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rulings of this court this contention seems to us to be correct. It has been held in a number of cases in this court that where according to the custom of the caste the re-marriage of a widow is valid, Act XV of 1856 is inapplicable. This has been the course of rulings in this court, and although personally we may have hesitation in accepting the view adopted in those rulings, we think we are bound by the uniform course of decisions in this court, and must therefore hold that section 2 of Act No. XV of 1856 is inapplicable to a case like this. This being so, the decree of the court below cannot be supported. The result is that we allow the appeal, set aside the decree of the court below and dismiss the plaintiff's suit with costs in both courts.

*Appeal allowed.*

## MISCELLANEOUS CIVIL.

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*March* 17.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

THE RAJPUTANA MALWA RAILWAY CO-OPERATIVE STORES, LIMITED, (APPLICANT) *v.* THE AJMERE MUNICIPAL BOARD (OPPOSITE PARTY)*.

*Act No. XV of* 1877 *(Indian Limitation Act), schedule II, articles* 2, 61, 62 *and* 120—*Limitation—Suit to recover from a Municipal Board money alleged to have been illegally levied as octroi duty—Municipal Board's powers of taxation.*

A Municipal Board, in disregard of certain lawful orders of the Government of India, levied upon a Company trading within municipal limits certain sums by way of octroi duty over and above what they were legally entitled to levy. *Held*, on suit by the Company to recover from the Board the sums so levied, (1) that the suit would lie and (2) that the suit was one for money had and received to the use of the defendant within the meaning of article 62 of the second schedule to the Indian Limitation Act, 1877. *Morgan* v. *Palmer* (1) and *Neate* v. *Harding* (2) referred to. *Seth Karimji* v. *Sardar Kirpal Singh* (3) dissented from.

THE facts of this case were as follows:—

The plaintiff company were general merchants and importers at Ajmere. They sued the Municipal Board of Ajmere for refund of Rs. 81-7-0, alleged to have been wrongly charged by the Board as octroi duty for goods imported by the Company into India by sea between the 20th of January, 1899, and the

*Civil Miscellaneous No. 246 of 1909.

(1) (1824) 2 B. and C., 729; (2) (1851) 6 Exch., 349; 86 R. R., 328. 26 R. R., 537.

(3) Punj. Rec., 1886, C. J., 283.

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24th of April, 1899, and also to recover another sum of Rs. 1,510-15-5 alleged to have been an excess charge as octroi duty on imports made between 24th of April, 1899, and the 6th of October, 1901. The plaintiffs alleged that, in respect of the first item of claim, all sea-borne goods were exempt from duty by a Resolution of the Government of India, dated the 6th of November, 1868, and that, in respect of the second item, the Board charged in excess of the maximum duty chargeable under Resolution of the Government of India Nos. 55 to 60 of the 24th of April, 1899.

Both the court of first instance and the court of appeal at Ajmere dismissed the suit as barred by limitation under article 2, schedule II to the Indian Limitation Act, XV of 1877.

Upon the application of the plaintiff company, the Judicial Commissioner and District Judge of Ajmere-Merwara referred the case for a ruling by the Hon'ble High Court.

Mr. *M. L. Agarwala*, for the plaintiffs applicants, contended that under the Resolution of the Governor General in Council, dated the 6th of November, 1868, sea-borne goods imported into India between the 20th of January, 1899, and 24th of April, 1899, were exempt from octroi duty, and that under the Resolution, dated the 24th of April, 1899, a maximum of octroi duty was fixed, and the Municipal Board was not competent to exceed the limit fixed thereby. The Resolutions aforesaid had the force of law, and the Municipal Board had no right to ignore them. Ignorance of the Resolutions could not validate any act of the Municipal Board which militated against the provisions thereof. A suit for a refund of the octroi duty levied illegally was a suit for money had and received, and, as such, was governed by article 62 of the Limitation Act.

Babu *Surendra Nath Sen* (for *Babu Jogindro Nath Chaudhri*), for the opposite party, admitted that the Resolutions of the Governor General in Council had the force of law and were binding on the Municipal Board, and that it was beside the question whether the said Resolutions were or were not communicated to the Municipality of Ajmere. He also admitted that the octroi schedule prepared by the Municipality in violation of the aforesaid Resolutions could not be justified. The

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Municipality was competent under section 41 of Regulation V of 1886 to impose octroi duty on goods brought within its limits. Its framing its octroi schedule the Municipal Board purported to act in pursuance of the Regulation, which was "an enactment in force in British India" within the meaning of article 2 of the Limitation Act. In honest ignorance of the Resolutions, and honestly believing that a state of facts existed which justified the Municipality in imposing duty on sea-borne goods, the Municipality charged the duty complained of. It was true that section 41 of the Regulation ought to have put the defendant upon inquiry as to whether any Resolutions of the Governor General in Council sanctioned the duty or not. The defendant acted negligently, but not maliciously. If the defendant, acting under powers conferred by Regulation V of 1886, erroneously exceeded the powers given, but acted honestly in order to exercise such powers, he must be considered as acting in pursuance of the Regulation. It was the tortious act of the defendant which gave rise to this suit. Although the plaintiffs sought to have their money *refunded*, it was in substance a suit for compensation for the doing of an act by the defendant in excess of the powers given by Statute. The tortious act having been committed with reference to specific sums, the compensation which the plaintiffs were entitled to was the refund of those sums. Having reference to these facts, the suit was barred by article 2 of the Indian Limitation Act. He referred to *Ganesh Das* v. *C. F. Elliot* (1), *Narpat Rai* v. *Sirdar Kirpal Singh* (2) and *Seth Karimji* v. *Sardar Kirpal Singh* (3) which were cases in point; and also to *Ranchordas Moorarji* v. *The Municipal Commissioner for the City of Bombay* (4), which supported him in principle.

MR. *M. L. Agarwala* was not called upon to reply.

STANLEY, C. J., and BANERJI, J.—This is a reference under section 18 of the Ajmere Courts Regulation No. 1 of 1877. The plaintiff company carries on business as general merchants in Ajmere, and for the purposes of its trade imports oilman's stores and other articles for sale. They sued the Municipal Board of

(1) Punj. Rec., 1883, C. J., 487.
(2) Punj. Rec., 1886, C. J., 138.
(3) Punj. Rec., 1886, C. J., 283.
(4) (1901) I. L. R., 25 Bom., 387.

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Ajmere for recovery of a sum of Rs. 81-7-0 said to have been wrongly charged against them by the Board for octroi duty for goods imported into India by sea between the 20th of January, 1899, and the 24th of April, 1899, and also to recover a sum of Rs. 1,510-15-5 alleged to have been charged against the Company for octroi duty on goods similarly imported between the 24th of April, 1899, and the 6th of March, 1901, in excess of the maximum duty chargeable. The allegation of the Company is that, in respect of the duty charged during the first mentioned period, sea-borne goods are distinctly exempted from duty by the Resolution of the Governor General in Council, dated the 6th of November, 1868, and as to the rest of its claim, the Company says that from the 24th of April, 1899, to the 6th of March, 1901, the Board wrongly charged the plaintiff Company the sum above mentioned in excess of the maximum duty chargeable under the Resolutions, of the Government of India Nos. 55 to 60 of the 24th of April, 1899. The prayer of their plaint is that a decree may be passed in favour of the plaintiff Company for the two sums abovementioned.

The learned Assistant Judicial Commissioner dismissed the suit, holding that the claim fell within article 2 of schedule II to the Limitation Act, and was barred by limitation.

This decision was upheld by the learned District Judge.

The present reference has been made and a ruling of this Court is solicited on the following points :—

(1) Whether the case is governed by article 2 of schedule II of the Limitation Act XV of 1877, or article 61 or 62 or 120?

(2) Whether the Resolutions of the Government of India, dated the 6th of November, 1868, and 24th of April, 1899, applied?

We shall first deal with question No. 2. In 1868, Ajmere was under the administration of the Government of the North-Western Provinces. In 1869 it became a separate administration, but in 1871 was placed under the Government of India. In the Resolution of the Government of India of the 6th of November, 1868, which appears in the issue of the Gazette of the 14th of November, 1868, articles liable to customs duty and imported into India by sea were exempted from assessment to octroi duty.

By the Resolutions of the Government Nos. 55 to 60, dated the 24th of April, 1899, a maximum rate of duty on articles subject to sea customs duty was prescribed, viz., Rs. 1-9-0 per cent. Under section 41, Regulation No. V of 1886, the Municipal Committee of Ajmere-Merwara was empowered, with the previous sanction of the Chief Commissioner, and "subject to any general rules, or special orders which the Governor General in Council may make in this behalf" to impose in the whole or any part of the Municipality, among other taxes, an octroi on goods brought within the Municipality for consumption or use therein.

It will be observed that the power thus conferred is subject to any general rules or special orders, passed by the Governor General in Council. From the 6th of November, 1868, up to the 24th of April, 1889, the Resolution of the Government of India of the 6th of November, 1868, was in force, and sea-borne goods were exempted from liability to any octroi duty. From the date of the Resolution of the 24th of April, 1899, up to the 17th of December, 1903, when a further Resolution was passed raising the rate of duty, the maximum rate of octroi duty chargeable by the Municipality was Rs. 1-9-0 per cent. Whether the Municipal Committee was or was not aware of those Resolutions, it ought to have been aware of them, as the power conferred upon them to impose taxes was expressly subject to any general rules or special orders passed by the Governor General in Council. The Committee ought to have made inquiry and ascertained if there were any such general rules or special orders in existence, and it is idle for the Committee under the circumstances to contend that the tax imposed by it was imposed in good faith. It was in direct violation of the Regulation under which the Committee purported to act. We are wholly unable to agree with the learned Assistant Commissioner and District Judge that the tax complained of was not illegally levied. The fact that the Resolutions of 1868 and 1899 were not forwarded to the Municipality is beside the question. It was the duty of the Municipal Committee to inquire and ascertain if there were any such resolutions in existence before they imposed taxes. We have no hesitation, therefore, in answering question

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No. 2 in the affirmative, namely, that the Resolutions of the Government of India of 1868 and 24th of April, 1899, do apply.

The remaining question for consideration is whether the present case is governed by article 2 of schedule II to the Limitation Act, or article 61 or 62 or 120. Articles 61 and 120 clearly do not apply. The language of article 62 is borrowed from the form of count in vogue in England under the Common Law Procedure Act of 1852. Prior to the passing of the Supreme Court of Judicature Acts of 1873 and 1875, there was a number of forms of pleading known as the *common indebitatus* counts, such as counts for money lent, money paid by the plaintiff for the use of the defendant at his request, money received by the defendant for the use of the plaintiff, &c. These forms are no longer in use. Statements of claim must now be more specific and must contain a statement in a summary form of the material facts on which the plaintiff relies. The most comprehensive of the old common law counts was that for money received by the defendant for the use of the plaintiff. This count was applicable where a defendant received money which in justice and equity belonged to the plaintiff under circumstances which rendered the receipt by the defendant to the use of the plaintiff. It was a form of suit which was adopted when a plaintiff's money had been wrongfully obtained by the defendant, as for example, when money was exacted by extortion, or oppression, or by abuse of legal process, or when over-charges were paid to a carrier to induce him to carry goods or when money was paid by the plaintiff in discharge of a demand illegally made under colour of an office. It was a form of claim which was applicable when the plaintiff's money had been wrongfully obtained by the defendant, the plaintiff in adopting it waiving the wrong and claiming the money as money received to his use [*e.g.*, see *Morgan* v. *Palmer* (1); also *Neate* v. *Harding* (2)].

A suit for compensation or damages is a suit of a different nature. In it a plaintiff does not seek for the return of a specific sum of money, but for damages to be assessed by the court for a wrongful act. Now in the case before us the plaintiff Company

(1) (1824) 2 B. & C., 729 ; 26 R. R., 537. (2) (1851) 6 Ex. 349 ; 86 R. R., 328.

does not ask for compensation or damages. In the plaint in clear and express terms it asks for a decree for the payment of two specific sums representing amounts illegally taken by the Municipality, one sum representing amounts received between the 20th of January, 1899, and the 24th of April, 1899, and the other representing sums taken after the 24th of April, 1899, being the difference between 6¼ per cent. actually taken for duty and Re. 1-9-0 per cent. which the Municipality was by the Resolutions of Government permitted to realize. This is in the nature of a claim for money had and received by the defendant Municipality for the plaintiff's use and is not a claim for compensation or damages. It is the old count for money had and received in modern dress. If the plaintiff Company had sought compensation under article 2, it would have been open to it to claim a much larger sum than the sum actually claimed. For example it might have reasonably claimed interest on the amount of the sums improperly taken by the Municipality from time to time. The claim in our opinion therefore clearly comes within article 62 and not within article 2.

The learned Judicial Assistant Commissioner observes that the suit is "virtually a suit in respect of an act done in pursuance of an enactment." It may be so. But it is not a suit for damages or compensation. In holding that the suit was one coming under article 2, he relied upon two cases decided by the Chief Court of the Punjab, in which it was held that a suit for the refund of money wrongfully levied under the colour of law, was a suit for compensation to which article 2 would apply. In the judgement in one of these cases—*Seth Karimji* v. *Sardar Kirpal Singh* (1)—Plowden, J., in delivering judgement observed as follows:—I think, therefore, that notwithstanding the suit may fall within the description given in article 62 or 96 of the second schedule, and be in other respects maintainable in either of these forms, yet for the purposes of limitation the defendant is entitled to rely upon the suit being in substance of the description given in article 2 and to insist upon the benefit of the provisions of article 2." We are wholly unable to agree with the learned Judge in the opinion thus expressed.

(1) Punj. Rec., 1886, C. J., 283.

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In the judgement in *Narpat Rai* v. *Sirdar Kirpal Singh*, in the same number of the Punjab Record, at page 138, which was also relied upon by the courts in Ajmere, it is stated that to bring a suit for a refund under article 2 it is requisite for the defendant to show amongst other things that the relief sought falls under the term "compensation" as used in this schedule. We agree as to this.

But if it was intended by the learned Judges in these cases to lay down the proposition that, when a plaintiff has an option to bring his suit in the form of a suit for money received by the defendant for his use or in the form of a suit for compensation for doing or omitting to do an act alleged to be in pursuance of an enactment in force for the time being in British India and he elects to proceed for money received for his use, the fact that he might have claimed damages or compensation entitles the defendant to the benefit of the shorter period of limitation allowed by article 2, we cannot agree with them. If the relief sought in the claim had been for damages or compensation, different considerations would arise. In the case before us the relief is not such. The claim is one for specific sums received by the defendant Municipality for the plaintiff Company, and cannot, we think, be properly regarded as a claim for Compensation or damages.

For these reasons we are of opinion that article 62 is the article of the Limitation Act which applies to the case and that neither article 2, nor article 61, nor 120, has any application.

This is our answer to the reference.