

QUEEN-  
EMPRESS  
v.  
SAMAVIER.

the operation of section 537—point to a deliberate intention on the part of the legislature to throw upon the authority empowered to grant the sanction, the duty of designating the offence for which leave to prosecute is given, and this duty cannot be delegated.

On the ground that no legal sanction has been given we must quash the commitment under section 215, Criminal Procedure Code.

## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.*

SRINIVASA (PLAINTIFF), APPELLANT,

v.

RATHNASABAPATHI (DEFENDANT), RESPONDENT.\*

1892.  
Dec. 5, 14.

*District Municipalities Act (Madras)—Act IV of 1884, s. 261—Limitation—  
Contract Act—Act IX of 1872, s. 74—Penalty.*

The council of a municipality, under Madras Act IV of 1884; entered into a contract for the lighting of the town whereby it was provided that the deposit made by the contractor should be forfeited on any default made by him in carrying out the terms of the contract. One holding a decree against the contractor attached the amount of the deposit in the hands of the municipal council, but the council subsequently passed a resolution in July 1888 declaring that the amount of the deposit had been forfeited. The decree-holder having purchased from the contractor his right to the money in question now sued in 1890 to recover it from the municipality:

*Held*, (1) that the suit was not barred by the rule of limitation in Madras District Municipalities Act, s. 261;

(2) that the provision for forfeiture in the contract was penal and unenforceable and consequently that the resolution of July 1888 was *ultra vires*.

PETITION under Provincial Small Cause Courts Act, s. 25, praying the High Court to revise the proceedings of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in Small Cause suit No. 914 of 1890.

In 1887 one Harithirthayyan entered into a contract with the Municipal Council at Negapatam for the lighting of that town, and under the terms of the contract he deposited Rs. 500 which it was provided should be forfeited on any default made by him in carrying out his contract. The contractor failed to perform his

\* Civil Revision Petition No. 465 of 1891.

contract and the Municipal Council passed a resolution on 25th July 1888 forfeiting the deposit. The plaintiff was the holder of a decree passed against the contractor in execution of which the above-mentioned sum was attached on 15th January 1888. On the 18th of July the Municipal Council resolved that Rs. 424 only were due to the contractor and should accordingly be remitted to Court. This resolution having been cancelled by that of 25th July above referred to, the plaintiff purchased from the contractor his right to the money in the hands of Municipal Council and he now sued in 1890 to recover the amount. The Subordinate Judge held the suit was barred under the Madras District Municipalities Act, s. 261, and he accordingly dismissed the suit.

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The plaintiff preferred this petition.

*Rama Rau* for appellant.

*Pattabhirama Ayyar* for respondent.

JUDGMENT.—We are of opinion that the Subordinate Judge is in error in holding that the suit is barred under section 261, Madras Act IV of 1884. The cases contemplated in that section are suits for compensation and for damages, and the principle is to allow public bodies time for tender of amends to the parties so as to avoid litigation—see *President of the Taluk Board, Sivaganga v. Narayanan*(1) and cases quoted therein: also *Chunder Sikhur Bundopadhyaya v. Obhoy Churn Bagchi*(2) and *Joharmal v. The Municipality of Ahmednagar*(3). Upon the second point we are of opinion that the penalty prescribed by the muchalka of 23rd March 1887 is one which cannot be enforced since the contract renders the penalty altogether irrespective of the importance of the breach—see *Soper v. Arnold*(4) and *Lachman Das v. Chater*(5). The contract does not fall within the exception to section 74 of the Indian Contract Act, since the bond was not given under the provisions of any law for the performance of any public duty or act in which the public are interested. No doubt the public are in a sense interested in the proper lighting of the municipal town, but the contract is not one for which any special provision is made in the Municipal Act and cannot be placed in a different category to a contract made with any private individual.

(1) I.L.R., 16 Mad., 317. (2) I.L.R., 6 Cal., 8. (3) I.L.R., 6 Bom., 580  
(4) 37 Ch. D., 96, [see also 14 App. Case, p. 429]. (5) I.L.R., 10 All., 29.

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The resolution of the Municipal Council of 25th July 1888 was, therefore, *ultra vires*. We must set aside the decree of the Subordinate Judge and decree in plaintiff's favor for Rs. 424-2-5 with costs in both Courts.

## APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SUBBARAYADU (PETITIONER), APPELLANT,

v.

PEDDA SUBBARAZU (COUNTER-PETITIONER), RESPONDENT.\*

*Civil Procedure Code—Act XLV of 1882, ss. 311, 622—Application to set aside execution sale—Remedy of one claiming adversely to the judgment-debtor—Revision petition—Jurisdiction.*

One alleging himself to be the undivided brother and, as such, the legal representative of a deceased judgment-debtor applied to have set aside a sale of certain property alleged by him to be joint family property, which had taken place in execution of the decree. He did not make the purchaser a party to such application. The Court of first instance dismissed the application. On appeal, the Appellate Court made the purchaser a party to the proceedings, and holding that there was irregularity in conducting the sale reversed the order of the Court of first instance:

*Held*, (1) that the Appellate Court was wrong in so holding upon evidence recorded by the Court of first instance when the purchaser was not a party to the proceedings;

(2) that the proper remedy of the applicant was a regular suit and not a proceeding under Civil Procedure Code, 311.

APPEAL under Letters Patent, s. 15, against the order of Mr. Justice PARKER made on civil revision petition No. 199 of 1890. By that petition the petitioner prayed the High Court to revise the order of C. A. Bird, District Judge of Godavari, in appeal suit No. 72 of 1889, reversing the order of R. Hanumanta Rau, District Munsif of Tanuku, made on miscellaneous petition No. 1338 of 1888.

The petitioner, before the District Munsif, prayed for the cancellation of the sale of certain land which had taken place in execution of a decree passed against his undivided brother Subba-

\* Letters Patent Appeal No. 32 of 1891.