

APPELLATE CIVIL

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Bennet

MUNICIPAL BOARD, AGRA (DEFENDANT) *v.* RAM
KISHAN (PLAINTIFF)*

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August, 2

Municipalities Act (Local Act II of 1916), section 326—Not applicable to suits on contracts—Suit by contractor for payment for works done—Limitation.

Section 326 of the Municipalities Act is intended to apply to suits in tort in respect of wrongful acts done by a Municipal Board or by officers or servants of that Board; and a suit based on contract is not contemplated by the section. So, a suit by a contractor for payment for works done does not come under section 326 and the limitation of six months, prescribed by clause (3) of that section, does not apply to such a suit.

A Municipal Board and its officers and servants are treated on the same footing as private individuals, when they enter into a contract. No special privilege accrues to them in making contracts and the law of limitation for contract suits is the same for them as for private individuals.

Dr. K. N. Katju and Mr. M. N. Kaul, for the appellant.

Dr. N. P. Asthana, Messrs. S. K. Dar and G. Agarwala, for the respondent.

MUKERJI and BENNET, JJ. :—This is a first appeal from a decree of the learned Subordinate Judge of Agra awarding a sum of money to the plaintiff. Two points have been urged in appeal: firstly, that the claim was barred by limitation and secondly, that the order striking out the defence of the defendant appellant was unjust and irregular and the suit should have been tried on its merits. We shall deal with the point of limitation first. The plaint sets forth that the plaintiff is a contractor and that he carried out certain works detailed in the appendix to the plaint on behalf of the defendant the Municipal Board of Agra; that the plaintiff found

*First Appeal No. 504 of 1929, from a decree of J. N. Dikshit, Additional Subordinate Judge of Agra, dated the 21st of August, 1929.

that the Board was making delay in payments and that the plaintiff served a statutory notice on the 19th of June, 1928, informing the Board that unless the amount claimed was paid within two months, interest at 2 per cent. per mensem would be charged from the defendant; that the defendant has only paid a portion of the amount due to the plaintiff and that a sum now remains due which the defendant is liable to pay to the plaintiff for wrongfully withholding payment; that in spite of repeated letters, notices and reminders, the defendant is simply putting off the plaintiff, though the defendant has acknowledged its liability to the plaintiff; that the cause of action has been accruing to the plaintiff every month and, finally, the cause of action accrued on the 31st of March, 1929. As regards this date it may be noted that the appendix shows that this was the date of the last payment made to the plaintiff. The plaint was tendered on the 25th of May, 1929, and there was some deficiency in court fee and it was finally registered on the 1st of June, 1929.

The argument of the learned counsel for the appellant is that this suit comes under section 326 of the United Provinces Municipalities Act of 1916 and that under sub-section (3) the period of limitation is six months after the accrual of the cause of action. He points out that the appendix shows that the various works were completed by dates the latest of which is December, 1928, and that this would be more than the period of six months before the date of filing of the suit on 25th of May, 1929. Some of the works were completed in 1927. The main question before us is whether section 326 of the Municipalities Act applies or not. The point was urged before the lower court and the lower court held that that section did not apply, because the Board went on admitting their liability to the plaintiff and the cause of action was therefore a recurring one. In this Court this ground has not been urged and a broad ground is

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urged by learned counsel for the respondent that section 326 of the Municipalities Act is not intended to apply to suits on contract. That section states: "No suit shall be instituted against a Board, or against a member, officer or servant of a Board, in respect of an act done or purporting to have been done in its or his official capacity" The first point taken by counsel for respondent is that the suit must be in respect of an act done by the defendant. In the present case the act is not something done by the defendant which has given rise to a cause of action, but the act is something which has been done by the plaintiff, that is, a contract under which the plaintiff has performed work. No doubt in one sense the plaintiff and the defendant both agreed to the contract, but the contract alone is not the cause of action. It is the carrying out of the contract by the plaintiff that is a principal part of the cause of action. There is not in this case a definite refusal by the defendant. Even if there had been, it is contended by the learned counsel that because the case is one of contract the acts which may be subsequently done by the defendant will not bring the case under section 326. For this proposition learned counsel referred to a ruling in *District Local Board, Poona v. Vishnu Raghoba* (1), in which it was held under a similar section of the Bombay Local Boards Act that the section on limitation had no application to a suit on a contract. It has also been held in a Full Bench ruling of the Bombay High Court, *Manohar Ganesh v. Dakor Municipality* (2), in regard to the Bombay Municipal Act II of 1884 that such suits on contract would not come under the similar section for limitation. On page 301 it stated: "Claims based on contract can never be included under this section for the simple reason that they are not claims 'for anything done or purporting to have been done in pursuance of the Act'." There was in the Municipal Act of 1873,

(1) (1932) I.L.R., 57 Bom., 67.

(2) (1896) I.L.R., 22 Bom., 289.

which applied formerly to the United Provinces, then the North-Western Provinces, a similar section, section 73. A Full Bench ruling of this Court in *Birj Mohan Singh v. Collector of Allahabad* (1) held that this clause for limitation would not apply to a suit for declaration by certain persons that they as owners of land had a right to establish a market. It is true that in the present Municipalities Act the words "in pursuance of the Act" do not appear, and instead of that we have the words "in its or his official capacity". We do not think however that the change in the language is intended to bring under section 326 suits by a person based on contract. In our view section 326 is intended to cover wrongful acts done by a Municipal Board or by officers or servants of that Board. It was argued that an act may include an omission and that in the present case the omission to pay might be included in the term "act." That may be so, but it will not help the appellant, because the reason why we consider that this suit does not come under section 326 is that it is not a suit in tort but it is a suit in contract and we consider that a suit in contract is not one contemplated by section 326. In *Bradford Corporation v. Myers* (2) there was a case before the House of Lords on a similar point in regard to an English statute where the language was for all practical purposes similar. It was held by Lord HALDANE on page 251: "My Lords, in the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority . . . In *Sharpington v. Fulham Guardians* (3) FARWELL, J., decided that the Act did not apply where in the

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(1) (1882) I.L.R., 4 All., 339.

(2) [1916] 1 A.C., 242.

(3) [1904] 2 Ch., 449.

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execution of a public duty the guardians had contracted with a builder to build for them a receiving house for the children of paupers, and the builder was suing them for breach of the particular contract they had entered into. We pointed out that although the general duty made it *intra vires* to do so, there was no duty to enter into that particular contract. He declined to hold that the mere fact that the contract was within the power of a public body to make rendered the breach anything more than a breach of the private duty to the individual builder arising out of the terms of the contract." In other words this view of law treats a municipal body and its officers and servants on the same footing as private individuals when they enter into a contract. No special privilege accrues to them in making contracts and the law of limitation for contract suits is the same for them as for private individuals. It is difficult to see what reason there could be for the law to be otherwise. Why should a Municipal Board receive any special protection when it enters into a contract? It is not a question of incapacity, and although in some senses it may be incapable it is not incapable in the legal sense. As regards acts done in performance of a statutory duty under the Municipalities Act different conditions arise and it is reasonable for the law to offer protection to municipal officers for such acts. But the making of a contract is not an act of that nature and it is not an act in performance of a statutory duty. Therefore there is no reason why the limitation period should be shortened. As a matter of practical experience it would be impossible to apply a period of six months' limitation to municipal contracts, and the history of the present suit is sufficient reason to show that point. In the present suit the correspondence between the Municipal Board and the plaintiff shows that the Board was unable to decide what were the amounts due to the plaintiff, and had consequently asked the plaintiff for time to

make inquiries of its own officers. To hold that the plaintiff would be barred by six months' limitation while such a correspondence and inquiry were going on would be to make a mere travesty of justice. We consider therefore that the period of limitation of six months in section 326 of the Municipalities Act is not intended to apply to a suit on contract and therefore it does not bar the plaint in the present case. Some Allahabad rulings were shown by learned counsel for the appellant, but we consider that those rulings are distinguishable from the present case.

The next question which arises in this appeal is the correctness of the order of the lower court in striking out the written statement. The plaintiff made three applications on the 10th of August, 1929, one for inspection, another for production of documents and a third for discovery. All these applications were in very wide terms and in our opinion the applications were not framed according to the provisions of the Code of Civil Procedure, because they should have been much more definite in mentioning the documents required. The court passed orders on the 14th of August, 1929, that the defendant should comply with these applications. The discovery was to be complied with by the 16th of August, the inspection by the 20th of August, and the documents were to be produced on the 21st of August. On the 21st of August the Municipal Board made an application to the effect that the order of the court was communicated to the vakil on the 16th or 17th instant. This is alleged by the learned Subordinate Judge to be incorrect and he says that on the 10th of August that matter was communicated. The application further pointed out that the 18th, 19th and 20th were holidays; that "all the documents asked for could not be traced and some of the documents have been brought today and efforts are being made to trace out the others, which will be shown and produced before the court as soon as

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they are available." It appears to us that this application on behalf of the defendant was very reasonable under the circumstances. But the lower court considered that the Board had not made any honest effort and the lower court ordered that the defence be struck off. We consider that this order of the lower court cannot be upheld.

Accordingly we set aside the decree of the lower court and remand the case for disposal according to law. Costs hitherto incurred will be costs in the cause.

REVISIONAL CIVIL

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Bennet

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GHULAM NIZAM-UDDIN (APPLICANT) v. AKHTAR
 HUSAIN KHAN (OPPOSITE PARTY)*

District Boards Act (Local Act X of 1922), sections 18, 19, 20—Election petition—Decided by District Judge as election court—Revision to High Court—Powers of superintendence of High Court—Civil Procedure Code, section 115—Letters Patent, sections 11, 35—Government of India Act, 1915, section 107—Powers of local legislature—Whether section 19 (2)(c) of District Boards Act ultra vires—Government of India Act, 1915 & 1919, sections 45A, 80A, 84—Devolu- tion Rules, 1920, schedule I, part II, paragraphs 1, 17.

No revision lies to the High Court from the decision of a District Judge hearing an election petition under section 18 of the District Boards Act, 1922, nor is such tribunal under the powers of superintendence of the High Court under section 107 of the Government of India Act. In such cases the election court is presided over by the District Judge as a *persona designata* under section 18 of the District Boards Act, and the court is not a civil court.

*Per MUKERJI, J. :—*Having regard to the provisions of section 20, clauses (1) and (2) of the District Boards Act, it is clear that the District Judge, when acting as the presiding officer of an election court, is to have the powers and privileges of a civil court but not the status. The District Judge acts as a