APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT *v.* THE GUJARAT GINNING AND MANUFACTURING COMPANY, LIMITED (ORIGINAL PLAINTIFF), RESPONDENT*.

1919. November 26.

District Municipal Act (Bom. Act III of 1901), section 59 (b) (vi) and proviso (b)—Special sanitary cess—Owner of private latrines connecting them with Municipal sewer—Authority of Municipality to levy cess.

The plaintiffs built on their premises private latrines which were cleansed by manual labour. After sometime the plaintiffs were allowed by the Municipality to connect the latrines with the Municipal sewer and this was done at the plaintiffs' own expense. The plaintiffs were thereafter called upon to pay a special sanitary cess which the defendant Municipality claimed to be entitled to levy under section 59 (*b*) (vi) of the Bombay District Municipal Act, 1901. The plaintiffs paid the tax under protest and brought a suit for the recovery of the amount paid. The lower Courts allowed the plaintiffs' claim on the ground that the plaintiffs at their own expense connected the privies with the Municipal sewer and the Municipality did not make arrangements for receiving and conducting sewage into Municipal sewer. On appeal to the High Court,

Held, dismissing the plaintiffs' suit, that it was clearly the intention of the Act that if the Municipality provided a sewer for receiving the sewage and the owner of private latrines connected them with the sewer and then the Municipality provided the water, although it might be at an additional cost to the owner, for carrying the sewage from the latrines to the sewer, the latrines were being cleansed by the Municipal Agency, and the Municipality were entitled to levy a special sanitary cess.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree passed by M. I. Kadri, Extra Joint Second Class Subordinate Judge at Ahmedabad.

Suit to recover amount of tax paid.

*Second Appeal No. 527 of 1917.

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The plaintiff company carried on business in Ahmedabad. The company had built private latrines for its operatives in the company's premises. These latrines were cleansed by manual labour up to the year 1909 when it appeared to the company that it would be more convenient if the latrines were connected with Municipal sewer which ran along the road on which the plaintiffs' premises abutted. Accordingly the company was allowed to connect the latrines with the Municipal sewer at their own expense. The defendant Municipality, thereupon, ordered the company to pay a special sanitary cess. The company paid the tax for four years (1910-14) under protest and in 1915 brought a suit to recover Rs. 4,709-9-0 amount of tax paid under protest.

The defendant Municipality contended that by a Resolution of the Government No. 4585, dated the 21st August 1905, under section 61 of the District Municipal Act, the defendant recovered the tax at 8 annas per head, that before levying the tax the defendant gave an opportunity to the plaintiff to file his objections under section 60 of the District Municipal Act, but the plaintiff filed no objections; and that the tax was neither unlawful nor unjust.

The Subordinate Judge held that the plaintiff company was not legally liable for the tax, for it had at its own expense connected the privies with the Municipal main drainage gutter, while the Municipality did not by manual labour remove the night soil from the plaintiff's privies nor had it made arrangements for receiving and conducting the sewage into the Municipal sewers. He, therefore, allowed the plaintiff's claim.

On appeal, the District Judge confirmed the decree.

In Second Appeal by the defendant Municipality, the case was heard by Heaton and Shah JJ. and their

Lordships, by an interlocutory judgment, dated the 11th February 1919, sent down the following issue :—

"Whether, apart from supplying sewers as part of the drainage system, and apart from maintaining that system as a means of cleansing the private latrines, the Municipality in fact had made any provision for conducting or receiving the sewage of the plaintiff's latrines into the Municipal sewers during the years in question."

The interlocutory judgment was as follows :—

SHAH, J. :—The plaintiff in this case sued the Ahmedabad Municipality to recover the amount of a special sanitary cess paid under protest to the Municipality for the years 1910-11 to 1913-14 on the ground that the cess was illegal.

The Municipality contended that it was legal as it was duly sanctioned by the Governor-in-Council and levied in accordance with the provisions of the Bombay District Municipal Act (Bom. Act III of 1901).

Both the lower Courts have allowed the plaintiff's claim on the ground that the levy of the cess is not legal ; and in the appeal before us the same question has been raised and the correctness of the conclusion of the lower Courts is questioned on behalf of the Municipality.

Before dealing with the points arising in this appeal, it will be convenient to state a few facts, about which there is no dispute. The plaintiff, a limited company, owns mill premises with latrines thereon for the use of the mill-hands. These latrines have been connected with the Municipal sewer on the road near the plaintiff's premises. The Municipal sewer with which the latrines are connected forms part of the general drainage system maintained by the Municipality. The sewage of the latrines is received into the Municipal sewers and carried away through the Municipal sewers.

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The latrines are cleansed not by manual labour but apparently by drainage system. The special sanitary cess is leviable by the Municipality under section 59 of the Bombay District Municipal Act, provided the conditions as to the levy of the cess as laid down in the chapter relating to Municipal taxation are satisfied. The cess in question was levied in accordance with the rules and bye-laws framed by the Municipality and sanctioned by the Governor-in-Council. The rules and bye-laws then in force have been subsequently modified but we are not concerned with these new rules. The cess has been levied on the footing that the latrines on the mill premises are cleansed by the operation of the drainage system.

The case for the plaintiff is that the Company is not liable to pay the special sanitary cess as the costs of connecting the privies with the Municipal sewers have been defrayed by the Company. It is further contended here that the latrines are not "cleansed by Municipal Agency" as the plaintiff pays for the water required for flushing the latrines and for the men employed to keep the latrines clear. The Municipality in effect contend that under section 59, clause VI read with proviso (*b*) (i), they have made provision for conducting or receiving the sewage of the latrines into Municipal sewers and that when they have done that the latrines are "cleansed by Municipal Agency" within the meaning of clause VI and that they are entitled to levy the cess.

The contention that the latrines are not "cleansed by Municipal Agency" as contemplated by clause VI of section 59, is based upon facts, which were neither alleged nor proved in the trial Court. It is really a new point. The argument is that if the plaintiff makes arrangements for flushing the latrines, and employs men

to keep them clean, they are not "cleansed by Municipal Agency". Assuming the facts alleged by the plaintiff in the argument before us in his favour, on reading clause VI and the proviso (*b*) (i) of section 59 it is clear that where the Municipality make provision for the cleansing of latrines by manual labour or by conducting or receiving the sewage thereof into their sewers, where the drainage system is in operation the latrines are cleansed by Municipal agency within the meaning of clause VI. The fact that the owner of the latrines has to make some arrangements to pass on the sewage from the latrines into the connecting sewers and then into the Municipal sewers makes no difference..

Thus the important question is whether the Municipality have made provision for conducting or receiving the sewage of the latrines into their sewers. The lower appellate Court has held that under the proviso it is not enough for the Municipality merely to construct sewers in the neighbourhood of the premises and to permit the owner to discharge his sewage into the Municipal sewers, but they must construct a branch system of drainage of some sort so that the conducting or receiving of the private drainage may be effected at the cost of the Municipality, though a very little work would be sufficient. It has further held that in the present case the plaintiff has done the whole work.

At this stage I do not desire to express any opinion on the question whether by providing a general system of drainage and by putting up Municipal sewers near the premises of the plaintiff the Municipality can be said to have made provision for receiving the sewage of the latrines into the Municipal sewers. That is a question, which must be considered, if necessary, after the finding on the question of fact is received.

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Assuming, without admitting, that the learned District Judge is right in his view that the "provision" referred to in clause (*b*) (i) in the proviso means some arrangement connecting the private latrines with the nearest Municipal sewers and not the laying out of Municipal sewers as a part of the drainage system generally, the question is whether the Municipality have made such provision in this case. The lower appellate Court has found that the plaintiff has done the whole work. As a finding of fact it would be binding upon this Court in second appeal. It seems to me, however, that it is vitiated on two grounds. In the first place it is largely influenced by the consideration as to who has paid the costs of the connection. The proviso in section 59 makes no reference to the costs of making provision for conducting or receiving sewage of the latrines into the Municipal sewers. The fact as to who has paid the costs is relevant; but I do not think that it is by any means conclusive. It is necessary to know, for instance, as to who has done the work of connecting the latrines with the Municipal sewers and whether the Municipality have done or have to do anything to maintain the connection. There has been no investigation from this point of view. Secondly, the parties have given no evidence in this case except that certain correspondence between the Municipality and the Local Government through the Commissioner, N. D., has been put in. This correspondence so far as it is intended to prove the opinion of the Local Government as to the legality of this cess is not relevant; and it affords no proper proof of the facts which it may be necessary to know in order to determine whether the Municipality have made provision for conducting or receiving the sewage into Municipal sewers. The question that arises in this case is one of general importance and some difficulty;

and it is hardly satisfactory to have a finding without any clear proof of facts, which may have a bearing upon this question. I am not satisfied that the finding as recorded is based upon any legal evidence.

As I have already said it would be relevant to know whether the Municipality have done any work in effecting the connection between the plaintiff's latrines and their own sewers, and if so, what? It is also relevant to know whether after the connection is effected the connecting sewers or any parts thereof are maintained by the Municipality; and a plan showing the relative position of the latrines, connecting sewers and Municipal sewers may be useful in enabling the Court to have a general idea of the arrangement for conducting or receiving the sewage of the latrines into the Municipal sewers. I have referred to these points as merely indicating the lines on which evidence might have been adduced. It is for the parties to adduce all relevant evidence in order to enable the Court to decide the point, and I think they may be given a further opportunity of adducing such evidence. It is quite possible that the parties may agree as to the facts relevant to the main position; if so, a clear and categorical statement of facts agreed to by both the parties should be put in. The Court will consider not only the question as to who defrayed the cost of effecting the connection but also as to how far any active assistance of the Municipality was essential, and as to how far it was rendered in effecting the connection between the latrines and the Municipal sewers. It will be open to the lower appellate Court to consider such other facts as it may think relevant to the issue.

It is not suggested before us that the Municipality have not received the sewage of the latrines into their sewers and maintained the drainage system as a means of carrying the sewage during the years in question.

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I would, therefore, send down the following issue to the lower appellate Court for a fresh finding:—Whether, apart from supplying sewers as part of the drainage system, and apart from maintaining that system as a means of cleansing the private latrines, the Municipality in fact had made any provision for conducting or receiving the sewage of the plaintiff's latrines into the Municipal sewers during the years in question.

The parties to be at liberty to adduce fresh evidence. Finding to be returned in three months.

HEATON, J.:—I agree to the sending down of the issue and with the observations of my learned brother. What has to be determined is whether the Municipality "has made provision for conducting or receiving the sewage" from the plaintiff's premises "into Municipal sewers." That is a question of fact and it is a question which cannot be answered until the Court which determines it, knows what the actual arrangements are. It is necessary to know the nature of the general drainage system; and in particular to know exactly how the plaintiff's latrines are drained into the Municipal sewers. I could not myself answer the question until either I actually saw the material things or had before me plans and sketches or at least an intelligibly full description.

I think the District Judge is wrong as a matter of law, in assuming what he did assume, in the absence of knowledge of the kind I have indicated. He made a large generalization when the law requires the ascertainment of definite and particular facts and then, and not till then, the determination of the question whether the facts show that the Municipality have made the provision required.

THE District Judge found on the issue in the negative.

The defendant Municipality filed objections against the finding.

N. K. Mehta, for the appellant:—The Ahmedabad Municipality was entitled to levy a special sanitary cess in respect of the plaintiff Company's private latrines under section 59 (*b*) (vi) of the District Municipal Act, 1901.

The section empowers a District Municipality to levy the cess in respect of private latrines "cleansed by Municipal agency" subject to the proviso (*b*). The proviso requires that before the Municipality can levy the cess, it must have "made provision for the cleansing thereof by manual labour or for conducting or receiving the sewage thereof into Municipal sewers".

We admit the pipes connecting the plaintiff's latrines with the Municipal sewers were laid at their expense, but that does not make any difference for the purpose of the section. If the Municipality has made arrangements for "receiving the sewage into Municipal sewers," it has satisfied the requirements of the Act for the levy of the cess. The Municipality has provided the sewers and manholes with which connections are made with private latrines. The pipes empty sewage of the latrines into the sewers and so the Municipality has done everything required of it by the Act before it can levy the special sanitary cess.

B. J. Desai with *G. N. Thakor*, for the respondent:—Before the Municipality can levy the cess, it must show that the latrines were cleansed by Municipal agency; and that it has made provision for the cleansing thereof by manual labour or for conducting or receiving the sewage thereof into Municipal sewers.

The lower Courts have found that the Municipality has not done anything more than constructing the

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sewage works. The connection of the latrines with the sewers were laid at the cost of the plaintiff Company and so the Municipality cannot be said to have made any provision for conducting or receiving the sewage with the Municipal sewers.

Further, the Municipality must show that the plaintiff's latrines are cleansed by Municipal agency. As a matter of fact the water laid on to the latrines is paid for by the plaintiff and so it is the plaintiff who cleans the latrines and not the Municipality. Therefore there is no necessity to look to the proviso as the conditions which bring the proviso into operation do not exist.

MACLEOD, C.J.:—The plaintiff-Company, which carries on business in Ahmedabad, sued to recover from the Committee of Management appointed by Government for the Ahmedabad Municipality Rs. 4,709-9-0, which was the amount that they had paid to the defendants as a special sanitary cess directed to be paid by the defendants, which it was alleged the defendants had no right whatever to levy. The facts for the purpose of the case are as follows:—The Municipality have provided a main sewer along the road on which the plaintiffs' premises abut. The plaintiffs have on their premises private latrines for their operatives, and previous to the period in question in this suit, they cleansed those latrines by manual labour. Then it appeared to them that it would be more convenient if they connected their latrines with the Municipal sewer, and they were allowed to do so. The plaintiffs were thereafter called upon to pay a special sanitary cess which the defendants claimed to be entitled to levy under section 59 (*b*) (vi) of the Bombay District Municipal Act. That entitles the Municipality to levy "a special sanitary cess upon private latrines, premises or compounds cleansed by Municipal agency, after notice given as hereinafter required". Then there is a

proviso (*b*) "no special sanitary cess shall be leviable in respect of any private latrines, premises or compounds unless and until the Municipality have (i) made provision for the cleansing thereof by manual labour, or for conducting or receiving the sewage thereof into Municipal sewers, and (ii) issued either severally to the persons to be charged, or generally to the inhabitants of the district or part of the district to be charged, with such cess, one month's notice of the intention of the Municipality to perform such cleansing and to levy such cess".

Apparently no objection was taken at the time to the levying of the special sanitary cess. The trial Court held that the plaintiff Company were not legally liable for the tax, for they had at their own expense connected their flushing privies with the Municipal main drainage gutter, while the Municipality did not by manual labour remove the night soil from the plaintiff's privies, nor had it made arrangements for receiving and conducting the sewage into the Municipal sewers. The learned Judge, therefore, allowed the plaintiff's claim on the ground apparently that if the Municipality did not make the connection between the main sewer and the private latrines, they could not charge the special sanitary cess.

In First Appeal the same view was taken by the District Judge. He said :—

"The grounds on which a special sanitary cess can be levied are stated in section 59 and the ground there given is not the use of the Municipal sewer or in sharing in the benefits of the sewage farm or pumping system, but the making provision by the Municipality for conducting or receiving the sewage into Municipal sewers. What then entitles the Municipality to demand a special sanitary cess is not the construction of sewers in the neighbourhood of the premises, nor the permission to the property owner to discharge his sewage into the Municipal sewers, but the construction of a branch system of drainage of some sort so that the conducting or receiving of the private drainage may

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be effected at the cost of the Municipality. I imagine that a very little work would have been sufficient".

So that the learned District Judge's view was this. There is a main sewer. It is not sufficient if the Municipality provide the sewer. They must incur some of the expenses and do some of the work necessary for connecting the latrines to the sewer. If they pay for a very little, a foot or two of pipe-line, so as to connect the plaintiff's latrines with the main sewer, that would be sufficient in his opinion to entitle the Municipality to levy the cess. But as the whole of the expenses of connection were made by the plaintiff he dismissed the appeal.

In Second Appeal the real point at issue was taken, namely, that one must look first to (*b*) (vi) of section 59 in order to determine when the Municipality can in the first instance levy the special sanitary cess. It was argued that (*b*) (vi) shows that it cannot be levied upon private latrines or premises or compounds unless they are cleansed by Municipal agency; and then even if they are cleansed by Municipal agency, still the cess cannot be levied unless the Municipality has made provision for the cleansing of private latrines or premises by manual labour, or for conducting or receiving the sewage thereof into the Municipal sewers. It was further argued, that the plaintiff's latrines are not cleansed by Municipal agency, that the Municipal water laid on to the latrines is paid for by the plaintiff, and that, therefore, it is the plaintiff who cleanses the latrines and not the Municipality. Therefore there is no necessity to look to the proviso as the conditions which bring the proviso into operation do not exist. I see that my brother Shah, before whom this Second Appeal was originally argued with my brother Heaton, said at p. 2 of the printed book: "Assuming the facts alleged by the plaintiff in the argument before us in

his favour, on reading clause (vi) and the proviso (*b*) (i) of section 59 it is clear that where the Municipality make provision for the cleansing of latrines by manual labour, or for conducting or receiving the sewage thereof into their sewers where the drainage system is in operation the latrines are cleansed by municipal agency within the meaning of clause (vi). The fact that the owner of the latrines has to make some arrangements to pass on the sewage from the latrines into the connecting sewers and then into the municipal sewers makes no difference". But the case was remanded for the trial of an issue whether, apart from supplying sewers as part of the drainage system, and apart from maintaining that system as a means of cleansing the private latrines, the Municipality in fact had made any provision for conducting or receiving the sewage of the plaintiff's latrines into the Municipal sewers during the years in question. That issue is found by the District Judge in the negative. The learned District Judge has found that none of the work of the connection between the sewer and the plaintiff's latrines was done by the Municipality, not even the branch connection, which is sometimes constructed by the Municipality. When that is done the owner has to pay a tax of 8 annas a year. In the remand judgment Mr. Justice Shah says: "At this stage I do not desire to express any opinion on the question whether by providing a general system of drainage and by putting up Municipal sewers near the premises of the plaintiff the Municipality can be said to have made provision for receiving the sewage of the latrines into the Municipal sewers. That is a question, which must be considered, if necessary, after the finding on the question of fact is received".

It seems to me that although the owner of private premises with private latrines may pay the whole of

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the expense of the connection between his premises and the manhole, still it can be said that the Municipality have made provision for the receiving of sewage from his private latrines by having laid down the sewer, with the manholes at intervals, with which connections are made with private premises. The making of the connection consisting of a few feet of pipe-line from the manhole to the limit of the owner's premises is a very minor matter, and if the Municipality provide the sewer and the manhole, then they have done what is required of them by the proviso (*b*) (i). It follows then that they are entitled to charge a special sanitary cess, provided it can be said that these private latrines on the plaintiff's premises are cleansed by Municipal agency. If the sewer was not in position, as it is, then the private latrines could not be cleansed except by manual labour. It is true that by another tax the plaintiff pays for the Municipal water which carries the sewage along the connecting pipe down to the sewer, but it cannot be said that these private latrines are cleansed, not by Municipal agency, but by the agency of the owner. I think it was clearly the intention of the Act that if the Municipality provide a sewer for receiving the sewage, and the owner of private latrines connects them with the sewer and then the Municipality provides the water, although it may be at an additional cost to the owner, for carrying the sewage from the latrines to the sewer, the latrines are being cleansed by Municipal agency, and the Municipality are entitled to levy a special sanitary cess. In my opinion, therefore, these appeals should be allowed and the plaintiff's suits dismissed with costs throughout. The cross-objections are disallowed with costs.

HEATON, J.:—I need not restate the facts and arguments which appear fully in the judgments of this

Court in the case which was remanded, and in the judgment of my Lord the Chief Justice which has just been delivered. When the Bench first heard the case, and I was a member of that Bench, we found that we could not arrive at any satisfactory decision because the facts were far too vague. The facts have now been made definite. The question is whether the plaintiff is or is not liable for a special sanitary cess. His liability depends upon the fulfilment of two conditions. First of all the private latrines must be cleansed by Municipal agency. Taking the facts which are either admitted, or stated in the remand judgment of the District Judge, I hold that these latrines are cleansed by Municipal agency. They are cleansed by the combined operation of the Municipal water system and the Municipal drainage system. That is what actually happens in practice. They are flushed with water which comes from the Municipal system, and that water carries away what is required to be carried away through the drainage pipes into the main sewer. The Municipal water system is organised and maintained by Municipal agency. The general drainage system is organised and maintained by Municipal agency also, and, therefore, I think that it can with certainty be said that, as things now stand, these latrines are cleansed by Municipal agency and not by private agency.

The second condition is that the Municipality shall have made provision for conducting or for receiving the sewage into the Municipal sewers from the private latrines. They certainly have not made provision for conducting the sewage. The whole of that has been done by the private owners, the plaintiffs. But I hold that the Municipality have made provision for receiving the sewage. They have done it in this way. They have first of all provided a general sewage system.

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That of course is essential. Without that there can be no provision for receiving the sewage. But it does not follow that because there is a general system, that therefore, there is provision for receiving the sewage from any particular private premises. What has happened appears on the facts stated by the District Judge. You cannot receive the sewage at every point into the main sewer. You have to make special provision for receiving it at the point at which you wish to receive it, and that is done in Ahmedabad by providing a manhole and the necessary facilities for connecting the subsidiary pipes with the main sewer. The manhole has been provided in such a way that the plaintiffs were able to connect the subsidiary sewer or drain, which they had made, directly with the main sewer. Seeing that the Municipality not only provided the general system including the main sewer, but also the manhole and the facilities which made it possible for the plaintiff to connect up his subsidiary system with the main system, I think that they had made provision for receiving the sewage. I, therefore, agree that the appeal should be allowed and that the claim should be dismissed with costs throughout.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1919. October 20.

KISONDAS GURU LAXMANDAS BAIRAGI (ORIGINAL PLAINTIFF No. 1), APPELLANT *v.* DHONDU WALAD TUKARAM NARVADE AND OTHERS (ORIGINAL DEFENDANTS AND PLAINTIFF No. 2), RESPONDENTS.*

Contract—Sale—Consideration—Past co-habitation, whether good consideration.

* Second Appeal No. 240 of 1918.