## APPELLATE CIVIL.

*Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.*

1931, August 19.

K. TULASIRAM (PLAINTIFF), APPELLANT,

*v.*

THE CHAIRMAN, MUNICIPAL COUNCIL, MADURA, R. S. NAIDU (DEFENDANT), RESPONDENT.*

*Madras District Municipalities Act (V of 1920), Sch. IV, rr. 56 to 58 and 61 and 62—Extraordinary audit or re-opening of closed audit—Power of—Surcharge made pursuant to—Suit contesting legality of—Maintainability—Appeal to Local Government by party aggrieved and partial success therein—Suit if barred in case of.*

The appellant was chairman of a municipality from June 1921 till June 1923. He was succeeded by another whose term of office lasted till 1st July 1923, when the respondent succeeded to the office. During the appellant's term of office the periodical audits provided for by the rules framed under the Madras District Municipalities Act were regularly made. In 1924, a supplemental audit was made of the accounts of the period from 1st April 1921 till 18th January 1924. It was ascertained that, owing to the negligence of successive chairmen, a large sum of money had been misappropriated and the auditor surcharged the appellant, amongst others. The appellant appealed to the Local Government and obtained a reduction. He then filed a a suit for an injunction restraining the respondent from recovering from him the sum representing the unremitted surcharge under rule 62 of the rules in Schedule IV of the Act.

*Held* that there was no jurisdiction to conduct the supplemental audit.

Rules 56 to 58 of the rules in Schedule IV of the Act provide for one recurring audit only, as the result of which defaulters can be charged or surcharged. They do not provide for extraordinary audits or the re-opening of audits when once they have been closed.

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* Second Appeal No. 213 of 1929.

*Held further* that the audit in pursuance of which the surcharge on the appellant was made not being one contemplated by the rules in Schedule IV of the Act, the appellant's suit was not affected by the remedies provided by those rules.

Even if the remedies provided by the rules in Schedule IV of the Act can be held to be substituted for the ordinary remedy by suit in cases governed by the rules, the same result will not hold in a case where the auditor being authorized to issue surcharge notices only on the audit mentioned in the rules conducts an audit outside the rules and in fact the surcharge certificate is not a certificate within the rules at all but *ultra vires* of them.

*Held also* that neither the appellant's appeal to the Local Government against the surcharge nor the reduction of the amount of the surcharge by the Local Government in the appeal was a bar to the appellant's suit.

SECOND APPEAL against the decree of the District Court of Madura in Appeal Suit No. 80 of 1928 preferred against the decree of the Court of the Principal Subordinate Judge of Madura in Original Suit No. 150 of 1926.

*F. S. Vaz* for appellant.—The Madras District Municipalities Act is a complete code so far as powers of audit are concerned. Rules 56 to 58 in Schedule IV of the Act relate to audit. By those rules an auditor is given full powers to require the production of all documents relevant to the inquiry and the report submitted by him is final; see rule 58 (*d*). Once an audit is completed and a report is made it is final; and neither the Government nor an auditor subsequently appointed by it has power to re-open that audit. The rules in question have been copied from section 247 of the Public Health Act of 1875 in England, and it has been held on the construction of that section that there is no power of a second audit; see *Reg* v. *Inhabitants of Chiddingstone*(1); Glenn on the Law of Public Health, 13th Ed., Vol. I, pages 800–1; Lumley's Public Health, Vol. II, page 2288; and Encyclopædia of Local Government Law, pages 84, 85, 95 and 96. In 1922 a special Act was passed conferring upon the Government the power of re-opening an audit under the Public Health Act. There is nothing in the present case to show

(1) (1862) 26 J.P. 246.

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that the Government authorized the auditor to re-open the prior audit. Even if the auditor had power to re-open the prior audit, his act was a judicial act, and he ought to have given the appellant notice and heard him before condemning him. As to what is a judicial act, see *Everett* v. *Griffiths*(1), per Lord ATKINSON. Lastly, the suit is one instituted under the general law and is maintainable. It is not one instituted under rule 61 of Schedule IV of the Act. Rule 61 applies only when the auditor acts within his powers and is inapplicable to a case of an extraordinary audit such as there has been in the present case. Where a special tribunal is established by a statute, the right of suit in the ordinary civil Court is barred only if the special tribunal operates under the statute; see *Ganesh Mahadev* v. *The Secretary of State for India*(2) and *Leman* v. *Damodarayya* (3).

*P. Venkataramana Rao* (*Government Pleader*), with him *J. R. Alwar Nayudu*, for respondent.—Section 122 is the main section of the Act relating to audit, and it does not limit the period during which the audit can be made. Rule 56 in Schedule IV does not do so either. Rule 57 gives complete power to the auditor to call for any accounts he wants. Rule 58 does not also restrict the period. Clause (*d*) of the rule refers to the "final statement of the audit", and these words may include audit for a prior period.

[The words are "the audit", that is, only one audit. No other audit is referred to—WALLER J.]

The audit is not confined to the particular period. An audit may be a partial audit, that is, an audit relating to particular matters only. Information in regard to other matters may not be available to the auditor and he may not be in a position to audit those matters. In that case his audit will be a partial audit and his report a partial report, and an auditor appointed subsequently will not be debarred from investigating into those matters which were left uninvestigated by the previous auditor. As regards the maintainability of the suit, when a statute confers powers on individuals or bodies and third parties are aggrieved by the exercise of such powers by them, they must pursue the remedies given by the statute. Rule 61 in Schedule IV of the Act gives a remedy to a person aggrieved by a surcharge. He must pursue that remedy and cannot

(1) [1921] 1 A.C. 631, 682. (2) (1918) I.L.R. 43 Bom. 221.
(3) (1876) I.L.R. 1 Mad. 158.

have recourse to the right of suit under the common law. Again, when a person has two remedies open to him, a remedy provided by statute and a common law remedy, he must pursue one of them and cannot have recourse to both; see Halsbury, Vol. XXVII, pages 188–189, section 370, and *Ramachandra* v. *The Secretary of State*(1). The appellant has availed himself of the remedy by appeal and cannot therefore have recourse to civil Courts.

[Rule 61 does not deprive the appellant of a right of suit—WALLER J.]

[On the assumption that the act of the auditor was one entirely without jurisdiction the appellant need not have gone to the Local Government at all. Does the fact that he did so bar his right of suit?—KRISHNAN PANDALAI J.]

The appellant can, under rule 61, apply to the civil Court to set aside the order even where the auditor acted without jurisdiction.

["Setting aside" referred to in that rule is on the merits and not on the ground of total absence of jurisdiction in the auditor—WALLER J.]

The following cases were referred to: *Wake* v. *Mayor, etc., of Sheffield*(2), *Iswaranunda Bharathi Swami* v. *Commissioners, H.R.E. Board*(3), *Wolverhampton Waterworks Co.* v. *Hawkesford*(4), *Mahammad Raza Saheb Belgami* v. *Sadasiva Rao*(5), *Dewa Singh* v. *Fazal Dad*(6) and *Pita Ram* v. *Jujhar Singh*(7). *Ganesh Mahadev* v. *The Secretary of State for India*(8) is distinguishable on the ground that there the right of appeal conferred by the statute was not resorted to.

*F. S. Vaz* in reply.—In *Ganesh Mahadev* v. *The Secretary of State for India*(8) the right of appeal conferred by the statute was resorted to; see page 225. *Secretary of State for India* v. *Major Hughes*(9) is a direct authority on the question that the filing of an appeal is no bar to the right to file a suit; see page 305. See also *Baijnath Sahai* v. *Ramgut Singh*(10). Appellant has the option of filing a suit or of applying under

(1) (1888) I.L.R. 12 Mad. 105.
(2) (1883) 12 Q.B.D. 142, 146.
(3) (1931) I.L.R. 54 Mad. 928.
(4) (1859) 141 E.R. 486, 494.
(5) (1925) I.L.R. 49 Mad. 49.
(6) (1928) I.L.R. 10 Lah. 338.
(7) (1916) 15 A.L.J. 661, 663.
(8) (1918) I.L.R. 43 Bom. 221.
(9) (1913) I.L.R. 38 Bom. 293.
(10) (1896) I.L.R. 23 Calc. 775 (P.C.)

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rule 61. The cases cited for the respondent are distinguishable.

*Cur. adv. vult.*

JUDGMENT.

WALLER J.

WALLER J.—The appellant in this case was Chairman of the Madura Municipality from 11th June 1921 till 25th June 1923. He was succeeded by Hajee B. Syed Shamsuddin Bahadur, whose term of office lasted till 1st July 1923, when he, in his turn, was succeeded by the defendant in the suit, Mr. R. S. Naidu. The rules framed under the Madras District Municipalities Act provide for periodical auditing of municipal accounts and the Government have prescribed that there shall be an audit every half-year. During the appellant's term of office such audits were regularly made. In 1924, when Mr. R. S. Naidu was Chairman, it was discovered that extensive frauds had been going on in the street-lighting department of the municipality and a supplemental audit was made of the accounts of the period from 1st April 1921 till 18th January 1924. It was ascertained that, owing to the negligence of successive chairmen, a large sum of money had been misappropriated and the auditor surcharged the appellant, his immediate predecessor and his two successors. In the case of the appellant and of Mr. R. S. Naidu the surcharges were large, Rs. 7,000 odd and Rs. 6,000 odd, respectively. The rules in Schedule IV of the Act allow to persons surcharged in this way either of two remedies. They may apply to the District Court to set aside the surcharges or "in lieu of such application" may appeal to the Local Government. All four of the aggrieved persons chose the latter course. Three of them succeeded in getting their surcharges remitted completely. The appellant did not; all that he obtained was a reduction to Rs. 2,500. He then filed

a suit in order to get an injunction restraining Mr. R. S. Naidu from recovering this sum from him under rule 62. The two main questions raised by it were these—whether the auditor had jurisdiction to re-open audits already closed and whether the plaintiff had any right to sue. The Sub-Judge found on the first issue in favour of the appellant. The District Judge, though with some hesitation, dissented from his finding and held that there was nothing in the rules that prevented an audit being re-opened. That was not quite the right method of approaching the problem. The question was rather whether there was anything in the rules that allowed the re-opening of a closed audit. If the rules prescribe a half-yearly audit and nothing more, whence is derived the power to re-open that audit, to conduct an extraordinary or supplemental audit and, as a result, to make surcharges? Certainly not from anything in the rules themselves. On the second issue, the Sub-Judge and the District Judge again disagreed. The former considered that the appellant had a right of suit. The latter was of a different opinion. Both seem to have thought (and there was nothing in the plaint to disabuse them of that idea) that the suit was brought under rule 61. If that had been so, the Sub-Judge was quite wrong in holding that the remedies allowed by the rule were not mutually exclusive. It is quite plain that, if an aggrieved person has resorted to one, he cannot have the benefit of the other as well. Mr. Vaz now points out that this is a regular suit and not an application under section 61, which is not a suit at all and would have had to be presented to the District Court. His case is that all that was done was without any legal foundation and that his client has therefore a right to sue. He concedes, of course, that, had there been any jurisdiction to conduct an extraordinary audit, his right

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to sue would have been barred by the special remedies provided by the statute.

We will now deal with the first question—whether there was any jurisdiction to conduct a supplementary audit. The relevant rules are rules 56 to 58 in Schedule IV of the Madras District Municipalities Act. Rule 56 directs the chairman to submit to the auditor such accounts as he needs. Rule 57 empowers the auditor to summon documents and persons and to question such persons. Rule 58 (*a*) requires the auditor to report irregularities in expenditure or collection of money to the Council. Under sub-rule (*b*) he must keep the Council informed of the progress of the audit. By sub-rule (*c*) he is instructed to report to the Council any loss or waste of money, caused by neglect or misconduct, with the names of the persons directly or indirectly responsible. Sub-rule (*d*) runs : (The auditor shall)

> "submit to the council a final statement of the audit and a duplicate copy thereof to the Local Government within a period of three months from the end of the financial year or within such period as the Local Government may notify."

And the Local Government have notified that the audit is to be made half-yearly. The District Judge thought that, as sub-rule (*c*) contained no time-limit, the auditor was under an obligation to report financial irregularities to the Council, whenever he discovered them. We do not agree that sub-rule (*c*) can be isolated in this manner from the rest of the rule. It must be that the report referred to is one arising out of and based on the audit prescribed by sub-rule (*d*). Similarly rules 56 and 57 appear to be designed for the purpose of that audit and no other. By rule 58 (*a*) the auditor must report what he has observed, obviously, what he has observed in the course of that audit. Sub-rule (*b*) also must refer to that audit and to no other. The rules

then, in our judgment, provide for one recurring audit only, as the result of which defaulters can be charged or surcharged. They do not provide for extraordinary audits or the re-opening of audits when once they have been closed.

As the rules are obviously framed on English precedents, it may be noted that, at one time and, in the case of one statute, up till a quite recent date, the position was the same. The statutes provided for periodical audits, but said nothing about any other. And it was held that there was no jurisdiction to re-open audits that had been completed. There is a case under the Poor Law Act that dates back to 1862—*Reg v. Inhabitants of Chiddingstone*(1). An attempt was made to force a Poor Law auditor to re-open the audits of the six previous years. He refused on the ground that he was *functus officio* in respect of those audits and had no power to re-open accounts that had been examined, audited and closed. A writ of *certiorari* was issued, but the Court held that his refusal was legally correct. Four years later, in 1866, the Poor Law Amendment Act empowered the Poor Law Board to require an auditor to hold an extraordinary audit, which was to be deemed to be an audit "within the meaning of the several Acts relating to the audit of the accounts of the poor rate." Section 247 of the Public Health Act of 1875 prescribed—in its original form—an annual audit of the accounts of certain authorities. It is divided into ten sub-sections, which, in many respects, resemble and may well have served as a model for the relevant rules in Schedule IV of the Madras District Municipalities Act. The commentators on the Act point out that there is no provision in the section—as in the Poor Law Amendment

(1) (1862) 26 J.P. 246.

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Act of 1866—for holding an extraordinary audit and state that the Local Government Board consistently refused to allow such an audit. This state of affairs lasted till 1922, when an Act was passed giving the Minister of Health the power of ordering an extraordinary audit to be held. The view therefore in England has always been that if an Act, which prescribes the holding of periodical audits, omits to give power to direct the holding of an extraordinary audit, an account which has been audited and closed at one of the periodical audits cannot be re-opened. In this view, we cannot avoid the conclusion that in this case, there being no power reserved by the rules in Schedule IV to re-open audited accounts, the extraordinary audit and the surcharge certificate were without any legal validity whatever. Even apart from the English precedents, the matter seems plain enough. On the face of them, the rules provide for one audit only, the periodical one, and it is quite impossible to read into them a power to hold any other kind of audit or to re-open a closed account. The appellant therefore succeeds on the first point.

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KRISHNAN PANDALAI J.—On the second point the respondent contends that the suit is incompetent (1) because the ordinary remedy by suit must be deemed to have been taken away by the substitution of the special remedies provided by rule 61 of Schedule IV and (2) because the plaintiff, having elected to appeal to Government against the surcharge as if it came within rule 61 and partially succeeded thereby, cannot now repudiate that election and sue to have the decision obtained by himself set aside.

To succeed on the first branch of this contention it must be shown not merely that on a proper construction the provisions in Schedule IV as to surcharge and

the remedies open to those aggrieved by a surcharge by an auditor acting within the rules are, so to say, a code in themselves intended to exclude the ordinary mode of redress by suit, but also that the same result holds in a case like the present where the auditor, being authorized to issue surcharge notices only on the audit mentioned in the rules, conducts an audit outside the rules, and in fact the surcharge certificate is not a certificate within the rules at all but *ultra vires* of them. The decisions in *Secretary of State for India* v. *Major Hughes*(1), *Baijnath Sahai* v. *Ramgut Singh*(2) and *Ganesh Mahadev* v. *The Secretary of State for India*(3) are illustrations of the distinction between the two classes of cases. In the first case the Cantonment Magistrate of Poona acting under rules made by Government under the Cantonment Act, which enabled him to assess lands and buildings in the cantonment to a tax based on their annual value from which assessment an appeal lay to the Cantonment Committee whose decision was final, assessed the lands and buildings held by the Western India Turf Club not on the annual value of the properties but on the total gross income of the club, which resulted in the assessment being enhanced from Rs. 200 to about Rs. 9,400 per year. An appeal to the Cantonment Committee was unsuccessful, and so, that assessment became final under the rules. When the suit was brought for recovery of the excess sums wrongly levied on the ground that the Magistrate was not acting within the rules, it was never questioned that if the Magistrate's action were *ultra vires* any objection to the suit could be raised, and the only point suggested was that applying a wrong basis for assessment is not acting *ultra vires*. But the contrary was held. The High

(1) (1913) I.L.R. 38 Bom. 293. (2) (1896) I.L.R. 23 Calc. 775 (P.C.).
(3) (1918) I.L.R. 43 Bom. 221.

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Court observed that the Regulations had not been in substance or effect complied with, that the money had been claimed and received without a shadow of a right and that according to an earlier decision, *Kasandas* v. *Ankleshvar Municipality*(1), the case was one in which the jurisdiction of the Court was not ousted. In the case of *Kasandas* v. *Ankleshvar Municipality*(1), in which the plaintiff failed, JENKINS C.J. said :

"Had the appellant (plaintiff) been able to make out that which is the basis of his argument, that the prescribed rules for arriving at a valuation had not been observed, then I agree he would have successfully distinguished this case (24 Bom. 607)."

The decision of the Privy Council in *Baijnath Sahai* v. *Ramgut Singh*(2) turned on the effect of not observing the essential procedure laid down for enforcement of a demand under the Public Demands Recovery Act. The Collector had sold the defaulter's property without there being in existence a certificate which was declared by the Act to have the force of a decree and which alone would have authorized the sale. The attempt was made in argument to show that the omission was immaterial and had been condoned. The High Court said (page 779) that the Act was framed with the intention as far as possible to exclude proceedings duly taken under it from being reviewed in Courts of Justice.

"The safeguards provided by the Act for the exercise of those powers may or may not be sufficient to prevent those powers being sometimes used harshly and improperly ; but, such as they are, they must be strictly enforced, and the form of procedure laid down in the Act must be strictly followed."

Their Lordships of the Privy Council endorsed this by remarking that the provision that a certificate is to have the force and effect of a decree is a very stringent

(1) (1901) I.L.R. 26 Bom. 294. (2) (1896) I.L.R. 23 Calc. 775 (P.C.).

provision and that it is unnecessary for them to point out the necessity there is when power is given to a public officer to sell the property of any of His Majesty's subjects that the forms required by the Act which are matters of substance should be complied with. In *Ganesh Mahadev* v. *The Secretary of State for India*(1) a suit to recover silver seized and a penalty imposed by the Customs Collector was held maintainable notwithstanding section 188 of the Sea Customs Act which declares adjudication by the Customs authorities final. The ground of decision was that there had been in fact no adjudication by the Collector after himself hearing the evidence and giving the plaintiff an opportunity of being heard. In the present case the auditor's surcharge certificate if validly given under the rules can be enforced as a decree and it is idle to suggest that that force and effect is to be given to a so-called certificate given on an audit unauthorized by the rules and further to suggest that the aggrieved party has no other remedy against this illegal demand being enforced against him under the summary procedure of certification except that provided by the rules which were framed for an entirely different purpose.

The cases cited by the learned Government Pleader for the respondent were all cases of public authorities or officers acting within their powers though irregularly and there was no question of *ultra vires* in them. Indeed in *Wake* v. *Mayor, etc., of Sheffield*(2) the Master of the Rolls pointed out the difference and founded his decision on it. The case of *Ramachandra* v. *The Secretary of State*(3) was one in which the Forest Officer decided that a certain area of forest land was not part

(1) (1918) I.L.R. 43 Bom. 221. (2) (1883) 12 Q.B.D. 142.
(3) (1888) I.L.R. 12 Mad. 105.

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of the plaintiff's property and the plaintiff after appealing unsuccessfully to the District Judge under the Forest Act brought a separate suit to set aside that decision. It was held that the suit did not lie. Similarly in *Mahammad Raza Saheb Belgami* v. *Sadasiva Rao*(1) the Examiner of Local Fund Accounts acting as auditor under the rules now in question surcharged the chairman of the Guntur Municipality for making payments out of the municipal fund which were illegal, because they were made in contravention of a Government Order made under rule 37 of Schedule IV. The chairman having applied unsuccessfully under rule 61 to the District Judge to remit the surcharge, a revision petition to the High Court was dismissed, the Court upholding the decision of the District Judge on the merits. An application to the Court for a writ of *certiorari* was in those circumstances also dismissed, both learned Judges observing that a substituted remedy was provided by the Act and that, even if the general power of issuing the writ in those circumstances were held not to be taken away, the writ would not issue where other and equally efficacious remedies exist for redress of the grievance complained of. It is clear that the Court was not dealing with a case of surcharge *ultra vires* of the Madras District Municipalities Act.

The case of *Dewa Singh* v. *Fazal Dad*(2) was of an absconding accused against whom proceedings under sections 87 and 88 of the Code of Criminal Procedure were taken and his property was sold and purchased by a stranger. After his arrest and trial in which he was acquitted he applied to the criminal Courts for restoration of the property and it was held on the

(1) (1925) I.L.R. 49 Mad. 49. (2) (1928) I.L.R. 10 Lah. 338.

criminal side up to the High Court that under section 89 only the net sale proceeds could be restored but not the property. The absconder then brought a civil suit against the purchaser and it was held that the suit did not lie. It was not denied for the plaintiff that the Magistrate had jurisdiction to take proceedings under sections 87 and 88 and that the civil Court would have no jurisdiction to entertain a suit of the kind if the sale had been properly carried out. But it was urged that there were irregularities in the proclamation fixing a date for the absconder's appearance and that no warrant of attachment had been issued. These irregularities notwithstanding, the suit was held not maintainable. Here again there was no question of *ultra vires* and the authority concerned was a Court from whose acts the Code of Criminal Procedure prescribes resort to higher tribunals for redress. In the case in *Pita Ram* v. *Jujhar Singh*(1) a claimant to property seized by a Receiver in insolvency proceedings, having urged his claim in the Insolvency Court and failed, instituted a civil suit urging the same claim. That was a case which could have been decided on the ground of *res judicata* without going into the several matters urged before the Court and discussed in the judgment. Statutory provisions giving jurisdiction to inferior Courts, to Government departments, or to bodies created *ad hoc* must be strictly construed and the procedure prescribed must be exactly followed. Where public officers acting under colour of statutory authority either decline to exercise or act beyond the authority given, it will not be held in the absence of clear language that the Legislature intended to destroy the ordinary right of His Majesty's subjects to seek

(1) (1916) 15 A.L.J. 661.

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remedy in the Courts and to place them at the mercy of irresponsible tribunals or irresponsible state departments; see *Rex* v. *Board of Education*(1) affirmed in *Board of Education* v. *Rice*(2), and cases cited in Halsbury's Laws of England, Vol. XXVII, page 190, foot-note (*g*). The result is that the audit in pursuance of which the surcharge on plaintiff was made not being one contemplated by the rules in Schedule IV, the plaintiff's suit is not affected by the remedies provided by those rules, even if those remedies be held to be substituted for the ordinary remedy by suit in cases governed by the rules.

The second branch of the respondent's contention is equally fallacious for the reasons already indicated. The plaintiff's assumption that he was entitled to appeal to the Local Government against the surcharge in this case cannot bind him as by an election to submit to an illegality. Nor can the fact that the Government were pleased to reduce the amount of this surcharge estop him from seeking justice in the Courts to the extent to which the surcharge was confirmed.

In the result the decree of the lower appellate Court must be reversed and that of the Subordinate Judge restored with costs in this and the lower appellate Court.

A.S.V.

(1) [1910] 2 K.B. 165. (2) [1911] A.C. 179.