[201] APPELLATE CIVIL.

The 30th April, 1881.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE HUTCHINS.

The Municipal Commissioners for the Town of Madras.....(Defendants) Appellants.

versus

Frederick George Reddy Branson.....(Plaintiff) Respondent.*

City of Madras Municipal Act—Water-rate—Liability of Commissioners to suit for compensation for not supplying water and collecting rate—Injunction to restrain collection of rate dissolved.

By the provisions of the *City of Madras Municipal Act*, 1878, if a water-rate is levied by the Commissioners they are bound to supply water for house-service to every rate-payer who desires and provides the necessary works to connect his premises with the main, which ought to be within 150 yards of his premises, and the rate-payers are bound to pay water-rate whether or not they avail themselves of the privilege of house-service. If the Commissioners do not perform this duty the rate-payer has a remedy by action and may recover compensation, either under the provisions of Section 433 (which provides that a person aggrieved by the failure of the Commissioners to do their duty may bring his action and the Court may either direct the duty to be performed " or make such order as to the Court may seem fit ") or under those of the *Statute of Westminster*.

Semble:—If the Court does not order the execution of the works under Section 433, the only other order it could make would be an order for reasonable compensation.

The Legislature intended the water-rate to be a payment for a benefit conferred, and the tax should not be levied till water can be supplied. If in part of the city the Commissioners are able to supply water and desire to obtain at once a return for their works they should apply to the Government to exempt the rest of the city from the operation of the Act.

Where a public body has received by statute a discretionary power to levy and is laid under an obligation to collect a rate, an injunction cannot be granted by a Court so as to deprive such public body of the power of exercising its discretion or to prohibit it from discharging the obligation.

THE facts and arguments in this case sufficiently appear in the Judgment of the Court (TURNER, C.J., and HUTCHINS, J.).

The Advocate-General (Hon. *P. O'Sullivan*) and Mr. *Norton* for the Appellants.

Mr. *Johnstone* for the Respondent.

[202] Judgment:—The respondent is the owner of a dwelling-house in a public street within the Municipal limits of the City of *Madras*. Having been assessed to and paid the water-rate, levied under the provisions of *Madras* Act V of 1878, he required the Commissioners to lay a main and furnish him with a supply of water for domestic purposes and to erect a stand-pipe or fountain

* Appeal No. 41 of 1880 against the decree of the High Court on the Original Side, dated 7th September 1880.

at or within a distance of 150 yards of his premises, and intimated that in the event of their refusal to comply with his request, he would commence proceedings against them to recover damages for their default.

The Commissioners having taken no notice of the demand and failed to comply with it, the respondent instituted this suit. In his plaint he set out the provisions of the Act on which he relied to establish the rights he claimed, averred that he had been assessed to and had paid the tax, that he had made a demand on the Commissioners who had neglected to comply with it, and that he had served them with notice of action. He claimed a decree ordering the appellants to furnish him with a supply of water and to erect a stand-pipe, &c., at or within 150 yards from his premises, and to pay him as damages Rs. 48 for their failure to furnish him with water and erect stand-pipes at or within the distance mentioned, and he also prayed that the appellants should be restrained by injunction from collecting the water-rate assessed on his premises until they had executed the necessary works and were in a position to supply him with water as claimed by him.

The appellants in their written statement alleged there had been no wilful refusal on their part to comply with the respondent's demands, that they had used and were using their best endeavours with the funds at their disposal to carry out works to supply the city with water in accordance with the requirements of the Act, and that they had applied to the Government to sanction the raising of a further loan for that purpose. They also pleaded that the plaint disclosed no cause of action. It was not denied that the nearest standpipe or work for the supply of water was at a distance of 1,600 yards from the premises of the respondent.

At the settlement of issues no issue was taken as to whether in fact the default of the appellants arose from their inability to procure funds for the construction of works, or whether in fact the **[203]** Commissioners had been and were doing all that could be reasonably required of them in the execution of their powers under the Act to provide a supply of water.

The learned Judge by whom the suit was tried overruled the pleas of the appellants, and, holding that the respondent having been assessed to and paid the water-rate was entitled to a supply of water for the use of his household, and that the appellants were bound to furnish that supply, awarded the respondent the damages claimed, and, inasmuch as the appellants admitted that they were not and, for some years, should not be in a position to furnish water to the respondent, in order to avoid a multiplicity of actions, the learned Judge granted an injunction restraining the appellants from collecting the rate from the respondent until they should be in a position to supply water to him as required by the Act or until the further order of the Court.

In appeal it is urged the respondent could not maintain suit on the facts admitted, and that the respondent was not entitled either to damages or an injunction.

The learned *Advocate-General* who appeared in support of the Appeal contended that no action would lie against a public body for damages for the mere neglect of a statutory duty, or, as a less extensive proposition, that no action for damages would lie against a public body for any such neglect while the neglect arose from inability and the public body had reasonably endeavoured to carry out the Act, and that all relief should be refused where it was impossible to carry out the Act. He cited in support of this argument *Reg.* v.

The Ambergate Railway Company (1 E. & B., 372); *Reg.* v. *Land Tax Commissioners* (16 Q. B., 381); and *Glossop* v. *Hestin and Isleworth Local Board* (L.R., 12 Ch. D., 102).

He contended that the supplying of water not being a condition precedent to the collection of the rate, the Court ought not to have granted an injunction to restrain the collection of the rate. He also relied on the authority of *Galloway* v. *The Lord Mayor and Corporation of London* (L.R., 1 H.L., 34) as establishing that, in favour of public bodies, statutes receive a more liberal construction than would be proper in the case of adventurers working for profit.

[204] He argued that the payers of water-rate were not entitled to any greater advantages than other persons resident in the Municipality, and that it would be inconvenient to hold that any resident might maintain an action against the Commissioners for the neglect of any duty imposed on them by the Act in connection with the supply of water and scarcely less inconvenient to hold that any payer of the water-rate was entitled to do so, and lastly he urged that, both in the case of the water-rate payer and the resident, the injury resulting from any such default as was imputed to the Commissioners was of a public character and did not confer on a private person a right of suit.

Questions having been raised as to whether the respondent is entitled to any such right and the Commissioners are subject to any such obligation as have respectively been declared by the Judgment under appeal, it will be convenient we should deal with them before we enter on the further question whether the respondent is entitled to the remedies decreed to him or to any remedies which it is in the power of this Court to award him.

The purposes for which a water-supply is required in a city admits of a broad distinction into private and public. The private purposes are those for which a private person requires it, such as domestic use or the processes of manufactures: the public purposes for which water is required are for employment in extinguishing fires and in carrying on the work of sanitation, the flushing of sewers and the watering of streets and the prevention of disease among these classes of the inhabitants who are unable to provide themselves with water suitable for domestic consumption. It is the province of public bodies, such as Municipal Commissioners, to make provision to meet the public requirements where this has not been effected by private enterprise, and inasmuch as, in the discharge of this public duty, they obtain facilities for meeting private requirements also, it is usual to empower or compel them to do so, and while the cost of meeting public requirements is fairly cast on the whole body of rate-payers, the cost of providing for private consumption is with equal justice imposed on those who either do, or are in a condition to benefit by it.

The Legislature in some cases leaves an option to the rate-payer to introduce water into his premises for his private consumption, subject to the payment of a prescribed charge: in **[205]** others, if he is in a position to avail himself of such a supply, it authorizes the collection from him of a special water rate, whether he avails himself of the supply or not.

In order to ascertain what obligations are imposed on the Municipal Commissioners of this city, what powers of taxation are conferred on them and what obligations and rights are conferred on persons who for their private consumption either do or can avail themselves of the water introduced by the Commissioners, it will be necessary to examine *Madras* Act IX of 1867, as well as *Madras* Act V of 1878, in which the Legislature has dealt with these questions.

Act IX of 1867 was enacted *inter alia* to make provision for the conservancy and improvement of the Town of *Madras* and to enable the Commissioners to levy taxes and rates therein.

By the 98th section of the Act, the Commissioners were authorized to raise money on the mortgage of the rates to be levied under the Act for the construction of works of a permanent character. By the 171st section they were empowered to lay pipes for bringing water into the town, and by the 203rd section to lay in the streets mains and pipes for the supply of water and to erect sufficient and convenient stand-pipes for the gratuitous use of the rate-payers, such stand-pipes being at intervals of not more than one hundred yards and at all times kept charged with water.

By the 204th and 205th sections of the Act, it was enacted that when the Commissioners should have carried out a system for the supply of water to the town or to any division or portion thereof, including such convenient mains or stand-pipes as aforesaid, the Commissioners should, with the sanction of the Government, by notification declare that the supply was complete within the town or any such division or portion, and that thereupon it should be lawful for the Commissioners to assess a rate on all occupied buildings or premises in such district.

By the 206th section it was declared that every householder assessed to and paying the rate should be entitled to have a supply of water from the mains and pipes of the Commissioners for the domestic use of himself and his household, and to lay down communication pipes for bringing into his house a proper and sufficient supply for domestic purposes.

[206] By the 211th section the Commissioners were required to keep in their mains at all times a sufficient supply and to maintain at stated hours a sufficient pressure to raise the water in all buildings and places in which it might be introduced, and by the 215th section all moneys collected in respect of the supply of water were to be applied to defray the expense of making or maintaining water-works, to the liquidation of debts incurred in providing the supply, and to other purposes connected therewith. It will be seen that in this Act it was left to the option of the Commissioners to introduce water and to erect stand-pipes for gratuitous distribution. It was also left to their option to declare their system in the town or any part of it complete, but until they had declared it complete, they had no power to levy a water-rate, and when they had levied a rate, they were bound to furnish the payers of the rate with a constant supply which they might introduce into their houses. On the other hand, every owner of premises above a certain annual value was liable to assessment, whether or not he availed himself of the water for domestic use; and by reason of the imperative provision as to the intervals between stand-pipes by a connection with mains, he could obtain a supply at a distance not exceeding 50 yards from his premises.

By the *City of Madras Municipal Act* of 1878, considerable alterations were introduced as to the obligations of the Commissioners respecting water-works, but generally in the direction of increasing these obligations than diminishing them. Whether because water had been brought to the city, or as seems probable, because the Legislature considered the Commissioners were dilatory in the execution of improvements, the Legislature made imperative what it had before left optional, and conferred on the Government important powers of interference. If it appears to the Governor in Council that the Commissioners are omitting to fulfil any duty imposed on them by the Act connected with the cleansing or drainage of the city or other sanitary work, that authority

is empowered to make an order on the Commissioners to show cause why an inquiry by a special officer should not be directed, and if an inquiry is directed, on receipt of the report of the officer, to order any work recommended by him to be carried out within a certain time, and, if necessary, by means of a loan, and, on the failure of the Commissioners to comply with the order, [207] to execute the work at the cost of the Municipality. Sections 64-66 which confer on the Government these large powers appear to afford an explanation of certain changes in the Act which are more immediately pertinent to the present inquiry.

With regard to the water-supply, the 211th section of the Act took away from the Commissioners the option they had previously enjoyed, and made it imperative on them to provide continuously an adequate supply of drinking water within the city, and for that purpose to cause pipes to be laid, &c., in the public streets, and to erect in such streets stand-pipes for the gratuitous use of the inhabitants of the city for domestic purposes.

The Commissioners are, however, no longer required to erect such stand-pipes at intervals not exceeding 100 yards, but they are bound so to place them that "there shall be one at a distance not exceeding 150 yards from any house in any public street." The Act then contemplates that water-mains shall be laid in all public streets so as to afford a supply within 150 yards of every house in a street, and that at public stand-pipes or fountains this supply shall be available for all persons gratuitously and continuously.

Bearing in mind these imperative provisions, we may pass to the provisions respecting private supply, or what is ordinarily described in connection with water-works as the "house-service."

By the 139th section of the Act, the Commissioners "in order to provide for the maintenance, repairs, extension and improvement of water-works" are empowered to impose on all houses, buildings and lands, with certain exceptions, an annual tax, not exceeding a certain percentage of their annual value. But it is provided that the Government may by notification exempt any division or part of a division from the payment of the tax, and may also from time to time remove such exemption. The 141st section declares in almost the same terms as those of the analogous section of the former Act that "every person paying such tax shall be entitled to have free of further charge a sufficient supply of water from the pipes of the Commissioners for the domestic use of himself and his household." By the 142nd section the works necessary for such supply and all future alterations and repairs of such works are to be conducted by the President of the [208] Municipality or under his orders, but the expense is to be defrayed by the owner or occupier.

The alterations of the law then effected in these sections are these. It is no longer declared a condition precedent to the levy of a water-rate that the Commissioners should have notified the completion of their works: they are empowered to levy a water-rate when they think fit, and they must do so throughout the town; the option is taken away from them of levying it in a portion of the town only. This power of exempting divisions or parts of divisions the Legislature has reserved to the Government, and the only explanation that is suggested for this alteration is the apprehension of the Government that the Commissioners might be dilatory in carrying out the complete scheme contemplated by the Act.

It is still left to the option of the Commissioners to levy a rate, but if they do levy a rate, the obligation attaches to them to supply with water for

domestic purposes every rate-payer who desires and provides the necessary works to connect his premises with the main, which, if the Commissioners have done their duty, cannot be at a greater distance from his premises than 150 yards. On the other hand, the rate-payers are still under the obligation of paying a water-rate whether or not they avail themselves of the supply by introducing it into their houses. But in the most distinct language the Legislature has in compensation for this obligation declared them entitled to the supply free of further charge except the outlay necessary to convey it into their premises from the mains which it was imperative on the Commissioners in the exercise of their duty to provide within a certain distance from all houses. The 150th section of the Act, in terms almost identical with those of Section 215 of Act IX of 1867, imposes on the Commissioners the obligation of applying the moneys raised by the water-rate to the expense of making and maintaining the water-works. Lastly, by the 433rd section of the Act, it is enacted that any person aggrieved by the failure of the President or of the Commissioners to carry out any work or perform any duty which he or they is or are bound to carry out or perform under this Act, may bring an action against the Commissioners, and, if the Court finds such work or duty is incumbent on the President or Commissioners under the Act, it may direct the **[209]** immediate performance of such duty or the execution of such work or make such order as to the Court may seem fit.

Here, again, we find a provision which, although it may possibly not be in excess of the powers which the Court would possess independently of the Act, by its express declaration indicates the intention of the Legislature to insist on the performance by the Commissioners of the duties imposed on them by the Act.

In our examination and contrast of these Acts, we have shown that, while the Commissioners have power to levy a water-rate on the plaintiff, which the plaintiff cannot refuse to pay, the Commissioners are bound to furnish him with a water-supply, and that the Legislature contemplated that the supply should be brought within a certain distance of his premises. The Commissioners have, it is admitted, failed to discharge this duty, and the question next arising for determination is whether the plaintiff is entitled to seek a remedy by suit.

The enactment known as the *Statute of Westminster* provided a remedy by action on the case for all persons aggrieved by the neglect of a statutory duty. It is laid down in *Comyn's* Digest (Actions on Statute F) "that in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy on the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the said law."

This was the rule applied by the Court in *Couch* v. *Steel* (3 E. & B., 402), and although the House of Lords in *Atkinson* v. *The Newcastle Water-works* (L.R., 12 Ex. D., 448) questioned the propriety of its application in that instance and declared it must to a great extent depend on the purview of the Legislature in the particular statute and the language, more especially "where an Act is not an Act of public and general policy but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works," their Lordships did not question the existence of such a right of action in a proper case.

In *Glossop* v. *Heston and Isleworth Local Board* (L. R., 12 Ch. D., 115), the Court held that, under the circumstances and in view of the necessary

[210] duration of the works contemplated, the delay on the part of the Local Board to carry out their works did not amount to such a refusal as to entitle the plaintiff to a mandatory injunction, and expressed a doubt whether, if there had been such a refusal or any *malâ fide* delay, a mandatory injunction to carry out considerable public works would be granted at the suit of a proprietor who would receive benefit from their execution, but this case cannot be relied on to show that where a special benefit is by the term of the Act provided for a person or a particular class of persons in compensation for an obligation imposed on them, they have no right to claim compensation in damages. The argument of the learned *Advocate-General* that statutes are to receive a liberal construction in favour of public bodies is not supported to the extent necessary for his case by the decision cited by him. The decision in *Galloway* v. *The Lord Mayor* (L. R. 1 H. L., 34) is an authority for the position that enactments conferring powers on public bodies for public purposes should receive a more liberal construction than they would properly receive in favour of private adventurers, but it is not an authority for the contention that enactments imposing on public bodies obligations should not be construed according to the manifest intention of the Legislature.

If the Act were silent, the plaintiff would, in our judgment, be entitled to maintain a suit for compensation. Is he deprived of it by reason of the enactment of Section 433, or is he confined to the remedies prescribed by that section?

It is sound law that where a right or duty is entirely the creation of a statute and a specific remedy is provided by the statute for its enforcement, that remedy and that only must be pursued (*Addison* on Torts, p. 39) unless the remedy does not cover the entire right. In the Act under consideration, we are not prepared to say that under the words "or make such other order as to the Court may seem fit" the Court may not have power to award compensation, but if it has not such power, then the provisions of the Act do not cover the entire right. It may in many cases be quite unreasonable that the Court should order the execution of a work necessary to enable the Commissioners to discharge their duty, and in exercising that power, the Court would no doubt [211] be influenced by the considerations present to the minds of the learned Judges in *Glossop* v. *Heston and Isleworth Local Board*, but if it abstains in such cases from ordering the execution of work, the only other order it could pass would be an order for reasonable compensation. However this may be, the plaintiff is, in our judgment, entitled to maintain a suit. Nor can we regard it as an answer to the suit that the Commissioners have not at their command the funds necessary to enable them to discharge their duty. We cannot assent to the argument drawn from the direction as to the application of the rates levied that it was the intention of the Legislature that water-rate should be collected before the works are completed. There might be force in this argument if the Commissioners were not allowed to have recourse to other sources to find funds for the execution of the work. The Legislature in our judgment intended the rate to be a payment for a benefit conferred, nor is any injustice involved in holding that the Commissioners, if they levy a tax, must levy it throughout the area not excepted by Government, and if they levy it, must supply water or pay compensation. It is not imperative on the Commissioners to levy a water-rate. They should not do so until they are in a position to supply water, and if, in a part of the city, they are in a position to do so and desire to obtain at once a return for their works, they should apply to the Government to except the other portions of the city from the operation of the Act. The Government will then exercise the power it has reserved to itself;

and will determine whether it will in whole or in part assent or refuse compliance with the request, and in so doing, it will be doubtless guided by the consideration whether the Commissioners have used due diligence to carry out the Act. On the question as to the right of the plaintiff to maintain suit and to recover damages, we are in accord with the opinion of the learned Judge by whom the suit was tried.

We regret we are unable to agree with him that the plaintiff is entitled to an injunction. No case has been cited to show that where a public body has received by statute a discretion to determine on the levy of a rate and an obligation to collect it, it is competent to the Court to deprive the public body of such discretion or to prohibit it from the discharge of its obligation.

[212] We must, therefore, allow the appeal so far as to reverse the order for and dissolve the injunction. In other respects we affirm the decree and dismiss this appeal. We direct that each party bear his own costs of this appeal.

Solicitors for the Appellants :—Messrs. *Barclay* and *Morgan*.

Solicitors for the Respondent :—Messrs. *Branson* and *Branson*.

NOTE.—Act V of 1878 (Sections 141 and 211) has been amended by Madras Act III of 1881 (8th April 1881).

NOTES.

[*See* (1879) 2 Mad. 362 F. B.]

[3 Mad. 312.]

APPELLATE CIVIL.

The 2nd May, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE HUTCHINS.

Kanara Paniker.....(First Defendant) Appellant

versus

Ryrappa Paniker.....(Plaintiff) Respondent.*

Self-acquisition by member of tarwad—Adverse possession by branch of tarwad.

When a member of a tarwad in possession of lands acquired by former members of his taverai (branch) openly sets up an dependent title to those lands, his possession becomes hostile to the tarwad, and Limitation begins to run against the tarwad from that time.

THE plaintiff in this case, as Karnavan of *Valayamprath* Tarwad, sued the first defendant and his mother the second defendant as members of the tarwad, to recover certain parcels of land in their possession; and as to other parcels in the possession of tenants, prayed for a declaration that they were the property of the tarwad, inasmuch as the defendants, who denied that plaintiff belonged to the *Valayamprath* Tarwad, claimed them as their own. The lands claimed were numbered 1-20 in the plaint.

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* Second Appeal No. 829 of 1880 against the decree of the Subordinate Judge of North Malabar, modifying the decree of the District Munsif of Badagara, dated 23rd August 1880.