APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

1932
October 5

THE SAUNDATTI YELLAMA MUNICIPALITY BY ITS PRESIDENT (ORIGINAL PLAINTIFF), APPELLANT *v.* SHRIPADBHAT SHESHABHAT JOSHI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Bombay District Municipal Act (Bom. Act III of 1901), section 59, sub-clause (x) and section 81A—Pilgrims attending shrine—Levy of tax—Farming out levy of tax on pilgrims illegal—'Tax', meaning of.

Section 81A of the Bombay District Municipal Act (Bom. Act III of 1901) gives a Municipality power to lease a levy of a 'toll', but gives it no power to farm out the levy of an impost on pilgrims which is described in the Act, [section 59, sub-clause (x)] as a 'tax'.

SECOND APPEAL against the decision of V. M. Ferrers, District Judge, Belgaum, confirming the decree passed by R. G. Shirali, the Subordinate Judge at Bail-Hongal.

Suit to recover money.

Saundatti Yellama Municipality had levied a "tax" on the pilgrims visiting the shrine of Yellama at Saundatti in the District of Belgaum and a toll on the vehicles used by the pilgrims under the powers conferred upon the Municipality by section 59, sub-clauses (*iii*) and (*x*) respectively of the Bombay District Municipal Act III of 1901. By a lease dated March 20, 1926, the Municipality let to the defendant for the sum of Rs. 4,500, the right of recovering the toll and the tax from March 15, 1926, until October 6, 1926, from pilgrims to the shrine of Yellama, vehicles and animals. In the contract the rates to be charged on the persons, vehicles and animals were specified. Defendant paid part of the consideration but the last instalment for a sum of Rs. 1,076-13-0 remained unpaid. The Municipality sued to recover this amount from the defendant.

Defendant admitted the execution of the lease but contended that the lease was void as it was beyond the power of the Municipality to grant him the right to collect

*Second Appeal No. 193 of 1930.

fees from pilgrims attending this shrine. The Subordinate Judge held that the lease was opposed to law and public policy and hence unenforceable. His reasons were as follows :—

"The right includes the right to collect sums on vehicles (1) it is confined to vehicles used only by the pilgrims; (2) it can be exercised only during the time of the Jatra; (3) it includes the right to collect poll-tax of one anna per pilgrim; (4) heading of the printed prospectus of the terms distinctly mentions that what is let is the 'pilgrim tax'. All these facts show beyond doubt that what lessee is allowed to collect by the lease is "a tax on the pilgrim" within the meaning of clause (*x*) of section 59 of the District Municipal Act of 1901 and not a toll which is the one indicated in clause (*iii*) of the sub-section. The mere fact that the right includes the imposition of taxes on vehicles and animals does not make the taxes a toll. The tax in question not being a toll, there seems to be no provision expressly or impliedly authorising its letting by the Municipality. Section 81A of the Act refers only to tolls. It cannot be extended to other taxes. (11 Ind. Cases 669 and 30 Bom. L. R. 715 at p. 719.)"

On appeal the District Judge agreed with the opinion of the Subordinate Judge and dismissed the appeal. His reasons were as follows :—

"The Municipalities Act, by section 81A expressly conferred upon the Municipality the right to lease a levy of any toll. The same Act by section 3 (*14*) has this definition: 'Tax shall include any toll, rate, cess, fee or other impost leviable by this Act.' It is evident, therefore, that the word has much wider connotation than the word toll. There are many imposts which are taxes which would not be included within the meaning of the word 'toll'. The right to lease which the Municipality enjoys under section 81A was the right to lease a levy of any toll. It has not the right to lease a levy of any tax. The express power to farm out tolls negatives an implied power to farm out taxes. In so far as the right to collect poll-tax of one anna imposed upon the pilgrims was a part of the consideration for this contract, the contract was for an unlawful consideration."

Plaintiff preferred a second appeal to the High Court.

H. B. Gumaste, for the appellant.

D. R. Manerikar, for respondent No. 1.

BEAUMONT C. J. This is an appeal from a decision of the District Judge of Belgaum, who confirmed the decision of the Subordinate Judge of Bail-Hongal. The plaintiff-Municipality sue defendant No. 1 (with defendants Nos. 2 and 3 as sureties) for the balance of a sum of Rs. 1,076-13-0

1932

SAUNDATTI YELLAMA MUNICIPALITY v. SHRIPADBHAT SHESHABHAT

Beaumont C. J.

which he had to pay under a contract in the form of a lease dated March 20, 1926, (exhibit 16), by which the Municipality let to the defendant for the sum of Rs. 4,500 the right of recovering *jakat* from March 15, 1926, until October 6, 1926, from all pilgrims to Shree Yellamma Devi, vehicles and animals. Then, in the contract the rates to be charged on persons, vehicles and animals are specified. The first charge is on every person above five years of age one anna and the other charges are on animals and vehicles. The defendant paid part of the consideration, but he has not paid the last instalment for which the Municipality now sue.

The defence of the defendant is that it was beyond the power of the Municipality to grant him the right to collect fees from pilgrims attending this shrine. That question turns on the construction of the Bombay District Municipal Act. Under section 59 the Municipality may impose for the purposes of this Act any of the following taxes. Then sub-clause (*iii*) includes a toll on vehicles and animals entering the District but not liable to taxation under the preceding clause, and sub-clause (*x*) includes a tax on pilgrims resorting periodically to a shrine within the limits of the Municipal District. So that sub-clause (*iii*) mentions a toll, and sub-clause (*x*) mentions a tax. Then, section 81A provides that it shall be lawful for the Municipality to lease the levy of any toll that may be imposed under this Act by public auction or private contract. Under the definition clause 3, sub-clause (*14*) it is provided that tax shall include any toll, rate, cess, fee or other impost leviable under this Act. That is not properly speaking a definition of "tax"; it is only a statement that where the context so admits "tax" is used in a comprehensive sense as including a variety of charges. In section 59, to which I have already referred, in the phrase "the Municipality may impose any of the following 'taxes'" I think "taxes" is used in the comprehensive sense referred to in the definition, and includes various

imposts. But when you come to sub-clause (*x*) under which the Municipality may charge a tax on pilgrims resorting periodically to a shrine, it is clear that the word "tax" is not used in the comprehensive sense. It cannot there include a rate or a cess, which would be inappropriate words with which to describe a levy on pilgrims. The word "tax" there seems to me to be used in the sense of a toll, that is to say, a payment charged for a particular benefit, namely, the right to attend a shrine. But, in my opinion, in construing section 81A, which gives the Municipality power to lease the levy of any toll, we must apply the dictionary which the Legislature has provided and hold that the section confers on the Municipality power to lease the levy of what is described in the Act as a toll and nothing else. Undoubtedly, this particular levy on pilgrims is described rightly or wrongly not as a toll, but as a tax. On the whole, therefore, I think that the view of the lower Courts was right, and that the Municipality had not the power to farm out the levy of this imposition on pilgrims which is described as a "tax", though I think it might have been more correctly described as a "toll."

Mr. Gumaste on behalf of the appellant has argued that apart from section 81A the contract can be justified under section 40 of the Act. But I think the subject-matter of this lease does not fall under section 40, which gives a Municipality power to lease any moveable or immoveable property which may have become vested in it. This levy had not become vested in the Municipality at the date of the contract. Nor do I think that the agreement can be upheld on the principle of estoppel, the case of the defendant being that the contract is *ultra vires* the corporation. The corporation cannot by estoppel acquire a power to do something which is outside its legal capacity. It is, I think, clear that, if such a case had been raised, the defendant, having had the advantage of this contract, would have to account to the Municipality for any benefit he

1932

SAUNDATTI YELLAMA MUNICIPALITY v. SHRIPADBHAT SHESHABHAT

Beaumont C. J.

derived under it under section 65 of the Indian Contract Act. No such claim was raised in either of the lower Courts, and the evidence appears to show that the defendant in fact made a loss out of the contract. That, indeed, was admitted by the Municipality's own witness. On the face of that admission, although no doubt accounts have not been taken, I think that it would be wrong to remand the case and direct an issue to be tried as to whether the defendant made any profit under section 65 of the Indian Contract Act. For these reasons I think the judgments of the lower Courts were right and that the appeal must be dismissed with costs.

RANGNEKAR J. The facts of the case which has given rise to this appeal have been set out in the judgment of my Lord the Chief Justice, and it is not necessary for me to refer to them in detail.

The Saundatti Municipality had levied a "tax" on the pilgrims visiting the shrine of Yellama at Saundatti in the District of Belgaum and a "toll" on the vehicles used by the pilgrims. The "toll" and the "tax" were levied under the powers conferred upon the Municipality by section 59, sub-clauses (*iii*) and (*x*) respectively of the Bombay District Municipal Act, III of 1901. The right to collect the toll and the tax was farmed out by the Municipality under the contract in question to the defendant for Rs. 4,500. Of this sum a large part has been paid and the suit is in respect of the balance. The defendant contended that the contract was *ultra vires* the Municipality. Both the lower Courts have accepted the contention, and hence this appeal.

The only question on the appeal, therefore, is whether the contract was *ultra vires* the Municipality. The answer to the question depends on a true construction of section 59 of the Bombay District Municipal Act, read with some other relevant sections of the Act.

Section 59 gives the Municipality, subject to any orders which the Governor in Council may make, power to impose for the purposes of the Act, certain taxes. Taxes which can thus be imposed are set out in the section itself, and looking at the description of the taxes one thing is clear that section 59 refers to various kinds of imposts, using in each case a word or a name to signify the appropriate impost. Thus, we have in the section, a rate, a tax, a toll, an octroi on animals and goods, a cess, and so on. It is clear from the section that the word "tax" used in the body of the section is used in a general or comprehensive sense, and this is in accordance with the meaning given in the interpretation section. Section 3, sub-clause (*14*), runs as follows: "'Tax' shall include any toll, rate, cess, fee or other impost leviable under this Act." It is clear that this is not a definition of the term "tax." The word "includes" in interpretation clauses is intended to be *enumerative*, not exhaustive.

Now, a charge of the kind described in sub-clause (*x*) would be more aptly described as a "toll" rather than a "tax." Mr. Gumaste, therefore, says that when the legislature has used the word "tax" in sub-clause (*x*) of section 59 it is a mistake, and that we should substitute for it the word "toll." I am unable to accept the contention, having regard to the fact that various kinds of imposts are differently described in section 59, and the word "tax" in the body is used in a comprehensive sense. I find there are many indications in the Act itself in which particular kinds of imposts are described as "taxes" and certain others described as "tolls." Then, the Act was amended in 1930, and the amendment refers to this particular kind of tax on pilgrims, and even in the amended section the legislature has adhered to the term "pilgrim-tax" and made no change in the wording of the tax on pilgrims in section 59. Therefore, although I think that properly speaking a tax on pilgrims is a toll, I do not think it is open to us to ignore the language used by the legislature in the statute and to hold that the

1932

SAUNDATTI YELLAMA MUNICIPALITY v. SHRIPADBHAT SHESHABHAT

Rangnekar J.

"tax" on the pilgrims referred to in sub-clause (x) is a "toll."

Section 81A gives the Municipality the power to lease a right to levy tolls which may be imposed by the Municipality under this Act. It follows from this section that the Municipality has no power to lease a right to levy any "tax" or any other kind of impost other than a toll, for it is clear law that the powers of a corporation created by statute are limited by the statute itself, and what a corporation is not expressly authorised to do, it must be taken to have been impliedly prohibited by the statute. Therefore, the contract, so far as it gave the defendant the right to collect the "tax" on pilgrims, was *ultra vires* the Municipality. Part of the consideration was therefore unlawful. Then, the general rule is, that when you cannot sever the illegal from the legal part of a contract, the contract is altogether void. (*Kristodhone Ghose* v. *Brojo Gobindo Roy.*[1]) Here, it is conceded, and it is obvious, that there was one single consideration for two objects, and the part that was legal—that is one relating to collection of tolls—cannot be severed from the illegal. That being so, the whole contract was void under section 24 of the Indian Contract Act.

Mr. Gumaste refers to section 40 of the Act. I do not think the taxes to be imposed under section 59 of the Act are "property moveable and immoveable" within the meaning of that section. Therefore, I think the learned Judge was right in holding that the contract in the suit which included the right to levy tolls on vehicles coming to this shrine and a right to levy tax on pilgrims visiting this shrine was *ultra vires* the Municipality.

Mr. Gumaste next argued that the defendant was estopped from raising this contention. I do not think the argument is sound. The principle of estoppel by conduct applies to

[1] (1897) 24 Cal. 895.

corporations, but subject to this, that if the act done was in itself *ultra vires* the corporation, no conduct of the body can have the effect of estopping it from setting up its want of capacity to do the act. There is a clear distinction between the doing of an act which is permitted by the Act but which is not done in any of the modes indicated by the statute and the doing of an act which is prohibited by it, and when a contract such as this is, as I have held it is, *ultra vires*, in my opinion the rule of estoppel cannot be relied upon in order to validate that which was forbidden by the statute.

The next point taken by Mr. Gumaste is that in any case he is entitled to the benefit of section 65 of the Indian Contract Act and he relies on a decision of the Privy Council in *Harnath Kuar* v. *Indar Bahadur Singh*.[1] This position is not challenged by the learned counsel for the respondent; he has fairly conceded that it was open to the Municipality to rely on the principle of that section, but he argues, and in my opinion rightly, that the plaintiff never put forward any such case and never sought any issue as to whether the defendant was not bound to restore the advantage which he had received under the agreement which under the statute was void. I do not think, therefore, it would be proper to allow Mr. Gumaste to raise this case for the first time at this stage. Apart from this, there is a fatal answer to the argument. The record shows that it was admitted by the plaintiff that the defendant did not make any profit in this transaction; on the other hand he had suffered a loss. Further, when the defendant asserted that he had suffered a loss of Rs. 2,500, there was no cross-examination on the point. In this state of things, even if I was inclined to grant a remand, I do not think any useful purpose would be served by doing so.

Finally, there is one more point to which I would like to refer. On the question of construction of section 59

[1] (1922) L. R. 50 I. A. 69, s. c., 45 All. 179.

1932

SAUNDATTI YELLAMA MUNICIPALITY v. SHRIPADBHAT SHESHABHAT

Rangnekar J.

Mr. Gumaste wanted to rely on and refer to the opinion of the Legal Remembrancer, which, he said, was in his favour. He relied on a decision of the Calcutta High Court in *Mathura Mohan Saha* v. *Ram Kumar Saha*,[1] in which it was held that it was open to the Court in construing a statute to consider the interpretation put upon it by those whose duty it was to construe, execute and apply the statute. The learned Judges in support of this proposition referred to a previous decision of theirs in *Baleshwar Bagarti* v. *Bhagirathi Dass*.[2] On looking into that case, I find that two cases which seem to be American cases were relied upon as an authority for the proposition. It is not necessary for me to examine this view closely, but, with great respect to the learned Judges, I am unable to agree that the opinion of the Legal Remembrancer, even assuming it was his duty to construe it or to execute or apply the statute, is relevant in a case where the construction of the statute is the only question. I think the opinion of the Legal Remembrancer in this case was irrelevant and should not have been admitted. For these reasons I agree that the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

[1] (1915) 43 Cal. 790. [2] (1908) 35 Cal. 701.

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Blackwell.

1932 *September 2*

NARAYANRAO VITHAL SAYANNA AND ANOTHER (ORIGINAL APPLICANTS), APPELLANTS *v.* SOLOMON MOSES AND OTHERS (ORIGINAL RESPONDENTS), RESPONDENTS.*

Letters Patent of the Bombay High Court clause 15—*Contempt of Court by persons some of whom are parties to a suit and others not—Order in proceedings for contempt—Contempt of criminal nature—Whether appeal competent from such order.*

Publishing of comments upon a pending trial by persons some of whom are parties to the suit and some of whom are not, constitutes a contempt of a criminal nature.

*O. C. J. Appeal No. 25 of 1931 from application in suit No. 1416 of 1929.