

# **BOMBAY HIGH COURT**

Municipal Borough of Ahmadabad

Vs.

Jayantilal Chhotalal Patel

First Appeal No. 169 of 1942

(Chagla, Bavdekar and Gagendragadkar, JJ.)

09.04.1947

## **JUDGMENT**

### **Chagla Bavdekar, J.**

1. The suit from which this reference to a full bench arises was filed by the plaintiff against the Municipal Borough of Ahmadabad in respect of a contract which the Municipality had entered into with him for the purpose of cleaning the streets of Ahmadabad. The plaintiff claimed various sums due to him under the contract. The learned trial Judge decreed the plaintiff's claim in part. From that decision an appeal was preferred to this Court and in that appeal the only question that survived was with regard to a sum of ₹ 4,100, which the Municipality purported to forfeit under the terms of the contract. This sum was deposited by the plaintiff when the contract was entered into, and the question that arose with regard to this sum was whether the plaintiff's suit was maintainable having regard to the provisions of Section 206 of the Bombay Municipal Boroughs Act. The appeal came before Mr. Justice Macklin and my learned brother Bavdekar and they referred the following question to a full bench;

2. When a Municipality has obtained powers from a Municipal Act to enter into a contract, is the exercise of their power to enforce the contract an act. done in pursuance of the Municipal Act?

3. A few facts may perhaps be necessary in order to appreciate what the rival contentions of the parties are. The Ahmadabad Municipality passed a resolution on October 29, 1937, forfeiting this deposit. On March 1, 1938, the plaintiff gave notice of his claim, and on August 31, 1938, he filed the suit. Now, under Section 206 of the Bombay Municipal Boroughs Act-

No person shall commence any suit against any municipality or against any officer or servant of a municipality or any person acting under the orders of a municipality for anything done or purporting to have been done in pursuance of this Act, without giving to such municipality, officer, servant or persons two months previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act complained of.

4. Therefore, if the section applied, the plaintiff's claim was clearly out of time. In order to place a proper construction on Section 206 the first thing to bear in mind is that it constitutes a restriction on the ordinary rights of litigants and, therefore, it must be strictly construed. Only those suits fall within the ambit of the section which are in respect of anything done, or purporting to have been done, by the Municipality in pursuance of the Act. The key words are "in pursuance of the Act," and the whole controversy has arisen as to the true meaning and effect of that expression. In this case the plaintiff's contention is that the act of the Municipality in forfeiting the deposit is wrongful and it is in respect of that wrongful act of the Municipality that the suit has been brought. Can it be said that forfeiting the deposit is done by the Municipality in pursuance of the Act? It is only if the Municipality has forfeited this deposit purporting to act under a power given to it by the statute that it could be said that the plaintiff's claim comes within the Section. Under Section 68(1)(c) of the Act one of the duties cast upon the Municipality is the duty of cleansing public streets and under Section 48(1) of the same Act the Municipality is empowered to enter into and perform all contracts which may be necessary or expedient in order to carry into effect the provisions and purposes of the Act. Therefore it is clear that while a statutory duty is cast upon the Municipality to cleanse the public streets, there is no such duty cast upon it to enter into any contract. It may or may not enter into a contract in order to discharge its duty and no individual could require the Municipality to enter into a contract with him. What the plaintiff was seeking to litigate in his suit was his private rights which came into existence as a result of the contract entered into between him and the Municipality. He was not seeking to enforce a public duty cast upon the Municipality by the statute, and even the defence of the Municipality was not that it was forfeiting the deposit in pursuance of the powers given to it under the statute, but that it was doing so in pursuance of a power given to it under the contract. Therefore, while the plaintiff was seeking to enforce his rights under the contract, the Municipality was defending that suit on the ground that it was exercising its right to enforce the contract according to the construction placed by it on the contract. Apart from any authority it seems to us difficult to hold that a suit to enforce the rights of a private individual under a contract entered into with the Municipality which the Municipality was not under any statutory obligation to enter into can fall within the ambit of the section.

5. Turning to the authorities, the principle has been discussed and well-settled in England. The first case we should like to refer to is the case of *Sharpington v. Fulham Guardians*<sup>1</sup> In that case the guardians of Fulham entered into a contract with a builder for certain works required by them for the purpose of carrying out their public duties, and the Court held that the plaintiff's claim was in respect of a private duty arising out of a contract, not for any negligence in performing a statutory or public duty, and the Public Authorities Protection Act did not apply. The "relevant section of that Act corresponds substantially to Section 206 which we are considering in this case. It was sought to be argued in that case that the contract entered into by the Fulham guardians was a contract entered into in discharge of a public duty or under statutory authority, and therefore a suit in respect of that contract came within the mischief of the Act. Dealing with that argument Mr. Justice Farwell stated that every contract entered into by a local authority must be in discharge of a public duty or under statutory authority, because otherwise it would be ultra vires. The

learned Judge also points out that the guardians had entered into a private contract in order to carry out a public duty and what was complained of in the action was the breach

<sup>1</sup>[1904] 2 Ch. 449

of the private contract, and the conclusion he came to was that what was complained of was a

breach of a private duty of the guardians to a private individual.

6. Then we come to the leading case of *Bradford Corporation v. Myers*<sup>2</sup> There the defendants, a municipal corporation, were authorised by Act of Parliament to carry on the undertaking of a gas company and they were also empowered to sell the coke produced in the manufacture of the gas. They contracted to sell and deliver a ton of coke to the plaintiff, and by the negligence of their agent the coke was shot through the plaintiff's shop window. The plaintiff filed a suit for damages in respect of this negligent act and the House of Lords held that the act complained of was not an act done in the direct execution of a statute, or in the discharge of a public duty or in the exercise of a public authority. It is important to note that this was not a suit on contract and the House of Lords refused to make the distinction that only suits on contract fell outside the ambit of the Act and suits which were ex delicto came within the mischief of the Act. Lord Buckmaster took the view that the plaintiff's claim was based on a private obligation which the Municipality owed to him; it was not a duty owed by the Municipality to the whole of the public. Lord Haldane in his speech at p. 252 succinctly enunciates the principle of law. This is what the learned law Lord says:

For it seems to me that the language of Section 1 does not extend to an act which is done merely incidentally and in the sense that it is the direct result, of not the public duty or authority as such, but of some contract which it may be that such duty or authority put it into the power of a public body to make, but which it need not have made at all.

Therefore, the act done must be the direct result of some duty cast upon the local body, or some authority conferred upon it. If it is the direct result of a contract which although the local body is empowered to enter into but is under no obligation to do so, then that act is not the act contemplated by the section.

7. Coming to our High Court, from the time when Mr. Justice Parsons and Mr. Justice Ranade in *Municipality of Faizpur v. Manak Dulab*<sup>3</sup> decided that Section 48 of the Bombay District Municipal Act Amendment Act, which corresponds to Section 206 of the Bombay Municipal Boroughs Act, did not apply to a suit for the specific performance of a contract or for damages for breach thereof there has been a continuity of decisions on the same line till we come to the latest decision in *Mandlik v. Jalgaon Municipality*<sup>4</sup>, The only discordant note has been struck by Sir Norman Macleod, Chief Justice, and Mr. Justice Shah in *Baban v. Poona Municipality*<sup>5</sup>, which really induced Mr. Justice Macklin and my learned brother Bavdekar to refer this matter to a Full Bench. In that case the facts were very similar to the facts before us, There too the District Municipality had deducted a certain amount from the deposit made by the contractor for the non-performance of the contract, and that Bench took the view that the suit was out of time as it fell under the provisions of Section 167 of the Bombay District Municipal Act. With great respect to that Bench no authority seems to have been cited before them and the judgment is not a reasoned one. Sir Norman Macleod came to that conclusion on the ground that as the Municipality obtained their powers to enter into this

<sup>2</sup>[1916] 1 A.C. 242

<sup>4</sup>AIR 1944 Bom 97 : (1943) 45 BOM LR 1059

<sup>3</sup>I.L.R.(1897) 22 Bom. 637

<sup>5</sup>(1921) 23 Bom LR 881

contract from the Act it follows that their powers to enforce the contract, according to the construction they put upon it, must also be in pursuance of the Act. With great respect that is an

entirely fallacious proposition. Their power to enforce the contract arose from the contract itself and not in pursuance of the Act. This case was considered by another Divisional Bench in *District Local Board, Poona v. Vishnu*<sup>6</sup> the Bench consisting of Mr. Justice Patkar and Mr. Justice Murphy. They followed the decision to which I have already referred in *Municipality of Faizpur v. Manak Dulab*, and held that Section 186 of the Bombay Local Boards Act (corresponding to Section 206 of the Municipal Boroughs Act) had no application to a suit to recover damages for breach of a contract. Discussing the case of *Baban v. Poona Municipality*, they sought to distinguish it on the facts of the case. In our opinion it is not possible to distinguish that case at all. In our opinion it does not incorporate a correct statement of the law and we hold that it was not rightly decided. Sir John Beaumont, Chief Justice, and Mr. Justice B.J. Wadia also considered the same question in *Vishwanath Sadashiv v. Bombay Municipality*<sup>7</sup>, There they were considering Section 527 of the Bombay Municipal Act, which also corresponds to Section 206 of the Municipal Boroughs Act, and Sir John Beaumont at p. 691 says that that section did not cover acts which were done in pursuance of a contract which the local authority was empowered to enter into, but was not required to enter into, by its Act. He further says, "one has to see whether the act complained of was done pursuant to the direct requirements of the Act, or was done under some contract which the Corporation entered into under the powers conferred by the Act but which it was not compelled to enter into." And finally we have the decision of Mr. Justice N.J. Wadia and Mr. Justice Sen in *Mandlik v. Jalgaon Municipality*, which was considering this identical question, and they held that the section did not apply to suits based on contracts. Neither in the case in *Vishwanath Sadashiv v. Bombay Municipality* nor in *Mandlik v. Jalgaon Municipality* was the judgment of Sir Norman Macleod cited. We might point out that perhaps it would not be quite right to demarcate the line of cases falling within the ambit of the section and those not falling within the ambit of the section by dividing them into suits on contract and suits which are not on contract. As I have already pointed out, the House of Lords in *Bradford Corporation v. Myers* refused to accept that test as the correct test. A better and a proper test seems to be whether the suit is in respect of a public duty which the local authority has to discharge under the statute or is it in respect of a private act or a private obligation which it owes to a private individual. Mr. Shah for the appellant has drawn our attention to a decision of the Madras High Court which seems to support the view put forward by him. That case is reported in *Athimannil Muhammad v. Malabar District Board*<sup>8</sup> but in that case a suit was filed for damages against the President of the District Board for cancelling a contract of lease for one year for the tolls in certain places. What the President did was that as he received a tender for a larger amount he cancelled this contract with the plaintiff and he defended the action on the ground that he was acting in performance of what he thought was his duty under the Madras Local Boards Act. With respect, it seems rather difficult to agree with this decision. The more so as the reasoning of the judgment of Mr. Justice Varadachariar is based on a comparison of the position in law under Section 80 of the Code of Civil Procedure . Now, turning to that section it is clear that the language is much wider and it is not possible to say that Section 80 and Section 206 are in pari materia. Section 80 requires a notice in respect of any act purporting to be done by a public officer in his official capacity. There is

<sup>6</sup>(1932) 35 Bom. L.R. 55

<sup>8</sup> I.L.R.(1934) Mad. 746

<sup>7</sup> AIR 1938 Bom 410 : (1938) 40 BOM LR 685

no question there of an act being done in pursuance of an Act. If a public officer acts or purports to act in his official capacity, then in respect of anything done by him a notice is required under that section. This High Court for a long time took the view that even under this

section suits ex-contractu did not fall within it. But the Privy Council in *Revati Mohan Das v. Jatindra Mohan Ghosh*<sup>9</sup> held that even suits ex contractu fall within the ambit of that section looking to the clear language of that section. Therefore, to draw any inference from the decision of the Privy Council which interpreted Section 80 of the Civil Procedure Code as helping to construe the provisions of Section 206 is, to our minds, with respect, erroneous.

8. Coming to the question referred to us, if the Municipality is purporting to exercise their power to enforce the contract, then any act done is not in pursuance of the Act, but it is in pursuance of the contract, and therefore we answer the question in the negative.

<sup>9</sup>36 Bom. L.R. 544