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that he is a trespasser in order to determine that he is not a tenant or a protected tenant. I agree with Mr. Tarkunde that the provisions in law which oust the jurisdiction of the Civil Court must be strictly construed. But considering it as strictly as I can, looking to the language used by the Legislature in s. 70 (*b*) of the Tenancy Act, and looking to the scheme of the Act, it seems to me clear that all questions with regard to the status of a party, when the party claims the status of a protected tenant, are left to be determined by the Revenue Court, and the jurisdiction of the Civil Court is ousted.

In my opinion, therefore, the trial Court was right and the learned Assistant Judge was in error.

The result is the order of the Trial Court must be restored and the order of the lower appellate Court set aside. Rule absolute with costs.

Rule absolute

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Dixit.

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THE JALGAON BOROUGH MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT *v.* THE KHANDESH SPINNING AND WEAVING MILLS CO. LTD. (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Bombay Municipal Boroughs Act (XVIII of 1925) s. 206—Notice under—When Notice to the Municipality necessary—Illegal acts and acts "done or purported to have been done under the Act"—Distinction between.

The plaintiffs gave notice to the Jalgaon Municipal Borough on May 2, 1947 under s. 206 of the Bombay Municipal Boroughs Act, 1925, stating that the levying of the octroi duty by the Municipality on the fuel oil imported by the plaintiffs within the Municipal limits was illegal, *ultra vires* and wrongful and that the Municipality was bound to refund the amount of Rs. 15,008 recovered by it. On July 15, 1948, the plaintiffs filed a suit in the Jalgaon Court for recovering a sum of Rs. 37,000 and odd by including in the claim the payments made by them after the notice. On the question whether the claim made in the suit in respect of subsequent payments which was not covered by the terms of the notice, was sustainable, it was contended by the plaintiffs that the levying of the Octroi duty on fuel oil was illegal and could not be said to be anything done or purported to have been done in pursuance of the Act and that, therefore, the operation of s. 206 of the Act was not attracted,

* First Appeal No. 502 of 1949.

Held, that the plaintiffs' claim for refund of the amount not covered by the terms of the notice given under s. 206 of the Act could not be sustained.

An act which is *prima facie* illegal is not within the category of acts "done or purported to have been done in pursuance of the Act", but an act done under a vestige or semblance of authority or with some show of a right, would fall within the category. An act which is outrageous and extraordinary or one which cannot be supported at all as having been done with a vestige or semblance of authority or in exercise of a right vested in the party is not an act which is "done or purported to have been done in pursuance of the Act". Inasmuch as s. 73 (*iv*) of the Bombay Municipal Boroughs Act, 1925, and the Octroi Rules and By-laws gave power to the Municipality to impose Octroi duty on goods imported within its limits it could not be said that the act of the Municipality in imposing Octroi duty on fuel oil by a wrong interpretation of the words "oil used for machinery" was illegal or outrageous and extraordinary or done without any vestige or semblance of authority or without a shadow of right. Its act was, therefore, within the terms of s. 206 of the Act.

City Municipality, Bhusawal v. *Nusserwanji Hormusji*,[1] *The Rajputana Malwa Railway Co-operative Stores, Ltd.* v. *The Ajmere Municipal Board*,[2] and *Municipal Council, Dindigul* v. *Bombay Co. Ltd.*,[3] distinguished.

Secretary of State for India v. *Major Hughes*,[4] *Corbett* v. *South Eastern and Chatham Railway Managing Committee*,[5] *Parvateppa* v. *Hubli Municipality*,[6] *Koti Reddi* v. *Subbiah*,[7] and *Dhulia Municipality* v. *Mahomed Isak*,[8] referred to.

First Appeal from the decision of M. M. Nadkarni, Civil Judge (Senior Division) at Jalgaon.

The Khandesh Spinning and Weaving Mills Ltd. (the plaintiffs) were a joint stock Company carrying on business at Jalgaon. For the purpose of their Mills they used to import charcoal within the jurisdiction of the Jalgaon Borough Municipality (the defendants). On account of the scarcity of charcoal, the said Mills resorted to the use of fuel oil or furnace oil. The Municipality was entitled under s. 73 (*iv*) of the Bombay Municipal Boroughs Act, 1925, to impose Octroi duty on goods imported within its limits. Rules and by-laws were framed by the Municipality for the levy of the Octroi duty and these were sanctioned by the Government. The Municipality levied octroi duty at the rate of 4 annas per maund on the fuel oil or furnace oil imported by the Mills from May 21, 1946. The Municipality claimed that the fuel oil imported by

[1] (1939) 42 Bom. L. R. 491.
[2] (1910) 32 All. 491.
[3] (1928) 52 Mad. 207.
[4] (1913) 38 Bom. 293.
[5] [1906] 2 Ch. D. 12.
[6] (1937) 39 Bom. L. R. 881.
[7] (1918) 41 Mad. 792.
[8] (1934) 37 Bom. L. R. 1027.

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the Mills fell under Item 73 of Class III of Schedule A to the aforesaid Rules and By-laws which provided for the levy of an Octroi duty at that rate on all articles of sizing used in mill industries, oils for machinery etc. Disputes arose between the plaintiffs and the defendants and correspondence took place between them. The plaintiffs claimed that the fuel oil or furnace oil was imported by them in lieu of charcoal which they used before, and that the defendants were not entitled to charge anything more than six pies per maund by way of Octroi duty, which was the duty payable on charcoal. The defendants, on the other hand, contended that the fuel oil or furnace oil fell within the description of "oils used for machinery" and was, therefore, rightly charged with Octroi duty at the rate of 4 annas per maund. The plaintiffs ultimately gave a notice to the Municipality under s. 206 of the Bombay Municipal Boroughs Act, 1925, stating *inter alia*, that the levying of the said duty and its recovery from them was illegal, *ultra vires* and wrongful, and that the Municipality was bound to return the amount of Rs. 15,008 wrongfully recovered from and paid by the Mills under protest. The Municipality having failed to comply with the notice, the plaintiffs filed a suit on July 31, 1947, against the defendants in the High Court for a declaration that the defendants' act of levying Octroi duty on fuel oil was illegal, for a perpetual injunction restraining the defendants from levying and recovering it, and for recovery from the defendants of Rs. 18,776-6-0 which was the amount which they had paid up to the date of the filing of the suit. At the time of filing of the suit in the High Court the plaintiffs had obtained leave under clause 12 of the Letters Patent in so far as they claimed a refund of the monies to themselves at their registered office in Bombay. The defendants took appropriate proceedings for the revocation of leave under clause 12 and on September 30, 1947 Mr. Justice Coyajee revoked the leave and ordered that the plaint be taken off the file of the Court. In appeal the order of revocation was confirmed whereupon the plaintiffs obtained from the Court on April 14, 1948, leave to withdraw the suit with liberty to file a fresh suit on the same cause of action.

On July 15, 1948, the plaintiffs filed the present suit in the Court of the Civil Judge, S. D., at Jalgaon. At the same time they applied for amendment of the plaint as originally filed in the High Court and put forward a claim for Rs. 37,422-11-0 by adding the aggregate of the sums which they had paid to

the defendants between the date of their withdrawal of the suit in the High Court and the date of the presentation of the plaint in the Jalgaon Court. When this amended claim was made by the plaintiffs, they did not give any notice to the defendants under s. 206 of the Bombay Municipal Boroughs Act, 1925, for the refund of the enhanced amount or for the refund of the amount in excess over the claim criginally made in the High Court suit. The trial Court, however, allowed the amendment to be made.

The defendants contended that he fuel oil or furnace oil was liable to the Octroi duty of 4 annas per maund, that in any event the plaintiffs had failed to give the notice under s. 206 of the Bombay Municipal Boroughs Act, 1925, in regard to its additional claim, and that the plaintiffs' claim for the recovery of any amount beyond six months previous to the institution of the suit was barred by limitation.

The trial Judge held that the fuel oil or furnace oil did not fall within item No. 73 or Class III of Schedule A to the Rules and By-laws and that the defendants were not entitled to levy any Octroi duty on the fuel or furnace oil. He further held that notice under s. 206 was necessary and that the same had not been given in regard to the additional claim of the plaintiffs. He, however, allowed to the plaintiffs in the computation of the period of limitation, exclusion of the time which was occupied in prosecuting the suit and appeal in the High Court and allowed to the plaintiffs a refund of an aggregate amount of Rs. 24,549-15-0. He also gave to the plaintiffs the declaration they had sought as well as the perpetual injunction as prayed.

The defendants appealed to the High Court, contending that the plaintiffs' suit ought to have been dismissed. The plaintiffs filed Cross-objections with regard to the claim which was disallowed.

The appeal and the Cross-objections were heard.

R. B. Kotwal, for the appellant.

H. D. Banaji with *Arvind D. Desai,* for the respondent.

BHAGWATI J. [After stating the facts and holding that fuel oil or furnace oil did not come within item 73 or any other item of Class III of Schedule A to the Octroi Rules and By-laws and that defendants were not entitled to levy any octroi duty on the oils, His Lordship further held that it was

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incumbent on the plaintiffs to give a notice under s. 206 of the Bombay Municipal Boroughs Act, 1925, in regard to the claim which arose after the notice given on May 2, 1947, and that in so far as they had failed to do so and filed the suit with an amended claim, they had transgressed the provisions of s. 206.' His Lordship then proceeded.]

Mr. Banaji, however, contended that s. 206 of the Bombay Municipal Boroughs Act, 1925, did not apply to the facts of the present case. He contended that the levy of octroi duty on fuel oil or furnace oil by the defendants was illegal, and that, therefore, the act of the defendants in levying that octroi duty could not be said to be anything done or purporting to have been done in pursuance of the Act, and if it could not be said to be anything done or purporting to have been done in pursuance of the Act, the operation of s. 206 of the Act was not attracted, it was not incumbent on the plaintiffs to give notice of the type to the defendants, that the plaintiffs' claim was governed by Article 62 of the Indian Limitation Act which applied in all cases where monies had been received by the defendants to the use of the plaintiffs, and that, therefore, the plaintiffs were entitled to recover all the monies which they claimed from the defendants, their claim in that behalf being well within three years of the date of the accrual of the cause of action. Mr. Banaji placed particular reliance on a decision of Mr. Justice Kania, as he then was, reported in *City Municipality, Bhusawal v. Nusserwanji Hormusji*[1]. In that case, the plaintiffs had filed the suit against the defendant Municipality to recover *inter alia* a sum of Rs. 666-12-0 which represented the amount of certain taxes which had been adjudicated by the Court as an illegal levy. On such an adjudication, being made by the Court in another suit at the instance of one of the tax-payers, the plaintiffs had filed the suit, out of which the second appeal arose, to recover the amount an the ground that the tax had been illegally levied. The learned Judge had, before him, this judgment of the Court which had declared the tax as having been illegally levied. An argument had been advanced before him contending that, under s. 206 of the Bombay Municipal Boroughs Act, 1925, the act of the Municipality in imposing the tax was one purported to have been done in pursuance of the Act, and that, therefore, the claim in respect of that act should have been made within six months from the date of the act complained of. A

[1] (1939) 42 Bom. L. R. 491.

decision of our High Court in *Parvateppa* v. *Hubli Municipality*[1] was cited in support of this proposition. But the learned Judge observed that, in his opinion, it was not necessary to decide that point. What the learned Judge apparently meant was that, in so far as the tax had been illegally levied, there was no question of considering whether the act which was complained of was done or purported to have been done in pursuance of the Act. An illegal act could certainly not have been "done or purported to have been done in pursuance of the Act." It would be only a lawful act, or an act which was apparently lawful, which could have been "done or purported to have been done in pursuance of the Act." An illegal act would certainly not fall within that category. The learned Judge, therefore, went on to consider whether the plaintiffs' suit before him was governed by article 62 of the Indian Limitation Act or Article 96 thereof, and came to the conclusion that it was governed by Article 62 of the Indian Limitation Act. Mr. Banaji also drew our attention to two decisions of the Allahabad and the Madras High Courts, one reported in *The Rajputana Malwa Railway Co-operative Stores, Ltd.* v. *The Ajmere Municipal Board*[2] and the other reported in *Municipal Council, Dindigul* v. *Bombay Co. Ltd.*[3] in both these cases, a *prima facie* illegal act was certainly considered not within the category of acts "done or purported to have been done in pursuance of the Act." The acts which would fall within the category of those "done or purported to have been done in pursuance of the Act" could only be those which were done under a vestige or semblance of authority, or with some show of a right. If an act was outrageous and extraordinary or could not be supported at all, not having been done with a vestige or semblance of authority, or some sort of a right invested in the party doing that act, it would certainly not be an act which is "done or purports to have been done in pursuance of the Act." The distinction between the *ultra vires* and illegal acts, on the one hand, and those purporting to be done in pursuance of the Act, on the other, is quite well known. (*Vide Secretary of State for India* v. *Major Hughes*,[4] *Corbett* v. *South Eastern and Chatham Railways Managing Committee*,[5] *Parvateppa* v. *Hubli Municipality*,[1] *Koti Reddi*

[1] (1937) 39 Bom. L. R. 881.

[2] (1910) 32 All. 491.

[3] (1928) 52 Mad. 207.

[4] (1913) 38 Bom. 293 at pp. 307, 308.

[5] [1906] 2 Ch. D. 12 at p. 20.

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v. *Subbiah*[1] and *Dhulia Municipality* v. *Mahomed Isak*[2] The distinction is really between *ultra vires* and illegal acts, on the one hand, and wrongful acts, on the other—wrongful in the sense that they purport to have been done in pursuance of the Act; they are intended to seem to have been done in pursuance of the Act and are done with a vestige or semblance of authority, or sort of a right invested in the party doing those acts. If the defendants, therefore, not having the power to levy octroi duty at all, either wholly or in regard to some classes of goods, had purported to levy the same, it would certainly have been an act which was outrageous and extraordinary, with not a vestige or semblance of authority, or not even a shadow of a right. But we have in s. 73(*iv*) of the Bombay Municipal Boroughs Act, 1925, the power given to the defendants to impose octroi duty on articles and goods imported within their jurisdiction. We have also the various items of Class III of Schedule 'A' to the Octroi Rules and By-laws which have been framed by the defendants with the sanction of the Government, and we have Item No. 73 in that Class III of Schedule 'A' which comprises various articles including oils used for machinery. If the defendants, in the interpretation which they gave to the words "oils used for machinery", did something which ultimately, on an adjudication in that behalf, the Court found to be wrongful, the act of the defendants in the matter of the levy of octroi duty on fuel oil or furnace oil, as they purported to do, could not be said to be illegal or outrageous and extraordinary, or done without having any vestige or semblance of authority, or without even a shadow of a right. It is no doubt true that their interpretation of the expression "oils used for machinery" was wrong. But they had, in so far as they had got the power and the authority to impose octroi duty on articles and goods imported within their jurisdiction, and had levied octroi duty on oils used for machinery comprised within Item No. 73 of Class III of Schedule 'A' to the Octroi Rules and By-laws which had been framed by them with the sanction of Government, a vestige or semblance of authority or a shadow of a right for doing so, though they had no real authority to do so, nor had the substance of the right for doing so. What they did, therefore, was not an act done in pursuance of the Act, but it was an act which they purported to do in pursuance of the Act. They

[1] (1917) 41 Mad. 792.

[2] (1934) 37 Bom. L. R. 1027 at p. 1032.

intended to seem as if they were doing the act complained of in pursuance of the Act. Their action was, therefore, well within the terms of s. 206 of the Bombay Municipal Boroughs Act, 1925. We are, therefore, of the opinion that it was incumbent on the plaintiffs to give notice of their claim for refund to the defendants. In so far as they gave the requisite notice under s. 206 of the Act to the defendants on May 2, 1947 they were well within their rights to prosecute their claim and institute the suit against the defendants for the refund of the amounts which the defendants had recovered from them up to July 31, 1947. This, however, could not be predicated of the plaintiffs' claim from the defendants for refund of the excess over the sum of Rs. 18,776-6-0. To the extent, therefore, that the plaintiffs claimed, in their amended plaint which they put on file on July 15, 1948, to recover the excess over this sum of Rs. 18,776-6-0, the plaintiffs' claim could not be sustained.

[The rest of the judgment is not material to the report.]

Appeal allowed in part.

Cross objections dismissed:

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Dixit.

MUKTABASAPPA BHIMAPPA AMTI AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 9), APPELLANTS *v.* HANMANTAPPA KAREHANAMAPPA KOPPADAVAR (ORIGINAL PLAINTIFF), RESPONDENT.*

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Hindu law—Legal necessity—Sale by widow with limited estate—Sale challenged after long lapse of time—Proof of necessity—Recitals in sale deed—Presumptions in absence of recitals—Whether presumptions based on circumstances and available evidence are permissible.

Where the parties to the transaction are dead and direct evidence as to legal necessity is not available, it is well settled that presumptions are permissible. Ordinarily, it is for a purchaser from a Hindu widow having a limited interest in the property sold to prove that the sale was justified by legal necessity which he may do by establishing that there was necessity in fact or that he made due inquiry about the existence of the necessity and believed in its existence. Where the transaction is ancient and there are recitals in the deed of sale as to necessity, recitals consistent with the circumstances and probabilities should be given

* First Appeal No. 202 of 1949 (with F. A. No. 275 of 1949).