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C. M's. P.
 Nos. 87, 88,
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upon some ground of the kind mentioned in the section, which the Court passing the decree could have considered and given effect to before it passed the decree. The application, therefore, is not in any way aided by this section, and there is no other section having any material bearing on the present question.

This decision is quite in accordance with what was decided by this Court in the cases reported in 1, *Madras High Court Reports*, 131, 250, 154, and the judgment of the Calcutta High Court cited from 4, *Bengal High Court Reports, Appellate Jurisdiction*, 213, directly supports it.

In the present case then the Lower Appellate Court alone had vested in it the jurisdiction to review on the ground put forward by the Petitioners, and if they had not specially appealed, they would have been entitled to apply to that Court to review its decrees. But their special appeals having been admitted and those decrees affirmed by the decrees in the special appeals, the Lower Appellate Court's jurisdiction ceased to be exercisable. The clear rules on this point the High Court had occasion to lay down in a case from Salem in 1868:—*P. Mari Nanjappa Naikan (Petitioner) and Muniyappa Naikan and others (Counter-Petitioners)* decided 8th February 1868.

The Petitions must be dismissed but without costs.

Petitions dismissed.

Appellate Jurisdiction. (a)

Referred Case No. 53 of 1870.

GUNDAM VENKATASAMI against CHINNAM PURUSHOTTAMA.

The plaintiff, a Head Constable of Police, sued the defendant, an Inspector of Police, for money had and received to the plaintiff's use. The defendant had received the pay of the plaintiff but failed to give it to the plaintiff.

The defendant pleaded that the suit was barred by Section 53 of the Police Act (Act XXIV of 1859) and that plaintiff was estopped from denying that the section applied by reason of an admission made by him.

Held, that the plaintiff was entitled to recover the amount sued for.

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THE following case was referred for the opinion of the High Court, by G. Ramchendra Row, the District Munsif of Ellore, in Suit No. 227 of 1870.

(a) Present: Holloway and Innes, JJ.

The plaintiff, a Police Head Constable, sues the defendant, a Police Inspector, for 16 Rupees, part of his pay for **January**, and 20 Rupees his whole pay for April 1869. He states that the defendant kept back the money, telling him that those Rupees had been spent by him, and complains that he has not yet paid the money to him.

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It would appear that before resorting to this Court the plaintiff complained of this to the Head Assistant Magistrate of this District, who dismissed the complaint because the plaintiff's allegations did not amount to an offence under the Indian Penal Code. (Document B). The plaintiff has subsequently been discharged from the Police. He gave a notice (marked A) to the Superintendent of Police, under Section 53 of the Police Act, asking him to direct the defendant to pay the money now claimed; but the Superintendent returned the notice to the plaintiff, declining to interfere in the matter. Hence the present suit.

The defendant pleads Limitation under Section 53 of the Police Act (a) and claims a protection from the suit under its proviso on the ground that for the alleged misappropriation he has already been criminally prosecuted before the Head Assistant Magistrate. As regards his withholding payment of the money sued for, he denies the truth of the plaintiff's allegations.

The plaintiff now denies the applicability of the said Section 53 to his case, on the ground that the cause of action in this suit arose, not in anything done under the provisos

(a) Section 53 of Act XXIV of 1859 is as follows:—

All actions and prosecutions against any person which may be lawfully brought for anything done or intended to be done under the provisions of this Act, or under the General Police powers as hereby given, shall be commenced within three months after the act complained of shall have been committed, and not otherwise, and notice in writing of such action and of the cause thereof shall be given to the defendant, or to the Superintendent or other superior Officer of the District in which the act was committed, one month at least before the commencement of the action, and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court after such action brought by or on behalf of the defendant; and though a decree shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the Judge before whom the trial shall be, shall certify his approbation of the action; provided always that no action shall in any case lie where such officers shall have been prosecuted criminally for the same act.

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of the Police Act, or under the general powers thereby given but in a breach of private contract of debt which, he says, ought to be governed by the general Law of Limitation and of civil liability. From the notice A, it would appear that the plaintiff admitted the applicability of that section to his case by giving that notice under it.

The question of law for determination is, whether or not Section 53 of the Police Act is applicable to the plaintiff's case; if inapplicable, whether the plaintiff's admission of its applicability in the notice marked A should now estop him from denying its applicability.

I have found that the plaintiff's pay was appropriated by the defendant for his own use as asserted by the plaintiff, and the above question of law answers in the plaintiff's favor in my humble opinion, but the defendant requests me to refer this question for the opinion of the Honorable Judges of the High Court

The grounds for my opinion are as follows:—To apply Section 53 to this case, I should see, firstly, what the thing done by the defendant is, and secondly, whether that thing was done by the defendant either under the provisions of the Police Act or under the general powers thereby given to a Police Inspector.

As regards the first, the plaintiff says that the defendant's breach of promise to pay the money is the thing complained of; and the defendant asserts that his alleged breach of duty to pay the plaintiff's pay is the cause of this action. I should, however, take that thing as the thing complained of which has compelled the plaintiff to bring this suit; and that thing is the defendant's breach of promise to pay the money as promised, and not his breach of duty to pay it as the plaintiff's salary; the defendant seems to have passed through two different stages of the transaction; the first stage was that he on behalf of the State was entrusted with the distribution of the salaries of certain Police servants; there he spent the plaintiff's pay for himself instead of giving it to the plaintiff. Is this the cause of the present action as asserted by the defendant? I have humbly to submit that it is not; be-

cause the plaintiff does not base his claim upon that breach of the defendant's duty; he does not claim the money for the services he rendered to the State; he does not impute to the defendant anything wrong in spending the money for his own use; while, on the other hand, he plainly admits that he ratified the defendant's act of withholding the payment by giving his ready and unqualified assent to it, when he was, in the second stage of the affair, told by the defendant that that money had been spent by himself. If then, there is any cause of complaint, it must have its rise in the second stage; here, I believe, there was a regular private contract between the parties, and that was to this effect and in this form, viz; the defendant said to the plaintiff, "I have taken your pay for you and have spent it for myself, I shall by and bye pay you the money;" and the plaintiff without a word of disapproval said, "very well; pay it to me afterwards;" but the defendant has broken this private contract and withheld the payment. It is this withholding, and not the first, that leads the plaintiff to the Court; and it is this breach of contract committed by the defendant as a private individual, and not the first breach of duty as a Police Inspector, that forms the cause of the present action.

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Whether this breach of private contract is anything done under the Police Act, is what I have next to see. It is plain that such private contracts and their breaches are not things done under the Police Act; they are things done by individuals in their private natural capacities; and the Act does not say that the Police Officers have not such capacities. I have, therefore, to submit that the act now complained of is not one done under the Police Act or under the general powers thereby given; and that Section 53 does not at all apply to this case. It provides a special limitation in its body and a conditional civil remedy in its proviso for a special class of wrongs done under the color of that Act, and not for a special class of people in all their capacities.

Taking it for granted that the defendant's breach of duty to pay the plaintiff's pay should be considered as the thing now complained of, I have still humbly to submit that the section does not apply to this case, because I consider that the act of distributing

1870. salaries is not an act done under the provisions of the Police
 November 23. Act or under the general powers thereby given, as the Act
 R. C. No. 53 of 1870. does not provide for any method of distributing the salaries,
 and as from the nature of the defences contemplated in
 Section 54, it does not appear that such departmental func-
 tions were also the things intended by the Legislature to be
 included in anything spoken of in Section 53.

What still remains to be considered amounts to this : whether I should say that an inapplicable law is applicable to a case because the party that now pleads its inapplicability has once admitted it to be applicable to his case. Here I should humbly submit that the plaintiff says that, when he gave the notice A, he mistook the applicability of that law to all wrongs committed by the Police whether in their public or private capacity ; and I believe that he misunderstood the Section. As an admission can be evidence only when it is not the result of mistake or other such deluding causes, it is my humble opinion that this admission cannot estop the plaintiff from pleading its inapplicability, nor make the Court to put upon the law a borrowed construction ?

No counsel were instructed.

The Court delivered the following

JUDGMENT :—In this case the act alleged to have been done has nothing whatever to do with Police duties.

People are not estopped from standing on their legal rights by mistaking them and, as in this case, giving a notice as if required by the Act when it is not.