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IN THE GOODS OF PREMCHAND MOONSHEE.

laying down, that this section is imperative on the Court, and that the Courts have no discretion but to order security to be given—*Degumbari Dabi* v. *Aushootosh Banerjee* (1).

Then what are the facts here? The plaintiff as a legatee is entitled to ask for payment of her legacy. The defendants are in possession of the estate, which was originally of large value. They make no reply to the plaintiff's demand for payment. They do not even inform her of the position of the estate, which according to the case now made in their written statement is not sufficient to pay the legacies in full. The plaintiff therefore had no alternative but to seek the assistance of the Court. It is clear that the suit must proceed in the form of an administration suit, and the plaintiff must in the ordinary course obtain a decree for the amount of her legacy without abatement if the assets should prove sufficient; otherwise subject to abatement. In either case the plaintiff, as plaintiff in an administration suit, will be entitled to be paid her costs out of the general estate. In neither case can she be deprived of her costs or be made liable to pay the defendants' costs.

The present application therefore was wholly unnecessary and must be refused with costs.

It is scarcely necessary to add that it was not sought to support this application on any ground connected with the plaintiff's disability alleged in the defendant's written statement. The grounds relied on were merely those indicated in section 380 of the Code.

Application refused.

Attorney for the plaintiff: Mr. *N. C. Bose.*

Attorney for the defendant: Babu *Ukhoy Chunder Dutt.*

J. V. W.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

BENI MADHUB NAG (PETITIONER) *v.* MATI LAL DAS, OVERSEER, HOWRAH MUNICIPALITY (OPPOSITE PARTY.)*

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June 6.

Bengal Municipal Act (Bengal Act V of 1876), section 313—Bye-Law—"Ultra vires"—Bengal Municipal Act (Bengal Act III of 1884), section 2.

* Criminal Motion No. 252 of 1894 against the order passed by Babu Nogendro Nath-Pal Chowdhry, Deputy Magistrate of Howrah, dated the 16th of March 1894.

(1) I. L. R., 17 Calc., 610 (613).

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BENI MADHUB NAG v. MATI LAL DAS.

Where a Municipality passed a bye-law purporting to be made under the provisions of section 313 of Bengal Act V of 1876, which was duly sanctioned by the local Government, to the effect that persons, failing to trim trees overhanging tanks which were likely to foul the water with their falling leaves, after service of notice on them to that effect, should be liable to a penalty, and where subsequent to the repeal of that Act by Bengal Act III of 1884 a person was convicted and fined for having disobeyed such bye-law,

Held, that the conviction was bad, as the bye-law was not one authorised by the terms of section 313, and was consequently *ultra vires*, and that section 2 of Bengal Act III of 1884 could not make valid a bye-law which was originally invalid.

THE petitioner in this case was charged at the instance of an overseer of the Howrah Municipality with failing to comply with the terms of a notice served on him requiring him to cut and trim the branches of certain trees belonging to him which overhung a tank belonging to a private person.

The notice was in the following terms :—

"Take notice that you are hereby required within three days from the date of service hereof to cut your *sujna* trees overhanging the tank at Khetter Banerjee's lane belonging to Prosonno Coomar Nag, as the said trees are liable to foul the water of the above tank by the leaves thereof falling into it. If you fail to do so within the term specified above you will be liable to a fine of Rs. 10 and to a daily fine of Rs. 2 until the terms of this notice are complied with.

(Sd.) N. S. DUTT,

Dated the 30th November 1893. *Vice-Chairman.*"

This notice purported to be issued under bye-law No. 83. On receipt of this notice the petitioner applied to the Vice-Chairman to be informed where the bye-law in question was to be found, as no such bye-law existed amongst those passed by the Howrah Municipality and sanctioned by the local Government under Act III of 1884, and in reply he was informed that the bye-law in question was published in the *Calcutta Gazette* of the 14th January 1880, and it appeared to have been passed and sanctioned under the provisions of section 313 of Bengal Act V of 1876.

The bye-law was in the following terms :—

"Bye-law 83.—The Commissioners may give notice in writing to the owner of any trees or shrubs overhanging any tank and

liable to foul the water thereof to cut or trim the same in such a manner as that they should not overhang the tank.

"Whoever fails to comply with such requisition shall be liable to a fine which shall not exceed Rs. 10 and to a daily fine which shall not exceed Rs. 2 until such requisition be complied with."

The petitioner objected that the bye-law was not in existence and had no application, the Act under which it was passed having been repealed and new bye-laws having been passed and sanctioned under the new Act; he also objected that the prosecution had not been sanctioned by the Chairman, and raised other defences which it is not material to notice here.

The Deputy Magistrate overruled all the objections, and convicted the petitioner sentencing him to a fine of Rs. 5.

The petitioner then applied to the High Court to set aside the conviction on the ground that the bye-law was *ultra vires*, not being warranted by the provisions of Bengal Act V of 1876; that even if once good it had no force after the repeal of that Act; that it could only have been good in respect of Municipal tanks and never could refer to a private tank; and that the prosecution was bad inasmuch as the sanction of the Chairman had never been obtained or specifically given as required by law.

On the application a rule was issued which now came on for hearing.

Mr. *M. Ghose* and Babu *Atulya Charan Bose* for the petitioner.

The *Deputy Legal Remembrancer* (Mr. *Leith*) for the opposite party.

The arguments are sufficiently stated in the judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) which was as follows:—

The petitioner Beni Madhub Nag has been convicted under bye-law 83 of the bye-laws of the Howrah Municipality for failing, in pursuance of a notice issued to him, to cut certain branches of a tree belonging to him which are alleged to overhang a tank belonging to a private individual and to be likely to foul its water. He has been sentenced to pay a fine of Rs. 5.

Mr. Ghose on behalf of the petitioner contends that this bye-law, which purports to have been framed under the provisions of section 313, Bengal Act V of 1876, is not warranted by the provisions of that section, and therefore cannot be legally enforced.

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The bye-law runs as follows :—(see *ante* p. 838.)

Now, on looking at the provisions of section 313 of Bengal Act V of 1876 it is clear that this bye-law is not one such as the Commissioners of Municipalities were authorised to frame under this section. Section 2 of Bengal Act III of 1884 no doubt lays down that all bye-laws prescribed under any enactment repealed by that Act shall be deemed to have been prescribed under that Act, and this bye-law 83 has undoubtedly been prescribed and sanctioned by the local Government under Bengal Act V of 1876. But Mr. Ghose contends that the word "prescribed" in section 2 of Act III of 1884 must mean "duly" or "lawfully prescribed," and that section 2 of Act III of 1884 cannot make *intra vires* under section III of 1884 a bye-law which is obviously *ultra vires* under Act V of 1876. This argument appears to us to be sound, and we think the objection raised is fatal to the conviction. We accordingly set it aside and direct that the fine, if paid, be refunded.

H. T. H. *Conviction quashed.*

ORIGINAL CIVIL.

Before Mr. Justice Sale.

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RAM KANYE AUDHICARY *v.* CALLY CHURN DEY AND ANOTHER.*

Interest—Rule of damdupat—Hindu law—Usury—Account directed by decree in mortgage suit between Hindus—Interest for periods before, during and after the six months allowed by decree for redemption.

Where a mortgage decree, in a suit between Hindus, directed an account to be taken of what was due to the plaintiff for principal and interest, the latter to be computed at the contract rate for six months, provided for redemption on payment of the amount due within the six months, and directed in case of default of payment that interest due be added to the principal sum, interest thereafter to be computed on the aggregate amount at 6 per cent; *Held*, that in taking the account the rule of *damdupat* was rightly applied to the interest accruing on the mortgage debt both previous to and during the six months allowed for redemption, notwithstanding the form of the decree, (*Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose* (1) referred to); and that the same rule was applicable to the interest accruing after the period of six months had elapsed.

* Original Civil Suit No. 63 of 1892.

(1) I. L. R., 14 Calc., 781.