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dismissal on the merits may also be ordered if the pleader does not appear. Under sub-rule (2) if the appellant does not appear the court may dismiss for default. But this does not prevent a dismissal on the merits where there is no appearance under sub-rule (1). The power of the appellate court therefore to take these two courses under rule 11 is not in our opinion taken away when a notice is issued to the respondent and the respondent appears in accordance with that notice. For these reasons we do not consider that this ground No. 1 is sound. We may also note that in this particular case before us this ground was abandoned when learned counsel for the defendant appellant before the learned single Judge stated that he accepted the findings of the court below and desired to argue the case on points of law which arose on those findings.

For these reasons we are of opinion that the plaintiffs have proved their case that the property is wakf and such wakf is not affected by the provisions of the Municipalities Act and accordingly the plaintiffs are entitled to the reliefs for which they ask. We therefore restore the decree of the lower appellate court and we allow this Letters Patent appeal with costs throughout and set aside the decree of the learned single Judge.

Before Mr. Justice Harries and Mr. Justice Misra

RAM NARAIN (PLAINTIFF) *v.* MUNICIPAL BOARD, MUTTRA (DEFENDANT)*

1938
July, 29

Municipalities Act (Local Act II of 1916), section 326—Not applicable to suits on contract—Suit by contractor for payment for work done—Statutory notice not necessary.

A suit brought against a Municipal Board by a contractor for money due to him on account of certain work performed by him for the Board and for refund of security money deposited by him does not fall within the purview of section 326(1)

*Second Appeal No. 1657 of 1934, from a decree of Jagan Nath Singh, Additional Civil Judge of Muttra, dated the 5th of October, 1934, confirming a decree of S. M. Ahsan Kazmi, Additional Munsif of Agra at Muttra, dated the 18th of January, 1932.

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of the Municipalities Act, and, therefore, no notice as prescribed by that sub-section is necessary.

Dr. *N. P. Asthana* and Mr. *Nanak Chand,* for the appellant.

Mr. *G. S. Pathak,* for the respondent.

HARRIES and MISRA, JJ.:—This is a plaintiff's second appeal against concurrent decrees of the courts below dismissing his claim for certain moneys due under a contract entered into between him and the Municipal Board of Muttra.

The plaintiff is a contractor and performed certain work for the defendant Board under a contract entered into between the parties. After the work was completed a dispute arose and the defendant Board refused to pay a sum of Rs.3,019 which the plaintiff alleged was due to him upon the contract. Eventually the plaintiff brought this suit claiming a sum of Rs.3,847 being this sum of Rs.3,019 alleged to be due to him under the contract together with certain security money and interest. The defendant Board raised a number of defences and eventually the plaintiff's claim was dismissed by the court of first instance. On appeal to the learned Civil Judge the decision of the learned Munsif was upheld upon the ground that the plaintiff had failed to serve a notice upon the defendant Board as required by section 326(1) of the Municipalities Act, 1916. The only other question considered by the learned Civil Judge was the question of limitation and upon that issue he found in favour of the plaintiff. No findings have been recorded by the lower appellate court upon any of the other issues in the case.

On behalf of the appellant it has been urged before us that the present suit is not a suit falling within section 326(1) of the Municipalities Act, 1916, and that being so no notice was necessary as required by the terms of that sub-section.

Section 326(1) of the Municipalities Act, 1916, reads as follows: "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, until the expiration of two months next after notice in writing has been, in the case of a Board, left at its office, and, in the case of a member, officer or servant, delivered to him or left at his office or place of abode, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and the plaint shall contain a statement that such notice has been so delivered or left."

Section 326(3) of the Act is in these terms: "No action such as is described in sub-section (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action."

The plaintiff did serve a notice upon the defendant Board, but it is common ground that this notice did not contain the matters mentioned in section 326(1) of the Act. The learned Civil Judge, therefore, held in consequence that as no notice had been given which complied with this sub-section the suit failed.

The question which we have to consider is whether a suit claiming the balance due for work done under a contract between the parties is a suit falling within section 326(1) of the Municipalities Act, 1916. If it is, then a notice complying with that Act is essential, but if it is not, the action can proceed without any such notice.

On behalf of the plaintiff appellant a number of cases have been cited and in our judgment it has been consistently held of later years by this Court that section 326(1) of the Municipalities Act, 1916, can have no application to a suit such as the present one

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In the case of the *Municipal Board, Agra* v. *Ram Kishan* (1) the very point which we have to decide was decided by a Bench of this Court. That Bench held that the period of limitation of six months in section 326 of the Municipalities Act did not apply to a suit on contract. That section, it was said, was intended to cover wrongful acts done by a Municipal Board or by officers or servants of the Board. The claim in that case was a claim for the balance due under a contract to execute certain public works. The contractor had completed the work and had brought the suit for an alleged balance due to him. The Bench decided that the period of limitation for such a suit was not six months as provided by section 326(3) of the Municipalities Act, 1916, but three years as provided by the Indian Limitation Act. In deciding that the period of limitation for such a suit was three years they had to decide whether the suit fell within section 326(1) of the Municipalities Act, because section 326(3) only prescribes a period of limitation of six months for suits described in section 326(1) of the Act with two exceptions. Unless the case fell within section 326(1) the period of limitation was three years and not six months. This case in terms holds that a claim such as the present claim is not one which falls within section 326(1) of the Municipalities Act, 1916. If the claim does not fall within that sub-section then no notice is required, because the notice is prescribed by that very sub-section. We can see no distinction whatsoever between the case of the *Municipal Board, Agra* v. *Ram Kishan* (1) and the present case

The learned Civil Judge appears to have thought that the case of the *Municipal Board, Agra* v. *Ram Kishan* had been doubted in the case of *Cantonment Board, Allahabad* v. *Hazarilal Gangaprasad* (2). That was a Bench case decided by SULAIMAN C.J., and MUKERJI, J., and we are wholly unable to agree with the learned

(1) (1933) I.L.R. 55 All. 1002. (2) (1934) I.L.R. 56 All. 885.

Civil Judge that this case throws any doubt whatsoever upon the earlier case to which we have referred. In fact it appears fairly clear from the judgment of SULAIMAN, C. J., that he approved of the view which was expressed in the case of the *Municipal Board, Agra* v. *Ram Kishan* (1).

The matter is, however, in our judgment concluded by a Full Bench decision of this Court in the case of *District Board, Allahabad* v. *Behari Lal* (2). That was a case under section 192(1) of the District Boards Act, but we have compared that section with section 326 of the Municipalities Act, and there is no difference whatsoever in the wording of the two sections. They are in precisely similar terms and both are sections dealing with the protection of public authorities and their servants. In the Full Bench case of *District Board, Allahabad* v. *Behari Lal* (2) it was held that where a contractor had entered into a private contract with the District Board and had brought a suit against the District Board for refund of a deposit made by him as security and for recovery of money on account of extra work done by him under the orders of the overseer and engineer of the Board, which was not expressly sanctioned by a resolution of the Board, such a suit was not governed by section 192(1) of the District Boards Act, but was governed by the ordinary three years' rule under the Limitation Act. It is to be observed that the claim in hat case was a claim for security money and for a sum in respect of work alleged to have been done. The claims were similar to the claims in the case which we have now to decide. In deciding that the three years' rule applied the Full Bench held in terms that the suit before them was not a suit falling within section 192(1) of the District Boards Act. As we have stated earlier, that section of the District Boards Act is in the very same terms as section 326 of the Municipalities

(1) (1933) I.L.R. 55 All. 1002. (2) (1935) I.L.R. 58 All. 569.

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Act, 1916, and if a claim for the balance due for work done against a District Board does not fall within section 192(1) of the District Boards Act, it follows that a similar claim against a Municipal Board cannot fall within section 326(1) of the Municipalities Act. The effect of this Full Bench case is that the present claim cannot possibly be regarded as a claim falling within section 326(1) of the Act. That being so, the form of notice prescribed by that Act was unnecessary and failure to give such a notice was no ground whatsoever for dismissing the suit.

Mr. *Pathak*, who has appeared for the respondent Board, has urged strenuously that the present case is governed by two recent cases decided by their Lordships of the Privy Council, namely *Bhagchand Dagadusa* v. *Secretary of State for India* (1) and *Rebati Mohan Das* v. *Jateendra Mohan Ghosh* (2). This latter case of the Privy Council is discussed at great length in the Full Bench case of *District Board, Allahabad* v. *Behari Lal* (3) to which we have referred, and, further, in arriving at their conclusion the Full Bench purport to apply the principles laid down in the Privy Council case to which we have referred. It has been contended by Mr. *Pathak* that we should follow these decisions of the Privy Council, but in our judgment we are bound by our own Full Bench case which has explained the effect of the Privy Council cases. We see no conflict between our Full Bench case and the Privy Council cases, but even if there was such a conflict we would be bound to follow the Full Bench case of our own Court which in terms purports to explain and limit the effect of the Privy Council decisions. Mr. *Pathak's* argument in effect amounts to this that the Full Bench decision of this Court is not in accordance with law. As we have stated, we cannot accept such an argument and we must follow the Full Bench case of our own Court.

(1) (1927) I.L.R. 51 Bom. 725. (2) (1934) I.L.R. 61 Cal. 470.
(3) (1935) I.L.R. 58 All. 569.

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Certain earlier decisions of this Court which appear to be in favour of the respondent were cited before the learned Civil Judge, but it is clear that the later view of this Court is in favour of the plaintiff and, as we have stated, there is now a Full Bench decision of this Court which concludes the matter in the plaintiff's favour.

The result, therefore, is that we are bound to hold that the claim out of which this suit arose was not one falling within the purview of section 326(1) of the Municipalities Act, 1916, and that being so, no notice as prescribed by that sub-section was necessary. This appeal, therefore, must be allowed and the decrees of the lower courts set aside. As the lower appellate court has not considered the other issues in the case, we remand the case to that court to be heard and determined according to law. The court must consider the remaining issues and then pass such a decree as it deems proper. The costs of this appeal and of the previous proceedings in the courts below will abide the event. The plaintiff is entitled to a refund of the court fee.

Before Mr. Justice Bennet and Mr. Justice Verma

HEMRAJ (DECREE-HOLDER) *v.* KHEM CHAND AND OTHERS (JUDGMENT-DEBTORS)*

1938
May, 12

Hindu law—Sons' liability for father's debts—Avyavaharika *debt, repugnant to good morals or fair dealings—Decree for damages resulting from a wrongful act of the father—Sons or the family estate in their hands not liable—Civil Procedure Code, order XXXII, rule* 3(5)—*Guardian* ad litem *continues to represent the minor in execution stage.*

Under the Hindu law the sons' liability for the father's debts does not arise where the debt or liability incurred by the father was an *avyavaharika* debt, i.e. one due to such conduct of the father as would be considered repugnant to good morals or fair dealings. For this purpose it is not necessary that there should have been an element of criminality in the conduct of the father; it is enough if it was a wrongful act which a decent and fair minded person would not do.

*First Appeal No. 344 of 1936, from a decree of H. P. Asthana, Civil Judge of Agra, dated the 12th of September, 1936.