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I hold that the reply to the issue should be in the negative and that the court cannot be considered to have decided a case within the meaning of section 115 where it has set aside the award and superseded the arbitration pending a suit which is consequently to be tried by the court.

ISMAIL, J.:—I agree.

VERMA, J.:—I agree.

APPELLATE CIVIL

Before Mr. Justice Bennet, Acting Chief Justice, and Mr. Justice Verma

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July, 28

CHIMMAN LAL AND OTHERS (PLAINTIFFS) *v.* ZAHUR UDDIN (DEFENDANT)*

Municipalities Act (Local Act II of 1916), *sections* 116(*b*), 118, 124(1)—*Well and adjoining land dedicated to public use for specified purposes—Whether "public well"—Whether proprietary rights of municipality therein—Property held by municipality "on any trust"—Sale by municipality void—Civil Procedure Code, order XLI, rules* 17, 30—*Dismissal of appeal on the merits though non-appearance of appellant.*

Where it appeared that the owner of a well and some land adjoining it had made a dedication or wakf in favour of the public, i.e. that the public had a particular right of user to use the well and the adjoining land for the purpose of certain fairs and festivals,—

Held that it was a "public well" within the meaning and operation of section 116(*b*) of the Municipalities Act, 1916, and no question could therefore arise of the Municipal Board having acquired proprietary rights in the property by virtue of the words "shall vest in and belong to the Board" in that section. Even if the section had been applicable, the word "vest" therein was to be understood in a restricted and not in a wide sense, as laid down by the Privy Council in *Maharaja of Jaipur* v. *Arjun Lal* (1), and the Municipal Board would not be entitled to sell the property.

Further, the well and the land appurtenant to it came within the words "property entrusted to its management and control"

*Appeal No. 106 of 1935, under section 10 of the Letters Patent.

(1) I.L.R. [1937] All. 901.

in section 118 of the Municipalities Act and the words "property held by it on any trust" in section 124(1) of the Act, and therefore the Municipal Board had no power to transfer the property. The fact that the trust or wakf had been in existence long before the Municipal Board came into existence would not prevent the application of these words to the case; by its action in entering this land and well as property of the Board the Board assumed the control of this trust property, and this was irrespective of the question whether the Board was or was not entitled to do so; and no question of adverse possession was raised in the case.

Held, also, on a consideration of order XLI, rules 17 and 30, of the Civil Procedure Code, that there is nothing in the rules to prevent the appellate court from dismissing an appeal on the merits although the appellant does not appear and address the court; the court is not bound, in such circumstances, to dismiss the appeal only for default of appearance.

Mr. *P. M. L. Verma*, for the appellants.

Messrs. *Mushtaq Ahmad*, *G. S. Pathak* and *Waheed Ahmad Khan*, for the respondent.

BENNET, A.C.J., and VERMA, J.:—This is a Letters Patent appeal by Chimman Lal and certain other Hindus of Bareilly city, plaintiffs, whose suit has been dismissed by a learned single Judge of this Court. The plaintiffs brought a suit on the allegations in paragraph 10 of the plaint that there was a pucca well known as "Chah Sheran" and pucca steps and some land on the four sides of the well appurtenant thereto and some trees in Bareilly city entered in the village papers of Qasba Hafizpur as a public wakf property, and that the Hindus had acquired rights of easement in the property, asking that an injunction should be issued against the defendant to restrain him from interfering with the general public taking water from this well and using the land appurtenant to the well as a resting place at certain Hindu and Muhammadan fairs. The defence was that the Municipal Board of Bareilly had been in possession of the well and land for more than 50 years and had made a sale deed of the property in question to

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the defendant. The facts were that the Municipal Board had acquired some land for a site of a school from the defendant Syed Zahur Uddin, and they gave him a sum of money in payment and a transfer of this well and the adjoining land as part of the consideration. On receiving this sale deed, dated the 9th of June, 1931, the defendant began to exclude the public from the property. The trial court decided in favour of the plaintiffs. The defendant appealed to the lower appellate court and failed to appear although he was given several opportunities and the lower appellate court decided the appeal on the merits in the presence of the respondents plaintiffs. The lower appellate court confirmed the findings of the trial court. Those findings were:

"It is satisfactorily proved from the oral and documentary evidence that the land in suit belonged to one Imamuddin Ashraf, which is entered as *"parti quadim"* in the old settlement. The plaintiffs' witnesses proved that the land was given by Imamuddin Ashraf to Chhatu Bhagat, who constructed the well in question with ornamental carvings and lion statues. The mortgage deeds of 1888 and 1890 show clearly that the well in suit was built by Chhatu Bhagat."

"The defendant could not show any title deed of the Municipal Board relating to the land. From 1922 the Board began to record the land in its own name. This is no evidence of title. . . . For the defendant reliance was placed on section 116 of the Municipalities Act. It does not confer any title on the Board, because the land was already a dedicated property. . . ."

"It is satisfactorily proved not only by plaintiffs' evidence but also from the defendant's own evidence that the land and well were being used by the public, Hindus and Muslims, at the time of various fairs such as Nekpur, Naryawal, Madar (Muslim fair), Dasehra, etc. Under the circumstances there can be no question of adverse possession by the Board, who was acting or managing merely as a trustee."

"Part of the land was sometimes let out by the Board to vegetable vendors, through a thekadar. Such use of open land cannot amount to adverse possession, and did not in any way interfere with the public right of holding fairs and user of

the land and the well. I hold that the land was a wakf property and was dedicated to the public and that the Municipal Board was not owner of the land, and that the suit is not time barred."

Now, when the case came before the learned single Judge, the Judge states: "It was argued by Dr. *Katju* on behalf of the appellant that accepting the findings of the lower courts the plaintiffs had no case." The learned Judge sets out those findings but he does not state clearly the finding that the land was wakf property and dedicated to the public. He has apparently only considered the finding that there was a customary right of easement of the public in the land as well as for the use of the well. We consider that the findings of the lower appellate court go beyond this point and clearly set out that the land was dedicated property for the use of the public and therefore was trust property and wakf. The position in our opinion would be somewhat different if the rights of the public in the property were merely those taken by the learned single Judge as a right of easement in the land and the well. The learned single Judge proceeded to treat the land as land in which there was a customary right of the public and he considered that under section 116(*b*) of the U. P. Municipalities Act of 1916 the property in question, that is the public well and the adjacent land appurtenant to it, was property which "vested in and belonged to the Board". Further he held that as the property had vested in the Board it could be subject of sale by the Board under section 124(1). In regard to the question of trust he merely stated: "It cannot be said that the well and land in dispute was held by the Board in trust inasmuch as no trust was created." Now, his statement that no trust was created is directly contrary to the finding of fact by the lower appellate court that the land was wakf property and was dedicated to the public. It was not therefore correct, where learned counsel for the appellant accepted the findings of the lower courts, to discard one of those

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findings of fact in such a summary manner. This particular point in regard to a trust has been argued by learned counsel for the Municipal Board before us in the following manner. He argued that the only trust which could be considered was a trust which would come under secion 118 of the Municipalities Act which states: "Subject to the provisions of the next section and to any condition imposed by the owner of the property, a Board may manage and control any property entrusted to its management and control." According to him section 118 requires that there should be a trust in favour of the Municipal Board and in that case the property would be held by the Board as property entrusted to it and such property entrusted to the Board would come within the words in section 124(1), "not being property held by it on any trust", and in that case the Board could not sell such property. Learned counsel however argues that the present trust or wakf had been made long before the Board came into existence and therefore could not be a trust which would come under section 118 or section 124(1). We consider, however, that that is much too narrow a meaning to give to the words "property entrusted to its management and control" or "property held by it on any trust." In our opinion when the Board was created in accordance with the earlier Municipalities Act the land was in existence as wakf. By its action in the year 1922 in entering this land and well as property of the Board the Board assumed the control of this trust property. The mere fact that the Board may not have been entitled to assume control of the trust property in this case does not in our opinion act in favour of the Board or entitle the Board to transfer that property. There can be no question of the Board having acquired title by adverse possession of this trust property, nor has any such point been argued. The contention of learned counsel for the appellant was that because this particular property consisted of a well and land appurtenant to the well therefore the property

would become the property of the Board under section 116(*b*). That section refers to "all public streams, lakes, springs, tanks, wells, etc." Now the question is, can it be said that the well in question is a public well in the sense of this section? In our opinion the well in question was the property of a private individual and that private individual made a dedication or wakf in favour of the public, that is that the public had a particular right of user to use this well and the adjoining land for the purpose of fairs on certain festivals. It was not a transfer of the property to the public and we do not consider that the well and the ground appurtenant to it did come under section 116(*b*). There is in our opinion a difference between a public well and the well which has been dedicated to the public for certain specific purposes only. On that view, as the well and ground appurtenant to it do not come under section 116 of the Municipalities Act, no question arises of the Municipality acquiring rights of property from the words "shall vest in and belong to" in that section. The well and the land appurtenant to it in our opinion come under the words "property held by it in trust" and therefore the Board was not entitled to transfer this property to the defendant by the sale deed as section 124(1) prevents a Board from transferring such property.

A further matter was pointed out by learned counsel for the appellants to the effect that the words in section 116 have been interpreted by their Lordships of the Privy Council in a particular sense. In *Maharaja of Jaipur* v. *Arjun Lal* (1) there was a case from this city of Allahabad in regard to a portion of land owned by H. H. the Maharaja of Jaipur which comprised a shop and the street in front of it. Apparently this was a public street. Their Lordships of the Privy Council held that the ruling in *Municipal Council of Sydney* v. *Young* (2) applied to the case before them, and they

(1) I.L.R. [1937] All. 901. (2) [1898] A.C. 457(459).

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made a quotation from the judgment of Lord MORRIS as follows: "Now it has been settled by repeated authorities .... that the vesting of a street or public way vests no property in the municipal authority beyond the surface of the street, and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, but that it does not vest the soil or the land in them as the owners. If that be so, the only claim that they could make would be for the surface of the street as being merely property vested in them *qua* street, and not as general property." Their Lordships then observed: "This passage puts forcibly the restricted sense to be attributed to the word 'vest' in enactments such as section 116 of the United Provinces Act now in question." From this passage it is clear that the words in section 116 of the Municipalities Act, "shall vest in and belong to the Board", do not in the case of a public street give the Municipal Board proprietary rights in the soil but only a control over the surface of the street. Learned counsel argued that this meaning and interpretation of the words was only in regard to public streets. That may be so, but we think that it indicates that the words cannot be used in a wide sense in regard to the other sub-sections of section 116. In particular we consider that this sub-section cannot be used in the way in which learned counsel for the respondent desires to use it, that is he thinks that the Municipal Board is entitled to assume proprietary rights over any property which is the subject of a public trust. For these reasons we consider that the decree of the learned single Judge must be set aside and the decree of the lower appellate court restored.

A further point was argued as a last resort by learned counsel for respondent, and that was the first ground of his second appeal to this Court: "Because the lower appellate court acted illegally in deciding the appeal on the merits." For this proposition he relied on a certain

ruling of a Bench of this Court in *Nasir Khan* v. *Itwari* (1). In that case on the date fixed for appeal, which we are not told was an appeal in which a notice had issued or not, there was the absence of counsel for the appellant and of the appellant, but a person alleging himself to be the brother of the appellant applied for an adjournment, and the lower appellate court refused to grant the adjournment. In a few lines that court stated that the court considered the reasons given by the subordinate Judge for the decision were sound, and the appeal was dismissed on the merits with costs. The Bench of this Court held that the order should be passed that the appeal to the court below was dismissed for default, and if the appellant wished to restore the appeal he should apply to the court below and satisfy that court that the appeal should be restored. We are unable to understand how the Bench of this Court could have legally passed such an order. Only the court before which an appeal is pending can dismiss that appeal for default. The proper order for the Bench of this Court to have passed, if it had considered that the court below was wrong, was to restore the appeal and direct that the court below should dispose of it according to law. We do not think therefore that this ruling is one which we can follow. Contrary to this ruling there are two decisions of this Court, one of which is a Bench ruling, *Baldeo Prasad* v. *Kunwar Bahadur* (2). The circumstances there were very similar. On the date fixed for the hearing of the appeal one of two appellants appeared before the court and applied for the adjournment of the appeal. He was called on to argue his appeal but as he had nothing to say the appeal was dismissed on the ground that it had not been supported. The Bench of this Court held that the appeal should have been disposed of on its merits and the mere fact that it was not argued did not justify the District Judge in dismissing it without

(1) (1923) I.L.R. 45 All. 669. (2) (1912) I.L.R. 35 All. 105.

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going into the merits. Similarly a learned single Judge of this Court in *Mohammadi Husain* v. *Chandra* (1) held that where a pleader appeared and stated that the file of the case was heavy and that he could not prepare the appeal and was unable to address the court and asked for an adjournment which was refused, the learned Judge was wrong in dismissing the appeal for want of prosecution and that the Judge should have decided the case on the merits, following order XLI, rule 30. Learned counsel argued before us that under rule 30 it is provided: "The appellate court, after hearing the parties or their pleaders, etc." shall decide the appeal. We consider that these words apply only if the parties or their pleaders address the court and that in case they do not address the court the rule does not prevent the court making a judgment on the merits. Learned counsel further alluded to rule 17 which deals with dismissal for default. In sub-rule (1) it is provided that if "the appellant does not appear when the appeal is called on for hearing, the court *may* make an order that the appeal be dismissed." It is not provided that the court *shall* make an order that the appeal be dismissed. It is optional for the court to take that course. Learned counsel argued that the only alternatives were for the court to make an order of dismissal for default or to make an adjournment. This is not provided by the section and there is nothing to show that the court is not allowed by the rules to make a decree on the merits. In sub-rule (2) it is no doubt provided in regard to the respondent that "where the appellant appears and the respondent does not appear, the appeal *shall* be heard *ex parte*." That however provides that there shall be a hearing on the merits. When an appeal is heard under order XLI, rule 11, the court may either act under sub-rule (1) or sub-rule (2). Under sub-rule (1) the dismissal may be on the merits and this may be after hearing the pleader if he appears, but the words indicate that a

(1) [1937] A.L.J.174.

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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)*

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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.