

APPELLATE CIVIL.

Before Stephen and D. Chatterjee JJ.

1912

Dec. 17.

KAILASH CHANDRA NAG

v.

SECRETARY OF STATE FOR INDIA.*

Punitive Police—Costs, apportionment of—Police Act (V of 1861 as amended by Act VIII of 1895), ss. 15, cl. (4), 16—District Magistrate, duty of—Amount realized on apportionment made by a Deputy Magistrate, effect of—Secretary of State for India, suit against, if maintainable.

An apportionment of costs made by a Deputy Magistrate, under s. 15, cl. (4) of the Police Act, for maintenance of a police force, is illegal.

Where, therefore, an apportionment of costs having been made by a Deputy Magistrate, and which, on appeal, having been affirmed by the District Magistrate, the amount of costs assessed was recovered from a person under s. 16 of the Act by distress warrant :—

Held, that the amount not being legally realized, a suit for the recovery thereof would lie against the Secretary of State for India in Council.

Shivabhajan v. The Secretary of State for India (1) referred to.

SECOND APPEAL by Kailash Chandra Nag, the plaintiff.

This appeal arose out of an action brought by the plaintiff against the Secretary of State for India in Council to recover Rs. 131-4 as., being the amount of taxes assessed and costs of distress warrant. The plaintiff's allegation was that, in pursuance of two

* Appeal from Appellate Decree, No. 1525 of 1910, against the decree of H. Walmsley, District Judge of Mymensingh, dated Jan. 17, 1910, confirming the decree of Probohdh Chandra Roy, Officiating Munsif of Sherpur, dated March 26, 1909.

proclamations dated the 10th August, 1907, by the Government of Eastern Bengal and Assam under the powers conferred on it by the Police Act (V of 1861), some additional police forces were employed in the areas within the jurisdiction of the police-stations of Sherpur and Nalitabari, in the district of Mymensingh, at the cost of the inhabitants thereof; that he was assessed to pay various sums by a Deputy Magistrate, instead of the District Magistrate; that the District Magistrate rejected his (the plaintiff's) objection to the assessment; that subsequently distress warrant having been issued by the Subdivisional Officer of Jamalpore for realization of taxes assessed upon him, he had to pay the aforesaid sum, and hence the suit was brought by him against the Secretary of State for India in Council, after giving notice under section 424 of the Code of Civil Procedure.

The defendant pleaded, *inter alia*, that the assessment made was not illegal and without jurisdiction, and that the suit against him was not maintainable. The Court of first instance gave effect to the contention raised by the defendant, and dismissed the suit.

On appeal, the learned District Judge of Mymensingh affirmed the decision of the first Court. Against this decision the plaintiff appealed to the High Court.

Babu Ram Charan Mitter, for the respondent, raised a preliminary objection that no second appeal lay in the case, as the suit out of which the appeal arose was of the nature cognisable by a Court of Small Causes, its value being less than Rs. 500.

Babu Kishori Lal Sarkar (with him *Babu Mukund Nath Roy* and *Babu Akhilbandhu Guha*), for the appellant, submitted that such a suit was excepted from the cognisance of a Court of Small Causes under Art. 3 of Sch. II of the Provincial Small Cause Courts Act.

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The suit was maintainable against the Secretary of State for India in Council. By 21 & 22 Vict., c. 106, the Government of India is a corporate body, and the Secretary of State for India in Council stands in the position of the East India Company, against whom any action could be brought by any party; and the question of the "Acts of Sovereign," as stated in the judgment of the lower Court, does not arise.

Under section 15, clause (4) of the Police Act, the assessment and the apportionment must be made by the District Magistrate. In the present case the District Magistrate did not assess; it was a Deputy Magistrate who assessed, and the assessment was consequently illegal. The mere fact that the matter went up on appeal to the District Magistrate, and the appeal was dismissed by him, does not make the assessment valid. [STEPHEN J. If the assessment is illegal, why is the Secretary of State liable?] The Secretary of State has realised the money and, being in possession of money to which he is not entitled, is liable: see *The Secretary of State for India v. Hari Bhanji* (1). The Secretary of State is liable for money improperly received by a public servant acting ostensibly under a statute, in the event of the money finding its way into the Public Fund. Under section 16 of the Police Code the money passes into the Police Fund and therefore to the Public Fund. He relied on 21 & 22 Vict., c. 106, s. 65, and on the cases of *Shivabhajan v. Secretary of State for India* (2) and *Collector of Furreedpore v. Gooroo Doss Roy* (3).

Babu Ram Charan Mitter, for the respondent. The assessment was made by a Deputy Magistrate, and it was confirmed, on appeal, by the District Magistrate. This was a substantial compliance with the

(1) (1882) I. L. R. 5 Mad. 273.

(2) (1904) I. L. R. 28 Bom. 314.

(3) (1869) 11 W. R. 425.

requirements of the Act. Had the plaintiff not appealed, the apportionment would have been illegal.

The suit is not maintainable against the Secretary of State. He is not liable for the money realised from the plaintiff. If the money had gone to the coffers of the Secretary of State, he would undoubtedly be liable. In the present case, the money realised was a part of the general Police Fund, and is therefore not a part of the Public Fund. He referred to the case of *Shivabhaian v. Secretary of State for India* (1) in support of his contention.

Babu Kishori Lal Sarkar, in reply.

Cur. adv. vult.

STEPHEN AND D. CHATTERJEE JJ. The facts of this case, so far as they are material to the decision of the questions before us in second appeal, are as follows:

In August, 1907, the Government of Eastern Bengal and Assam, acting under section 15 of the Police Act 1861 (as amended by the Amendment Act of 1895), declared that from the conduct of the inhabitants of certain parts of the district of Mymensingh it was expedient to increase the number of police in those places. Their number was accordingly increased, and under section 15(4) it became the duty of the District Magistrate to apportion the costs among the inhabitants of the places in question: but the apportionment was, as is admitted by the respondent, made by a Deputy Magistrate. The present appellants appealed to the District Magistrate to alter the apportionment, and he dismissed the appeal, but it is impossible to hold that this amounted to the making of an apportionment by him, under the rather stringent terms of the sub-section in question. After

(1) (1904) I. L. R. 28 Bom. 314, 325.

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the dismissal of the appellant's appeal, the amount assessed on him was recovered, under section 16, by distress, and we must suppose was applied to the maintenance of the police force, as provided in that section.

The first point raised before us is whether the amount of his apportionment was legally realised from the appellant, and, for the reasons we have stated, we must hold that it was not.

A second question then arises whether the Secretary of State was rightly sued. The wrong that the plaintiff alleges he has suffered is that money has been unlawfully taken from him: the remedy he seeks is that it may be restored to him. We must suppose that the money has, at one time at least, been at the disposal of the Local Government, and been applied by its officer according to law. On these facts, the liability to repay the money has been incurred by some one: has it been incurred on account of the Government of India? If it has, the revenues of India are chargeable (21 and 22 Viet., c. 106, s. 42), and the Secretary of State, to whose control the revenues of India are subject, is the right person to be sued (*Id.*, s. 41), and in considering this question we may take the Government of India to be, not the Governor-General in Council, but, to use an older phrase, "the superintendence, direction and control of the country" [*Sivabhaian v. Secretary of State* (1)] which seems to include the Local Government. We are of opinion that we must answer the question we have propounded in the affirmative. It has not been argued before us that the Local Government has power to raise any money which is not under the general control of the Secretary of State, and we are not aware that his liability for money raised under

(1) (1904) I. L. R. 28 Bom. 314, 321.

colour of the law for the benefit of the Local Government has been saved, as it may have been in the case of money levied or received by a Municipal Corporation or a District Board. Consequently, applying the rule laid down in *Sivabhajan v. Secretary of State* (1), the conditions which would afford a principal exemption for the act of an agent have not been excluded, as a principal cannot retain money improperly received for his use by his agent.

The same result may be reached by another road. The money in question in this case was received for the benefit of the Local Government, for it was received to defray the expenses of a police force under its immediate control, according to its disposal. Suits against the Government of India may be instituted against the Secretary of State, under section 416 of the Code of Civil Procedure, 1882, under which this suit was brought, and by section 2 of the same Act the Local Government is included in the expression "the Government of India." If the Local Government is liable, it is therefore correctly sued as the Secretary of State in Council, and we have not been invited to decide any question of liability that may arise between the Secretary of State and the Local Government.

We are, therefore, of opinion that this suit is rightly brought against the Secretary of State, and this appeal is therefore allowed; the judgment of the lower Appellate Court is set aside, and the suit is decreed in favour of the plaintiff, who is entitled to his costs in all the Courts.

S. C. G.

Appeal allowed.

(1) (1904) L. L. R., 28 Bom. 314.