Before Justice Sir Edward Bennet and Mr. Justice Verma

JAGANNATH (PLAINTIFF) *v.* MUNICIPAL BOARD, SORON (DEFENDANT)* 1939 *January*, 16

Municipalities Act (Local Act II of 1916), *section* 326(1), (3)—*"Act" means tortious act—Suit for declaration that a bye-law imposing a certain fee is* ultra vires*—Limitation—Recurring cause of action—Municipalities Act, sections* 293(1), (2); 298, *List I, head* J(*d*)*—Fees in respect of projections over streets are not "taxes"—Suit in respect of such fees cognizable—Municipalities Act, sections* 160, 164, 318, 321—*Jurisdiction.*

The cause of action for a suit for declaration that a bye-law framed by a Municipal Board and certain fees prescribed by the bye-law are illegal and *ultra vires* is a recurring one which arises from day to day as long as that bye-law is in existence. Section 326(3) of the Municipalities Act does not, therefore, bar the suit.

The word "act" in section 326(1) of the Municipalities Act refers to tortious acts.

The fees which a Municipal Board is authorised to charge under section 293 of the Municipalities Act do not amount to "taxes", properly so-called, which are dealt with in chapter V of the Act. Sub-section (2) of section 293 lays down that the fees mentioned in the section may be recovered in the manner provided by chapter VI; but the fact that these fees may be so recovered cannot make them 'taxes", which are dealt with in chapter V. Sections 160 and 164 of the Act occur in chapter V and clearly deal only with those taxes which are dealt with in that chapter and the imposition of which is authorised by section 128; they have no application to the fees in question. The suit, therefore, is not barred by sections 160 and 164.

Again, section 318 of the Act provides an appeal to the District Magistrate against an order or direction under a bye-law made under heading G of section 298, List I, but none against an order or direction under a bye-law made under heading J(*d*), as in the present case. Section 321, therefore, did not apply to bar the suit.

*Second Appeal No. 1073 of 1936, from a decree of S. W. Alam, Additional Civil Judge of Etah, dated the 1st of June, 1936, confirming a decree of Ram Saroop Lal, Munsif of Kasganj, dated the 29th of March, 1935.

1939

JAGANNATH v. MUNICIPAL BOARD, SORON

Mr. *M. L. Chaturvedi,* for the appellant.

Mr. *Shiva Prasad Sinha,* Dr. *M. Nasim* and Begam *Faruqi,* for the respondent.

BENNET and VERMA, JJ.:—These three connected second appeals arise out of three different suits filed by three different persons against the Municipal Board, Soron. The points that arise for decision, however, are the same in all the three appeals. The appellant in each case was the plaintiff. The suits have been dismissed by both the courts below.

In the year 1930 certain bye-laws were made by the Municipal Board under section 298, List I, heading J (*d*) of the U. P. Municipalities Act(No. II of 1916) for charging fees in respect of projections over streets and drains. These bye-laws were confirmed by the Commissioner. The projections of the plaintiffs in each of these cases have been in existence from before the passing of the bye-laws in question. Bye-law No. 11 deals with existing projections and provides that the rates noted in the schedule will apply also to all projections of the nature of "saiban, takhtas and patia zerin". The Municipal Board acting under these bye-laws took certain steps to recover from the plaintiff in each case what it considered to be due to it under these bye-laws. Thereupon these suits were filed, the relief claimed being a declaration that the bye-law passed by the Municipal Board, Soron, under which a certain sum of money had been demanded from the plaintiffs was "illegal" and was "not connected with the stone slabs of the plaintiffs." It was also prayed that a perpetual injunction be issued to the defendant Board restraining it from taking proceedings of attachment or sale against the plaintiffs for the recovery of the amount in question. The grounds on which the bye-laws in question are attacked and are alleged to be illegal and *ultra vires* of the Board are given in paragraphs 3 and 4 of the plaint. The issue framed by the trial court on this point was issue No. 5 which runs

thus: "Was the defendant competent to frame the bye-laws in question and were they properly framed, and can a demand be made from the plaintiff in pursuance thereof?" Among the pleas taken by the defendant Board in its defence were the pleas of limitation and jurisdiction, and those are the only two questions with which we are concerned in these appeals. The trial court held that the suits were barred by time. On the question of jurisdiction it held that the civil court was competent to entertain these suits. The lower appellate court has decided in favour of the defendant Board on both the points mentioned above, namely limitation and jurisdiction, and has not decided the other issues that arose. The only questions that have been argued before us are the questions mentioned above, namely, whether the lower appellate court is right in holding that these suits are barred by limitation and whether it is right in holding that the civil court has no jurisdiction to entertain these suits. No other point, for example whether a suit for a declaration of the nature prayed for in these suits can be maintained, has been raised and we express no opinion on that question.

The grounds on which the lower appellate court has held that these suits are barred by limitation are these. A notice was served by the Board on these plaintiffs in July, 1932, demanding payment of the fee in question and the movable property of each of these plaintiffs was attached in January, 1933. The court below has taken the view that in view of the provisions of sub-section (3) of section 326 of the Municipalities Act the suits should have been filed within six months, at any rate from the attachment of the movable property, if not from the service of the notice, and as the suits were not filed until the 19th of January, 1934, the court below has held that they are barred by time. Learned counsel for the plaintiffs appellants has urged that section 326 (3) has no application to a suit of this

1939

JAGANNATH v. MUNICIPAL BOARD, SORON

nature, and that in a case of this character the plaintiff has a recurring cause of action. He has cited the case of *Ambika Churn Mozumdar* v. *Satish Chunder Sen* (1) in support of his contention. We agree with the decision in that case and are of opinion that the contention of the learned counsel is correct. The word "act" which has been used by the legislature in sub-section (1) of scetion 326 of the U. P. Municipalities Act occurs also in the corresponding section of the Bengal Municipal Act, namely section 363, and the learned Judges in their judgment in the case cited have observed that the word "act" refers to tortious acts. We agree with the opinion expressed in the judgment. The declaration prayed for is in respect of a bye-law framed by the Municipal Board and it seems to us that the cause of action which these plaintiffs have is a recurring one which arises from day to day as long as that bye-law is in existence. In our opinion, section 326 (3) does not bar the suit.

The second ground on which the lower appellate court has based its decision dismissing the suits is that the suits are not cognizable by the civil court. In our opinion, the judgment of the court of first instance on this point was correct and the lower appellate court has erred in differing from it. The court below does not refer to any section of the Municipalities Act, but it has been argued by the learned counsel appearing for the respondent Board that the jurisdiction of the civil court is barred by reason of the provisions of sections 160 and 164 of the Municipalities Act. Now, the bye-laws in question have been framed under section 298, List I, heading J(*d*) and deal with fees to be paid under section 293(1) of the Act. Section 293(1) runs thus: "The Board may charge fees to be fixed by bye-law or by public auction or by agreement for the use or occupation (otherwise than under a lease) of any immovable property vested in, or entrusted to the

(1) (1898) 2 C.W.N. 689.

management of, the Board, including any public street or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise." It is to be found in chapter VIII, headed "Other powers and penalties", under the sub-heading "Rent and Charges". The portion of the Act which deals with taxation is chapter V and section 128 enumerates the taxes, properly so-called, which can be imposed by a Municipal Board. It seems to us that the fees which a Municipal Board is authorised to charge under section 293 do not amount to taxes, properly so-called, which are dealt with in chapter V of the Act. Sub-section (2) of section 293 lays down that the fees mentioned in the section may be recovered in the manner provided by chapter VI; and section 166, which is the first section of chapter VI, deals not only with taxes but also with "any other sum declared by this Act or by rule to be recoverable in the manner provided by this chapter." But the fact that these fees may be recovered in the manner provided by chapter VI cannot make them *taxes* which are dealt with in chapter V. Sections 160 and 164 on which reliance is placed on behalf of the Board occur in chapter V and clearly deal only with those taxes which are dealt with in that chapter and the imposition of which is authorised by section 128. It is clear therefore that sections 160 and 164 have no application to the fees in question. It may also be pointed out that section 318 of the Act provides an appeal to the District Magistrate against an order or direction made by a Board under a bye-law made under heading G of section 298 but does not provide any appeal against an order or direction under a bye-law made under any other heading of that section. Section 321 of the Act also has therefore no application. Suits of this nature are clearly cognizable by the civil courts unless their cognizance is either expressly or impliedly barred. The only sections of the Municipalities Act on which reliance has been placed by the learned

1939

JAGANNATH v. MUNICIPAL BOARD, SORON

counsel appearing for the respondent Board do not, in our opinion, apply. The lower appellate court has relied on the case of *Sheo Narain* v. *Town Area Panchayat, Chhabramau* (1). In that case the question that arose for decision was with respect to a tax, properly so-called. The case is therefore distinguishable.

For the reasons given above we allow these appeals, set aside the decrees of the courts below and remand these cases to the lower appellate court with directions that it shall re-admit the appeals to their original numbers and shall proceed to decide the remaining issues that arise in these cases. Costs here and hitherto shall be costs in the cause.

Before Mr. Justice Rachhpal Singh and Mr. Justice Ismail

1939 *January*, 16

LALITA DEVI (APPLICANT) *v.* NATHUJI JOSHI (OPPOSITE PARTY)*

Lunacy Act (IV of 1912), section 65(2)—"Unsound mind"—Degree of—So as to be incapable of managing his affairs—"Imbecile"—Appointment of manager of the estate.

There is no definition of the expression "unsound mind" in the Lunacy Act, 1912. For the purpose of section 65(2) of the Act the degree of unsoundness of mind has to be found in relation to the capacity of the alleged lunatic to manage himself and his affairs; it is not necessary that he must be found to be incapable in both the respects, and a special finding may be come to that though he is capable of managing himself and is not dangerous to himself or to others, yet he is of unsound mind so as to be incapable of managing his affairs; and in that case the court will appoint a manager of his property.

Lalu Ram v. *Thakur Das* (2), distinguished.

Messrs. *P. L. Banerji* and *N. D. Pant*, for the appellant.

Dr. *K N. Malaviya*, for the respondent.

RACHHPAL SINGH and ISMAIL, JJ.:—This is a first appeal from order of the learned District Judge of

*First Appeal No. 321 of 1937, from an order of Sarup Narayan, District Judge of Benares, dated the 29th of August, 1937.

(1) [1936] A.L.J. 33. (2) (1905) 2 A.L.J. 156.