

# **BOMBAY HIGH COURT**

Province of Bombay

Vs

Municipal Corporation of Bombay

(Macmillan, C.J. Simonds and D Parcq, J.J. M Jayakar and M Nair, J.J.)

10.10.1946

## **JUDGMENT**

### **Du Parcq, J.**

1. By a written agreement dated March 1, 1943, the parties to this appeal concurred in stating a special case for the opinion of the High Court of Bombay. The question of law for the opinion of the Court was:- "Whether the Crown is bound by Sections 222(1) and 265 of the City of Bombay Municipal Act." The High Court (Sir John Beaumont C.J. and Rajadhyaksha J.) declared that the Crown was bound by these sections, and, in accordance with the agreement between the parties, made an order as to costs in the respondents' favor. The present appeal is against this decision.

2. The City of Bombay Municipal Act, 1888, has twenty-one chapters and 528 sections and covers, as might be expected, a wide field. Chapter X deals with water-supply. Section 265, which is in this chapter, is as follows:-

The Commissioner shall have the same powers and be subject to the same restrictions for carrying, renewing and repairing water-mains, pipes and ducts within or without the city, as he has and is subject to under the provisions hereinbefore contained for carrying, renewing and repairing drains within the city.

3. The terms of this section thus necessitate a reference to Chapter IX, which has for its subject "Drains and Drainage-works," and contains Section 222(1), which says:-

The Commissioner may carry any municipal drain through, across or under any street, or any place laid out as or intended to be a street, or under any cellar or vault which may be under any street, and, after giving reasonable notice in writing to the owner or occupier, into, through or under any land whatsoever within the city, or, for the purpose of outfall or distribution of sewage, without the city.

4. It appears from the special case, and from the correspondence annexed thereto, that the

Corporation wished to lay a water-main in a road known as Antop Hill Road, for the convenience of residents in the district known as Antop Hill. The case states that "the land in the locality of Antop Hill is for the most part private land belonging to the Government of Bombay, and the road serving the locality, known as Antop Hill Road, is also a private road belonging to the Government and in charge of the Public Works Department. The meaning of the expression "private land belonging to the Government" is obscure, but the correspondence suggests that the land forms a residential district in which Government employees (among others) are housed, and counsel were agreed that for the purposes of this appeal it might be assumed that it had been acquired by the Crown from private owners after the passing of the Municipal Act,

5. In these circumstances the Corporation's hydraulic engineer sought to obtain permission from the Provincial Government to lay the required water-main along the Antop Hill Road. The Government was willing to consent, but only subject to four conditions, two of which the Corporation regarded as objectionable. The two conditions to which objection was made were (1) that the Corporation should, on twelve months' notice, remove the water-main and restore the land to its original condition, (2) that the Corporation should pay in advance a rental of one rupee per annum. Eventually the Commissioner (the second respondent to this appeal), in purported exercise of his powers under Section 265 and 222(1), gave notice of his intention to carry out the proposed work. There followed the agreement under which the question in issue was submitted to the High Court.

6. The High Court held, following previous decisions of its own, that the principle to be applied for the decision of the question whether or not the Crown is bound by a statute is no different in the case of Indian legislation from that which has long been applied in England. The parties concurred in accepting this view, and their Lordships regard it as correct.

7. The general principle to be applied in considering whether or not the Crown is bound by general words in a statute is not in doubt. The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, "*Roy nest lie par ascun statute si il ne soit expressement nosme.*" But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, "by necessary implication." If, that is to say, it is manifest from the very terms of the statute that it was the intention of the Legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.

8. In the judgment delivered by the learned Chief Justice, in which Rajadhyaksha J. concurred, the principle "that the Crown is not bound by legislation in which it is not named expressly or by necessary implication" was in terms accepted, but an interpretation was placed upon it which their Lordships are unable to approve. After stating the principle in the words just quoted, the learned Chief Justice went on to say that if it can be shown that legislation "cannot operate with

reasonable efficiency unless the Crown is bound, that would be a sufficient reason for saying that the Crown is bound by necessary implication", and he concluded his judgment by enunciating the proposition that if the provisions of the Act "cannot operate efficiently and smoothly unless the Crown is bound-the Crown must be held to be" bound by necessary implication." Applying the general principle in this sense, and in the light of the knowledge which the Court had of existing conditions in Bombay, the Chief Justice came to the conclusion that the Corporation could not be sure of carrying out its statutory duty efficiently unless it had the same powers in relation to the Crown as it possessed in respect of the subject. The High Court therefore held that the question put in the special case must be answered in the affirmative.

9. Even if the High Court were correct in its interpretation of the principle, its method of applying it would be open to the objection that regard should have been had, not to the conditions which it found to be in existence many years after the passing of the Act, but to the state of things which existed, or could be shown to have been within the contemplation of the Legislature, in the year 1888. It may also be objected that the view taken by the High Court appears to ignore the possibility that the Legislature may have expected that the Crown would be prepared to co-operate with the Corporation so far as its own duty to safeguard a wider public interest made co-operation possible and politic, and may well have thought that to compel the Crown's subservience to the Corporation beyond that point would be unwise. As was pointed out by Wills J. in *Gorton Local Board v. Prison Commissioners* [1904] 2 K.B. 165 (n), 168, it may be reasonable to" suppose that the Legislature has no less confidence in a department which represents the Crown than in a local authority.

10. Apart from these considerations, however, their Lordships are of opinion that to interpret the principle in the sense put upon it by the High Court would be to whittle it down, and they cannot find any authority which gives support to such an interpretation.

11. It was contended on behalf of the respondents that whenever a statute is enacted "for the public good", the Crown, though not expressly named, must be held to be bound by its provisions, and that as the Act in question was manifestly intended to secure the public welfare, it must bind the Crown. This contention, which did not meet with success in the High Court, was again raised before their Lordships. The proposition which the respondents thus sought to maintain is supported by early authority, and is to be found in Bacon's. Abridgement and other text-books, but in their Lordships' opinion it cannot now be regarded as sound except in a strictly limited sense. Every statute must be supposed to be "for the public good," at least in intention, and even when, as in the present case, it is apparent that one object of the Legislature is to promote the welfare and convenience of a large body of the King's subjects by giving extensive powers to a local authority, it cannot be said, consistently with the decided cases, that the Crown is necessarily bound by the enactment. In the recent case of *Attorney-General v. Hancock* [1940] 1 K.B. 427, 435, Wrottesley J. cited a series of decisions in which the Crown was held not to be bound although the statute in question was clearly for the public benefit. A plain and striking

example is the case which their Lordships have already cited of *Gorton Local Board v. Prison Commissioners* (supra), where it was held that a by-law, made under the Public Health Act, 1875, and clearly designed to safeguard the health of the public, did not bind the Crown, and gave the local board no control over one of His Majesty's prisons. In the present case the High Court disposed of the submission by a finding that, on the material before them, it was not shown to be for the public good that the Crown should be bound by the Municipal Act. This is perhaps not a wholly satisfactory way of dealing with the respondents' contention, which was, not that the Court must consider whether it is for the public good that the Crown should be bound by a particular Act, but that wherever an Act is "for the public good" it must be taken to bind the Crown. Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the Court is asked to draw this inference, it must always be remembered that, if it be the intention of the Legislature that the Crown shall be bound, nothing is easier than to say so in plain words.

12. It is necessary to deal here with one further point which was not argued before the High Court. While this appeal was under their Lordships' consideration, their attention was directed to some weighty observations in two Scottish cases which suggested a possible answer to the Crown's claim to exemption. These observations are to be found in *Somerville v. The Lord Advocate*<sup>1</sup> [particularly in the judgment of Lord Kyllachy (at pp. 1064, 1065), and in *Magistrates of Edinburgh v. The Lord Advocate*<sup>2</sup>, per Lord Dunedin (then. Lord President) at pp. 1090, 1091]. It will be sufficient to quote a passage from the judgment of Lord Dunedin in the latter case, in which he said:—I may say that I agree personally with the views expressed by Lord Kyllachy in *Somerville's* case, and I think the outcome of it is this : While I do not doubt that there are certain provisions by which the Crown never would be bound unless that were clearly expressed—such, for instance, as the provisions of a taxing statute or certain enactments with penal clauses adjoined, as, for example, certain provisions of the Motor Car Act, and so on—yet, when you come to a set of provisions in a statute having for its object the benefit of the public generally, there is not an antecedent unlikelihood that the Crown will consent to be bound, and this, I think, would be so in the case of regulations which are meant to apply to all the land in a city, and where the Crown's property is not property held *jure coronae*, but has been acquired from a subject-superior for the use of one of the public departments.

13. In the present case it appears that the land of the Crown is not held *jure coronae* but, as has been said, was acquired from private owners, so that the dicta of the learned Lord President are directly in point. Their Lordships thought it right to require further argument on this aspect of the appeal, but, after careful consideration, remain of opinion that the law of England, and of India, is what they have stated it to be, and that no distinction can be drawn in such a case as the present

between property held *jure coronae* and other property of the Crown. The view expressed in the Scottish cases has not been adopted in England, and does not seem to their Lordships to be in accordance with a body of English authority which, where an ancient doctrine of the common law of England is in question, ought in their Lordships' opinion to prevail.

14. Their Lordships have accordingly considered the question before them in the 'light of the principle as they have stated it. In so stating it their Lordships believe that they have done no more than express in their own words a well-settled proposition of law, and they need only refer, in addition to the cases already cited, to *Hornsey Urban Council v. Hennell*<sup>3</sup> and *Cooper v. Hawkins*<sup>4</sup> After full consideration their Lordships can find no reason to say that, by necessary implication, the Crown is bound by the relevant sections of the Municipal Act. They were pressed with the argument that such an inference might be drawn from certain express references to the Crown in other parts of the Act itself and from the fact that by the Government Building Act, 1899, the Legislature had provided for the exemption of government buildings from certain municipal laws. The argument was that no express provisions saving the rights of the Crown would be necessary if the Crown were already immune. This is not an unfamiliar argument, but, as has been said many times, such provisions may often be inserted in one part of an Act, or in a later general Act, *ex abundanti cautela*, and, so far as the Act of 1899 is concerned, it is fallacious to argue that the Legislature which passed it must have had in mind the particular sections of the Act of 1888 which are now under review or that it was impliedly interpreting those sections.

15. For these reasons their Lordships have come to the conclusion that the appeal ought to be allowed. The decree of the High Court should be set aside, and a decree substituted declaring that the Crown is not bound by Sections 222(1) and 265 of the City of Bombay Municipal Act, 1888, and ordering that, in accordance with the agreement between the parties, the defendants (the respondents to this appeal) shall bear their costs and pay the plaintiff its costs of the special case. The costs of this appeal must be paid by the respondents. Their Lordships will humbly advise His Majesty accordingly.

#### Cases Referred.

120 R. 1050

2[1912] S.C. 1085

3[1902] 2 K.B. 73

4[1904] 2 K.B. 164