

## APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

THE DISTRICT LOCAL BOARD, POONA (ORIGINAL DEFENDANT), APPELLANT  
v. VISHNU RAGHOB WADERKAR (ORIGINAL PLAINTIFF), RESPONDENT.\*

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*Bombay Local Boards Act (Bom. Act VI of 1923), section 136—Action based upon a breach of contract—Notice not necessary.*

An action based upon a breach of contract does not fall within the ambit of section 136 of Bombay Local Boards Act, 1923, and therefore a failure to comply with the provisions of that section affords no bar to the suit.

*Manohar Ganesh Tambekar v. Dakor Municipality,*<sup>(1)</sup> *Municipality of Faizpur v. Manak Dulab,*<sup>(2)</sup> *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay,*<sup>(3)</sup> *Bradford Corporation v. Myers,*<sup>(4)</sup> followed.

*Baban Hemraj v. The City Municipality, Poona,*<sup>(5)</sup> distinguished.

APPEAL against the Order passed by J. R. Dhurandhar, Assistant Judge at Poona, reversing the decree passed by M. T. Mehta, Subordinate Judge at Poona.

Suit for damages.

Facts material for the purposes of this report are stated in the judgment of Patkar J.

*K. H. Kelkar*, for the appellant.

*P. B. Gajendragadkar*, for the respondent.

PATKAR J. In this case, the plaintiff sued to recover Rs. 1,777-8-0 as damages from the District Local Board of Poona, for breach of a contract entered into on February 8, 1926, with the District Local Board to construct a building at Junnar for the use of the office of the Sub-Inspector of Police. The learned Subordinate Judge held that the suit was barred under section 136 of the Bombay Local Boards Act, 1923, Bom. Act VI of 1923, which runs as follows :—

“No suit shall be commenced against any local board, or against any officer or servant of a local board, or any person acting under the orders of a local board, for

\*Appeal from Order No. 54 of 1931.

<sup>(1)</sup> (1896) 22 Bom. 289.

<sup>(2)</sup> (1901) 25 Bom. 387.

<sup>(3)</sup> (1897) 22 Bom. 637.

<sup>(4)</sup> [1916] 1 A. C. 242.

<sup>(5)</sup> (1921) 46 Bom. 123.

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anything done, or purporting to have been done, in pursuance of this Act, without giving to such local board, officer, servant, or person one month's previous notice in writing of the intended action and of the cause thereof, nor after three months from the date of the act complained of."

The suit was filed more than three months after the accrual of the alleged cause of action.

On appeal, the learned Assistant Judge held that section 136 of the Bombay Local Boards Act had no application to a suit based on a contract.

Section 136 of the Local Boards Act is framed in terms of section 167 of the Bombay District Municipal Act III of 1901, similar to section 48 of the Bombay District Municipal Act (II of 1884) and section 527 of Bombay Act III of 1888. It was held by the Full Bench in *Manohar Ganesh Tambekar v. Dakor Municipality*<sup>(1)</sup> that the provisions of section 48 of Bombay Act II of 1884 do not apply to actions for the possession of land brought against a Municipality. Ranade J. at p. 299 observed :—

"Actions based on contracts, and claims in the nature of ejection, have been accordingly held not to fall within the scope of this section--*Mayandi v. McQuhae*."<sup>(2)</sup>

And again at page 301 observed:—

"Claims based on contract can never be included under this section for the simple reason that they are not claims 'for anything done or purporting to have been done in pursuance of the Act'. Claims for the specific performance of a contract to sell or lease land will not, therefore, fall within the section."

In the case of *Municipality of Faizpur v. Manak Dulab*<sup>(3)</sup> it was held that section 48 of the Bombay District Municipal Act, Amendment Act (II of 1884), does not apply to a suit for the specific performance of a contract or for damages for breach thereof. It was observed at p. 639 as follows :—

"It is thus a suit for specific performance of a contract, or for damages for breach thereof. Such a suit is not an action for anything done or purporting to be done in pursuance of the Bombay District Municipal Act; for the Act, though it may give the municipality power to make contracts, does not authorize them to refuse to perform them, and no section of the Act has been quoted as one under which they are now purporting

<sup>(1)</sup> (1896) 22 Bom. 289.

<sup>(2)</sup> (1878) 2 Mad. 124.

<sup>(3)</sup> (1897) 22 Bom. 637

to act. That section 48 does not apply to actions on contracts was ruled in *Mayandi v. McQuhae*,<sup>(1)</sup> and was also stated in the judgment of Ranade, J., in *Manohar v. The Dakor Municipality*.<sup>(2)</sup>

In *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay*<sup>(3)</sup> it was observed by Sir Lawrence Jenkins at p. 393 as follows :—

“There is another mode of approaching this case. It is established that notice is not required where the action is brought on a contract: for the conduct leading to the action is a wrongful act or omission under the contract, as distinct from one in the execution of the Act; and it is the breach of a specific contract that is the occasion of the right to sue.”

The same view is taken by the Madras High Court in *Mayandi v. McQuhae*,<sup>(1)</sup> in the case of *Trustees of the Harbour, Madras v. Best & Co.*<sup>(4)</sup> and *Muthya Chettiar v. The Secretary of State for India*.<sup>(5)</sup>

In Halsbury's Laws of England, Vol. XXIII, page 342, article 693, it is observed as follows :—

“The performance of a specific contract made in pursuance of a public duty is not the performance of a public duty, even though the defendant is a public authority and the making of such contract would have been *ultra vires* save for statutory powers; nor is the performance, even by a public authority, of acts merely incidental to the ownership of property the performance of a public duty.”

Consideration of the cases decided under the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), also leads to the same result. The question is discussed in the judgments of Farwell J. in *Sharpington v. Fulham Guardians*<sup>(6)</sup> and Romer L. J. in *Jeremiah Ambler & Sons, Limited v. Bradford Corporation*,<sup>(7)</sup> and Vaughan Williams L. J. in *Lyles v. Southend-on-Sea Corporation*.<sup>(8)</sup> It was observed by Farwell J. in *Sharpington's case*<sup>(9)</sup> as follows (p. 456) :—

“The public duty which is here cast . . . is to supply a receiving house for poor children . . . . In order to carry out this duty they have power to build a house or alter a house, and they accordingly entered into a private contract. It is a breach of this private contract that is complained of in this action . . . . It is a complaint by a private

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<sup>(1)</sup> (1878) 2 Mad. 124.<sup>(2)</sup> (1896) 22 Bom. 289 at p. 299.<sup>(3)</sup> (1901) 25 Bom. 387.<sup>(4)</sup> (1899) 22 Mad. 524.<sup>(5)</sup> (1908) 31 Mad. 522.<sup>(6)</sup> [1904] 2 Ch. 449.<sup>(7)</sup> [1902] 2 Ch. 535 at p. 594.<sup>(8)</sup> [1905] 2 K. B. 1 at p. 14.

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individual in respect of a private injury done to him. The only way in which the public duty comes in at all is, . . . that if it were not for the public duty any such contract would be *ultra vires*."

The point has been dealt with authoritatively by the House of Lords in *Bradford Corporation v. Myers*<sup>(1)</sup> where Viscount Haldane observed at p. 251 as follows :—

" My Lords, in the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority."

And at p. 252 as follows :—

" For it seems to me that the language of section 1 does not extend to an act which is done merely incidentally and in the sense that it is the direct result, not of the public duty or authority as such, but of some contract which it may be that such duty or authority put it into the power of a public body to make, but which it need not have made at all."

The point has been dealt with by the Calcutta High Court in *Jatindramohan Ghosh v. Rebatimohan Das*,<sup>(2)</sup> where the question was considered whether the word " act " as used in section 80 of the Civil Procedure Code is used in a generic sense and embraces a suit on a contract, and the question arising under the Public Authorities Protection Act of 1893 was discussed at pp. 968 to 975 and it was observed at p. 975, following the decision of the Privy Council in *Bhagchand's* case,<sup>(3)</sup> that the words of section 80 " Suit . . . . in respect of " are wider than the words of the Statute of 1893, viz., " Any action . . . for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority." It is not necessary in this case to consider the question whether the suit on a contract falls within section 80 of the Civil Procedure Code. In *Bhagchand Dagadusa v. Secretary of State for India*<sup>(4)</sup> the question for consideration was whether section 80 of the Civil Procedure Code applied to a suit for an injunction to prevent

<sup>(1)</sup> [1916] 1 A. C. 242.

<sup>(2)</sup> (1931) 59 Cal. 961 at p. 993.

<sup>(3)</sup> (1927) 1. R. 54 I. A. 338.

serious and irreparable injury, and it was held that the section applied to all forms of suit and whatever the relief sought including a suit for injunction, as the section is express, explicit and mandatory and admits of no implications or exceptions, and after referring to cases under the Public Authorities Protection Act, 1893, it was observed that the words "in respect of" a form going beyond "for anything done or intended to be done" show it to be wider than the statute on which the English Authorities were decided.

It is the obligatory duty of the Local Boards under section 50, clause (b), of Bombay Act VI of 1923 to make adequate provisions in regard to the construction and repair of public buildings, and under section 45, sub-section (2), all works other than those to be executed by the Government Executive Engineer under sub-section (1) of the section shall be executed by such agency and subject to such supervision as the Local Board at whose cost any such work is to be executed thinks fit. There is no provision in the Act, making it obligatory to execute the construction of a building through a contractor, or indicating that the execution of the construction of a building through a contractor was a performance of its statutory duties. The work could have been executed by the Government Executive Engineer if the Local Board had communicated a desire to that effect. The complaint in the present case is by a private individual in respect of private injury done to him by breach of the contract. The question of public duty arises only in a remote way inasmuch as but for such public duty any such contract would be *ultra vires*. The performance of the contract is only incidental to the statutory powers of the Local Board.

We think, therefore, that the consensus of authority is in favour of the view that an action based upon a breach of contract would not fall within the ambit of section 136 of the Bombay Local Boards Act of 1923.

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The only case cited in favour of the appellant is *Baban Hemraj v. The City Municipality, Poona*,<sup>(1)</sup> where the plaintiff entered into a contract with the defendant Municipality to carry soil water for one year, and the Municipality levied from time to time fines and penalties from the plaintiff for breaches of contract, as provided for in the contract, and the plaintiff sued to recover the amount of fines and penalties so levied, and it was held that the suit was governed by section 167 of the Bombay District Municipal Act, 1901, and not having been brought within a period of six months from the acts complained of was time-barred. The question arising in this case does not appear to have been discussed in the judgment. The case might also be distinguished on the ground that the Municipality claimed, according to the terms of the contract, to deduct a certain amount from the plaintiff's deposit for non-performance of his contract, and as such deductions were justified under the powers conferred upon them by the Act, it was held that their powers to enforce the contract, according to the construction they put upon it, must also be in pursuance of the Act. If it was intended to hold that suits for damages for breach of contract come within the protection afforded by section 167 of the Bombay District Municipal Act, corresponding to section 136 of the Bombay Local Boards Act, I am with all respect unable to agree.

The view which we have arrived at has also been accepted by Baker J. in *The Poona City Municipality by its President v. Dhondiba Ganpatrao Kenjale & others*.<sup>(2)</sup>

I think, therefore, that the view taken by the learned Assistant Judge is right and this appeal must be dismissed with costs.

MURPHY J. The point to decide is whether the plaintiff's suit, which was one for damages for breach of a contract to

<sup>(1)</sup> (1921) 46 Bom. 123.

<sup>(2)</sup> (1932) F.A. No. 30 of 1927, decided on 19th January 1932 (Unrep.)

build an office for the Sub-Inspector of Police and was brought against the Poona District Local Board, is within limitation, it not having been filed within three months of its alleged cause of action, as is required by section 136 of the Bombay Local Boards Act, 1923.

The learned Assistant Judge has found that since the acts complained of were not done in pursuance of the provisions of the Act, the bringing of the suit beyond three months did not bar it. The appellants rely on a ruling in *Baban Hemraj v. The City Municipality, Poona*.<sup>(1)</sup> There are numerous provisions to the same effect in many special acts relating to public bodies all similarly curtailing the usual periods of limitation, and the general view taken of such restrictions is that given in *Myers v. Bradford Corporation*,<sup>(2)</sup> the same case having been considered by the House of Lords,<sup>(3)</sup> a distinction being drawn between acts actually done in pursuance of the directions of the Statute and acts incidental to the exercise of powers arising out of the power to enter into contracts, but not in reality provided for by the Statute. The Bombay Full Bench case is *Manohar Ganesh Tambekar v. Dakor Municipality*,<sup>(4)</sup> and there is another case on the same point in the same volume in *Municipality of Faizpur v. Manak Dulab*,<sup>(5)</sup> in which the question of breaches of contract is especially noticed and discussed. To the same effect is the case *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay*.<sup>(6)</sup>

The current of decisions with the exception possibly of *Baban Hemraj v. The City Municipality, Poona*,<sup>(1)</sup> is clearly to the effect that such claims, as the one we have to deal with, are not brought for acts done in pursuance of the provisions of the Act, and the exception seems, as far as one can gather, to have been made, in the special circumstances

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<sup>(1)</sup> (1921) 46 Bom. 123.<sup>(2)</sup> [1915] 1 K. B. 417.<sup>(3)</sup> [1916] 1 A. C. 242.<sup>(4)</sup> (1896) 22 Bom. 289.<sup>(5)</sup> (1897) 22 Bom. 637.<sup>(6)</sup> (1901) 25 Bom. 387.

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of fines and penalties inflicted by a local board on a contractor, the authorities being neither referred to nor discussed.

I think that the decree appealed against is in harmony with the rulings of this Court generally—and with all other High Courts also—and that it should be confirmed and the appeal dismissed with costs.

*Decree confirmed.*

J. G. R.

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*Before Mr. Justice Patkar and Mr. Justice Murphy.*

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BASAPPA DANDAPPA PATHL AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 5), APPELLANTS v. GURLINGAWA KOM SHIVSHANKREPPA PATHL (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Hindu law—Adoption—Dwyamushyayana form—Inheritance—Natural and adoptive mother—Inherit equally as co-heiresses.*

Under Hindu law, on the death of a son adopted in *dwyamushyayana* form, his adoptive mother and natural mother inherit equally as co-heiresses property left by him.

APPEAL against the decision of V. B. Halbhavi, First Class Subordinate Judge at Bijapur.

Suit for a declaration of title and for possession.

Facts material for the purposes of this report are stated in the judgment of Patkar J.

*G. N. Thakor*, with *H. B. Gumnaste*, for the appellants.

*M. R. Jayakar*, with *G. R. Madbhavi* and *P. S. Joshi*, for the respondent.

PATKAR J. These appeals raise a novel and important and at the same time a difficult question of Hindu law which has not been covered by authority.

\* First Appeal No. 423 of 1927.