 183. The Court can take notice of events that have happened pending the appeal: *Rustomji* v. *Sheth Purshotamdas*.[9] Even if the suit does not abate against the heirs, the judgment should make it clear

(1) (1899) 22 Mad. 342.
(2) (1909) 33 Mad. 71.
(3) (1818) 6 Price 24.
(4) (1867) 7 W. R. 21 P. C.
(5) (1905) 28 Mad. 505.
(6) (1910) 35 Bom. 12.
(7) (1883) 24 Ch. D. 439.
(8) [1909] A. C. 383 at p. 391.
(9) (1901) 25 Bom. 606.

that the ancestral estate in the hands of the sons is not now liable under the decree.

Bahadurji.—The suit having already culminated into a decree, it cannot abate on account of the death of appellant No. 3. See *Gopal* v. *Ramchandra*[1] and *Paramen Chetty* v. *Sundararaja Naick.*[2]

H. V. Divatia, for respondent No. 2.

BATCHELOR, J. :—This was a suit filed by the Secretary of State for India in Council against twelve defendants. The 1st defendant was the Secretary and the 2nd defendant was the accounts clerk of the Kaira Municipality. The other defendants were Councillors of that Municipality. The relief claimed was the recovery from the defendants of certain sums of money said to have been embezzled from the Municipality by the defendants Nos. 1 and 2.

The learned District Judge of Ahmedabad gave the plaintiff a decree against the defendant-Councillors, but upon a technical ground refused to grant a decree against the Secretary and the accounts clerk, though he held them guilty of the embezzlements imputed to them. The present appeal is brought by the Municipal Councillors.

The first point taken by the learned pleader for the appellants was by way of demurrer to the suit, it being contended that the plaintiff was not entitled to sue even on the facts as stated in the plaint. Now, the plaintiff's title to sue was by him based upon section 42 of the District Municipalities Act of 1901, and the question between the parties on this point is solely whether section 42 of the Act is applicable on the state of facts alleged in the plaint. That state of facts is that three sums of money belonging to the Municipal fund

(1) (1902) 26 Bom. 597. (2) (1902) 26 Mad. 499.

1915.

MANILAL GANGADAS v. SECRETARY OF STATE FOR INDIA.

were embezzled by the 1st and 2nd defendants, paid servants of the Municipality, and that these embezzlements were facilitated by the appellant-Councillors' gross negligence of their duties as such Councillors. It is argued for the appellants that even upon those facts section 42 is not applicable to the suit inasmuch as the embezzlements by paid servants of the Municipality would not amount to misapplication of the Municipal funds within the meaning of the section. I was at first impressed by this argument, but on further consideration it seems to me that it ought not to prevail.

Mr. Thakor was able to make a plausible case for his contention by fastening upon the word 'misapplication' apart from its context, and by insisting that the strict etymological meaning should be ascribed to the word. In my opinion, however, the true meaning of the section is not to be arrived at in this way, but by a due consideration of its provisions as a whole. Now, the first paragraph of the section with which alone we are concerned runs as follows:

"Every Councillor shall be personally liable for the misapplication of any fund to which he shall have been a party, or which shall have happened through, or been facilitated by, gross neglect of his duty as a Councillor, and may be sued for recovery of the moneys so misapplied as if such moneys had been the property of Government."

Now Mr. Thakor's argument is that the mischief struck at by the section cannot extend beyond the case where the fund of the Municipality has been applied by the Councillors, or some of them, for purposes not authorized by section 52 and the following sections of the Act. It is said that misapplication must mean only a wrongful or unlawful application, and that the word, therefore, looks only to the object to which the funds of the Municipality are devoted. Reference was made to the case of *Reg.* v. *Mayor of Norwich*[1].

[1] (1882) 30 W. R. (Eng.) 752.

But if we turn to the words of the section, the first thing to be noticed is that there is no condition as to the person or persons by whom the misapplication contemplated must have been made, and it seems to me that this omission was deliberate. It cannot, therefore, be said that the operation of the section is restricted to misapplications made by any Councillor or Councillors. So long as any misapplication has been made, by whomsoever it may have been made, the section comes into play. To ascertain the precise scope of the word 'misapplication' as here used, it seems to me material to refer to the provisions of section 50, sub-section 2 and section 51 of the Act, which make it clear that the position of the Councillors in regard to the Municipal fund is in law that of trustees; and their liabilities, therefore, must be determined upon this footing. As trustees there can be no doubt that they would be bound to exercise over the trust property the same degree of caution and care as a man of ordinary prudence would exercise in the case of his own property. And though the Trusts Act would not perhaps strictly apply, yet there is no reason to doubt that the principle embodied in section 15 of that Act would govern the position of the present appellants. As trustees, therefore, it seems to me that they would be liable for any loss of the trust fund which was facilitated by the gross neglect of their duties as trustees, and upon this footing their liability would be the same whether the loss was caused by an act free from moral turpitude or by a crime. That being so, the first words of section 42 down to the word 'as a Councillor' should, I think, be read as enacting merely the ordinary provisions of the law. The addition of the words entitling the Government to sue may well be explained by reference to the notorious apathy of Indian mofussil rate-payers to move in cases where public moneys have been misappropriated or embezzled.

1915.

MANILAL GANGADAS v. SECRETARY OF STATE FOR INDIA.

Now, in the case before us on the facts stated in the plaint, the Secretary and the accounts clerk had control of these Municipal funds in order that they should hold them in a particular way, that is, I think, in order that they should apply them in a particular way. By embezzling the money, as it seems to me, they misapplied it, because they used it for purposes other than those for which it was entrusted to them. There was a diversion of the Municipal funds to an unlawful purpose, and that, I think, was enough to constitute a misapplication of the funds within the meaning of the section. I think that the context in which the word 'misapplication' occurs indicates that the word is employed rather in the broad and popular sense than in the narrow or etymological sense. As I have said, there is no requirement that the misapplication must be by the Councillors themselves or by any specified persons whatsoever, and the use of the passive word 'happened' seems to me to suggest also that the scope of the section extends to a misappropriation of the Municipal funds by a Municipal employee, provided only that the misappropriation was facilitated by the Councillors' gross neglect of their duties. And the same conclusion is suggested by the addition of the words extending the liability of the Councillors to cases where they have not been parties to the misapplication but have merely facilitated it by gross neglect of their duties.

I think there is force too in the learned District Judge's argument that one object of the section seems to have been to bring home to the consciences of the Municipal Councillors that their position entails duties as well as dignities.

On these grounds I am of opinion that the suit on the facts alleged was properly brought by the plaintiff and

that this first point taken for the appellants fails. That being so, it becomes unnecessary to consider certain subsidiary arguments which might arise as to the applicability of section 179 of the Act if the appellants' contention under section 42 had been upheld.

I pass, therefore, to what Mr. Thakor said in regard to the merits. And here I propose to be designedly short, because with great respect to the somewhat protracted argument which we have listened to, it seems to me that the appellants' case can, without injustice, be treated in a very summary manner.

Mr. Thakor urged that the suit was barred by limitation, because it fell under article 36 of the Limitation Act. My answer to that is that the suit does not fall under that article, but being, not only in name but in substance, a suit by the Secretary of State for India, it falls under article 149. Then it was said that since the embezzlement occurred in the period between December 1903 and February 1904, the cause of action accruing to the Municipality became extinct when the Municipality was suspended or superseded in 1909, and, therefore, there was no cause of action which the Secretary of State could inherit as the successor-in-title of the Municipality. It appears to me, however, that the answer to this argument is supplied by section 42 of the District Municipalities Act. If I am right in thinking that the suit properly fell under that section, then it is not exposed to any bar of limitation. For, as soon as these defalcations were committed in 1903-1904, the then Councillors became under the section liable to be sued at the hands of the Secretary of State within a period of sixty years.

As Mr. Thakor in the course of his argument gave little or no attention to the consideration of what are the substantial merits or demerits of the appeal, I think

1915.

MANILAL GANGADAS v. SECRETARY OF STATE FOR INDIA.

it necessary to say that paragraph 7 of the plaint recites the various instances of gross misconduct which were imputed to the Councillor-appellants, and that we heard nothing from Mr. Thakor which would enable us to say that these acts or omissions constituting grave misconduct were not committed by the Councillors.

The next point taken, however, was that even though these acts and omissions of grave misconduct were properly imputable to the Councillors, yet they were entitled to be absolved of the consequences inasmuch as the rules made by the Municipality under the old Act and imposing certain duties upon these Councillors were *ultra vires* of the authority making them. It was not contended that the rules were *ultra vires* when referred to the old Act, that is to say, to section 32 of the Act of 1884. But it was contended that the rules were beyond the powers which are conferred by the present Act of 1901. That argument, however, seems to me to receive a sufficient answer in section 2 of the present Act which expressly saves rules made under the preceding enactment. As to section 46 of the present Act to which Mr. Thakor made appeal, that section clearly cannot now be invoked, because the conditions of its operation do not exist. Those conditions do not exist, because, admittedly, this Kaira Municipality has not made or altered or rescinded any rules under the Act of 1901. The rules made under the Act of 1884 are, as I have said, saved by section 2 of the Act of 1901. And Mr. Thakor's complaint that those rules cast too heavy a burden on the Managing Committee receives no countenance from the Act of 1901 of which section 27 practically devolves upon the Managing Committee the exercise of all the powers of the Municipality. Then it was urged that the rules themselves were unworkable or were obsolete. But it became clear, after very slight discussion, that the only

meaning in these points was that no serious attempt had ever been made to carry those rules into practice. Then Mr. Thakor laboured to show that admitting the embezzlements, it could not be said that they were caused by his clients' gross negligence. But the Act does not require that the misapplication shall have been caused by the gross negligence of the Councillors. It requires only that the gross negligence of the Councillors shall have facilitated the misapplication, and to my mind it is unarguable that that is not the case here. For the evidence shows that there was in this mofussil Municipality an entire absence of any sort of real supervision or control, so that in fact it was left to the unchecked Secretary and clerks to deal with the funds as they chose. The way they chose to deal with them was the way of fraud and embezzlement, and it seems to me certain that these frauds were rendered easy, that is to say, facilitated by the absence of check or supervision which these Municipal servants enjoyed. This conclusion, I think, is not disturbed by the circumstance that other causes also contributed, as for instance, the absence of auditors and the slackness and inaction of the official president. I think it fair to say in justice to these Councillors, though in law it is neither excuse nor palliation, that probably they were no more inactive than the majority of mofussil Councillors usually are; so that I do not, for one moment, wish to impute to them any special or extraordinary remissness in the execution of their duties. What I do find proved is that like very many gentlemen in the mofussil, placed in similar positions, they failed to realize the character of the duties which were in law imposed upon them. They are certainly free from any sort of fraud or moral turpitude, and their case is unfortunate in this way that they who were probably no more guilty than many others have had the misfortune

1915.

MANILAL GANGADAS v. SECRETARY OF STATE FOR INDIA.

to have their obligations brought home to them so roughly. However that may be, the liability is imposed by the Statute and must in a suitable case, such as this, be enforced.

The only other point taken by Mr. Thakor was a faint attempt to dispute that the third sum mentioned in the plaint, viz., Rs. 425 was in fact embezzled. No attempt, either was, or could be, made to suggest that the other two sums, viz., the Rs. 200 and Rs. 81-13-0, were not embezzled. The misappropriation of these two sums was proved mainly by the evidence of the witness, Yasin, and it is upon Yasin's evidence also that the alleged embezzlement of the Rs. 425 mainly depends. Yasin, who must admittedly be believed in regard to the other two items, may, I think, be safely believed in regard also to the third item. And this is especially the case seeing that he was believed by the learned Judge who heard and saw him. I may add that no attempt was made by the defence to displace the evidence of Yasin by calling evidence to prove that the enormous mass of *kankar* to which these payments in the books were ascribed was ever in fact commanded or received by the Municipality.

On behalf of the heirs of appellant No. 7, who was the 10th defendant in the Court below, Mr. T. R. Desai has taken the point that since the 10th defendant died after the decree of the lower Court, that circumstance should alter the character of our judgment affirming the lower Court's decree. The learned pleader, however, has not been able to satisfy us that any such consequence should ensue, and the case of *Paramen Chetty* v. *Sundararaja Naick*[1] is against his contention. It appears to me that the only point which we have to consider in this connection is whether the decree made against the 10th

[1](1902) 26 Mad. 499.

defendant should be affirmed. We are of opinion that it should be affirmed, and what the consequences of that affirmation will be to the heirs of the 10th defendant is a matter which is not for decision by us now, but may be left for decision later.

I have now noticed all the points which have been urged in this appeal, and, in my opinion, for the reasons stated, the appeal fails and should be dismissed with costs.

The cross-objections are also dismissed with costs.

The other connected appeals, Nos. 19, 20 and 22 of 1913 are also dismissed with costs for the same reasons, and the cross-objections in them are similarly dismissed with costs.

HAYWARD, J. :—The Secretary of State sued to recover three sums alleged to have been misappropriated in the years 1903-1904 by the defendant No. 1, the Secretary, and the defendant No. 2, the accounts clerk, through the gross negligence of defendants Nos. 3 to 12, the Councillors on the Managing Committee of the Kaira Municipality.

The District Judge held that the suit though rightly framed against the defendants Nos. 1 and 2 during the supersession of the Municipality, could not be continued against them in that form after the re-establishment of the Municipality. He held, however, that the suit could and ought to be decreed against the defendants Nos. 3 to 12 by reason of the provisions of section 42 of the Bombay District Municipalities Act of 1901.

This first appeal has been brought by defendants Nos. 3 to 7 and 9 to 12. It has not been disputed on their behalf that the first two items of Rs. 200 and Rs. 81 were, as a matter of fact, misappropriated respectively at the end of 1903 and the beginning of 1904, but it has been urged

1915.

MANILAL GANGADAS v. SECRETARY OF STATE FOR INDIA.

that the misappropriation of the third item of Rs. 425 has not been duly established. That item is entered in the accounts as having been paid for *kankar* required for road mending and was supported by a receipt alleged to have been signed by a contractor named Yasin. There was no evidence of delivery of the *kankar* and the contractor denied payment of the money to him and his signature on the receipt. The denials of the contractor were believed. No good reason has been given, in my opinion, for coming to a different conclusion from that arrived at by the learned District Judge.

It has been argued, however, that the misappropriation of the three items was not facilitated, as alleged, by the admitted non-observance of the rules which required the defendant-Councillors, among other things, periodically to count the cash, examine the accounts and control the amount of the cash kept in hand by the Secretary and to satisfy themselves that proper security was given by the Secretary. It appears to me that *prima facie* the neglect of such duties would necessarily facilitate misappropriation by the Secretary and that the persistent neglect of such duties, specifically prescribed, could not be held to be other than gross neglect of duties within the meaning of section 42 of the Act. It is no answer whatever to say that other checks upon the dealings of the Secretary were neglected by other persons, such as the appointment of proper auditors by the general body and general control by the President of the Municipality.

It has, further, been argued that the rules did not admit of observance as they were in themselves unworkable, obsolete and *ultra vires*. It may be conceded that the rules were badly drafted, but they were certainly not, in my opinion unworkable by any body

of men who were *bona fide* bent on working them. Nor could they be said to have been obsolete. For, they were on rare occasions observed as pointed out by the learned District Judge. Nor, in my opinion, can they be held to have been *ultra vires*. The duties imposed by them were admittedly duties which could be delegated under section 27, sub-section 10 of the old Act of 1884, and it seems to me that the delegation was, as a matter of fact, effected by the mere passing of the rules, whether or no it could be argued that the rules were not rules regulating delegation within the meaning of section 32, clause (*a*) of the old Act of 1884. If the rules were valid rules under the old Act, they were saved from repeal by section 2, clause 1 (*b*) of the new Act of 1901. They would not appear to be inconsistent with any provisions of the new Act, for even wider duties than those delegated have been declared vested in the Managing Committee by section 27 of the new Act, and they have not been abrogated by new rules framed under section 46 of the new Act.

It has also been argued that the claim was time-barred. It was urged that the misappropriation occurred in 1903-04, and the amount could not be recovered by suit filed in 1910, beyond the period prescribed by article 36 of the Schedule to the Indian Limitation Act. Now it might have been open to argument that the suit was barred under that article, had the suit been one by the Municipality. But this suit was not brought by the Municipality. Nor was it brought on behalf of the Municipality. It was brought by the Government under a special right vested in the Government by section 42 of the District Municipal Act of 1901. It appears to me, therefore, that the suit was clearly within time under the provisions of article 149 of the Schedule to the Limitation Act.

1915.

MANILAL GANGADAS v. SECRETARY OF STATE FOR INDIA.

But the main contention in this appeal has been whether the misappropriation by defendants Nos. 1 and 2 could be held to be 'misapplication' within the meaning of section 42 of the District Municipal Act of 1901. It has been argued that misappropriation could not be called 'misapplication' in ordinary language and that the word 'misapplication' as introduced into the section contemplated only misapplication of funds by official acts of the Councillors to public objects not permitted by sections 54 to 56 of the Act. Now it seems to me that if a man, entrusted with moneys for a particular purpose, applies or converts those moneys to his own use either by depositing them in his own cash-box or by spending them on himself, he could correctly be said, in ordinary language, either to have misappropriated or misapplied those moneys. The result of his misappropriation was the 'misapplication' of those funds. Any diversion of funds however caused from their proper purposes would be covered by the wide term 'misapplication' and it is in that wide sense that the term has, in my opinion, been introduced into section 42 of the Act. It has purposely not been restricted to a 'misapplication to which a Councillor shall have been a party,' but has been applied expressly to a 'misapplication which shall have happened through or been facilitated by gross neglect of duty by a Councillor,' that is to say, which has happened by any other agency through the gross neglect of a Councillor. It would appear, therefore, to have been introduced in its ordinary wide sense upon a consideration alone of the construction of the section. This conclusion is in my opinion confirmed by a consideration of the objects aimed at by the section. It will be observed that the Councillors constituting the Municipality under sections 9 and 10 have been declared trustees for the application of the property of the Municipality for the

purposes of the Act by sections 50 to 52. Those purposes would appear to be public purposes obligatory or discretionary and have been specified in sections 54 to 56 of the Act. The Councillors have thus been placed in the position of public trustees, and would, therefore, be liable under the ordinary law for any misapplication, whether by their own acts or by any other agency through their neglect, of the property of the Municipality. Reference for this proposition may be had to Lewin on Trusts (12th Edition, Chapter XIV, section 2, page 327). The Councillors have been reminded of that liability by the section under discussion and the only modification possibly intended would appear to be in the specification of the neglect contemplated as gross neglect. That modification even if intended would not, however, affect the present case as the neglect here admitted would clearly be gross neglect even according to those authorities who recognise such a classification of neglect. But it would appear in any case to have been desirable to provide for the enforcement of that liability. No doubt tax payers would be entitled to enforce it as indicated in the case of *Vaman* v. *Municipality of Sholapur*[1]. It would, however, be unlikely that sufficiently well-to-do and public spirited tax payers would be found outside the ranks of the Councillors to undertake this unpleasant duty in small mofussil Municipalities, and it might be doubted whether any alternative and effective remedy would be found in the provisions of sections 92 and 93 of the Civil Procedure Code. Hence it would appear that it was considered desirable to confer the necessary powers by this particular section 42 of the Act of 1901 on the Government.

It was lastly urged that as the defendant No. 10 died after decree, it would be necessary to determine here

[1] (1897) 22 Bom. 646.

1915.

MANILAL GANGADAS v. SECRETARY OF STATE FOR INDIA.

the liability of his heirs. It appears to me that the only question to be determined here is whether defendant No. 10 was rightly made liable by the decree. The position of his heirs under that liability would be a matter for consideration in execution. It is not, in my opinion, a matter for decision on appeal from the decree. This would appear to be the view taken in the case of *Paramen Chetty* v. *Sundararaja Naick* [1].

It is not necessary in view of my conclusions on the foregoing points to consider the argument addressed to us upon the application of section 179 of the Bombay District Municipalities Act of 1901 and the question of the substitution of the Municipality under Order XXII, Rule 10, as a party in place of the Government.

The learned District Judge's decree ought, therefore, in my opinion, to be confirmed and this appeal to be dismissed with costs.

Appeal dismissed.

R. R.

CRIMINAL REVISION.

1915.
September 1.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

IN RE PANDHARINATH PUNDLIK REVANKAR.*

Criminal Procedure Code (Act V of 1898), section 517—Order as regards disposal of property—Discretion in making orders to be judicially exercised—Currency note—Property passes by delivery.

The accused stole a currency note, which he offered to a goldsmith as price for gold ornaments purchased by him. The goldsmith not having had sufficient cash, got the note cashed by a neighbouring shop-keeper (applicant), who cashed it in good faith. At the trial of the accused, the note was

[1] (1902) 26 Mad. 499.

* Criminal Application for Revision No. 214 of 1915.