REVISIONAL CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice and Mr. Justice King

MUNICIPAL BOARD, BAREILLY (PLAINTIFF) *v.* ABDUL AZIZ KHAN AND OTHERS (DEFENDANTS)* 1934 *March*, 16

Municipalities Act (Local Act II of 1916), sections 128, 155, 176—Octroi dues—Suit by municipality for recovery of octroi dues—Whether suit maintainable—Civil Procedure Code, section 9—Suit "impliedly barred"—Special remedy barring general remedy—Jurisdiction.

Where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to.

The right to impose and recover octroi dues has been conferred on Municipal Boards by section 128 of the Municipalities Act. This right has been created by that Act and did not exist independently of it. The Act itself has prescribed, in section 155, a remedy or penalty for non-payment of octroi dues. Further, although it is expressly laid down in the Act, by section 176, that a suit would lie for the recovery of other taxes, there is no such express mention as regards octroi dues. It appeared, therefore, that it was not intended by the legislature that apart from the special penalty imposed for the non-payment of octroi dues there should be a further right to recover the same by suit.

A suit by a Municipal Board for the recovery of octroi dues is, therefore, not maintainable under section 9 of the Civil Procedure Code, being a suit the cognizance of which is impliedly barred.

Messrs. *A. M. Khwaja* and *N. A. Sherwani*, for the applicant.

Mr. *M. A. Aziz*, for the opposite parties.

SULAIMAN, C.J., and KING, J.:—This is an application in revision by the Municipal Board of Bareilly through its Chairman against the defendants from a decree of the Munsif of Bareilly to whom the case had been transferred from the court of small causes and who

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under section 24(4) of the Civil Procedure Code is deemed to be a court of small causes on that account.

The Board claimed recovery of certain octroi dues alleged to be payable by the defendants on account of their introducing within the municipal limits cartloads of bricks without paying the proper duty. The defendants took the plea that a suit of this nature is not maintainable in the civil court at all. It appears that the Municipal Board first proceeded under section 155 of the Municipalities Act (Local Act II of 1916) in the Magistrate's court, but the complaint for some reason or other failed. The Board then instituted the present suit, which has been dismissed by the court below on the ground that the suit did not lie.

On behalf of the Board it is contended that the claim for recovery of the octroi duty is a claim for recovery of money and therefore the suit is of a civil nature within the meaning of section 9 of the Civil Procedure Code and that accordingly the suit is cognizable by the civil court unless it is expressly or by necessary implication barred by the Municipalities Act. On the other hand, it is contended on behalf of the defendants that the liability to pay the octroi duty was imposed by the Municipalities Act itself and did not exist independently of it and that inasmuch as the Municipalities Act itself provides for a penalty and according to the rules made thereunder provides the methods for collecting such dues, a civil suit does not lie. Had it been the intention that there would be a further remedy by civil suit, it would have been very easy to add a sub-section to section 155 similar to section 176.

The question mainly is one of an interpretation of the sections of the Municipalities Act. The general principle seems to be well settled. There can be three classes of cases in which a liability is imposed by a statute. If the liability existed previously to the Act and independently of it and that liability is merely

affirmed by the statute which gives a special and peculiar form of remedy different from the ordinary remedy, then, unless a contrary intention appears from the statute, a party has the option to pursue either remedy. Where the statute gives the right to sue in express terms and provides no particular form of remedy, then the party can proceed in the ordinary way prescribed for actions. But in cases where a liability which did not exist prior to the enactment is created by the statute which at the same time gives a special and particular remedy for enforcing it, then, unless a contrary intention appears, the remedy provided by the statute has to be followed and it is not competent to a party to pursue other forms of remedy: Vide *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1). This principle which is well recognized in England has been accepted by the Indian courts. In *Ramayyar* v. *Vedachalla* (2) a Full Bench of the Madras High Court accepted the principle laid down in *Beckford* v. *Hood* (3) that the general rule is that "Where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to; but where a statute is confirmatory of a pre-existing right, the new remedy is presumed as cumulative or alternative, unless an intention to the contrary appears from some other part of the statute." This observation was quoted with approval by another Full Bench of the Madras High Court in *Zamindar of Ettayapuram* v. *Sankarappa Reddiar* (4).

In our own High Court in the case of *Abdur Rahman* v. *Abdur Rahman* (5) the Full Bench at page 532 remarked: "The ordinary rule is that where the statute which creates the right also prescribes a specific remedy, the person aggrieved is limited to the remedy so prescribed." The remarks of JENKINS, C.J.,

(1) (1859) 6 C.B., (N.S.), 336 (356). (2) (1890) I.L.R., 14 Mad., 441.
(3) 7 T.R., 620. (4) (1903) I.L.R., 27 Mad., 483.
(5) (1925) LL.R., 47 All., 513.

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in *Bhaishankar Nanabhai* v. *Municipal Corporation of Bombay* (1) were quoted in which the learned CHIEF JUSTICE had observed that "In such a case there is no ouster of the jurisdiction of the ordinary courts, for they never had any; there is no change of the old order of things; a new order is brought into being."

The learned counsel for the applicant has relied very strongly on the case of *Shuttrughon Das* v. *Hoorna Showtal* (2). That case was for compensation for wrongful seizure of cattle and the suit was brought in the civil court. It was held that the suit lay because the right to recover compensation on account of wrongful seizure of one's cattle existed independently of the Cattle Trespass Act which also provided a summary remedy for compensation. It was held by the Bench that that summary remedy did not take away the ordinary remedy which an aggrieved person has under the ordinary law. It is also noteworthy that the amount of compensation which can be awarded under that Act to the aggrieved party is subject to a maximum of Rs.100 and may in some cases not be an adequate compensation for the injuries suffered. That case is therefore distinguishable.

Chapter V of the Municipalities Act deals with imposition and alteration of taxes. Section 128 confers the right on Municipal Boards to impose taxes, including "an octroi on goods or animals brought within the municipality for consumption or use therein." Section 153 confers power on the Board to make rules in order to regulate certain matters including assessment, collection or composition of taxes, and, in the case of octroi or toll, the determination of octroi or toll limits. Section 154 confers power to fix octroi limits. Then section 155 provides that "A person introducing or attempting to introduce within octroi limits, or abetting the introduction within octroi limits, of any goods or animals liable to the payment of octroi for which the

(1) (1907) I.L.R., 31 Bom., 604 (609). (2) (1889) I.L.R., 16 Cal., 159.

octroi due on introduction has neither been paid nor tendered, shall be punished with a fine which may extend either to ten times the value of such octroi or to Rs.50, whichever is greater and which shall not be less than twice the value of such octroi." It is important to note that the words, "with the intention to defraud the Board", which occurred in the corresponding section of the Municipalities Act of 1900, have been deleted.

In the exercise of its powers the Municipal Board has framed rules contained in Chapter X of the Municipal Account Code regulating how octroi duties are to be assessed and collected and how there have to be octroi barriers. The general scheme of these rules is that the goods imported into the municipality which are liable to payment of octroi are assessed at the barriers or, in case of dispute, taken to the head octroi office, or the octroi may be compounded for. The rules provide for the payment forthwith of the amount due at the barrier, or in case of dispute, for the taking of the goods to the head office. If the importer be still dissatisfied with the demand of the head octroi office, he is to pay the octroi forthwith, but he may appeal to the Board within a prescribed time. Then there are rules provided for a refund of the octroi duty when the goods are again exported. In particular, rule 179 lays down that no proof whatever of the previous payment of octroi shall be demanded, but the fact that the goods were in the municipality, and are being taken out would be accepted as sufficient proof that a refund is admissible.

On the other hand, there is provision for recovery of certain other municipal claims. There is a separate Chapter VI which provides how a demand has to be made in the first instance by presentation of a bill followed by an issue of a warrant with authority to municipal officers to have forcible entry for purposes of executing the warrant and ultimate seizure of the goods and their sale. Section 176 then lays down: "Instead of proceeding by distress and sale, or in case of failure to realise

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thereby the whole or any part of the demand, the Board may sue the person liable to pay the same in any court of competent jurisdiction."

Thus, in these other cases, although a special procedure is prescribed for the recovery of the municipal claims which is speedy and effective, the legislature has taken care to provide that instead of proceeding in that way the Board may sue the person liable to pay the same in any court of competent jurisdiction.

It is important to note that nowhere in the Act there is any mention that in case of non-realisation of the penalty for the non-payment of the octroi duty under section 155, or instead of proceeding under that section, the Board would have a right to sue for the amount. The omission is certainly significant. The reason is not far to seek. So long as the goods are stopped at the barrier or detained, the question of the assessment of the octroi duty and insistence of its payment can be easily settled without any complications. On the other hand, if goods are allowed to come within the municipal limits and time elapses, there would be considerable difficulty in finding out the exact quantity or description of the goods imported and the amount of octroi duty payable. A far more effective remedy in cases of a defiance of the Act is the penalty imposed under section 155, under which the minimum penalty that can be imposed is twice the value of the octroi and the maximum can go up to 10 times the value of such octroi or to Rs.50, whichever is the greater. Then there is section 114 which prescribes that "There shall be for each municipality a municipal fund, and there shall be placed to the credit thereof . . . all fines realised on conviction under the provisions of this Act" (as well as some other named Acts). Thus, the Municipal Board can in a very speedy manner get much more than the octroi duty remaining unpaid and also succeed in getting a heavy penalty imposed on the person who evaded such payment. There is therefore no real need for the Board

to bring a suit in the ordinary civil court for the recovery of this amount.

The circumstance that the rules provide for a refund of the octroi duty in case of exports and dispense with the proof that octroi duty had been previously paid when the goods were imported does not in any way create any serious difficulty. The octroi duty is leviable on goods brought within the municipal limits for purposes of consumption and use and would clearly not be leviable if the goods had not been consumed or used but are exported.

Similarly, the mere fact that the rate at which the octroi duty is to be charged is fixed by the rules and is not prescribed under the Act creates no insurmountable difficulty. The fact remains that the right to make the demand and recover the octroi dues has been conferred on the Municipal Board by the Municipalities Act and did not exist independently of it. The legislature has prescribed a penalty for non-payment of such dues. Although it is expressly laid down that a suit would lie for recovery of other taxes, there is no such express mention as regards octroi duties. In some sections octroi and toll dues are treated on a somewhat separate footing, obviously because there is no question of the presentation of bills in their case.

It therefore seems to us that having regard to the general scheme of the Municipalities Act, it was not intended by the legislature that apart from the special penalty imposed for the non-payment of the dues, the right to recover which has been created by the Act itself, there should be a further and an additional right to recover the same by suit.

The case of octroi dues comes within the purview of the general principle laid down in the cases mentioned above, and we must hold that, in the absence of any clear indication reserving the right of a separate suit, such a suit is barred. The case therefore does not fall under section 9 of the Code of Civil Procedure which

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makes an exception in case of suits of which the cognizance is either expressly or impliedly barred.

The application is accordingly dismissed with costs.

MATRIMONIAL JURISDICTION

Before Mr. Justice Young, Mr. Justice Thom and Mr. Justice Bennet

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PUSHONG *v.* PUSHONG AND FARRELL*

Divorce Act (IV of 1869), section 17—Confirmation of decree for dissolution of marriage—Practice—Application of guilty party for confirmation of decree—Not maintainable.

It is contrary to principle that a marriage should be dissolved on the motion of the guilty party. An application by a guilty respondent to a divorce petition, for confirmation under section 17 of the Divorce Act of a decree for dissolution of marriage passed by the District Judge, does not lie.

Mr. *Saila Nath Mukerji*, for the applicant.

YOUNG, THOM and BENNET, JJ.:—This is an application by a guilty respondent to a divorce petition, for confirmation of the decree of the learned District Judge. The only point for our decision is whether such an application lies. Section 17 of the Indian Divorce Act, under which this application is made, enacts as follows: "Every decree for dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court." There is nothing in the wording of the section itself which gives any guidance as to which of the parties to a divorce petition may move the court. We have, therefore, to look to the practice as it exists in England for guidance in this matter. The practice in England is clear. It has for long been held in England that only the innocent party can move the court for a decree absolute. The court will not listen to the guilty party. We may refer here to the well known case of *Ousey* v. *Ousey* (1). The learned Judge Ordinary in that case said as follows: "The principle that the

*Matrimonial Reference No. 1 of 1930.

(1) (1875) 1 P.D., 56.