

## APPELLATE CIVIL.

*Before Wort and Varma, JJ.*

GANESH PRASAD SAH

1938.

January, 6,  
7.

v.

SHEIKH JAWAD HUSSAIN.\*

*Limitation Act, 1908 (Act IX of 1908), article 115—suit on implied contract, whether governed by article 115—suit by Municipality on oral contract, whether maintainable—Bihar and Orissa Municipal Act, 1922 (B. & O. Act VII of 1922), section 64.*

Where the Municipality sued a farmer of a market for the recovery of a certain sum of money which he had agreed to pay orally in consideration of his right to collect tolls, held, that in view of the provisions of section 64 of the Bihar and Orissa Municipal Act the Municipality was not entitled to sue, the contract being not under seal.

*Ahmedabad Municipality v. Sulemanji Ismailji* (1), followed.

*Held*, that treating the case as a suit for enforcing an obligation under an implied contract the suit was barred under article 115 of the Limitation Act.

*Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* (2), *Ram Raghbir Lal v. United Refineries (Burma) Limited* (3) and *Chairman and Commissioners of the Chaibassa Municipality v. Gobind Sao* (4), referred to.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Wort, J.

*A. P. Upadhaya* (with him *Girindra Nath Mukharji* and *J. L. Brahmachari*), for the appellant.

\*Appeal from Appellate Decree no. 472 of 1935, from a decision of T. Luby, Esq., i.c.s., District Judge of Muzaffarpur, dated the 20th of May, 1935, reversing a decision of Babu Anjani Kumar Sahay, Subordinate Judge of Motihari, dated the 5th of April, 1934.

(1) (1908) I. L. R. 27 Bom. 618.

(2) (1916) I. L. R. 44 Cal. 759; L. R. 44 Ind. App. 65.

(3) (1933) I. L. R. 11 Rang. 186; L. R. 60 Ind. App. 183.

(4) (1937) I. L. R. 16 Pat. 302.

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*Syed Abdul Aziz and Janak Kishore*, for  
the respondent.

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WORT, J.—The District Judge in this case has dismissed the plaintiff's action, the plaintiff being the representative of the Motihari municipality, for the sum of money to which the municipality claimed to be entitled as against the defendant in the following circumstances.

The defendant had taken what has been described by the Judges in the Courts below as a lease of a market for the years 1927 and 1928. It was proposed to grant a fresh lease for the purposes of which a resolution of the municipality was passed. It is stated in the evidence that the defendant was present on that occasion and agreed to pay a sum of Rs. 4,001 for a further period of one year. It is a fact, however, that no contract or document under seal in compliance with section 64 of the Bihar and Orissa Municipal Act was made by the municipality, and the defendant therefore went into possession of the market under the resolution to which I have referred. After a period of seven months he offered to surrender his rights which surrender was accepted. I use the expression "lease" as an expression used by the learned Judges in the Courts below, but in my judgment it is quite clear that even if the grant had been to the defendant under seal it would not have been a lease; at the most it could be said that he had a license with respect to the land on which the market was held, and the dues payable by the defendant to the municipality were the dues in respect of that license. Had it been the case of a lease, the question which arises in this appeal, that is to say, whether the action is barred by limitation—and that is the only question—would have to be determined by considering whether the dues owing by the defendant were in the nature of rent or were in the nature of damages for use and occupation.

Now, the learned Judge in the Court below, as I have stated, has dismissed the action as being barred by limitation, applying Article 115 of the Limitation Act to the case. It appears to me that the appellant is on the horns of a dilemma. If they are in a position of not being able to enforce their rights by reason of the fact that the seal was not attached to the contract or document which either was executed or was to be executed, and that without such seal he is not entitled to sue, then quite clearly the action would fail on that ground. That view of the matter has been taken by Sir Lawrence Jenkins in *The Ahmedabad Municipality v. Sulemanji Ismalji*(<sup>1</sup>).

The contention of the appellant here is that the obligation to pay was not an obligation arising under contract within the meaning of Article 115 of the Limitation Act. It is admitted, and it is clear that the right of the plaintiff against the defendant is not one arising out of tort. Section 73 of the Contract Act was referred to in the course of the argument advanced on behalf of the appellant. The third clause of that section provides this :

“When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.”

Here for the reasons I have stated there was no contract binding within the meaning of the provisions of the Municipal Act, and the question therefore arises as to how does the obligation of the defendant in this action arise. Again the learned Advocate for the appellant is bound to admit that it is an implied obligation by the defendant to pay for the seven months during which he was in possession. That seems to me to come quite clearly within Article 115 of the Limitation Act which provides :

“The compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.”

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Their Lordships of the Judicial Committee of the Privy Council in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*(<sup>1</sup>) have held that Article 116 applies to contracts registered and impliedly, if not expressly, have decided that the term "compensation" within the Article is used in the widest possible sense in India. Apart from the assistance of that authority, speaking for myself, I should have been inclined to hold that the obligation of the kind in question in this case was not an obligation to pay the compensation from the point of view of the common law, but a definite obligation to pay a sum certain under an implied contract. But it is too late in the day to take that view of the matter having regard to the case to which I have referred and also a later case—the case of *Ram Raghbir Lal v. United Refineries (Burma) Limited*(<sup>2</sup>) in which their Lordships of the Judicial Committee of the Privy Council have followed the earlier case to which I have also referred. Again there is the authority of this Court in *Chairman and Commissioners of the Chaibassa Municipality v. Gobind Sao*(<sup>3</sup>), in which my learned brother Fazl Ali has held that Article 115 of the Limitation Act applies to a case similar to the present with only one exception to which I shall refer presently and not Article 120. The difference between the case of *Chairman and Commissioners of the Chaibassa Municipality v. Gobind Sao*(<sup>3</sup>) and the present one is that it would appear that the contract was under seal. But as I have pointed out in the earlier part of my observation, the appellant municipality is on the horns of a dilemma. If the decision to which I have just referred does not apply by reason of the fact that the contract is not under seal then I should have imagined the only conclusion to be arrived at would be that the municipality was not entitled to sue at all. If on the other they are entitled

(1) (1916) I. L. R. 44 Cal. 759; L. R. 44 Ind. App. 65.

(2) (1933) I. L. R. 11 Rang. 186; L. R. 60 Ind. App. 183.

(3) (1937) I. L. R. 16 Pat. 302.

to sue, they are entitled to sue by reason of the implied obligation which is expressly provided by Article 115 of the Limitation Act.

In those circumstances it seems to me that the decision of the learned Judge in the Court below is correct and the appeal fails and must be dismissed with costs.

VARMA, J.—I agree.

J. K.

*Appeal dismissed.*

### REVISIONAL CIVIL.

*Before Fazl Ali and Rowland, JJ.*

LALA MISTRY

v.

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*Code of Civil Procedure, 1908 (Act V of 1908), section 149 and Order XXXIII, rules 5 and 8—application for leave to sue in forma pauperis rejected—court, when is empowered to permit payment of court-fees—application finally disposed of—court, whether has power to allow plaintiff at a later date to pay court-fees—refusal to permit payment of court-fees, whether is a question of jurisdiction—section 115.*

An application for leave to sue as a pauper does not require two separate orders for its disposal, that is to say, an order refusing leave and a further order rejecting the plaint; but the order refusing leave finally disposes of the whole proceeding.

The power to permit an application to sue in *forma pauperis* to be converted into a plaint by payment of court-fees, which the Court undoubtedly has during the pendency of the application, can be exercised at the time of rejecting the application, that is to say, if in one single order the Court declines leave to sue as a pauper and also gives time for filing court-fees, this would be within the discretion allowed by

\*Civil Revision no. 380 of 1937, from an order of Babu Shivapujan Rai, Munsif of Patna, dated the 16th April, 1937.