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EMPEROR v. KOYA PARTU

Beaumont C. J.

wives. The prisoner comes of a poor class and if he had chastised his wife moderately but not sufficiently to do her serious damage, probably no more would have been heard of the matter. But, it was a very brutal thing for a man to beat a woman with a heavy stick and hurt her in vital parts of her body causing such injuries that she died in two days.

The sentence which the learned trial Judge imposed on the accused was one year's rigorous imprisonment, and I think certainly that it is too short, and the sentence should be enhanced to three years' rigorous imprisonment.

MADGAVKAR, J. :—I agree. As a party to the decision in *Emperor* v. *Jorabhai*,[1] I would add that the reasoning there is as appropriate to criminal appeals dismissed summarily, as to those dismissed after admission, and I am unable therefore to accept the argument for the appellant, which seeks to distinguish the case on that ground.

K. S. S.

[1] (1926) 50 Bom. 783.

ORIGINAL CIVIL.

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Blackwell.

TRUSTEES OF THE PORT OF BOMBAY v. MUNICIPAL CORPORATION OF THE CITY OF BOMBAY.*

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January 6.

Civil Procedure Code (Act V of 1908), section 90, and Order XXXVI, rules 1, 2, 3, 5 (2) (c)—Special case stated for the opinion of the Court—Jurisdiction—Case whether "fit to be decided"—Declaration without relief—Specific Relief Act (I of 1877), sections 42, 45 (d)—Meaning of "legal remedy"—Courts not to interfere where Legislature has constituted a special tribunal to deal effectively with the dispute—City of Bombay Municipal Act (Bom. Act III of 1888), sections 518 and 520.

A dispute arose between the Trustees of the Port of Bombay and the Municipal Corporation of Bombay as to the liability of the Municipality to lay water mains and provide fire hydrants on an estate reclaimed and owned by the Port Trust. Both the parties to the dispute by consent stated a special case for the opinion

*O. C. J. Suit No. 2226 of 1928.

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of the High Court under section 90 and Order XXXVI of the Civil Procedure Code and submitted for its decision the question as to the statutory liability of the Corporation in the matter. They had not filed in Court any agreement of the nature provided for in rule 1 of Order XXXVI.

Held, (1) that as the parties had failed to frame and file in Court an agreement as required by rules 1 and 3 of Order XXXVI, Civil Procedure Code, the provisions of section 90 of the Code were not complied with;

(2) that the Court had no jurisdiction to decide the question under section 45 (*d*) of the Specific Relief Act, 1877, as the Trustees had a "specific and adequate legal remedy" given to them under sections 518 and 520 of the City of Bombay Municipal Act, 1888;

(3) that the question submitted was not "fit to be decided" by the Court within the meaning of Order XXXVI, rule 5 (2) (*c*) of the Civil Procedure Code, as the Court could only give a declaration without any substantial relief, and that a fresh suit on the strength of such a declaration would be barred as a remedy was available under sections 518 and 520 of the City of Bombay Municipal Act which gave power to the Governor in Council to grant substantial relief, as regards the matters in dispute.

The term "legal remedy" in section 45 (*d*) of the Specific Relief Act would include any remedy given by law including Statute Law and would not necessarily be confined to a legal remedy enforceable only in a Court of law.

Where the Legislature has constituted a special tribunal with special and effective powers for determining a dispute, the Court of law ought not to interfere by giving some partial decision in the form of a declaration which it cannot make effective and which will not necessarily end the dispute.

Bexley Local Board v. *West Kent Sewerage Board*[1]; *The Wolverhampton New Waterworks Co.* v. *Hawkesford*[2]; *Barraclough* v. *Brown*[3] and *Bull* v. *Attorney-General for New South Wales*,[4] referred to.

THIS was a special case stated under section 90 and Order XXXVI of the Civil Procedure Code.

The plaintiffs, the Trustees of the Port of Bombay, were the owners of a large area of reclaimed land known as the Wadala Estate. That area was in the course of development and was being laid out by the plaintiffs with roads, drains and Railway sidings. There were no water mains or Municipal fire hydrants on the said estate, the nearest Municipal water main being at a distance of about 172 feet. There was also a large Municipal water main of 48 inches diameter at a distance of about 1,400 feet from that estate and the plaintiffs, for the purposes of the said estate, brought

(1) (1882) 9 Q. B. D. 518.
(2) (1859) 6 C. B. (N. S.) 336.
(3) [1897] A. C. 615 at p. 622.
(4) [1916] 2 A. C. 564.

water from the said water main by a small 8 inch diameter water pipe and distributed it through pipes and hydrants laid on their estate. There were also other smaller municipal water mains near the estate from which a supply of water could be obtained by the plaintiffs from the Municipal Corporation. The Municipal Corporation contemplated the removal of the small water mains and substituting in their place two water mains of 18 inches and 6 inches diameter respectively the latter of which was to be fitted with fire hydrants. The plaintiffs applied to the Municipal Corporation to lay water mains and provide fire hydrants on the estate at the cost of the Corporation. The Corporation declined to do so, and contended that they had made adequate provision for the protection of life and property as required by section 61 (*k*) of the City of Bombay Municipal Act, 1888. They further contended that as the plaintiffs were not prepared to bring the roads constructed and to be constructed on the said estate up to the Municipal standard, and to hand over the same to the Corporation or to undertake to do so, the said estate constituted a private development of the Trustees and the Corporation would not be justified in laying water mains and providing fire hydrants on the estate at the expense of the Corporation.

The Trustees stated that at the then stage of development, they would not be justified in handing over the roads or in giving the undertaking to the Corporation and that it would not also be desirable to bring up the roads to the Municipal standard. They however contended that the provision for water mains, for fire service and for all other general purposes, was a matter of vital necessity and that the Corporation was under a statutory liability to lay the water mains and provide fire hydrants on the said estate. They also contended

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that the said liability was absolute and was not dependent upon whether these roads were up to the Municipal standard or whether they were handed over to the Corporation. The estimated cost of laying the water pipes and fire hydrants was about Rs. 1,70,106.

The Trustees and the Corporation agreed to state the following questions of law for the opinion of the High Court under section 90 and Order XXXVI of the Code of Civil Procedure :—

"Whether upon the facts stated the said Corporation is under statutory liability (*a*) to lay water mains, and (*b*) to provide fire hydrants on the said Wadala Estate at the expense of the said Corporation."

They further provided that if the answers to the questions were in the affirmative, judgment should be entered for the Trustees with costs and if the answers were in the negative, judgment should be entered for the Corporation with costs.

O'Gorman and *B. J. Desai*, for the plaintiffs.

Sir Jamshed Kanga, Advocate General, and *Coltman*, for the defendants.

MARTEN, C. J. :—This is a special case stated under section 90 and Order XXXVI of the Civil Procedure Code, and laid by my orders under rule 64 of the Original Side Rules before a Bench of two Judges so as to expedite its final disposal by this High Court. It arises between the Bombay Port Trust as plaintiffs and the Bombay Municipal Corporation as defendants. The question submitted for the opinion of the Court is :—

"Whether upon the facts above stated the said Corporation is under statutory liability (*a*) to lay water mains, and (*b*) to provide fire hydrants on the said Wadala Estate at the expense of the said Corporation."

The dispute is not as to the general statutory obligations of the Municipal Corporation to make adequate

provision for the supply of water and for protection against fire within its statutory area, but as to what are its particular obligations in this respect as regards the Wadala Estate which is owned by the Port Trust. The Corporation contend that the Wadala Estate is in effect a private estate of the Port Trust, and that the Corporation has satisfied its statutory duties if its mains are brought to the boundary of the Wadala Estate, and if it is then left to the Port Trust as the owners of that Estate to make or at any rate to pay for all communicating pipes and hydrants which may be required. The Port Trust on the other hand contend that the Corporation are bound to lay and pay for all necessary mains and hydrants whether within or without this Estate.

During the course of the hearing we required certain amendments to be made in the case, and in particular in paragraph 2 so as to show the correct figures as regards the development, etc., of the Wadala Estate as at the date of the filing of the case in October 1928. We also required certain additional maps to be exhibited. But for present purposes it will be sufficient to say that this estate is shown on the plan Exhibit A, and that as will be seen therefrom, part of the estate is already developed for the purposes of the Port Trust Railway and other purposes, but part is still undeveloped and is vacant land. Further the water pipes within the estate and shown in red lines have all been laid by the Port Trust under their own statutory powers, and though they contend that the Corporation ought to have done this and paid for it, no claim for a refund is made. The plan also shows various mains of the Corporation either actual or projected lying outside the estate.

At an early stage in the arguments the Bench enquired what jurisdiction it had to decide the question submitted. In reply we were referred to sections 45

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and 50 of the Specific Relief Act, which give certain limited powers to the Court to enforce the performance by a Corporation of its duties, in lieu of issuing a writ of mandamus. At the time I understood that the plaintiffs had no other specific and adequate legal remedy within the meaning of proviso (*d*) to section 45. Accordingly it seemed to me that if we thus had the power under section 45 to "make an order requiring any specific act to be done or forborne," we must also have the lesser power of indicating by mere declarations or answers to questions, what in our opinion were the legal rights of the parties.

The case accordingly proceeded and was argued at great length by counsel on both sides over the greater portion of three days, during which a large number of sections of the City of Bombay Municipal Act were discussed in detail, including in particular sections 61 (*b*) and (*k*), 145, 170, 261, 266 and 271. It was not, however, until near the end of Mr. Desai's final speech in reply for the plaintiffs that our attention was for the first time drawn to sections 518 and 520 of the Act. Those sections contain stringent powers enabling the Governor in Council to enforce the performance by the Corporation of certain statutory duties, including those in question in this case. I need not detail the sections, but (*inter alia*) they enable the Governor in Council to appoint some person to carry out these duties, and to direct the expenses to be paid out of the Municipal funds, and also to order the bank, in which the Municipal fund is lodged, to pay the same.

The Bench thereupon required counsel to deal once more with the question of jurisdiction, but also allowed the arguments on the main points to be concluded. It was then apparent that no application would lie under section 45 of the Specific Relief Act, for proviso (*d*) was not satisfied, inasmuch as the applicant would have

another "specific and adequate legal remedy" under sections 518 and 520 of the Municipal Act. Some argument took place on the meaning of the words "legal remedy," but in my judgment they would include any remedy given by law including statute law and would not necessarily be confined to a legal remedy enforceable only in a Court of law.

It next had to be admitted that putting aside the Specific Relief Act, no jurisdiction could be pointed to as enabling a civil suit to be brought for a declaration in terms of the question submitted to us. It would not lie, for instance, either in contract or in tort, even supposing the Court in a suitable case was prepared to make a mere declaration without granting any substantial relief. It was, however, strenuously urged that section 90 and Order XXXVI of the Civil Procedure Code themselves gave jurisdiction to the Court, and indeed that once the parties had agreed to refer any particular dispute to the Court, the Court was bound to decide it whatever its character, subject to the Court being satisfied under Order XXXVI, rule 5 (2) (*c*) that it was "fit to be decided". The latter qualification was made in answer to an observation from the Bench that some disputes must be excluded from this wide proposition, e.g., matters concerning the Revenue, or the orders of the Governor and his Members of Council, which are expressly excluded from the jurisdiction of the High Court by sections 106 (2) and 110 of the Government of India Act. So, too, the Court could hardly be obliged to decide a mere dispute as to a gambling debt, because the parties so desired. (See *Sir Dorabji Tata* v. *Lance*[1]).

But a closer investigation of Order XXXVI shows that there are other qualifications for a case stated. Rule 1 obliges the parties to enter into an agreement in

[1] (1917) 42 Bom. 676 : 19 Bom. L. R. 697.

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writing stating the question in the form of a case for the opinion of the Court, and providing that upon the finding of the Court with respect to such question (*a*) a sum of money shall be paid by one party to the other, or (*b*) some property moveable or immoveable shall be delivered, or (*c*) " one or more of the parties shall do or refrain from doing some other particular act specified in the agreement ".

Now where in the case before us do I find any of these provisions satisfied? Provisions (*a*) and (*b*) are certainly not satisfied. Nowhere in the case do I find any agreement by the parties to pay money or deliver property consequent upon our finding on the question submitted to us. Nor do I find any agreement falling within provision (*c*). The case begins by stating that the parties have concurred in stating the question of law arising therein in accordance with the Code for the opinion of the Court. It ends by setting out the question, and stating in effect that judgment with costs is to be entered for the plaintiffs or the defendants according as whether the question is answered in the affirmative or the negative. It is true that clause 13 states that the estimated cost of laying the pipes and hydrants in question is about Rs. 1,70,106 " which would be the value of the subject-matter of this agreement under Order XXXVI, rule 2 ". But nowhere do I find any express agreement within rule 2 to do or refrain from doing any particular act, e.g., to lay these pipes and hydrants, supposing we thought the Corporation ought to do so.

Further, the filing of a proper agreement appears to me to be a necessary condition. Rule 3 provides that the agreement " if framed in accordance with the rules hereinbefore contained, may be filed in Court." Rule 4 provides that where the agreement has been filed the parties to it shall be subject to the jurisdiction of the

Court and shall be bound by the statements contained therein. Rule 5 (2) requires the Court to be satisfied that the agreement was duly executed by the parties. And I can see a very good reason for imposing the conditions contained in rule 1 (1), as they would prevent the Court from being burdened with mere academic discussions or other matters in which the parties had no substantial interest, and could not file an ordinary suit.

Accordingly it seems to me that on this ground alone the case does not comply with the Code, for the operation of section 90 is limited by the concluding words " in the manner prescribed," and, in my opinion " the manner prescribed ", viz., by Order XXXVI, has not been complied with. But as counsel did not raise this point, and as I appreciate the danger of giving decisions on points not argued at the bar, I will revert to Order XXXVI, rule 5 (2) (*c*), which was argued.

Do then we think this case is one " fit to be decided " by us within the meaning of rule 5 (2) (*c*) irrespective of the particular objection I have just dealt with? If we do decide it, all we are asked to do and therefore at the most are empowered to do is to give our opinions whether the Corporation is under a statutory liability to lay water mains and hydrants on this estate. The judgment to be entered will, therefore, be a mere declaratory judgment apart from costs. If either party should choose to ignore it, I doubt whether the other party would have any remedy. They could not execute the judgment, for it would be a mere declaration. Nor could they bring a fresh suit founded upon the declaration, for the remedy available under sections 518 and 520 of the City of Bombay Municipal Act would, in my opinion, exclude any application under section 45 of the Specific Relief Act. Indeed I regard sections 518 and 520 of the Municipal Act as the crux of the situation. I am sure that the remedies thereby given are much wider

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and more efficacious than any remedy this Court or the Court of Chancery itself could be induced to give. Normally the Court has a very natural reluctance to order or superintend the execution of large engineering schemes at all. Its usual remedy for disobedience to such mandatory orders as it does pass is *in personam* by imprisonment or sequestration. But sections 518 and 520 go much further. The Governor in Council may thereby authorize somebody else to lay the mains in dispute, and may force the Corporation's bankers to pay. And so the Gordian knot can be cut speedily and effectively.

There is also another important point to consider, viz., where, as here, the Legislature has constituted a special tribunal with special and effective powers for determining a dispute of this character, ought we to interfere by giving some partial decision which we cannot make effective, and which accordingly will not necessarily end the dispute? In my opinion we should not. I am always cautious as to granting mere declarations where no substantial relief is claimed. Thus in *Gray* v. *Spyer*[1] it was said by Lord Justice Younger, sitting as a Judge of first instance, that that case (pp. 556, 557)

> "very conveniently illustrates the ineffectiveness, at a pinch, of those abstract declarations which in the opinion of many judges are too much indulged in under modern procedure. . . . In truth these abstract declarations, whatever else they may be, are neither law nor equity. Perhaps when that is more clearly recognised they will, to the general advantage, be less promiscuously employed."

The actual decision in that case was reversed on appeal, but on this point the Master of the Rolls said (p. 27) :—

> "I agree with him (trial Judge) that claims for declaration should be carefully watched. Properly used, they are very useful; improperly used, they almost amount to a nuisance."

(See also *Sheo Singh Rai* v. *Mussumut Dakho*[2] and section 42, Specific Relief Act, 1877.) And in the present case the important fact that the substantial

[1] [1921] 2 Ch. 549, [1922] 2 Ch. 22. [2] (1878) L. R. 5 I. A. 87 at p. 111

relief can be granted by the Governor in Council leads me to the conclusion that the party aggrieved should first complain to the Governor in Council under section 518, and that this Court should not interfere at the present juncture.

On general grounds, too, I think this would be wise. The Corporation and the Port Trust are two statutory bodies with wide and most important duties to perform for the welfare of Bombay and its inhabitants. And if these two bodies or their expert advisers disagree over some important engineering scheme, the ordinary law Courts are hardly the best places for deciding their dispute, particularly if it involves matters of general policy in the development of Bombay. Accordingly one can well understand the Legislature setting up a special tribunal under section 518.

In the result, therefore, I would hold that under all the circumstances the question stated in the case is not fit to be decided by this Court. It is accordingly unnecessary to consider whether the mere agreement of the parties to state a case can give us any jurisdiction to decide a question which we could not decide in an ordinary suit. In *Guaranty Trust Company of New York* v. *Hannay & Company*[1] there was a difference of opinion in the English Court of Appeal as to whether the Court had power to make a mere declaration, although no cause of action existed. The majority held that the Court had that power.

So, too, it is unnecessary to decide whether our jurisdiction is wholly ousted by section 518 of the Act as regards a dispute of this nature. In *Bexley Local Board* v. *West Kent Sewerage Board*[2] the Court held that the sole tribunal under the statute then in question was the Local Government Board, and accordingly the

[1] [1915] 2 K. B. 536.

[2] (1882) 9 Q. B. D. 518.

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Court declined to hear a case stated by consent by both parties, although the Local Government Board itself had also consented. But even if the tribunal under the statute is not thereby constituted the sole tribunal, the Court may nevertheless in appropriate cases direct the parties to resort to it first. In *The Wolverhampton New Waterworks Co.* v. *Hawkesford*[1] Mr. Justice Willes said as follows (p. 356):—

"There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common-law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue."

I may also refer to *Barraclough* v. *Brown*[2] and *Bull* v. *Attorney-General for New South Wales*[3] for other instances where the Court left the parties to the remedies available before the Special Tribunal.

My conclusion then is that we ought to decline to decide the question asked us in this case, standing as it does by itself and without any claim for substantial relief, and should leave the parties to their remedies for substantial relief under sections 518 and 520 of the Municipal Act, which apparently have been overlooked hitherto.

I would, therefore, dismiss the case, and leave each party to bear its own costs. I naturally regret that the time of the Court has thus been occupied over points

[1] (1859) 6 C. B. N. S. 336. [2] [1897] A. C. 615 at p. 622.
[3] [1916] 2 A. C. 561.

which in the end have been left undecided, but it may be and I hope is so that their full discussion in open Court has not been fruitless, as it has shown each party where its strength and weakness lie both in fact and in law, and with leading public bodies such as those before us, this should go far towards the solution of the disagreement that has unfortunately arisen between them.

BLACKWELL, *J.* :—I concur, and have nothing to add.

Attorneys for plaintiff: Messrs. *Little & Co.*

Attorneys for defendant: Messrs. *Crawford, Bayley & Co.*

Suit dismissed.

B. K. D.

APPELLATE CIVIL.

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Patkar.

SHANKARBHAI DAJIBHAI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* BAI SHIV, WIDOW OF NARSI DESAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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January 30.

Bhagdari Act (Bom. Act V of 1862), section 3—Alienation by Bhagdar of unrecognised portion of a bhag—Alienation of similar portion of bhag by the Bhagdar's widow—Reunion of bhag—Reversioners—Suit to declare alienation invalid during the lifetime of the widow—Maintainability of suit by reversioners—Limitation—Indian Limitation Act (IX of 1908)—Articles 91, 120 and 125.

The property in dispute belonged to one N, who held it on the Bhagdari tenure. On October 13, 1915, N executed a deed of conveyance relating to this property in favour of defendant No. 2 his mortgagee and defendant No. 1 his wife for Rs. 4,999. Out of the consideration money the amount of Rs. 2,500 was settled as due to the mortgagee while the balance of Rs. 2,499 represented cash consideration paid by N's wife, defendant No. 1, to N. Within a few days of this deed, defendants Nos. 1 and 2 partitioned the property half and half. Entries were accordingly made in the revenue records and defendants Nos. 1 and 2 continued in possession of their respective shares until N's death in 1921. On N's death his widow, defendant No. 1, passed a sale deed dated April 5, 1922, in favour of defendant No. 2 in respect of the property in her possession for Rs. 2,499. On February 7, 1924, the plaintiffs who were the reversioners of N filed a suit for a declaration that the two sale deeds of October 13, 1915, and April 5, 1922, respectively were void and invalid against them and for the appointment of a receiver to conduct the management of the property of the deceased N during the lifetime of defendant No. 1.

*First Appeal No. 360 of 1925.