

(1953) 11 BOM CK 0005

In the Bombay High Court

Case No : Civil Revision Application No. 1278 of 1952

Trikamdas Udeshi

APPELLANT

Vs

Bombay Municipal Corporation

RESPONDENT

Date of Decision : 19-11-1953

Acts Referred:

Bombay Municipal Corporation Act, 1888 — Section 25, 26, 460, 68(B)
Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 227
Contract Act, 1872 — Section 72
Criminal Procedure Code, 1898 (CrPC) — Section 345
Railways Act, 1989 — Section 113

Citation : AIR 1954 Bom 427 : (1954) 56 BOMLR 264 : (1954) ILR (Bom) 727

Hon'ble Judges : Chagla, C.J

Bench : Single Bench

Advocate : K.A. Somjee and B.G. Thakor, for the Appellant; Murzban Mistree, C.H. Pardiwalla and Crawford Bayley and Co., for the Respondent

Judgement

1. A question of considerable public importance arises on this revision application. The petitioner boarded a tram-car belonging to the Bombay Electric Supply & Transfer Undertaking of the Bombay Municipality at Crawford Market. and got out at Bori Bunder without purchasing a ticket. He was thereupon called upon by the Traffic Supervisor to pay a sum of Rs. 5 as penalty. The petitioner paid the fine and obtained a receipt for it from the Supervisor. He then filed a suit in the Small Causes Court to recover this amount as having been paid under coercion. The Small Causes Court dismissed the suit. It is from that order that this revision application is preferred,

2. On 11-9-1950, the General Manager of the Bombay Electric Supply and Transport Undertaking issued a notice delegating certain powers u/s 68-B, Bombay Municipal Corporation Act to certain officers in respect of certain functions mentioned in the notice, and one of the powers delegated to a Traffic Supervisor was the power to compound any offence against the Bombay

Municipal Corporation Act which under the law at the time in force may legally be compounded; this was u/s 517 (1) (b) and the power was limited to the following Offences, viz., infringement of Tramways and Omnibus by-laws and avoiding or attempting to avoid payment of fares only.

What is contended by the petitioner is that the General Manager had no power to delegate, that even if he had the power, the delegation was illegal, that the petitioner had committed a non-compoundable offence by failing to purchase a ticket for travelling in the tram-car, and the Municipality had no power in law to compound a non-compoundable offence.

3. Now, in order to understand these contentions it is necessary to look at the scheme of the Bombay Municipal Corporation Act and the bylaws made thereunder. Section 460-H of the Act deals with the levy of fares and charges for transport services, and Clause (4) provides that if a person does not pay the fare, he shall be punished for the offence with fine which may extend to Rs. 10. Then by-laws have been framed u/s 461A of the Act and the relevant by-laws are 12 and 39. By-law 12 provides that no person travelling in any car shall avoid or attempt to avoid payment of his fare; and by-law 39 imposes a penalty not exceeding Rs. 25 for a breach of by-law 12.

Mr. Mistree has fairly conceded that looking to the terms of Section 460H (4), by-law 39 is clearly incompetent. When the statute itself imposes a penalty which is not to exceed Rs. 10, a by-law cannot increase the penalty to Rs. 25. But the more important aspect of Sub-section(4) of Section 460H is that it creates an offence and provides a penalty, and under the Criminal Procedure Code when a special law creates an offence, that offence is non-compoundable. Therefore, it is clear that the offence which Section 460H(4) creates is a non-compoundable offence. It is difficult to understand how the General Manager came to delegate the power to compound this offence u/s 68B.

That section provides that any of the powers, duties or functions conferred or imposed upon or vested in the General Manager by any of the sections, Sub-sections or clauses mentioned in Sub-section (2) may be delegated, and when we turn to Sub-section (2), Section 517 (1) (b) is not one of the sections mentioned therein. But the section also provides for delegation with the previous sanction of the Bombay Electric Supply & Transport Committee any other powers, duties or functions conferred or imposed upon or vested in the General Manager, and the powers and functions of the General Manager u/s 517(1)(b) have been delegated with the previous sanction of the Bombay Electric Supply & Transport Committee.

The notice mentions Section 517 (1) (b) of the Act in respect of which power has been delegated to the Traffic Supervisor. Therefore, the powers and the functions of the General Manager u/s 517 (1)(b) have been properly delegated to the Traffic Supervisor; but that power is to compound any offence against the Act which under the law at the time in force may legally be compounded, & the

notice to which reference has already been made does repeat the words of this Sub-section.

Therefore, what can be compounded is an offence which under the law at the time in force may legally be compounded. Therefore, to my mind it is quite patent that the Traffic Supervisor had no power to compound this offence which had been committed by the petitioner. I fully realise the practical difficulty in the way of the Bombay Electric Supply and Transport Committee if it had to file prosecutions against every passenger who travels without a ticket. But this practical difficulty should be got over not by resorting to powers which the Municipality does not possess, but by the necessary amendment of the law.

4. Mr. Mistree has drawn my attention to the position that prevailed under the old law. Before the Electric Supply and Transport Undertaking was taken over by the Bombay Municipality, it was governed by Act 1 of 1874 and under Sections 25 and 26 of that Act a penalty, could be prescribed by a bylaw and the Tramway Company was authorised to levy that penalty by going before a Magistrate. Therefore, the old law did not create an offence but gave the right to the Tramway Company to impose a penalty and furnished it with a remedy to recover that penalty, and it was held by this Court in -- Emperor Vs. C.S. Modi, that a person committing a breach of a by-law under the old Act could not be convicted, but that the Tramway Company could only go before the Magistrate in order to recover - the penalty.

By Act 48 of 1948, the Bombay Tramways Act was repealed and a new Chapter was added to the Bombay Municipal Corporation Act which is Chapter 16A, but instead of reproducing Ss. 25 & 26 of the old Act the Legislature thought fit to enact Section 460H(4) and the scheme of Section 460H(4) is entirely different from the scheme of Ss. 25 and. 26 of the old Act.

As I have already pointed out, Section 460H(4) creates an offence in respect of which a prosecution can lie and in respect of which a person committing the offence can be convicted. Attention might also be drawn to Section 113 of the Railways Act. That section empowers a railway servant to demand the requisite amount from a person travelling in a train without a ticket and on the failure or refusal to pay by the passenger the amount can be recovered by an application to a Magistrate. A similar provision can be made in the Municipal Act.

5. Therefore, on the position in law it is clear that the petitioner committed an offence u/s 460H(4) by not paying his fare and that he was liable to be prosecuted and convicted for that offence. It is also clear on the receipt issued by the Traffic Supervisor that the petitioner paid the sum of Rs. 5 to avoid proceedings in a Court of law and the only proceedings which could have been instituted in a Court of law were criminal proceedings to prosecute the petitioner for having committed the offence.

6. Now, what is urged by Mr. Mistree is that even if this is the position--and Mr. Mistree does not seriously contest that this is not the correct position, -- the

petitioner cannot recover Rs. 5 because he has not paid this sum under coercion as contemplated by Section 72, Contract Act. The Privy Council has considered the true meaning to be given to the word "coercion" used by the Legislature in Section 72, and in -- "*Kanhaya Lal v. National Bank of India, Ltd.* 15 Bom LB 472 (PC) (B) the Privy Council has expressed its opinion that the word "coercion" used in Section 72 is used in its general and ordinary sense as an English word and its meaning is not controlled by the definition of "coercion" In Section 15. Therefore, we have to consider whether coercion was exercised in the ordinary general sense which resulted in the petitioner paying Rs. 5 to the Traffic Supervisor.

Mr. Mistree has strongly relied on the finding of the learned Chief Judge that the payment made by the petitioner must be taken as completely voluntary and one which he was anxious to make in order to file his proposed suit, and the receipt itself which was passed by the Traffic Supervisor to the petitioner does mention that the sum of Rs. 5 was received by the Traffic Supervisor as an amount voluntarily paid to avoid proceedings in a Court of law, although in the notice sent by the petitioner through his advocate on July 2, he does mention that he paid this amount under protest. But I am bound by the finding of the learned Chief Judge and I will assume that the petitioner did not pay this amount under protest.

7. Now, in order that a payment may be said to be made under coercion it must be made under duress or some other form of compulsion. There must be a compelling reason which induces a party to make a payment which he would not have made if that compelling reason had not been present. The receipt itself mentions that the amount was paid to avoid proceedings in a Court of law. Therefore, the petitioner paid this sum in order to avoid a prosecution. He knew perfectly well that if he did not pay this sum of Rs. 5, he would have been prosecuted before a Magistrate, and the question is whether this circumstance is compulsion in law.

The Madras High Court in -- "*Muthuveerappa Chetti v. Ramaswami Chetti* AIR 1917 Mad 607 (C) has laid down that money obtained from the plaintiff by the defendant under an agreement to stifle a pending non-compoundable criminal prosecution, is money paid under coercion within the meaning of Section 72, Contract Act, and can be recovered back. Mr. Mistree says that in this case there was a pending criminal prosecution, whereas in the case before us no prosecution had been instituted. I do not see the distinction in principle Between a pending criminal prosecution and a prosecution which could have been launched at the instance of the Bombay Municipality. In both cases a prosecution is stifled.

In one case it is stifled when the case is actually pending, in the other case it is stifled inasmuch as the prosecution is not instituted, and Chief Justice Wallis in his judgment points out that it could not be said that in such a case the parties are "*in pari delicto*". With respect to the learned Chief Judge of the Small Causes

Court, he has, taken the view that if A pays money to B in order to stifle a prosecution, both parties are "in pari delicto" and therefore A cannot recover the amount from B. This view is clearly opposed to the view taken by the Madras High Court with which, with respect, I agree.

Although both might be "in delicto", they are not "in pari delicto", and the reason for it is the reason very succinctly stated by Lord Ellenborough as cited in -- "Ram Kumar Das v. Nanda Kumar Shaha AIR 1924 Cal 243 (D). "It never can be predicated as "per delictum", when one holds the rod, and the other bows to it." "Smith v. Cuff, (1817) 6 M &S 160 (E). The Calcutta High Court in that case took the same view of the law as the Madras High Court. If one were to apply the test laid down by Lord Ellenborough it is clear that the Bombay Municipality held the rod, the rod being the prosecution which it had the right to launch against the petitioner, and the payment made by the petitioner was bowing to the rod which the Bombay Municipality held.

It is impossible to suggest that both the parties were so situated that the petitioner could have refused to pay the amount if he so desired. Their situation was unequal. The Municipality could have dragged the petitioner to a criminal Court, there would have been publicity about the prosecution, the petitioner would have been convicted and would have been compelled to pay a fine. It is to escape these consequences that the petitioner paid the amount. If that is the position, then it is clear that the petitioner could not be said to be "in pari delicto" with the Bombay Municipality in the question of the payment of Rs. 5." Therefore, in my opinion the learned Chief Judge, with respect to him, was not right when he took the view that in any event the parties being "in pari delicto" the petitioner could not recover the sum of Rs. 5,

8. The final contention put forward by Mr. Mistree is that I should not interfere u/s 115 of the Civil Procedure Code. I have started this "judgment by saying that it raises a question of great public importance, and even though if I were to take a strict view of Section 115 that no question of jurisdiction arises in the decision of the learned Chief Judge, if necessary I would have exercised my power under Art. 227 of the Constitution to correct a Court or a Tribunal, which has gone wrong in a matter which is of grave consequence to the public at large in the city of Bombay.

9. The result is that the revision application must succeed. Rule will be made absolute with costs. The order of the Small Causes Court will be set aside and there will be a decree in favour of the petitioner for Rs. 5, with costs of the suit.

10. Revision allowed.