1904.

GHULAPPA BIN BALAPPA v. RAGHAVENDRA.

M. B. Chaubal appeared for the applicant (defendant 1) in support of the rule.

S. R. Bakhle appeared for the opponent 1 (plaintiff) to show cause.

H. C. Coyaji appeared for the opponents 2 and 4 (defendants 2 and 4) and supported the rule.

JENKINS, C. J.:—In our opinion effect should have been given to the plea of *res judicata* on the rehearing of the suit, for the Court which passed the decree in suit No. 162 of 1897 was a Court of jurisdiction competent to try this suit. Its inability to entertain it arose not from incompetence, but from the existence of another Court with a preferential jurisdiction. The rule must therefore be made absolute and the suit dismissed. The plaintiff must pay the costs of suit and rule but only one set.

Rule made absolute.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904. *January* 20.

ACHRATLAL HARILAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANT), OPPONENT.*

The District Municipal Act (Bom. Act III of 1901)—Non-feasance—Negligence in performance of duty towards plaintiff—Suit for damages.

The plaintiff, an inhabitant of Ahmedabad, having brought a suit against the Ahmedabad Municipality to recover damages sustained by him in respect of an injury caused to his horse and carriage in consequence of the neglect of the Municipality to repair a road,

Held that as the default leading to the damage was a mere non-feasance, the suit must fail, for the statute does not impose upon the Municipality a duty towards the plaintiff which they negligently failed to perform.

APPLICATION under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts' Act IX of 1887) against the decision of L. P. Parekh, Judge of the Court of Small Causes at Ahmedabad, in suit No. 725 of 1903.

* Application No. 210 of 1903 under the Extraordinary Jurisdiction.

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ACHRATLAL v. THE AHMEDABAD MUNICIPALITY.

Suit against a Municipality to recover damages for non-feasance.

The plaintiff sued the Municipality of Ahmedabad in the Court of Small Causes at Ahmedabad to recover rupees seventy-five as damages sustained by him in respect of the injury caused to his horse and carriage in consequence of the defendant's neglect to repair a certain road.

The defendant denied the claim and contended that it was not admissible.

The Judge dismissed the suit on the following grounds:—

The plaintiff has based his claim on a non-feasance but not on a mis-feasance. He says that because the road referred to in the plaint was not repaired, his horse stumbled on the 24th November, 1902, and broke his leg. He therefore claims Rs. 75 as damages. * * * * * *

There is no law which would make the Municipality liable for mere non-feasance. The Municipal Acts of 1873 and 1884 did not contain any provision holding the Municipality liable for mere non-repairs. There is also nothing in the new Act (III of 1901), which would make such a body responsible: *vide* Sander's Law of Negligence, p. 131; *Atkinson* v. *New Castle Waterworks Co.* No action for non-user of statutory powers can lie, *id.* 130-132; *vide* also Ratanlal's Law of Torts, p. 25; 22 L. T. Reports 295, 887; Mew's Digest of English Case Law, Vol. X, p. 94, and other cases cited on behalf of the Municipality. I. L. R. 17 Bom. 307 relied on by the plaintiff is on negligence only. It is true that section 54 requires the Municipality to set apart a reasonable sum for road repairs and that all roads vest in the Municipality. But those circumstances alone are not sufficient to make the Municipality responsible for non-repairs. It might be that the funds at the disposal of the Municipality were not sufficient to repair all roads.

The plaintiff applied under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts' Act IX of 1887) urging *inter alia* that the defendant being under a statutory obligation to maintain and repair all public roads, was liable for a breach of this statutory duty and that the Judge ought to have awarded the damages claimed. A *rule nisi* having been issued requiring the defendant to show cause why the decree of the Judge should not be set aside,

G. S. Rao appeared for the applicant (plaintiff) in support of the rule:—We sued the Municipality to recover damages for neglecting to repair a public road. The road vested in the

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ACHRATLAL v. THE AHMEDABAD MUNICIPALITY.

Municipality under the District Municipal Act (Bom. Act III of 1901) and it was incumbent upon it to keep it in a proper state of repairs. The Judge dismissed our suit holding that it was based on non-feasance and not on mis-feasance and, therefore, the Municipality was not liable. He relied on *Lascelles* v. *Lord Onslow* (1). That case is distinguishable. The statute which governed that case provided a special penalty, but the District Municipal Act does not provide such a penalty. Section 54 of the Act governs the present case. Section 50 shows what property vests in the Municipality. Taking the two sections together, all public streets become vested in the Municipality. The Municipality having thus become the owner of the road, it is liable at the instance of any member of the public like an ordinary private individual: *The Queen* v. *Inhabitants of Dukinfield* (2). The Judge found that the road was never repaired by the Municipality and yet he held that the non-repair would not make the Municipality liable. He further found that the accident was due to the negligence on the part of the Municipality, but he held that this was non-feasance which would not saddle the Municipality with liability. We submit that this is an erroneous view: *The Borough of Bathurst* v. *Macpherson* (3). No distinction can be drawn between non-feasance and mis-feasance: *White* v. *Hindley Local Board of Health* (4), *Henley* v. *The Mayor and Burjesses of Lyme* (5), *The Corporation of the Town of Calcutta* v. *Anderson* (6), *M'Kinnon* v. *Penson* (7).

L. A. Shah appeared for the opponent (defendant) to show cause:—First we contend that there is no section in the District Municipal Act which compels the Municipality to keep every possible road in the town in repairs. Secondly, in a case like the present no private action can lie. Section 178 of the District Municipal Act (Bom. Act III of 1901) provides a remedy. Section 54 imposes no absolute duty and refers to the application of Municipal funds. If any loss be caused by the non-repair of the road, the corporate body cannot be held liable in damages:

(1) (1877) 2 Q. B. D. 433, 441.
(2) (1863) 4 B. & S. 158, 161.
(3) (1879) 4 App. Cas. 256.
(4) (1875) L. R. 10 Q. B. 219.
(5) (1828) 5 Bing. 91.
(6) (1884) 10 Cal. 445 at p. 462.
(7) (1853) 8 Exch. 319.

Cowley v. *The Newmarket Local Board* (1), *Municipality of Pictou* v. *Geldert* (2), *Thompson* v. *Mayor, &c., of Brighton* (3), *Municipal Council of Sydney* v. *Bourke* (4). The Municipality stands in the shoes of Government and the test is whether Government would have been liable to plaintiff's claim. We submit not: *Sanitary Commissioners of Gibraltar* v. *Orfila* (5). All public roads are vested in Government under section 37 of the Land Revenue Code (Bom. Act V of 1879) and we find no case in which Government has been successfully sued for non-repair of roads within Municipal areas, nor any law under which Government can be held liable. The District Municipal Act imposes no such liability upon the Municipality as the plaintiff wants it to bear.

In the cases relied on for the applicant there was mis-feasance or non-feasance arising out of mis-feasance. They are, therefore, not applicable.

G. S. Rao, in reply:—Section 178 relates to prospective arrangement. It does not affect the right of private individuals to sue the Municipality in damages arising on account of its negligence. The Municipality does not stand in the shoes of Government. It is not invested with powers which are vested in Government. Its powers come into existence simultaneously with its creation. There was no transfer of the powers from Government to the Municipality.

JENKINS, C. J.:—As the default leading to the damage was a mere non-feasance, the plaintiff's suit fails, for the statute does not impose upon the Municipality a duty towards the plaintiff, which they negligently failed to perform. Therefore the rule must be discharged with costs.

Rule discharged.

(1) (1892) A. C. 345.
(2) (1893) A. C. 524.
(3) (1894) 1 Q. B. 332.
(4) (1895) A. C. 433.
(5) (1890) 15 App. Cas. 400 at p. 411.