

BOMBAY HIGH COURT

Pallonjee Eduljee

Vs.

The Lonavala City Municipality

First Appeal No. 143 of 1933

(Barlee and Tyabji, JJ.)

09.10.1936

JUDGMENT

Tyabji, J.

1. This appeal arises out of a suit brought by certain building contractors and sanitary engineers primarily on the basis of a contract between themselves and the defendant, the Lonavla Municipality. The plaintiffs allege that it was agreed that they should put up a new vegetable market, a new beef market and a slaughter-house for the defendant Municipality. The contract alleged by the plaintiffs is based on rates. It is not on the basis of a lump sum payable for the works to the contractor. An alternative to the suit based on contract is that contained in paragraph 15 of the plaint, which may be referred to shortly as a claim on the basis of Section 70 of the Indian Contract Act.

2. Dealing, first, with the claim on the basis of the contract between the Municipality and the plaintiffs (exhibit 32), it seems clear that the contract referred only to that part of the works done by the plaintiffs which was styled the vegetable market, and that assuming that there were any other provisions in the contract with reference to works not falling within the description of a new vegetable market, the provisions of Sections 48 and 49 of the Bombay Municipal Boroughs Act, 1925, were not followed. These sections require the sanction of the Municipality by a resolution passed at a general meeting in the case of a contract involving expenditure not covered by a budget grant : and every contract for the execution of any work involving expenditure exceeding L 500 shall be in writing and shall be sealed with the common seal of the Municipality, and shall specify the work to be done or the materials or goods to be supplied, as the case may be, the price to be paid, and other particulars. Some attempt was made to bring the contract (exhibit 32) under the provisions of Section 48(3)(b) and Section 49(2) proviso (b), the effect of which I have just stated : but the effort utterly failed, and so far as the claim of the plaintiffs is based on the work done in respect of the beef market and the slaughter-house, the

plaintiffs had to fall back upon the provisions of Sections 65 and 70 of the Indian Contract Act.

3. Section 65 of the Indian Contract Act again proceeds on the basis of there having been a contract, so that the plaintiffs cannot claim its benefit. But the other section relied upon, Section 70 applies, unless the argument on, behalf of the respondents (originally defendants) can be accepted.

4. Section 70 provides for a case where (1) a person lawfully does anything for another person, or delivers anything to him, (2) the second requirement of the section is that the lawful act or delivery shall not have been intended to be done gratuitously, and (3) the third is that the other person enjoys the benefit thereof. When these three conditions are satisfied, then, under Section 70, the latter person is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. The compensation to be made is in respect of the benefit enjoyed by the second person.

5. The argument in connection with Section 70 addressed to us on behalf of the defendants was that the act done by the plaintiffs cannot be considered to be a lawful act, inasmuch as it was done in contravention of Sections 48 and 49 of the Bombay Municipal Boroughs Act, and that in any case Sections 48 and 49 must override the provisions of Section 70 of the Indian Contract Act. *Young & Co. v. Mayor, &c., of Royal Leamington Spa*¹ and similar cases were relied upon for the proposition that when a corporation is restricted by statute from entering into contracts to a particular effect unless certain formalities are observed, a corresponding liability ought not to be allowed to arise apart from a contract satisfying the statute : to do so would be rendering nugatory the statutory provisions and disregarding the requirements of the legislature.

6. The case in India, however, stands on a different footing. We have here such sections as Sections 48 and 49 of the Bombay Municipal Boroughs Act provisions as to how contracts may be made. On the other hand, Section 70 of the Indian Contract Act contains a provision for binding a person to make compensation under conditions which do not postulate a contract. The expression "person" under the General Clauses Act, Section 3(39), includes "any company or association or body of individuals, whether incorporated or not." A Municipality is a body of persons incorporated and must consequently be included in the term "person." The applicability of Section 70 of the Indian Contract Act cannot, therefore, be excluded by the fact that there is no enforceable contract, (or to use the language of the Municipal Boroughs Act that there is not any contract binding on the Municipality), by reason of the requirements of Sections 48 and 49 not having been followed. Section 70 does not depend upon the existence of a contract binding on the parties and does not provide for contractual liabilities. There have been many cases on Section 70 in the Indian High Courts, but we are particularly concerned with those that refer to the apparent conflict between such a provision as is contained in Sections 48 and 49 of the Bombay Municipal Boroughs Act and the Indian Contract Act, Section 70. There need not necessarily be any conflict. There may be cases where there is no contract and Section 70 may be given effect to, apart from the provisions of Sections 48 and 49 of the Bombay Municipal

Boroughs Act. The English cases are distinguishable since there is in India a statutory provision creating a liability arising not out of contract but out of relations resembling those created by contract. The relation under Section 70 is created by the fact that one person lawfully does something for another or delivers anything to him and by the fact that the other person enjoys the benefit thereof : and when this relation arises, the liability to make compensation or to restore the thing delivered arises as a statutory liability not arising out of contract.

7. The observation of Straight J. in Chedi Lal Bhagwan Das I.L.R. (1888) All. 234, I presume that the Legislature intended something when it used the word 'lawful,' and that it

¹ (1883) 8 App. Cas. 517

had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation for it to the person for whom it was done has been relied upon, especially as it was cited and apparently followed in *Punjabhai v. Bhagwandas*² But with all respect the observation throws no light on the subject. It reads into the word "lawfully" the existence of a relation before the act was done, viz., such a relation as either

(1) directly creates, or

(2) by implication reasonably justifies the inference that by doing some act the plaintiff is entitled to look for compensation to the defendant.

But the very purpose of the section is to lay down in what circumstances such a relation must be taken to exist viz., in what circumstances the plaintiff may claim that his act has directly created or reasonably justified the inference that he is entitled to compensation.

8. In the result, Straight J.'s observation may be read in two ways. It is harmless if it is taken to mean that in certain circumstances the plaintiff is entitled to compensation and that the circumstances must be taken from the section that in the circumstances stated in the section, (under three heads), it may be assumed, unless the contrary is proved, that the one person held such a relation to the other as either directly to create, or by implication reasonably to justify, the inference that for the act done, the first named person was entitled to look for compensation to the person for whom the act was done. But in fact giving to the word "lawfully" the significance that Straight J. wishes to give it, renders the section tautologous and futile : for according to the suggested interpretation the section provides that where a person holds such a relation to another as to create or justify an inference! that by some act done by him for another person compensation is payable, in such a case if he does some act, compensation shall be payable to him, viz., where compensation is payable, it shall be payable.

9. The observations will, on the other hand, be misleading, if under guise of giving a meaning to the word "lawfully" the Court proceeds to determine, according to its own light and inclination, and not according to the terms of Section 70, whether the plaintiff already stood, before doing the

act, in such a relation that he became entitled to compensation. What the section does is to direct the Court to consider the plaintiff to be entitled to compensation where the relation laid down in the section has arisen. The section does not empower the Court under guise of interpreting the harmless, necessary word "legally" (which occurs in the course of one of three considerations laid down in the section) to determine according to the Court's own notions of justice what relations must entitle the plaintiff to compensation, and then say that if those relations do not exist, Section 70 does not come into operation : the section does not empower the Court to hold that no act shall be deemed to be lawful unless compensation is (according to the Court's own notions) due for doing it.

10. If the word 'lawfully' is given its usual, ordinarily understood meaning, there is no doubt that the acts for doing which compensation is claimed, were done lawfully.

² I.L.R. (1928) Bom. 309 : 31 Bom. L.R. 88

11. A question was raised before us that the plaint proceeds on the basis of the suit being for the purpose of enforcing specific performance of the contract, and that Section 70 was not relied upon, and that a suit on Section 70 is emphatically on a different basis from one based on the contract. Some of the matters to which I have referred support the same view, but on the whole it seems to me (as held by the learned Judge) that paragraph 15 of the plaint avers all the facts the existence of which will enable the plaintiff to rely upon Section 70, though there was no specific issue referring to Section 70; and though the questions that have to be considered and decided on Section 70 are of a different nature from those that arose when a claim is made on the basis of a contract. Detailed issues would no doubt be required on the basis of Section 70, but many of them have, in the course of the trial, been already considered and answered; and it is unnecessary to have those issues tried over again. The points have been argued, and there are materials sufficient to hold that the acts relied upon for the purpose of Section 70 by the plaintiffs were lawfully done : that there was a delivery of the completed works on the part of the plaintiffs to the defendant : that there was no intention to deliver them gratuitously : and that the Municipality enjoyed the benefit of the works.

12. But we have no definite finding with reference to the compensation that, under these circumstances, the Municipality must make to the plaintiffs for the works put up on the municipal sites, known as the beef market and the slaughter-house. The basis of the compensation under Section 70 would, it seems plain, not be the same as on contractual rights. The latter would be on the footing of the contract between the parties. The basis of the compensation under Section 70 would be in proportion to the benefit enjoyed by the Municipality and appropriate compensation is to be awarded mainly from that aspect, and perhaps it may be stated that it should be on a footing that would not include any such profits to the plaintiffs as they might be entitled to claim on the basis of a contract. It will be necessary, therefore, to require a finding from the lower Court on the question as to the amount of the compensation that the plaintiffs are entitled to, on the basis of Section 70 of the Indian Contract

Act, in respect of the beef market and the slaughterhouse put up by the plaintiffs on the municipal sites.

13. There is one other point that was argued before us and with which I must deal. A sum of L 1,000 had been deposited by the plaintiffs in respect of the contract entered into by them with the Municipality. The learned Judge has held that the deposit was on the terms that if the works were not completed within three months, it should be forfeited; and that as the works were not completed within three months, the defendants were entitled to forfeit the deposit. In my opinion, the learned Judge has not considered the question in the correct light. The deposit ought to be considered on the terms on which it was made, as resulting from a stipulation by way of penalty within the terms of the Indian Contract Act, Section 74. On that stipulation, the defendants were not entitled, in accordance with Section 74, to enforce the penalty in terms, but to receive from the plaintiffs who had broken the contract, reasonable compensation not exceeding the amount of the penalty stipulated for. The Indian Contract Act, Section 55, also bears on the case. That section provides for one specific kind of promise, where a certain thing is promised to be done at or before a specified time. In regard to the performance of such a promise a special rule is laid down : that (unlike the terms of contracts generally) the Court is not to enforce such a promise in accordance with its terms, but is to enforce it subject to the provisions of Section 55 : and the provisions of Section 55 are that, as a rule, a promise fixing the time within which the promisor is bound to do the thing promised, shall not be considered as a term forming the essence of the contract : and that for the non-performance of such a term no compensation shall be allowed unless the conditions stated in Section 55 are satisfied. As I have said, Section 55 has an indirect bearing on the question of the deposit under the contract to which I have referred. The deposit was not only in pursuance of a stipulation by way of penalty, but it was in respect of a penalty arising out of a failure to fulfil a term of the contract which fell under Section 55, a promise to do something within a stated time. In order, therefore, to determine the terms in accordance with which the stipulation for the forfeiture of the deposit should be given effect to, in other words, to construe a clause inflicting a penalty for non-fulfillment of an agreement within a stipulated period of time, the requirements both of Sections 74 and 55 must be considered. In any case, there are no materials placed before the Court on the basis of which the defendants became entitled to enforce the penalty to any extent, or to claim compensation for damages or loss arising out of the failure to perform the stipulation. If Section 55 is given effect to with reference to this penalty, damages might have been claimed by the defendants in respect of this penalty clause but no such claim was made. In my opinion, therefore, the plaintiffs are entitled to the return of the deposit.

14. It is unnecessary to disturb the order of costs made by the lower Court, but the appellants will be entitled to the costs of the appeal.

15. It has been stated to us that it may not be necessary to require the lower Court to return findings on the issues that I have indicated, as the parties may settle the amount of compensation

payable. It would certainly be advisable that they should do so. The case will be put on Board in the first week after the Vacation.

Barlee, J.

16. I agree. In this case there is no contract between the Municipality and the plaintiffs for the construction of the beef market and the slaughter-house. Contracts of a Municipality must be in writing and the Municipality cannot be held bound by oral contracts entered into by their president. On the other hand, Section 70 of the Indian Contract Act applies in terms. It has been objected that the plaintiff was not acting lawfully. With this I cannot agree. He was constructing the vegetable market under a contract and he was directed by the president to construct, in addition, other buildings for a beef market and a slaughter-house, and he did so. He may or may not have known the requirements of the Bombay Municipal Boroughs Act, but, even if he knew them, he must have anticipated that the necessary sanction would be obtained and the necessary written contract completed. He acted with perfect bona fides. Obviously he did not do the act gratuitously.

17. Mr. Thakor has argued that the Municipality got no benefit from the buildings. They cannot restore them since they have been put up on municipal ground. If they got no benefit then of course they would not have to pay compensation. This is a question which does not arise at this stage. It will be a question for inquiry whether any benefit was received. Prima facie as they require a slaughter-house and a beef market and as they have taken these buildings over and are using them they must have got some benefit. The learned Counsel put forward a hypothetical case that a man ought not to be called upon to pay for any building which a stranger chooses to put up on his land however expensive it may be. This of course is perfectly correct. But the argument does not apply to the facts of this case. If the buildings are larger than the defendants' requirement, then that can be taken into consideration when the question of benefit is enquired into.

18. The principal point in this case, - and a point of very great interest, is whether Section 70 applies at all to Municipalities. It is argued on the strength of English cases cited in Halsbury, Vol. VIII, p. 359, paragraph 805, and in particular *Young & Co. v. Mayor, &c., of Royal Leamington Spa*³ that the equitable principle of compensation cannot be applied where statute bars the way. But in India, where we have no conflict between, equity and statute, and the conflict, if any, is between statutes, it does not appear that the English case-law on the subject ought to govern our decision. We have to decide whether Section 70 of the Indian Contract Act is to be read subject to the provincial enactment embodied in the Bombay Municipal Boroughs Act which gives powers to Municipalities to enter into contracts. A local legislature has power under Section 80A of the Government of India Act to alter or repeal Acts of the Central Legislature, provided the previous sanction of the Governor General in Council is obtained, and the previous sanction of the Governor General in Council was obtained in this case. Therefore the local

legislature was competent by Section 48 to alter or amend Section 70 of the Indian Contract Act. But they did not do so directly and I cannot find that they did so by necessary implication, for the two Sections 49 of the Bombay Municipal Boroughs Act and 70 of the Indian Contract Act do not seem to be in part materiel. The former section lays down the requirements of a valid contract; the latter deals with the situation which arises when one of those requirements has not been fulfilled. I cannot see that the former can be looked on as an exception to the other, even though it may have the effect of imposing liability on a Municipality, for such liability is in no way contractual. As my learned brother has pointed out the rate-payers are protected by the provision that they can only be held liable to pay for such benefits as they have received or to restore something to which they have no claim. I think we can safely follow the case of *Zulaing v. Yamethin District Council*⁴ and the other Indian cases that were followed by the learned Judges who decided that case, such as *Mohamed Ebrahim Molla v. Commissioners for the Port of Chittagong*⁵ *Municipal Committee*, *Gujranwala v. Fatal Din*⁶ *Secretary of State v. G.T. Sarin and Company*⁷ and our Bombay case in *Abaji Sitaram v. Trimbak Municipality*⁸

19. I agree, therefore, with the order proposed by my learned brother.

20. Jan. 11, 1937. Barlee J. The attempt to settle the amount of compensation has failed. In consequence the order proposed by my learned brother in his judgment, dated October 9, 1936, must be carried out, that is, the learned Subordinate Judge should ascertain the amount of the compensation that the plaintiffs are entitled to, on the basis of Section 70 of the Indian Contract Act, in respect of the beef market and the slaughter-house put up by the plaintiffs on the municipal sites.

21. Finding to be returned within two months.

Appeal allowed.

³(1883) 8 App. Cas. 517

⁵ I.L.R. (1926) Cal. 189,

⁷ I.L.R. (1929) Lah. 375

⁴I.L.R. (1932) Ran. 522

⁶ I.L.R. (1929) Lah. 121

⁸ I.L.R. (1903) Bom. 66 : 5 Bom. L.R. 689