APPELLATE CIVIL.

Before R. C. Mitter J.

NIRMAL CHANDRA SANYAL

v.

PABNA MUNICIPALITY.*

1936

July, 8, 9, 17.

Corporation—Nuisance—Negligence—Damages—Calcutta Hackney Carriage Act (Beng. I of 1919), s. 60—Bengal Municipal Act (Beng. XV of 1932), s. 535.

Any act, otherwise unlawful and actionable, if done by a person under express statutory authority and without negligence, is not actionable. The statutory authority is to be regarded as statutory indemnity.

Geddis v. *Proprietors of Bann Reservoir* (1) referred to.

The statutory authority and the consequent statutory indemnity extend to the act itself and also to all its necessary consequences.

A legislature authorising an act must be deemed to have authorised by necessary implication all inevitable results of that act.

The aforesaid principles of exemption from liability are only applicable when the statutory authority is absolute and not conditional, that is, where the authority is imperative and not permissive.

Metropolitan Asylum District v. *Hill* (2) referred to.

Under s. 60 of the Hackney Carriage Act of 1919 the authority conferred upon a corporation to appoint a stand for hackney carriages is absolute. And a corporation causing public hackney carriage stand to be erected on any street under s. 60 of the Act is not liable even if the stand so erected becomes a source of nuisance to the neighbours.

Section 535 of the Bengal Municipal Act does not apply to a suit where the act complained of does not purport to have been done under the said Act or any rule or bye-law made thereunder.

*Appeal from Appellate Decree, No. 969 of 1935, with Cross-objection, against the decree of B. K. Basu, District Judge of Pabna, dated Mar. 5, 1935, modifying the decree of Amulya Gopal Chatterji, Second Munsif of Pabna, dated Sep. 27, 1934.

(1) (1878) 3 App. Cas. 430. (2) (1881) 6 App. Cas. 193.

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SECOND APPEAL by the plaintiff.

The material facts of the case and the arguments in the appeal appear in the judgment.

Jateendra Nath Sanyal and *Bijali Bhooshan Sanyal* for the appellant.

Surajit Chandra Lahiri and *Amaresh Chandra Ray* for the respondents.

Cur. adv. vult.

R. C. MITTER J. This appeal has been preferred by the plaintiff against the judgment and decree of the learned District Judge of Pabna, who has partly reversed the judgment and decree of the Second Court of the Munsif of that place. The defendants, the Commissioners of the Municipality of Pabna, have preferred cross-objections, and as the cross-objections go to the root of the matter, I have heard the respondents' advocate first in support of his cross-objections.

In 1918, the Commissioners of the Pabna Municipality had reserved a part of the Strand Road, in front of the plaintiff's land, as a hackney carriage stand. At that time the Calcutta Hackney Carriage Act of 1891 (Beng. II of 1891) was in force. The said Act had been extended to the municipal limits of the town of Pabna by notification No. 1008 T.—N., dated November 4, 1913. The said notification is in the following terms:—

In exercise of the power conferred by s. 11, cl. (*3*) of the Calcutta Hackney Carriage, Act II of 1891, the Governor in Council is pleased to extend the provisions of the said Act to the Pabna Municipality in the district of Pabna.

The Governor in Council is also pleased, in exercise of the power conferred by s. 1, sub-s. (*1*) of the same Act to appoint the Commissioners of the Pabna Municipality and their Chairman, respectively, to perform the duties imposed and to exercise the powers conferred by the Act on the the Corporation of Calcutta and the Chairman of the Corporation, respectively.

By the Calcutta Hackney Carriage Act, Bengal Act I of 1919, Bengal Act II of 1891 was repealed and no notification by the Local Government has been issued under s. 2, cl. (*a*) of Bengal Act I of 1919 extending the said Act of 1919 to the town of Pabna.

In July, 1933, the Commissioners of the Pabna Municipality paved the portion of the Strand Road reserved in the year 1918 as a hackney carriage stand. The said place is still being used as a hackney carriage stand.

The plaintiff filed his suit on December 11, 1933, against the Commissioners of the Pabna Municipality for a mandatory injunction for removal of the said hackney carriage stand, for a permanent injunction restraining them from allowing the said place to be used as a hackney carriage stand, for a permanent injunction for restraining them from obstructing the passage to his land from the Strand Road and for damages. The basis of these reliefs is the statement made in paragraph 4 of the plaint. The substance of that paragraph is that the hackney carriage stand is kept in a dirty condition, there is no flushing arrangement, and the bad smell has caused and is causing great discomfort with the result that some of the plaintiff's tenants occupying huts on his land had already left and the carriages standing in a long row caused obstruction to the ingress and egress to and from his land to the Strand Road.

The first Court dismissed the suit, and an appeal was taken by the plaintiff to the learned District Judge. The learned District Judge, apparently with the consent of both parties, inspected the locality and thereafter heard arguments and decreed the suit in part. He held that no case for an injunction has been made out by the plaintiff, but that he was entitled to damages which he assessed at Rs. 50. I will have to examine this part of his judgment in

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some detail hereafter. The plaintiff has preferred this appeal in which he maintains that an injunction ought to be granted. The defendants have preferred cross-objections in which they maintain that the decree for damages ought to be discharged and the plaintiff's suit dismissed in its entirety.

The learned advocate for the defendants respondents raises in his cross-objection a point which goes into the root of the matter and, if it be a sound one, the plaintiff's suit will have to be dismissed, even if the hackney stand constitutes a nuisance. He contends that if the Commissioners have the statutory power to appoint a place as hackney carriage stand, and if, in the exercise of that power, they do something which is necessary for the exercise of the same, no action can lie against them even if their act constitute nuisance. The proposition so stated and in such a broad form is in my judgment not the law. The principles of exemption from liability coming within this head, in my judgment, can be summarised in the following manner :—

(i) Whenever an act otherwise unlawful and actionable is expressly authorised by the legislature, no action would lie against the person who has the statutory authority to do the act, provided it is done without negligence. The statutory authority is to be regarded as statutory indemnity : *Geddis* v. *Proprietors of Bann Reservoir* (1), per Lord Blackburn at p. 455.

(ii) The statutory authority and the consequent statutory indemnity extends not only to the act itself, but to all its necessary consequences. When the legislature has authorised an act, it must be deemed also to have authorised by necessary implication all *inevitable* results of that act. As has been put in some of the cases, the test of the necessity of a consequence is

(1) (1878) 3 App. Cas. 430.

the impossibility of avoiding it by the exercise of due care and skill. No consequence which can be so avoided is within the scope of the statutory indemnity. It is on this principle that in *Vaughan* v. *Taff Vale Railway Company* (1), no damages were awarded against the railway company for fire caused by a spark escaping from one of their locomotive engines, it being proved that the engine had been constructed with due care and skill and escapes of sparks were inevitable. It is not necessary to multiply cases, many of which can be found in the reports which illustrate this principle.

(iii) The aforesaid two principles of exemption from liability are only applicable when the statutory authority is absolute and not conditional. Whether the authority is absolute or conditional has often to be implied from the general provisions of the statute. A good working test is that where the authority to do an act is imperative, that is, where the statute imperatively directs the acts to be done, and not permissive, *i.e.*, merely allows it to be done, it is to be considered as absolute; if it is merely permissive, the authority is *prima facie* conditional and does not absolve the authorised person doing the act from liability, if nuisance result from the act. *Metropolitan Asylum District* v. *Hill* (2), *Canadian Pacific Railway Company* v. *Parke* (3).

It is on this principle that Metropolitan District Asylum, a statutory corporation having statutory authority to build a small-pox hospital, was restrained from building it at Hampstead in London, as the erection of such a hospital there would be a source of danger to the neighbourhood. *Metropolitan Asylum District* v. *Hill* (2). On the same principle the case of *Rapier* v. *London Tramways Company* (4) was

(1) (1860) 5 H. N. 679; 157 E. R. 1351.
(2) (1881) 6 App. Cas. 193.
(3) [1899] A. C. 535.
(4) [1893] 2 Ch. 588.

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decided. There the tramway company was authorised by an Act of Parliament to use horse traction for their tram-cars. That power by necessary implication authorised building stables for the horses to be used for drawing the tram-cars. But the company was restrained from maintaining a large stable, which, by reason of the noise and smell, was a nuisance to the adjoining residents.

Having regard to the provisions of s. 60 of the Hackney Carriage Act of 1919 (Bengal Act I of 1919) which corresponds to s. 45 of Bengal Act II of 1891, however, I hold that the authority to appoint stands for hackney carriages is absolute. The statute does not merely permit the appointment of such reserved places for hackney carriages but *directs* the person or body authorised to do so. If, therefore, the Commissioners of the Pabna Municipality had in July, 1933, the statutory authority to appoint places to be used as public stands for hackney carriages they would not be liable even if the said public stand erected on a part of the Strand Road is a source of nuisance to the neighbours.

This leads me to the question as to whether they had the statutory authority. This depends upon the question whether the Calcutta Hackney Carriage Act, either of 1891 or 1919, was in force at Pabna in July, 1933. There cannot be any question that the Act of 1891 was not in force, because that Act being wholly repealed by Bengal Act I of 1919 is no longer on the statute book. The question is whether Bengal Act I of 1919 was in force then. It is admitted that no notification has been issued by the Local Government under s. 2, cl. (*a*) of this Act extending its operation to the town of Pabna. The only notification that has been issued is the notification No. 1008 T.—M., dated November 4, 1913, which I have quoted above. That notification extended to the town of Pabna the Act then in force, the Hackney Carriage Act of 1891. The word "said" used in the first paragraph

of the notification implies that. It was a notification issued under s. 1, cl. (*3*) of the Act of 1891. Section 25 of the Bengal General Clauses Act (Bengal Act I of 1899) is of no assistance to the Municipal Commissioners of Pabna. The only effect of that section is to make the notification No. 1008 T.—M., dated November 4, 1913, as if issued under Bengal Act I of 1919. By the application of s. 25 of the General Clauses Act, the said notification would read in the following manner:—

"In the exercise of the powers conferred by s. 2, "cl. (*a*) of the Calcutta Hackney Carriage Act I of "1919, the Governor-in-Council is pleased to extend "the provisions of Act II of 1891 to the Pabna "Municipality in the District of Pabna."

But this means to the Commissioners nothing, as Bengal Act II of 1891 is not in existence since 1919. The view I am taking is supported by the decision in the case of *The Chairman of the Commissioners of the Howrah Municipality* v. *Haripada Ray Chaudhuri* (1). I hold that since 1919 and *a fortiori* in July, 1933, the Commissioners of the Pabna Municipality had no statutory authority to appoint or reserve any place as a hackney carriage stand, and hence there is no statutory indemnity from actions for nuisance. I do not consider that s. 3, cl. (*2*) of the Hackney Carriage Act of 1919, which preserves intact "the validity of anything done or suffered or "any right, title, obligation or liability which may "have accrued under" the Hackney Carriage Act of 1891, protects the Commissioners from this action, if their act done in July, 1933, amounted to nuisance. The liability sought to be enforced in the suit is a liability which arose in July 1933, when the Hackney Carriage Act of 1891 was no longer in force.

(1) (1931) I. L. R. 59 Cal. 1007.

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The question now to be considered is whether the plaintiff has succeeded in proving that the construction of the *puccâ* hackney stand in front of his property has caused and is causing nuisance. In the plaint he stated that, by reason of the bad smell, his tenants have left. He also complained of obstruction to free access to his land from the public road caused by the hackney carriages standing in a row. The learned District Judge who inspected the locality has found that there is no extra accumulation of filth on the stand itself. The smell emitting from the stand itself is not more noxious or disagreeable than the smell emitting from the streets of Pabna generally. If this was the only finding, no action for nuisance would lie, for a person living in that town must put up with its usual and ordinary discomforts. But he finds something more. He finds that there is no proper drain or channel to drain off the urine of the horses with the result that offensive matter drains into and accumulates in a long strip of land in between the *puccâ* stand and the plaintiff's land. This finding, in my judgment, supports the plaintiff's action. I do not attach much importance to the respondents' contention that this fact is not specifically mentioned in the plaint. The plaintiff complained of nuisance and gave some instances of discomfort he and his tenants were feeling and I do think it would be giving a too strict interpretation to the plaintiff's pleading if I am to accept the respondents' contention. I do hold that the plaintiff is entitled to relief on the basis of this finding.

The learned District Judge refused the prayer for injunction, but awarded the plaintiff Rs. 50 as damages. He was, it seems to me, by reading his judgment, influenced to some extent in refusing the prayer for injunction by the promise made before him that the municipality will in a short time provide proper drains. This promise was made in March, 1935, but has not yet been redeemed. Injunction is

the usual and proper remedy in the case of continuing nuisances. It ought to be granted in some form unless the injury complained of is trivial. I do not consider that the discomfort caused to the plaintiff is trivial. One of his tenants has left the land. The plaintiff has no doubt failed to prove that the *puccâ* hackney carriage stand was the cause of his departure. But the fact is established that no tenant has come in his place since then and the hut that he occupies is now, owing to long and continued vacancy, in a dilapidated state. I hold that injunction is the proper relief. Having taken all the circumstances into consideration I think the Commissioners of the municipality should not be directed to remove the stand elsewhere, but that they should be directed to take proper care in the matter of keeping the stand and the adjoining places reasonably clean and for that purpose they are directed to clean and to keep in a reasonably clean state the strip of land in between the hackney carriage stand and the plaintiff's land by providing a suitable *puccâ* drain. They are, accordingly, directed to construct a suitable *puccâ* drain on that piece of land within six months from this date. If they fail to do so, the plaintiff will have such a drain constructed and recover the costs thereof from the commissioners of the municipality. As I am giving the plaintiff an injunction in this limited form, I discharge the decree for damages.

A point was taken that the suit, not being instituted within the time limited by s. 535 of the Bengal Municipal Act, is barred by time. I do not accept that contention. The said section applies when the act complained of is purported to be done under the Municipal Act or any rule or bye-law made thereunder. The act complained of, namely, the erection of a defective hackney carriage stand with no suitable contrivance for drainage does not come within this section, for the Bengal Municipal Act has no provision for the erection of such stands, nor are there

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any statutory rules or by-laws made under the said Act.

The appeal and the cross-objections are thus partially allowed. Each party to bear their costs of this Court.

Appeal allowed in part.

A. K. D.