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to appeal to His Majesty in Council. This case is distinguishable from the case of *Bhagwan Singh* v. *The Allahabad Bank, Ltd.* (1). There the decree was modified to the prejudice of the applicant and on that ground it was held that he was entitled to appeal to His Majesty in Council. In this view the present application must fail. We accordingly reject it with costs.

*Application rejected.*

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*Before Mr. Justice Walsh and Mr. Justice Stuart.*

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*November*, 18.

THE MUNICIPAL BOARD OF AGRA (DEFENDANT) *v.* ASHARFI LAL, (PLAINTIFF) AND SURAJ BHAN AND OTHERS (DEFENDANTS).*

*Municipal Board—Action against Board on account of misdescription of plaintiff in the roll of candidates, whereby he lost his right to offer himself for election—Liability of Board—Principal and agent—Discovery of documents—Civil Procedure Code* (1908), *order XI, rule* 12.

If any duly qualified citizen, or person entitled to be upon the electoral roll of any constituency is omitted from such roll so as to be deprived of his right to vote and so as to give the returning officer an adequate ground for refusing him the right to vote on election day when the matter has to be decided summarily, and that refusal or omission from the roll, as the case may be, turns out on investigation to be wrongful, he has suffered a legal wrong; he has been deprived of a right recognized by law, and he has against the person so depriving him a remedy by what has always been called "an action on the case" for nominal damages for the right that he has lost, which may, at the discretion of the court, be punitive or exemplary, if the conduct is the result of some malicious and wicked intention; and also for any pecuniary expenses to which he may have been reasonably put as a result of the wrong done, for example, efforts to replace his name on the roll.

Where such an action is brought against a Municipal Board, the complaint being that the list of candidates had been so tampered with as to deprive the plaintiff of his right to offer himself as a candidate, the question of the corporate liability of the Board and the individual liability of its officers or servants must be determined according to the general law of principal and agent.

In a case where the plaintiff is of necessity dependent for proof of his allegations upon documents in the possession of the defendant, of the precise nature of which he cannot be aware, the plaintiff's proper course is to apply to the court for an order under order XI, rule 12, of the Code of Civil Procedure.

THE facts of this case are fully stated in the judgment of WALSH, J.

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*First Appeal No. 47 of 1921, from an order of Joti Sarup, Additional Subordinate Judge of Agra, dated the 17th of December, 1920.

(1) (1920) 19 A. L. J., 3.

Pandit *Uma Shankar Bajpai*, for the appellant.

Mr. *Nihal Chand*, Mr. *Abu Ali* and Munshi *Narain Prasad Ashthana*, for the respondents.

WALSH, J.:—This is an appeal from an order of remand which was clearly rightly made, although, we think, made on wrong grounds. The matter raises a question of such importance, possibly to the plaintiff himself but certainly to the general public that it is desirable to make the law clear. It has not yet been tried and we refrain from expressing any opinion about the merits. We would merely say this by way of preface that, in our opinion, the law in India upon the questions raised is the same as the law in England, and the Common Law of England provides that if any duly qualified citizen, or burgher, or person entitled to be upon the electoral roll of any constituency is omitted from such roll so as to be deprived of his right to vote, and so as to give the returning officer an adequate ground for refusing him the right to vote on election day when the matter has to be decided summarily, and that refusal or omission from the roll, as the case may be, turns out on investigation to be wrongful, he has suffered a legal wrong; he has been deprived of a right recognized by law and he has against the person so depriving him a remedy by what has always been called "an action on the case" for nominal damages for the right that he has lost, which may at the discretion of the court be punitive or exemplary if the conduct is the result of some malicious and wicked intention; and also for any pecuniary expenses to which he may have been reasonably put as a result of the wrong done, for example, efforts to replace his name on the roll. It has been suggested by the Municipal Board before us that the plaintiff either did not seriously assert, or abandoned, this precise form of claim when he came to court. It is certainly contained in his plaint. It does appear to be absent from the judgments of the two courts as a substantive matter in dispute, and it is not the ground on which the lower appellate court has remanded the suit. But we are not satisfied that the plaintiff ever intended to abandon it, and it is clearly a matter which ought to be disposed of either by a correct judicial decision or by the consent of the parties. All that we know about the plaintiff's attitude

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in the matter is that he asked for something very much more,—one relief which he had already got, and another, namely, a declaration that the constitution of the Municipal Board was altogether invalid, which he was never likely to get,—and that he announced his intention of conferring such damages as he could recover upon some charitable institution.

In order that our view may be properly appreciated the allegation of the plaintiff should be stated. The suit is brought against the Municipal Board of Agra. The plaintiff, who is a pleader, is a previous member of the Board, on which he says he sat from 1914 to 1916. Two lists are prepared by the officials of the Board under statutory authority, namely, an electoral roll and a candidates' list. An election was approaching in the year 1919, and the plaintiff had been a severe critic of the Municipal administration up to that time. He alleges, and on this matter he is the best judge, that his criticism was such as to create hostility to himself personally among the members of the Board. He is a houseowner and an occupier at Agra and it is not denied that he is entitled to be on both the roll and the candidates' list; indeed he was on both, and the revising authority, consisting of three members of the Board, passed the roll and the list on the 31st day of January, 1919. Either as the result of what these persons did officially in the course of their business, or wrongly with intention in the course of their business, or as a result of the revengeful and malicious interference of some individual, either a member of the Board or an employé in the office of the Board, after the statutory sitting of the revising authority the plaintiff's name on the list was so put and his description so fabricated as to represent him to be somebody other than the person he was known to be. For example, on the candidates' list (and if his description of himself is correct, it is as a candidate that he was most objectionable to the Board) he is described by his right name but with his wrong father, his wrong caste, and his wrong occupation, all three of which put against his name were those of the owner of the house and not of himself. This being so, the Nomination Officers who acted sometime between the 31st day of January and the 8th day of March had to reject his nomination, because the person who presented himself

at the nomination was not the son of the father in the candidates' list. Thereupon the plaintiff brought this suit asking for the correction of the list as a specific relief, claiming damages for the wrong done to him, and at some later stage of the suit adding the somewhat childish claim that because the electoral list or the candidates' list had been tampered with, the whole constitution of the Board was invalid. Before the case came on for trial the District Magistrate had corrected the list. This indeed happened before the election took place and it is said that the plaintiff was an unsuccessful candidate. That is in no way a defence to the suit. We know nothing about the merits of municipal controversies at Agra, but it might happen that a candidate whose nomination had been rejected and whose qualifications had obviously become a matter of public discussion would be seriously hampered in his efforts to obtain votes, and, even although he succeeded in correcting the mistake and securing his proper nomination before the election, it might be sufficient in certain cases to explain his defeat. But apart from that, in the leading case on the subject, namely *Ashby* and *White*, which was decided in the reign of Queen Anne in England, the plaintiff in that case, who had been deprived of his right to vote, intended to vote for the successful candidate; none the less he had been deprived of a lawful right for which he was held entitled to recover damages. Unfortunately the defendants have done, up to this moment, little or nothing to clear the ground and to enable the courts to see whether or not the plaintiff's grievance is well-founded. What the defence may ultimately be nobody knows, because the door has been closed upon the plaintiff before that stage was reached. It is impossible to discover it from the pleadings, and one is bound to observe that one's suspicions are invariably aroused against defendants who shelter themselves behind pleas which disclose nothing on the facts or merits of the case. The defendants who have been sued and presumably rightly sued, because the plaintiff cannot know—no member of the public can know—what goes on behind the doors of the municipal body, are the Municipal Board itself and individual members, including the Executive officer. If liability is eventually established for damages, that

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liability, in order to be placed upon the right shoulders, must be decided according to the ordinary general principles of principal and agent. No individual member of the Board can be made liable in his own pocket, separately and independently of the Board, for an act in which he had no part or lot himself and which he did not in any way authorize. On the other hand, any individual member of the Board who either expressly or indirectly encouraged, incited, directed, or approved of, in other words, aided and abetted the attempt which was undoubtedly made by somebody to deprive the plaintiff of his right to be on the candidates' list would be liable in his own pocket, independently altogether of the question whether or not the Municipal Board would be liable as well. The Municipal Board as principal would only be liable for the act, i.e., the public funds of which the municipality are custodians and out of which they will have to pay any damages for any corporate act committed by them would only be liable for an act done by themselves informally, or formally by way of resolution, or by a committee of authority like the revising authority appointed by them, or by one of their servants doing what he did, although wrongfully, at a time and in a manner when and in which he is employed to do it by the municipality, if he did it improperly, i.e., if the act were done by a clerk whose duty it was to fill in the plaintiff's name correctly and he filled it incorrectly in the ordinary course of business, the municipality would be responsible for that.

It is perhaps desirable to say quite clearly, although it appears from what we have said already, that the ground on which the case was remanded, namely, the reconsideration of the issue as to whether the Board should be declared to be altogether invalid and improperly constituted because one of the names on its election list is wrongly entered, is one which no court ought to have entertained at all and which the lower court should disregard and strike out of the issues altogether. In its place an issue must be put which we ourselves frame:— "What damages, if any, ought the plaintiff to recover, and from whom, in respect of the wrongful omission to record his name correctly on the candidates' list."

This leads us to some further observations and further directions which, we think, under the special circumstances of this case and of its public importance, we ought to make. In a case of this kind, as one of us had occasion to remark the other day, in cases of an agent suing a principal who has all the figures in his possession, or a partner suing a firm which has all the accounts and books in its possession, a plaintiff is absolutely at the mercy of the defendant who knows the facts unless he takes the steps which the law has provided, and unless the court aids him in taking those steps, to discover the relevant documents which are in the possession of the defendant. So far as we know there is really no power, except in a suit, unless it be the power under the Criminal Procedure Code by means of a search warrant, by which any member of the public can get at documents relevant to the injury which he has suffered, if the public body which has the custody of these documents chooses to sit on them. The plaintiff in this case quite clearly, whatever else may be said about his motives, realizing the difficulty, stated in his plaint that he did not know who was the author of his grievance but that it was impossible to resist the conclusion that his name was intentionally removed from the list. He has a right, and any court trying such a suit has the duty, to insist that all documents in existence or which had been in existence which throw light on that question must be produced. The plaintiff made an effort to obtain discovery by the rather feeble machinery of a notice to produce, the only effect of which is, if the other side refuses to produce, to entitle you to prove your own copy, and as you have never seen the original it is not a very valuable right. That distinction is often lost sight of. A notice to produce is not a subpœna nor is it any part of the machinery for discovery. It merely gives you the right, if it is ignored, to prove any copy in your possession. Discovery is the machinery by which you discover what documents are in existence which are not in your possession. The defendants, not unnaturally, met the plaintiff half way, saying, no doubt correctly, that there were too many papers to file at that stage and that some might be lost, but they undertook to produce them at the proper time. It does not surprise us that the proper time never arose.

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It seldom does when vague promises of that kind are made. But under order XI, rule 12, any party, like the plaintiff in this case, may without filing an affidavit apply to the court for an order directing the other party to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. We think that in a case of this kind the plaintiff ought to have discovery, and it is not too late, and we direct the lower court before hearing this suit again on the merits to make an order under that rule if the plaintiff makes a proper application, and not to reject it on the ground that it has been made too late. It is necessary in the case of a public body to explain how the rule should be worked. In the first place the contention already made by the Board's counsel that there are too many papers is based upon a misunderstanding. It is not necessary to produce all the papers in the possession of the municipality, relating to the electoral roll and the candidates' list, of any kind whatever. All that is required is to produce for inspection the documents relating to the entry of the plaintiff's name on the candidates' list and the electoral roll and every document, through whatever stage it has passed, relating to the plaintiff's name, whether there has been any alteration, addition, or subtraction from the original entry in such rolls of the plaintiff's name, and any correspondence between the members of the Board and the Executive Officer or Secretary or other official or clerk of the Board relating to the plaintiff's name and the corrections or alterations made on the list relating to the plaintiff. It is not necessary to flood the court. It would be a breach of duty if the Executive Officer or the Secretary attempted to flood the court with a number of irrelevant documents. If anything has been destroyed or weeded out it must be included by description in the affidavit in the class of documents which have been in the possession of the municipality. There must be no attempt to burke that clause, which has been put in the rule for good reason. If a document has been in their possession, and is not now, its disappearance must be explained by an officer of the Board who knows what has become of it and why and when it was destroyed or removed. Lastly, following the ordinary practice

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in England with reference to a Municipal Corporation or limited company, the affidavit must be made on behalf of the Municipal Board by the Chairman or the Executive Officer, who making their affidavits jointly as such officers must swear that they have made all necessary inquiries of all employés in the Board with reference to the documents which they swear to in their affidavit, and if there is any document to which they make any objection, legally or otherwise, to produce, although it is relevant to this question, they must take their objection in the affidavit and the court must decide it before hearing the case.

The appeal must be dismissed with costs.

STUART, J.—I concur in the order proposed.

*Appeal dismissed.*

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*Before Mr. Justice Piggott and Mr. Justice Walsh.*

1921 *November*, 21.

SHIB KUMAR AND OTHERS (APPLICANTS) v. SHEO GHULAM AND OTHERS (OPPOSITE PARTIES).*

*Civil Procedure Code (1908), order XLIII, rule 1—Appealable order—Appeal as to costs only, when the substantive order is in favour of the appellant.*

If an order is itself appealable, an appeal will lie from that part of the order which relates to costs, although the substantive order may be in favour of the appellant. *Balkissen Dass* v. *Luchmeeput Singh* (1), *Moshingan* v. *Mozari Sajjad* (2) and *Vasudeva Ramchandra* v. *Bhavan Jivraj* (3) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Narain Prasad Ashthana*, for the appellants.

Dr. *M. L. Agarwala*, for the respondents.

PIGGOTT and WALSH, JJ.:—This first appeal from order comes before us under the following circumstances. On objection taken by the judgment-debtors a certain sale was set aside. The court, however, for reasons given, saw fit to order that the judgment-debtors should not merely bear their own costs of that objection but should also pay the costs of the other side. The judgment-debtors have submitted to the order in so far as it directed them to bear their own costs of the proceeding. They have no quarrel with the order directing the sale to be set aside, which was indeed passed at their instance. They appeal against

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* First Appeal No. 91 of 1921, from an order of Ladli Prasad, Subordinate Judge of Shahjahanpur, dated the 11th of April, 1921.

(1) (1881) I. L. R., 8 Calc., 91. (2) (1885) I. L. R., 12 Calc., 271.

(3) (1891) I. L. R., 16 Bom., 241.