CORPORATION OF CALCUTTA.

LEGAL OPINIONS

AND

RULINGS.

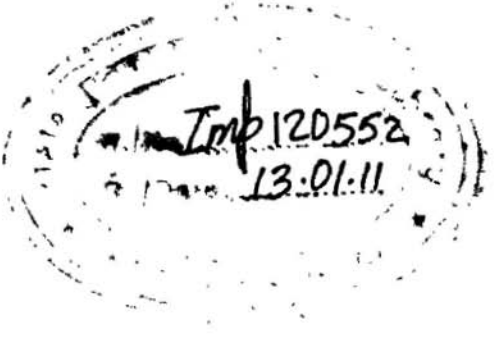
VOL. II.

APRIL 1907—APRIL 1909.

CALCUTTA :
PRINTED AT THE EDINBURGH PRESS,
300, BOWLAZAR STREET.

1910.


IMPERIAL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PART I.

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KEDAR NATH BHANDARY

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Kedar Nath Bhandary *vs.* Corporation.

Babu Kedar Nath Bhandary was a Drafting Assistant in the Secretary's Office. His services were dispensed with in 1906 on the reorganisation of the Department and the consequent abolition of his post. He instituted a suit against the Corporation for compensation and damages for wrongful dismissal, alleging that when he took up the appointment, Mr. R. T. Greer, Chairman of the Corporation, gave him an assurance that he would be kept on for at least 7 or 8 years, and he could not therefore be sent away before that period expired.

Held, That the provisions of Sec. 15 of the Calcutta Municipal Act do not apply to the appointment of Municipal officers and servants whose appointments are expressly provided for by chapter VI, and that under Sec. 65, appointments on less than Rs. 200 a month are subject to an annual sanction by the General Committee and any appointment made by the Chairman exceeding this sanction is *ultra vires*.

[Fletcher J., 21-5-07 : I. L. R., 34 Cal. 863 ; and 11 C. W. N. 861.]

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A suit was instituted against the defendants, who were the Secretary and the Chief Accountant of the Corporation, for the recovery of certain sums due from them. Pending disposal of the suit the Trustees of the Corporation Provident Fund were prohibited by an order of the Court from paying to Gainsford the amount due to him from the Provident Fund. The Trustees thereupon appealed for the modification or cancellation of the order on the ground that the Fund was not liable to attachment.

Held, That as the provisions of the Provident Funds Act IX of 1897 (and consequently the amending Act IV of 1903) were made applicable to the Corporation Provident Fund by Government Notification of the 8th July 1902, the Fund was not liable to attachment.

[Harrington J., 3-3-08 ; 12 C. W. N. 638.]

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JOGENDRA NATH MUKHUTI

vs.

CORPORATION.

Jogendra Nath Mukhuti *vs.* Corporation.

Bhobo Nath Sen who had been the lessee of the Corporation property known as the Square Mile since 1879, made certain proposals in 1906 for a re-settlement of the property with him for 20 years. A Special Committee of the Corporation considered these proposals together

Secs. 88 & 556. *Lease if Contract, and Tenders if necessary.* (contd.)

with the several offers which had been received. They recommended that the lease and the contract to unload the refuse should go together, and that the lease of the Square Mile should be granted to Bhobo Nath Sen for 22 years, it being one of the conditions of the lease that the lessee should unload the refuse waggons at the Square Mile without receiving any payment for it from the Corporation. The Committee decided that no tenders need be invited. The Special Committee's report was confirmed by the Corporation in due course.

One of the applicants for the lease of the property was Jogendra Nath Mukherji. He and another ratepayer obtained a rule to show cause as to why the Chairman and the Corporation should not forbear from accepting the offer of Bhobo Nath Sen until after tenders had been invited in accordance with law, and why the General Committee should not advertise for tenders for unloading the refuse waggons at the Square Mile and for the lease of the property. It was contended on behalf of the Corporation that the lease of land and the contract for unloading related to one and the same premises; that by Sec. 556 the Corporation could lease their properties on any terms they thought fit, and that in the present case they sought to grant the lease to Bhobo Nath Sen in consideration of his undertaking to unload the refuse for nothing, and paying them, besides, Rs. 1,01,500 in 22 years; that (1) a covenant in a lease that the lessee should do something is none the less a lease, (2) Sec. 88 of the Calcutta Municipal Act had no application because (*a*) the work was not being executed separately, (*b*) the words of the section did not cover a case like this, and (*c*) similar sections in the Public Health Act had been held to be merely directory and not obligatory.

Secs. 88 & 556. *Lease & Contract, and Tenders if necessary.* (concld.)

Held, That the Corporation had power to lease any property vested in them on any terms they thought fit without calling for tender in that behalf;

That although a covenant in or in respect of a lease is a contract, yet, if the same relate to the demised premises and be not independent of them, then, in that case, the contract in the covenant does not come within the meaning of Sec. 88 so as to make it obligatory on the Corporation to call for tenders.

[Woodroffe, J., 13-8-08; 13 C.W.N. 129.]

Sec. 341. *Encroachment.*

Encroachment, Projection, "Fixture," and Obstruction on Public Street.

CORPORATION

vs.

IMADUL HUQ.

Corporation *vs.* Imadul Huq.

Imadul Huq is the owner of premises Nos. 40, Gopalnagar Road and 52, Chetla Road. He or his predecessors built a verandah adjoining their house, and the pillars supporting the verandah were sunk down into the soil between the street and a drain which runs between the street and the front of the premises in question. The drain was covered up; there was a platform upon it and the verandah projecting from the house and attached to it was supported in the manner indicated above. Notices were served under Sec. 341 of the Calcutta Municipal Act for the removal of the encroachments, but the parties contended that the structure was not a fixture or projection within the meaning of the section and that they had acquired a valid right to it by reason of adverse possession for over 30 years. They applied to the Munsif

of Alipore for an injunction against the Corporation which was granted. The Munsif's decision was upheld by the Subordinate Judge of the 24-Perganas. The Corporation thereupon appealed to the High Court.

Sec. 341. *Encroachment* (concld.)

Held, That the structure in question was a fixture and a projection, encroachment or obstruction over or on a public street.

[Maclean, C. J., and Holmwood, J., 17-5-07 ; I.L.R., 34, Cal. 844.]

Building erected without sanction. Notice under Sec. 383 not a condition precedent to passing Demolition order.

Secs. 383 & 449. *Buildings. Notice before Demolition order unnecessary.*

SUSARMOYEE DEBI, *Petitioner*,

vs.

CORPORATION.

An application was made to the Municipal Magistrate for an order upon the petitioner to demolish a corrugated iron shed with mat walls erected without sanction. The petitioner admitted the erection of the building, but urged that as it was erected long ago and did not cause inconvenience to the public it should be allowed to stand. The Magistrate found that the building did cause inconvenience to the public and contravened the provisions of Sec. 368. He therefore directed its demolition. The petitioner thereupon appealed and it was contended on her behalf that the Corporation issued a notice under Sec. 383 which was replied to and that she was not given an opportunity of showing cause or of appealing to the General Committee.

Susarmoyee Debi *vs.* Corporation.

Held, That no notice under Sec. 383 is necessary before an order under Sec. 449 directing the demolition of a building can be passed.

[Rampini and Sharfuddin, J. J., 20-12-07 ; 12 C.W.N. 270.]

Secs. 406, 408 & 409. *Bustee Improvement. Reporting Officers. Objections to and amendment of Plan.*

Bustee Improvement. Reporting Officers if necessarily to be Municipal Servants. Owner's objections to proposed Plan how to be made. Amendment of original Plan. General Committee's power to proceed under Sec. 400 or Sec. 406.

ATARMANI DASI

vs.

CORPORATION.

Atarmani Dasi *vs.* Corporation.

The General Committee defined the external limits of the bustee at 34, Corporation Street, and took action under Sec. 406. They caused the inspection of the bustee by the District Medical Officer of the Corporation and by a Civil Engineer who was not a permanent servant of the Municipality. These persons submitted a report alone with a standard plan. Notices were then issued on all owners including Asmutennessa Bibi, the Vendor of the petitioner. On objections by the petitioner's vendor and one Abdul Samad, her neighbour, a Sub-Committee decided that a certain proposed road in the original plan should be deflected so as to save the masonry buildings of Abdul Samad. The original plan with this modification was approved by the General Committee on the 29th July 1904, and a written notice under Sec. 408 was then served upon the petitioner's vendor, Asmutennessa Bibi. Asmutennessa was prosecuted for non-compliance but acquitted, as she had sold the bustee to the petitioner. The General Committee then caused a notice under Sec. 408 to be served upon the petitioner and she was prosecuted for non-compliance but acquitted on the ground that the standard plan, containing an unauthorised modification, was not the standard plan as approved by the General Committee. The mistake was rectified and the matter was placed before the General Committee and

Secs. 406, 408 & 409. *Bustee Improvement. Reporting Officers. Objections to and amendment of Plan.* (contd.)

the issue of a fresh notice under Sec. 408 upon the petitioner was ordered. A notice was then served upon her, but she failed to comply; hence a prosecution was started. The contention on her behalf was:—

(1) That the plan was prepared so far back as 1904 and the proper course would have been action under Sec. 400 and not under Sec. 406;

(2) That the Engineer appointed under Sec. 406 not being an officer of the Corporation the report submitted by him and the medical officer was bad in law;

(3) That the approved standard plan having been prepared in 1907 could not be said to have been prepared within 6 months after the receipt of the report which was dated the 2nd February 1904;

(4) That the deflection of the road was saved merely to avoid expense and not for the purpose of improving the bustee and that it was therefore not an act which the Committee were empowered to do under the Municipal Act.

The Municipal Magistrate overruled all the above objections, and convicted the petitioner who thereupon appealed to the High Court.

Held, (1) That the law gave the General Committee full discretion to proceed either under Sec. 400 or Sec. 406.

(2) That the plan would not become bad in law because one of the reporting officers was not a servant of the Municipality;

(3) That the petitioner was not entitled to a fresh notice with regard to the deflection of the road in order to enable her to urge her objections to the deflection. The law contemplates that all persons interested will be present before the sub-committee and will present not merely their own objections to the scheme, but also any objection which

Secs. 406, 408 & 409. *Bustee Improvement. Reporting Officers. Objections to and amendment of Plan.* (concld.)

they have to any modification of the scheme on the objections raised by others. It is the duty of each of the interested persons to ascertain what the various objections of the other persons are and then to oppose those objections if necessary and

(4) That under the Act the Committee had the power to sanction any amendment of the original plan even though for the purpose of avoiding expense and not for the purpose of improving the bustee.

[Brett and Kyves, J. J., 10-8-08; 12 C. W. N. 1116; and 8 Cal, L. J. 507.]

Secs. 406, 408 & 409. *Bustee Improvement. Certificates of urgency of Improvements.*

Bustee Improvement. Certificate from Reporting Officers regarding urgency of Improvements necessary for action under Sections 407 and 408.

GOUR HARI KHAN

vs.

CORPORATION.

Gour Hari Khan vs. Corporation.

The petitioner was prosecuted for non-compliance with a notice under Sec. 408 for improving his bustee and was fined. He appealed, one of his grounds being that the certificate referred to in Sec. 406 (2) not having been annexed to the report submitted by the two officers who inspected the bustee, the proceedings of the General Committee on the said report were bad in law. The contention on behalf of the Corporation was, that inasmuch as all the improvements required were urgent, no certificate was necessary.

Held, That while Secs. 400 and 405 provided for the gradual improvement of bustees, Secs. 406-409 related to cases of emergency; that the certificate required under clause 2 of Sec. 406 was both for the necessary

improvements which were urgent and for those which were not, and that Secs. 407 and 408 which empowered the General Committee to approve of the standard plan and issue notices related to urgent improvements.

Secs. 406, 408 & 409. *Bustee Improvement. Certificates of urgency of Improvement.* (concld.)

That as in the present case no certificate was attached and it was not shown that the improvements indicated were urgent, the procedure under Sec. 408 would not apply, and that it was only in cases where a certificate is attached that the improvements are urgent that the General Committee may proceed under Sec 408 and give notices and may prosecute owners for non-compliance.

[Mitra and Fletcher, J.J., 20-8-07. Unreported.]

Bustee Improvement. Prosecution for non-compliance with notice. Liability of a co-owner. Jurisdiction of Sessions Judge of 24-Perganas.

Sec. 408. *Bustee Improvement. Co-owner's Liability. Jurisdiction of Sessions Judge of 24-Pergs.*

EMADAL HAQ

vs.

CORPORATION.

The petitioner was served with a notice under Sec. 408 and was subsequently prosecuted and fined for non-compliance. He appealed to the Sessions Judge of the 24-Perganas; his objections among others, were that the suit was barred by limitation and that one of the properties was not a bustee; that another did not belong to him; that with regard to a third he was only a part owner and that notice should have been served on all the owners. The Sessions Judge referred the case to the High Court with a recommendation that the conviction and sentence be set aside.

Emadal Haq *vs.* Corporation.

Held, That complaint of the offence had been made within the limit allowed by the Act; that the property

Sec. 408. *Bustee Improvement. Co-owner's Liability. Jurisdiction of Sessions Judge of 24-Pergs.* (concld.)

in respect of which the two privies had to be made was bustee land and belonged to him; that as a co-owner he would be liable to comply with the requisition; that, unless the Municipal Magistrate of Calcutta had a Court situated within the local limits of the 24-Perganas it was doubtful if the Sessions Judge had any jurisdiction in the matter.

[Ormond and Holmwood, J. J., 8-5-06. Unreported.]

Secs. 408 & 409. *Bustee Improvement. Standard Plan to be supplied. Execution of work by Corporation.*

Bustee Improvement. Notices under Sec. 408. Owner's default and suggestion to take action under Sec. 409. Insufficiency of time.

NAWAB FAKHER MOHAL SAHEBA

vs.

CORPORATION.

Fakher Mohal Saheba *vs.* Corporation.

This was with reference to the improvement of the bustee at 3, Koylasarak Lane and 6, Koylasarak Road. Proceedings were commenced in 1903 and the final notice under Sec. 408 was served on the 23rd December 1905. After the service of the notice the petitioner's son made a suggestion that the General Committee might take action under Sec. 409; this was rejected. He subsequently complained that it was difficult to remove the tenants. Eventually the petitioner was prosecuted and convicted. She thereupon appealed.

Held, That the General Committee did not commit any irregularity nor did they act improperly in declining the suggestion for action under Sec. 409.

That if there was any difficulty to remove the tenants, reference should have been made to the Court of Small Causes:

That sufficient time had been given and the Corporation had done all that the law required except perhaps that copy of the plan might have been sent to the petitioner before notice was given ; this, however, was not very material.

[Mitra and Holmwood, J.J.. 10-12-06. Unreported.]

Secs. 408 & 409. *Bustee Improvement. Standard Plan to be supplied. Execution of work by Corporation.* (concld.)

Bustee Improvement. Execution of work under Sec. 409 in case of default discretionary. Court's interference only in case of error of law or violation of procedure. Time limit under Sec. 413 for making improvements.

Secs. 408, 409 & 413. *Bustee Improvement. Execution of work by Corporation discretionary.*

HADJEE CASSIM MAMOJEE

vs.

CORPORATION.

Hadjee Cassim Mamojee *vs.* Corporation.

This case related to the improvement of the bustee at 62, Machua Bazar Road. Proceedings were commenced in 1904 when the property was in the hands of a Receiver. In December 1905, it passed on to the petitioner who became the owner within the meaning of the Act. Notice under Sec. 408 was served on him on the 9th January 1906, and he was required to make the improvements as indicated in the plan within 3 months. He failed to comply and was prosecuted and fined on the 6th February 1907, by the Municipal Magistrate. He thereupon appealed to the High Court, his contention being (1) that the case having been one which required expedition within the terms of Sec. 406, the General Committee might, on the owner's default, have executed the work itself within a reasonable time under Sec. 409, and (2) that the notice under Sec. 408, was served on him without his having been given an opportunity to object to the plan as provided by Sec. 407.

Secs. 408, 409 & 413. *Bustee Improvement. Execution of work by Corporation discretionary.* (concld.)

Held, That it was discretionary with the Corporation under Sec. 409 to itself execute any improvements under Sec. 409 and no Court could compel them to take action under the aforesaid Section ; that the Court of Revision could interfere with the order of the Municipal Magistrate only if there had been any error of law or violation of procedure as laid down by the law ; that though Sec. 413 lead the Court to suppose that 2 years is the utmost period within which the Corporation must take action under Sec. 408, it could not be said, regard being had to the facts of the present case, that the Corporation exceeded that period, and lastly, that the petitioner had ample opportunities to object.

[Mitra and Caspersz, J.J., 28-5-07. Unreported.]

Secs. 408 & 419. *Bustee Improvement. Prosecution after Bustee ceasing to be.*

Bustee Improvement. Prosecution, after Bustee ceasing to be such, for failure to make Road as in Standard Plan if legal.

ABINASH CHANDRA GANGULI

vs.

CORPORATION.

Abinash Chandra Ganguli *vs.* Corporation.

The petitioner, as owner of bustee at 82 and 83 Ripon Street, was, on the 29th November 1904, served with a notice under Sec. 408 to make certain improvements according to the standard plan. He was prosecuted on the 24th December 1905 for non-compliance and fined Rs. 10. In the meantime, and before the conviction, he had removed all the huts and obtained sanction to erect a masonry building. The sanction, it appears, was clogged with the condition that a certain road shown in the standard plan should be made. The building was

Secs. 408 & 419. *Bustee Improvement. Prosecution after Bustee ceasing to be.* (concld.)

erected on the 10th May 1907, but the road was not made. He was prosecuted for failing to comply with the notice of the 29th November 1904, and was, on the 26th June 1907, sentenced to pay a fine of Rs. 5 a day for 3 days. Against this order he appealed.

Held, That after the erection of the building the land ceased to be bustee land and the provisions of Sec. 408 ceased to have any operation.

That there could be no conviction under Sec. 408 for not making the road according to the standard plan when the land had ceased to be a bustee land.

That the proviso to Sec. 419 relied on by the Corporation and the Magistrate does not empower the prosecution of a bustee owner nor does it compel him to make a road according to the standard plan, after it has ceased to be a bustee.

[Mitra & Fletcher, J.J. 15-8-07 ; 12 C.W.N. 72.]

Secs. 408, 419 & 631. *Bustee Improvement Notice. Limitation of Time.*

Bustee Improvement Notice. Prosecution for non-compliance. Limitation of Time. Effect of Notice under Sec. 419 in enlarging time after commission of offence.

KUMUD KUMARI DASI

vs.

CORPORATION.

Kumud Kumari Dasi *vs.* Corporation.

On the 3rd March 1906 a notice was served under Sec. 408 on the petitioner to improve her bustee at 109-1, Russa Road, North, within three months. This period expired on the 2nd June.

On the 21st June 1906 she was told she would be prosecuted if she did not show reasonable expedition.

Secs. 408, 419 & 631. *Bustee Improvement Notice. Limitation of Time.* (concld.)

On the 2nd July, 1906, she gave notice under Sec. 419 of her intention to remove the bustee.

On the 13th August, 1906, she was granted time till the 2nd January, 1907, to carry out the required improvements.

On her failure to do so she was prosecuted for failure to comply with the notice of the 3rd March, 1906, and convicted by the Municipal Magistrate. She thereupon appealed to the High Court.

Held, That the notice having expired on the 2nd June, the offence was committed on the 3rd idem ;

That under Sec. 631 the prosecution should have been instituted *within* three months from this date and having been instituted *more* than three months after the expiry of the notice it was barred by limitation.

That the notice under Sec. 419 having been served *after* the offence had been committed could not have the effect of enlarging the time by six months and that such a notice if to be effectual must be served before the commission of the offence.

[Mitra and Caspersz, J.J., 5-6-07; I.L.R. 34 Cal. 909; and 11 C.W.N. 1096.]

Sec. 449. *Building sanction obtained by misrepresentation.*

Building sanction obtained on misrepresentation. Magistrate, if competent, to make an order confiscating the sanctioned Plan filed in Court and precluding construction of Building according to such Plan.

NOGENDRA NATH SADKHAN

vs.

CORPORATION.

Nogendra Nath Sadkhan *vs.* Corporation.

Proceedings were instituted under Sec. 449 and the Magistrate was asked to make an order directing that the

building erected by the petitioner or so much of it as had been unlawfully executed be demolished or altered to the satisfaction of the Magistrate. The Magistrate while holding that there was no ground for making such an order, found that the sanction to the plan had been obtained by misrepresentation and fraud, and therefore considered that he could preclude the petitioner from building on the sanction obtained. He therefore ordered that the sanctioned plan filed by the petitioner be not returned to him. The petitioner thereupon moved the High Court.

Sec. 449. *Building sanction obtained by misrepresentation.* (concld.)

Held, That the Magistrate was not competent to make an order of that description.

[Woodroffe and Mookherji, JJ., 18-10-05 : 3 Cal., L.J., 138.]

Buildings. Height of Building facing a street and an open Platform. 45° angle whence to be drawn.

Secs. 449, 451, & Rule 2 of Sch. XVII. *Buildings. Height Limit. Angle Rule.*

SHEOMALL GOENKA

vs.

CORPORATION.

The petitioner was the owner of a dwelling house situated in Bysack Lane—the eastern portion being assessed as 10-2, Bysack Lane and the western portion as 7, Sobharam Bysack Street. In 1898 or so a five-storeyed building was erected, partly on the western and partly on the eastern portions. In 1900-1901 a three-storeyed building was erected on the remainder of the eastern portion and the owner was prosecuted on the ground that the building in question intersected a line drawn from the opposite side of Bysack Lane at an angle of 45°, and that Rule 2 of Sch. XVII had been contravened. The defence set up was that the 45° line

Sheomall Goenka *vs.* Corporation.

Secs. 449, 451 & Rule 2 of Sch. XVII. *Buildings. Height Limit. Angle Rule.* (concld.)

should be considered as drawn from the further or southern side of the open public bathing platform opposite. The Magistrate held that the defence was true in fact and sound in law and therefore acquitted the petitioner. This was in 1902. In February 1907, a fourth storey was added to the three-storeyed building, directly opposite to the aforesaid open bathing platform. The total height of the premises was 53 feet 6 inches only and the width of the roadway 31 feet, the set-back allowed by the petitioner 6½ feet and the open space occupied by the bathing platform 24 feet, altogether 61½ feet. When the work was almost completed a notice was served under Sec. 451, whereupon the petitioner stopped the work and endeavoured to obtain sanction. Sanction was, however, refused on the ground that the open space occupied by the bathing platform ought not to be taken into consideration in calculating the height. The petitioner's submission was that he relied on the decision of the Municipal Magistrate in 1902. The petitioner was prosecuted; the Municipal Magistrate ordered that he should demolish the fourth storey within three months and fined him Rs. 50 for disregarding the notice under Sec. 451. The petitioner thereupon moved the High Court.

Held, That in determining the height of the building the angle of 45° must be drawn from the street alignment on the side of the street, and not from the side of the platform farthest from the street.

[Brett and Ryves, J.J., 21-8-08; 13 C.W.N. 74.]

Licenses. Liability of a Lime Trade Licensee under Sec. 198 to take out a separate license under Sec. 466 to Store Lime.

Secs. 466, 198, & Rule 7 of Sch. II. *Licenses for Storing and Trading in Lime.*

BEPIN BEHARY GHOSE

vs.

CORPORATION.

Bepin Behari Ghose *vs* Corporation.

The petitioner was carrying on a lime business, with another, at 6, Munshi Bazar Road. He had been granted a local license under Sec. 198 for his lime trade. He had, however, in the course of his business, stored quantities of lime in the above premises without taking out a separate license under Sec. 466. He was prosecuted and convicted by the Municipal Magistrate. He thereupon moved the High Court. The contention on his behalf was that the storing of lime was only auxiliary to the lime trade and it was not necessary, therefore, to take out a separate license under Sec. 466. F. . ance, a counsel or Vakil, it was argued, was not liable to take out a license for his profession as well as for keeping a chamber.

Held, That the purposes for which licenses under Sec. 198 and those under Sec. 466 are granted were widely different, and that a lime trader who has obtained a license under Sec. 198 is not exempted by Rule 7 of Sch. II from taking out a separate license to store lime under Sec. 466.

[Stephen and Coxe, J.J., 8-6-07; I.L.R., 34 Cal. 913; and 6 Cal. L.J. 183.]

GANESH DAS *alias* GANESHYAM DAS AND BHAGAWAN DAS

vs.

THE CORPORATION OF CALCUTTA.

Estoppel.

Sec. 449. *Estoppel by sanctioning the plan.*

The circumstances out of which this rule has arisen are as follows :—

Baboo Bansidhar, the owner of the part of the premises, No. 67, Shibu Thakur's Lane, obtained sanction for reconstruction of his portion of the building. In constructing the building, Bansidhar deviated from the sanctioned plan by building a third storey and a verandah on the third storey four feet six inches higher than what was sanctioned. Proceedings were accordingly taken against him under Section 449 of the Calcutta Municipal Act, and he was ordered, on the 13th of June 1907, to remove the roof of the verandah on the third storey on the road side which would provide a set back of four feet six inches so that the road angle could not cut it. The present petitioners, Ganeshyam Das and Bhagawan Das subsequently purchased Bansidhar's interest in the property and submitted an application accompanied by a plan to reconstruct the building. This plan was sanctioned. The petitioners are stated to have pulled down the whole building and proceeded at once to rebuild it. It appears that while the alterations were being made, a notice was served upon the petitioners on or about the 12th of August 1908, purporting to be under Section 451 of the Act requiring them to stop the work, but in spite of this notice the building was completed.

On the 23rd of November 1908, the President of the General Committee applied to the Municipal Magistrate to take action under Section 449 against the petitioners to

demolish the unauthorized construction and, on the 20th of April 1909, the Court ordered the petitioners to demolish the roof of the verandah in the third storey, or in the alternative to demolish so much of the building as had been constructed in deviation from the sanctioned plan within one month.

Estoppel.

Sec. 449. *Estoppel by sanctioning the plan.* (contd.)

The petitioners obtained a rule from this Court to have this order set aside.

The first ground taken is that the revival of the proceedings in the circumstances set forth was without jurisdiction. The third ground is that the Corporation having distinctly waived their objection to the said deviation at a time when the petitioners began to re-erect a portion of the building in accordance with their sanctioned plan were not at liberty to revive the proceedings; the fifth ground is that having regard to the length of time that has elapsed and the deviation of the angle being a negligible quantity, the learned Magistrate in the exercise of the discretion vested in him should not have ordered the demolition.

The argument on the first ground amounts to this that, under Section 449 of the Act, two courses only are open to the Court, first to order the owner to make the alterations himself within a given time or secondly to direct the Municipality to make the alterations at the expense of the owner, whereas in this case the Court orders the owner himself to make the alterations within a given time, and if the owner fails to comply with the order, the Corporation may proceed under Section 580 of the Act as was done in this case. Those proceedings were withdrawn and it is argued that it is no longer possible for the Municipality to enforce the Magistrate's order under Section 449. Although we do not think there is much force in this argument, yet

Estoppel.

Sec. 449.
Estoppel by sanctioning the plan.
(contd.)

it is unnecessary to discuss it because, as a matter of fact, it is admitted that the present petitioners after purchasing the property pulled the whole of it down.

The third ground is based on the fact that before re-building the premises, the petitioners obtained a sanction to rebuild it. It is stated that the Corporation are bound by the sanction and that the building has been erected in substantial compliance with it. The point turns on a question of fact. The learned Magistrate has found that the District Engineer did not sanction the whole of the plan submitted to him, but only that portion of it to the rear of the building which is coloured red. We have examined the record and we think that this finding is correct. It has been stated to us that persons desiring sanction from the Municipality to make alterations in existing buildings must submit, with their application for sanction, a plan showing the existing buildings in *yellow* and the proposed alterations in *red*. The party is required to show the existing portion in yellow, no matter whether any case is pending in Court about the existing portion or not.

On behalf of the petitioners it is argued that the District Engineer sanctioned the whole of the plan, and stress is laid on the wording of his order which runs as follows :—"In comparing the sanctioned plan, dated the 14th December 1906 (that obtained by Banshidhar), I find that the alternations proposed are mostly in the interior and of the trivial nature which do not contravene any of the regulations.

"The height in front I find increased, but as the building has been set back, the angle does not cut the main building. Sanction should therefore be issued."

Estoppel.

Sec. 449.
Estoppel by sanctioning the plan.
(Contd.)

It is argued that it was clearly brought to the District Engineer's notice that the building, as shown in the plan, was higher in front than originally sanctioned, and that he deliberately sanctioned this deviation because the whole building had been set back some 4 feet 6 inches from the road, and that consequently the road angle did not cut the main building. But it does not appear to us that this is the necessary inference to draw from Mr. Chapman's District Engineer evidence. When the plan was before him for sanction, he was only concerned in considering whether the proposed alterations shown in red should be allowed or not. The rest of the plan coloured yellow would represent to him buildings already in existence ; and the fact that some of those buildings had been erected contrary to sanction would not necessarily affect his judgment in sanctioning alterations in other parts of the premises if they were not otherwise objectionable. At the same time it is quite natural that if he discovered that some part of the existing buildings contravened the sanction, he should make a note of it.

The petitioners, therefore, in our opinion, cannot rely on exhibit A, as sanctioning their present building, except with respect to that part of the plan shown in red. They must, therefore, fall back on the original sanction given to Bunshidhar ; and there can be no doubt that the present building is 4 feet 6 inches higher than then sanctioned.

With regard to the fifth ground, it is stated that the matter is one between the petitioner and one Rash Behary Mullick. Under a partition decree the front portion of the premises became the exclusive property of Bunshidhar and the rear portion of Rash Behary Mullick. And it is argued that the petitioners having acquired Bunshidhar's

Estoppel.

Sec. 449. *Estoppel by sanctioning the plan.* (concld.)

interest are entitled to all the rights Bunshidhar held under the decree. It seems to us that this question is wholly irrelevant.

Court's Discretion.

Then it is argued that the Magistrate had full discretion not to order the demolition in this case, and that we have the same discretion. We cannot say that the Magistrate has erred in the exercise of his discretion in this case. The Magistrate visited the spot, and the order which he has passed only requires the petitioners to demolish the roof of the verandah in the third storey, unless, in the alternative, they prefer demolishing so much more of the whole building as has been constructed in deviation from the sanctioned plan.

We discharge the Rule.

[Cox and Ryves, J. J.—5-8-09.]

BHAGWAN DASS

vs.

RASH BEHARY MULLICK.

Sec. 632. *Plans sanctioned.*

The facts are as follows :—No. 67, Shibu Thakur's Lane was partitioned by a decree in a suit between Rash Behary Mullick, the complainant's predecessor and one Bunshidhar, the predecessor-in-title of the petitioners. In order to provide access to the portion that fell to the complainant, it was agreed that a strip of land 4 feet broad along the eastern boundary of the premises allotted to Bunshidhar should remain open for ever.

Sec. 632. *Plans sanctioned.* (contd.)

After the partition, the two partitioned portions were separately assessed and numbered 67 and 67/1 respectively. In November, 1906, Bunshidhar obtained sanction to rebuild his portion according to a sanctioned plan.

The present petitioners then acquired by purchase the interest of Bunshidhar in the premises and on the 17th June 1908 they put in a formal application to re-erect the premises, as 67, Shibu Thakur's Lane. This plan was sanctioned by the District Engineer on the 2nd July 1908.

It is quite apparent that the petitioners made use of their sanction most expeditiously ; and on the 10th July, the complainant petitioned the Chairman stating that the petitioners were erecting a building in contravention of the Building Regulations and that it was then a source of nuisance to him.

The petitioners, however, pressed on with the rebuilding, and complainant himself filed a complaint under Section 632 of the Act, alleging that the buildings were a nuisance. This was filed on the 14th August 1908.

When the enquiry was finished, it was found the whole building had been completed.

On enquiry the learned Magistrate found that the building was a nuisance within the meaning of the Act and made an order for its abatement, holding (1) that the so-called sanction by the District Engineer was *ultra-vires* and, therefore, a nullity ; (2) that it was obtained by fraudulent misrepresentation and was, therefore, not a valid sanction. It is to quash this order that this rule was obtained. It is contended that the order is altogether illegal. It has been argued, that Section 632 of the Calcutta Municipal Act does not apply to a case of this kind where the nuisance, if any, affects an individual, and

Sec. 632. *Plans sanctioned.* (contd.)

does not affect the public generally. It is argued that it was open to the Municipality to take action if it was thought necessary under Section 449, and if the Municipality after their attention had deen drawn to the facts do not move the Lower Court, the Court should not interfere under Section 632, but should leave the injured party to vindicate his rights in a Civil Court.

Nuisance, effect of, in vitiating sanction.

The term "Nuisance" as defined in the Act is wide enough to cover this case. Whether or not the building is a "nuisance" is obviously purely a question of fact. The erection of this wall thirty-three feet high close up against the house of Rash Behary Mullick, thereby depriving him of light and air, certainly is "a nuisance" to him and the occupants of his house, and under Section 632 any "person who resides in Calcutta may complain to a Magistrate of the existence of any nuisance." I therefore think the Magistrate had jurisdiction to make the order.

S. 632 and Estoppel.

Then it is argued that inasmuch as the buildings complained of were in fact sanctioned by the District Engineer and erected in accordance with this sanction, the Corporation are estopped from saying that the officer granting the sanction had no authority to grant it, and, that in any case the Court cannot consider whether or not the present building or any part of it contravenes the Building Regulations since they have been sanctioned. As regards this ground it is a matter which concerns the present petitioners and the Corporation. It cannot affect Rash Behary Mullick, who is in no way bound by the Act of the Corporation. He, as a resident of Calcutta, has a right to move under Section 632; it is no answer to say that the Corporation sanctioned it. It seems to me that if a building erected, whether in contravention of the

Sec. 632. *Jurisdiction of Court.*

Building Regulations or not or whether with or without sanction, is, in fact, a "nuisance;" a person residing in Calcutta, who is affected by it, has the right of moving a Magistrate under Section 632 to abate it, and it is within the jurisdiction of the Magistrate to pass orders. Whether he should or should not exercise his discretion is another matter, and will depend on the circumstances of the particular case, one of which certainly is whether the complainant has moved promptly. The plea of hardship raised by the petitioners is worthy of very little attention. They must have known that the building contravened the regulations of the Act. It has been found that they obtained their sanction by misrepresenting facts, and I personally do not think that the Lower Court on the evidence has arrived at a wrong conclusion on this point.

Lastly, it is urged that the Court must consider the terms of the partition decree between Rash Behary Mullick and the petitioner's predecessor in interest, and that, as under that decree, certain specified easements only were reserved to the portion owned by Rash Behary Mullick, he is not entitled to any thing more. The quarrel * * * was between two rival landowners who had had their rights *inter se* decided by a Civil Court decree. The Municipality as such, in the public interest, had refrained from taking action. On consideration I do not think there is very much substance in the argument having regard (1) to the evidence as to how the sanction to rebuild was obtained and (2) to the rapidity of the construction in spite of the protest of the other side. The partition decree affected the premises as they then stood, but in any case that decree cannot be held to over-ride the provisions of the Act

Sec. 652. *Partition decree does not affect.*

which is directed to provide for public sanitation among other public considerations.

This argument in effect implies that parties can contract themselves out of the provisions of the Municipal Act. But this is not so. Once the house was partitioned and separately assessed, it would not be open to the owner of 67/1 to rebuild his premises in total disregard of the regulations of the Act.

I would discharge the rule.

[Cox, J. J.—5-8-9.]

PART II.

Legal Opinions.

PART II.

Legal Opinions.

Enquiry into the conduct of a municipal officer appointed by the Chairman of the Corporation.

Secs. 15, 65 & 70. *Municipa Staff. Chairman's power.*

Case.

Not available.

Opinion.

The question referred to me for opinion is whether the Corporation or a Special Committee of the Corporation has power to enquire into the conduct of a Municipal Officer appointed by the Chairman. My opinion is that neither the Corporation nor the Special Committee has such power, and I will shortly state my reasons below :—

The Corporation being a creature of the Statute has all the powers conferred by the Statute and no others. I am unable to agree with the view put forward by some of the Commissioners as to "inherent powers."

Under section 15 the entire executive power for the purpose of carrying out the provisions of the Act is vested in the Chairman, and the section proceeds clause (*b*) by way of illustration to enact that the Chairman shall exercise supervision and control over the acts and proceedings of all Municipal officers and servants. This power of supervision and control includes the power to enquire into cases of alleged misconduct and in my opinion, therefore, the power to enquire into such cases provided for by section 15.

OPINION—(*Contd.*)

Secs. 15, 65 & 70. *Municipal Staff. Chairman's power.* (concld.)

No doubt section 70 in providing that the particular authority appointing a Municipal officer or servant and no other shall be competent to punish such officer or servant by necessary implication confers the power of enquiring into cases of alleged misconduct calling for punishment. The Corporation, therefore, has the power to enquire into the conduct of officers appointed by itself, under section 70. The Chairman has the same power of enquiry into such cases by virtue of section 15, clause (b), though he cannot inflict any punishment. But section 70 does not confer on the Corporation the power of enquiry into the conduct of officers or servants appointed by the General Committee or the Chairman. If it has power, it can only be by virtue of section 13, clause (3). But in my opinion the power of enquiry being expressly provided for in section 15, as a part of the power of supervision and control and included therein, section 13, clause (3) does not confer such power on the Corporation. Indeed it is only under section 70 that the Corporation has such power in the cases of officers appointed by itself and has it only by way of necessary implication from the power to punish.

6th October 1908. (Sd.) S. P. SINHA,
Advocate-General.

Sec. 73 (c) *Provident Fund Rules. Amendment. Retrospective Effect.*

Provident Fund Rules. Amendment. Retrospective Effect. Dr. Cook's Case. General Committee's Discretion.

CASE.

A case has arisen whether any rule made by the Corporation touching their Provident Fund can have retrospective

CASE—(*Concld.*)

Sec. 73 (*o*). *Provident Fund Rules. Amendment. Retrospective Effect.* (contd.)

effect given to it. The existing Provident Fund Rules have, in some respects, been amended. The amended Rules were made by the Corporation on the 30th October 1907. They were published in May 1907 and sanctioned by the Local Government on the 7th December 1907, and were published in the *Calcutta Gazette* on 26th February 1908, as required by sec. 570. Secs. 568 and 569 of the Calcutta Municipal Act III (B.C.) 1899 relate to the conditions and the procedure to be observed in the making of the rules. It is to be noted that rules for the Provident Fund can be made under sec. 73, and under sec. 569 no rule thereunder shall have any validity unless and until it is sanctioned by the Local Government.

The term of office of the late Health Officer, Dr. Cook, terminated on 1st November 1907, *i.e.*, he was in service till the 31st October 1907. The amended rules were made by the Corporation on the 30th October 1907, after previous publication, although they were not sanctioned by the Local Government until December 1907. Dr. Cook did not draw his Provident Fund money, probably he was waiting for Government sanction of the rules. The General Committee, on the 28th day of February 1908, passed a resolution directing payment of the amount giving him the benefit of the amended rules.

The question for Counsel's opinion is :—

Whether Dr. Cook may be given the benefit of the amended rules in the matter of the payment of the Provident Fund money payable to him as decided by the General Committee, or he should be paid his Provident Fund money in accordance with the old rules then in force ?

OPINION.

Sec. 73 (c). *Provident Fund Rules. Amendment. Retrospective Effect.* (concld.)

The matter is entirely within the competence of the General Committee to direct that Dr. Cook should be paid in accordance with the amended rule, as they have done.

They have the right to apply the amended rule in any case that they are dealing with after December 1907.

S. P. SINHA,
Advocate-General.

4th April 1908.

Sec. 73 (c). *Provident Fund Rules. Attachments. Gainsford's Case.*

Provident Fund—attachment of moneys invalid. Forfeiture of moneys on receipt of attachments. Gainsford's Case.

CASE.

In connection with the various orders received from courts prohibiting payment to Mr. Fred. Gainsford, late Secretary to the Corporation, the amount to his credit in the Provident Fund, the following reference was made.

1. Whether the Corporation is bound to give effect to the attachment and as to what steps should be taken by the Trustees of the Provident Fund to give effect to the provisions of Rule 23.

2. Whether or not the General Committee can, by virtue of Rule 23, make over the amount payable to Mr. Gainsford to his wife in the events which have happened.

OPINION.

1. The attachment is invalid, under sec. 4 of Act IX of 1897, which has been extended to the Provident Fund established by the Corporation of Calcutta under sec. 6 of Act IX of 1897 by the Notification No. 119 of the 8th July 1902.

The Trustees of the Fund are, in my opinion, entitled to apply to the Court from which the prohibitory order issued to remove the same.

Sec. 73 (c). *Provident Fund Rules Attachments. Gainsford's Case.* (concld.)

2. There seems to be some doubt as to whether Rule 18 does not entitle Mr. Gainsford to claim a portion at least of the money standing to his credit, on the ground that the same became payable to him on his retirement and before there was any prohibitory order served upon the Trustees. It would be safer for the Trustees to pay on the requisition of the General Committee to Mrs. Gainsford if she is properly authorised on Mr. Gainsford's behalf to receive the same.

S. P. SINHA,
Advocate-General.

14*th December* 1907.

[Subsequently an application was made to the High Court and the attachment was withdrawn. The question then arose as to how the money could be dealt with. The following opinion was obtained in conference.]

OPINION.

In my view the money is forfeited to the Fund under the rules, and the General Committee is free to deal with it according to the rules.

S. P. SINHA,
Advocate-General.

25*th April* 1908.

Secs. 88 & 422. *Gas Lighting Tender.*

Gas Lighting Tender. Defect in Procedure. Illuminant to be first determined under sec. 422. *Procedure under sec.* 88 *to be followed thereafter.*

CASE.

The Corporation, at their meeting held on the 21st April 1908, resolved—"That the tender of the Oriental Gas Company be accepted generally, and that the matter be sent back to the Special Committee to draw up the terms of the contract for the approval of the Corporation."

Secs. 88 & 422. *Gas Lighting Tender.* (concld.)

It was subsequently discovered that the advertisement for the tenders had not been issued by the General Committee as it should have been, and also, that the tenders, when received, were not laid before the General Committee. A reference was made to the Advocate-General and the following opinion was obtained in conference ; no written case was submitted.

OPINION.

The resolution of the Corporation, dated 21st April 1908, does not amount to a proper acceptance of any tender by the Gas Company, so as to constitute a completed contract. The tender really contains several alternative offers. The resolution does not accept any one of them specifically.

Under the circumstances, it amounts to no more than a resolution that gas is to be the illuminant, but that even is not expressly resolved upon.

It also appears that the procedure laid down under section 88, clauses 1 and 2 has not been followed. I think the proper course is to pass a formal resolution under section 422, clause (*c*) determining the illuminant, and then observe strictly the procedure laid down in section 88.

S. P. SINHA,
Advocate-General.

28*th April* 1908.

Secs. 88 & 556. *Square Mile Lease and Unloading Refuse Waggons.*

Square Mile Lease. Unloading work a condition of the Lease. Tenders if necessary.

CASE.

The facts were, Bhobo Nath Sen, who since 1879 had been the lessee of the Corporation property known as the Square Mile, made certain proposals in 1906 for a re-settlement of

CASE—(*Contd.*)

Secs. 88 & 556. *Square Mile Lease and Unloading Refuse Waggons.* (contd.)

the property with him for 20 years. A Special Committee of the Corporation considered these proposals together with the several offers which had been received. They recommended that the lease and the contract to unload the refuse should go together, and that the lease of the Square Mile should be granted to Bhobo Nath Sen for 22 years, it being one of the conditions of the lease that the lessee should unload the refuse waggons at the Square Mile without receiving any payment for it from the Corporation. The Committee decided that no tenders need be invited. Doubts having been expressed as to whether the work of unloading could be entrusted to any person without inviting tenders in the first instance under sec. 88, the following reference was made to the Advocate-General :—

The question, on which Counsel's opinion is sought for, is whether the proposal made by the Committee and substantially agreed to by Bhobo Nath Sen, subject to the amount of the rent being agreed upon, could be given effect to by the Corporation without calling for tenders : sec. 88 of the Calcutta Municipal Act should be referred to. It provides for the calling for tenders before entering into any contract for the execution of any work, etc. The work in the present case is the unloading work.

Counsel's attention is also invited to sec. 556 (2) of the Act—empowering the Corporation to sell, lease or otherwise transfer on such terms as they may think fit any land or building vested in them.

The Square Mile property consists of land and fisheries belonging to the Corporation. One of the terms of the

CASE—(*Concld.*)

Secs. 88 & 556. *Square Mile Lease and Unloading Refuse Waggons,* (concld.)

proposal is that the unloading work should be performed free of charge by Bhobo Nath Sen.

Under the circumstances, Counsel will be pleased to advise the Corporation whether or not the above proposal admits of being given effect to, without calling for tenders.

OPINION.

Under section 556 of Act III of 1899, (clause 2), the Corporation may lease on such terms as they may think fit any land vested in them. It seems to me clear that in making the settlement of the Square Mile property, the Corporation is granting a lease thereof, and it is quite competent for them to make it a term of that lease that the lessee should execute certain work, *viz.*, unload the refuse waggons free of charge and pay the stipulated rent. Section 88 would not apply to such a case, and it is not obligatory on the Corporation to call for tenders with reference to the unloading work before giving effect to such an arrangement.

S. P. SINHA,
Advocate-General.

1*st June* 1908.

Sec 96. *Standing Special Committees, Legality of*

Special Committees, Standing, Legality of. Delegation of Duties, Proper Form of.

CASE.

Not available.

OPINION.

(Obtained in Conference.)

(1) By sub-section (1) of section 96, the Corporation may, from time to time, by specific resolution,

OPINION—(*Contd.*)

Sec. 96. *Standing Special Committees Legality of.* (*contd.*)

appoint a Special Committee to inquire into and report upon any matter (to be specified in such resolution) which is reserved by the Act for the decision of the Corporation.

Every resolution passed under sub-section (1) of section 96 *shall forthwith be communicated to all Commissioners residing in Calcutta and be reported to the Local Government.*

Every Special Committee shall conform to any instructions that may, from time to time, be given by the Corporation.

Every Special Committee shall choose one of their number to preside at their meetings, provided that the Chairman shall be President, of any Special Committee of which he is a member.

If, at any meeting, the President is not present at the time appointed for holding the meeting, the members of the Special Committee present shall choose one of their number to be President of such meeting.

When any matter is referred to a Special Committee, the Corporation may fix a time within which the report of the Special Committee thereon is to be submitted to the Corporation.

All Proceedings of any Special Committee shall be subject to confirmation by the Corporation : provided that if the Chairman of the Corporation concurs in any action recommended by a majority of the members of any Special Committee, whether or not he is a member of such Special Committee, and considers that inconvenience would result from delay in taking such action, he may take such action without waiting for confirmation by the Corporation of the Proceedings of the Special

Sec. 96. *Standing Special Committees, Legality of.* (contd.)

Committee : but, if the Corporation do not confirm the Proceedings of the Special Committee, such steps shall be taken to carry out any orders passed by the Corporation as may still be practicable.

The Local Government are empowered to make rules declaring what proportion of elected Commissioners and what proportion of appointed Commissioners shall be nominated to be members of every or any Special Committee : provided that every Special Committee shall be so constituted as to contain not less than one representative of the elected Commissioners and one representative of the appointed Commissioners.

The Corporation are empowered to make rules for regulating the conduct of business at meetings of Special Committees.

(2) • By section 96 (2), the Corporation may, from time to time, by specific resolution, delegate to a Special Committee, any of their duties (to be specified in such resolution) which cannot, in the opinion of the Corporation, be properly performed at a meeting of the Corporation.

(3) Two readings of this section are put forward, and which I may illustrate by an example taken from section 150 of the Act. It is contended on the one hand that the Corporation may, under section 96, appoint a Special Committee to inquire into and report upon (*a*) the exemption, either wholly or partially, from the consolidated rate of any building or land used for the purposes of public charity ; (*b*) the exemption of the owner of any hut from the payment of the whole or any portion of the consolidated rate payable in respect of such hut ; (*c*) the exemption from the consolidated rate of all buildings and

OPINION—(*Contd.*)

Sec. 96. *Standing Special Committees, Legality of.* (contd.)

lands the annual valuation of which, as determined under Chapter 12 of the Act, does not exceed twenty rupees. And it is further contended that such Special Committee may be in the nature of a Standing Committee, whose duty it would be to inquire into and report upon any individual case coming within those three matters, when such individual case should arise.

(4) It is, I understand, contended on the other hand that the Corporation has only power to appoint a Special Committee in such a case as the following, namely, that if at a meeting of the Corporation the question is being discussed whether a house or land, say, No. 70, Chowringhee Road, if there be such a number, should be exempted either wholly or partially from the consolidated rate, as being premises used for the purposes of public charity, the Corporation may appoint a Special Committee for the purpose of inquiring and reporting to the meeting upon some specific matter which the meeting may desire to know in order to help it in coming to a conclusion whether the proposed exemption shall be granted or not. And it is further contended that such Special Committee, when it has inquired into and reported upon the matter referred to it, shall cease to exist for any purpose.

(5) I am of opinion that the first contention, above set forth, is more in accordance with the provisions of section 96 of the Act and with the constitution of the Special Committee, as laid down by that section and is a sound contention. For such ephemeral Committees, as are contemplated by the second contention set forth above, it seems to me that the elaborate provisions, as to the constitution and proceedings of the Special

OPINION—(*Contd.*)

Sec. 96. *Standing Special Committees, Legality of.* (contd.)

Committees, contained in section 96, would be out of place. Nor would it, in my opinion, be necessary to obtain legislative sanction to appoint such ephemeral Committees, unless it were true that no public body in meeting can appoint a Committee for the purpose of giving it information respecting a matter of fact as to which the meeting is not sufficiently informed, but which it is necessary or expedient for it to know in order to come to a satisfactory conclusion on a matter which is being discussed before it. I am not aware that there is any authority for that proposition.

(6) Again, the first contention is more in accordance with the provision of clause (2) of section 96. The power to delegate its duties given by that clause need not necessarily be given to a Committee appointed under the first clause of that section. The duties may be delegated to a Committee not appointed under the first clause of the section, but under the second, and such duties might necessarily in many cases require that the Committee whose duty it is to perform them should be in the nature of a Standing Committee. But whether the Committee be appointed under the first clause of the section or under the second, their nature is evidently the same, and all the provisions regarding the constitution and proceedings of Committees appointed under the second clause of the section, equally apply to those appointed under the first clause thereof. It seems to me therefore that if the Committees appointed under the second clause of the section must in some cases be of the nature of Standing Committees, it follows that the Committees appointed under the first clause of section 96 may be of the same nature.

OPINION—(*Contd.*)

Sec. 96. *Standing Special Committees, Legality of.* (contd.)

(7) The second question which I am asked to answer involves the form of the resolutions by which the Special Committees should be appointed. As to that I am of opinion that the Corporation, when appointing the Special Committees, should keep strictly within the words of section 96. The matters into which a Special Committee are to inquire into and report upon should be specified in the resolution distinctly and not by reference. For instance take section 150 of the Act. I am of opinion that a Special Committee may be properly formed by a resolution framed, as indicated in paragraph (1) but that a resolution appointing a Committee to inquire into and report upon all matters reserved to the Corporation by section 150 of the Act would not be a proper form of resolution.

(8) The same with regard to the delegation by the Corporation of any of their duties to a Special Committee under section 96, clause (2) of the Act. The clause provides that the duties shall be specified in the resolution, and it limits the duties which may be delegated to such duties so specified as cannot in the opinion of the Corporation be properly performed at a meeting of the Corporation. The proper form of a resolution delegating the duties of the Corporation arising under a given section of the Act would be as follows :—"That in the opinion of the Corporation the following duties.....(*naming them*)..... cannot be properly performed at a meeting of the Corporation, and that they be delegated to a Special Committee consisting of etc." It is not in my opinion a sufficient or proper delegation of duties under section 96, clause (2), to do so by a resolution—"That the Corporation delegate to the.....Special Committee the duties of the Corporation in

OPINION—(*Contd.*:)

Sec. 96. *Standing Special Committees, Legality of.* (contd.)

respect of all matters coming under their cognisance under sections.....(*naming the sections*).....of the Act." It is an incorrect and insufficient form for several reasons: (1) because section 96 gives no power to the Corporation to delegate their duties, generally, to any Committee; (2) because the Corporation have not come to any resolution that in their opinion the duties delegated are such as cannot be properly performed at a meeting of the Corporation; and (3) because the duties delegated are not specified in the resolution, as they should be.

(9) It is by no means easy to say what is the precise meaning to be attached to the word "duties," in section 96 of the Act. "Powers" and "duties" are spoken of separately throughout the Act: "powers" being generally spoken of as powers conferred and to be exercised, while "duties" are spoken of as duties imposed and to be performed. The only exceptions, I can find, are in section 14 where the collocation has been varied I think by mistake and in section 35 (6) where the word "imposed" has been omitted. But that "duties" alone, as distinguished from "powers" are intended to be delegated by section 96, clause (2), is in my opinion shown by the fact that in section 95 the General Committee are given power to delegate their powers or duties to the Sub-Committees, whereas in section 96 the delegation is expressly limited to duties only.

(10) I must not be taken as suggesting that powers are only conferred by the Act or duties imposed by those sections only in which the word "powers" or the word "duties" is made use of. Whether a power has been conferred or duty imposed in any given case is purely a question of construction. The use of the word "shall"

OPINION—(*Contd.*)

Sec. 96. *Standing Special Committees, Legality of.* (contd.)

would generally be connected with the imposition of a duty, but the performance of that duty might involve the exercise of a power. The use of the word "may" would generally be connected with the exercise of a power, but the exercise of the power might involve the performance of a duty. And, although the use of the word "may" would generally be connected with the exercise of a power, it might be so used as to make it a duty to exercise that power. Used as it is in section 96, it is extremely difficult to define exactly the meaning of the word "duty," but I am of opinion that they are intended to be such duties as do not involve he exercise of any power conferred by the Act upon the Corporation.

(11) I might illustrate my meaning by a reference to the example I have used in paragraph 4. The power of exempting lands or buildings or huts from the consolidated rate given by section 150 to the Corporation is given in such words as *primâ facie* do not impose any duty to exempt any building or land or hut from the consolidated rate, either in whole or in part. But it may be argued that the power being given to a public body is a power that is intended to be exercised in a proper case, and that it is the duty of the Corporation to enquire into any case in which an application is made to them to grant exemption from the consolidated rate on the ground mentioned in section 150, and to grant that exemption if they consider it to be a proper case to do so. Assume that this argument is sound—I am not deciding that it is so—and that the owner No. 70 Chowringhee Road has made an application to the Corporation for exemption from the

OPINION—(*Concld.*)

Sec. 96. *Standing Special Committees, Legality of.* (concld.)

consolidated rate on the ground that the premises are used exclusively for the purposes of public charity. That application might, in the ordinary course, be referred to the proper Committee for inquiry and report. The duties—assuming them to be duties—of deciding whether the case put forward in the application be a fit one for exemption, and of deciding what the extent of the exemption should be, if it were a proper case for exemption, are not, in my opinion, duties which could be delegated to that Committee under section 96, clause (2), because they are duties involving the exercise of a power conferred by the Act on the Corporation. The Committee may no doubt report that the case is a fit one for exemption, and may recommend the extent of the exemption which the Corporation should grant. But such recommendation can only be acted upon by the Chairman in a case falling under section 95, clause (12), which is made applicable to Special Committees by section 96, clause (3). In every other case, the Corporation and the Corporation alone must determine whether the case is a proper one for exemption, and the extent of such exemption, before any action can be taken to exempt the applicant.

I have dwelt at some length on the question of delegation, because it is of great importance to the officers of the Corporation and to members of committees that powers which must be exercised by the Corporation itself should not be exercised by those who have no statutory authority to do so. Such an exercise might turn out to be wholly invalid, and might lead to harrassing litigation.

P. O'KINEALY,

4th February 1908. *Advocate-General.*

Surplus Lands. Loan Funds. Balance of Loans how to be treated.

Secs 128 and 357 *Acquisition of Surplus Lands out of Loan Fund.*

CASE.

Not available.

OPINION.

The two questions which I have got to consider are: (1) whether surplus lands can be acquired in connection with the making of new streets, under section 357 (2) of Act III (B. C.) of 1899, as part and parcel of the scheme for making new public streets and carrying out drainage works; and, if so, whether or not the entire cost of the making of such streets, including the cost of purchasing the surplus land, could be met out of the loan funds, that is, moneys borrowed under section 128; and, (2) if the loan funds cannot be so applied, under section 357 (2), taken with section 128, can they be so applied, in view of the provisions of sections 110, 114, 119 and 126.

I find from the opinion of Mr. O'Kinealy, dated the 15th February 1905 (pp. 61-64 of the printed "Legal Opinions and Rulings"), that he considered that the loan funds raised under section 128 could probably be properly applied towards the acquisition of adjacent lands in the case put in the first question set out above. The matter was not directly before him in its present shape, and he was "not at all certain" that even in that case the loan funds could be so applied. I venture to think that this doubt is not justifiable. Provisions in a statute enabling a public body like the Corporation of Calcutta to undertake improvements in the City for the benefit of

OPINION—(*Contd.*)

Secs. 128 and 357 *Acquisition of Surplus Lands out of Loan Funds.* (contd.)

the public should be liberally construed (see L. R., 28, Ch. Dp. 486, at p. 496). "When they have made a new or widened an old street, they will necessarily have incurred a very great expense for which they can get no return. The new and improved street is dedicated to the public and (unlike a railway) yields no profit to those by whom it has been made. In order to meet this difficulty and *in order to enable the Corporation to re-imburse themselves*, the course has been to authorise them to take compulsorily, not only the buildings (or lands) actually necessary for forming the streets or other projected improvements, but also other neighbouring lands and buildings, the value of which, and the proper mode of dealing with which, *the legislature considers to be connected with and dependent upon the projected improvements.*" (Per Cranworth, Lord Chancellor, in Galloway *vs.* The Mayor and Commonalty of London, L. R., 1. H. L. Cases, p. 34 at p. 45). There can be no doubt that in enacting section 357, cl. (2), and cl. (5), the legislature had precisely the object so clearly put forward by Lord Cranworth, and I think section 128 authorises the Corporation to borrow sums of money which may be required for the construction of works of a permanent nature, including the purchase of adjacent or surplus lands "the value of which and the proper mode of dealing with which are connected with and dependent upon the projected improvements." In my opinion, therefore, it is undoubtedly within the power of the Corporation to raise a loan in pursuance of a scheme for making an improvement of a permanent nature of which it is a part and parcel to acquire surplus lands, with a view to reduce the total cost of the works,

OPINION—(*Contd.*)

Secs. 128 and 357 *Acquisition of Surplus Lands out of Loan Funds.* (contd.)

by selling the surplus lands at a profit. If the scheme originally framed does not include the acquisition and subsequent sale of such surplus lands, a question may arise whether a loan raised under section 128 for such a scheme can be applied at all towards the acquisition of such surplus lands, I do not think that there would be any valid objection to such a course, provided the necessary sanctions under sections 128 and 357 are obtained.

Having regard to the above answer to the first question, it is not necessary to answer the second. I may observe that the words " municipal funds " are not used in the same sense throughout the Act III (B. C.) of 1899, and this renders it difficult to answer the second question with any degree of certainty. But I think there is little doubt that, so long as the purpose for which a loan has been raised has not been completely carried out, no portion of such loan should be applied towards any other object. When the purpose has been completely carried out and there is a balance of the loan left, that balance may still be called the loan fund, but there is no particular trust attached to it. It cannot be applied towards the payment of the particular loan of which it is the surplus, and must therefore, in my opinion, form a part of the municipal funds, though the Corporation may, as a matter of sound finance, keep it separate ; or, if it does not do so, the Government may, with regard to the next proposed loan, require that the unexpended balance of the previous loan must be deducted out of the total amount proposed to be borrowed. I do not think that section 119 of the Act makes it compulsory for the Corporation to keep this money invested permanently. There would be no object

OPINION—(*Concld.*)

Secs. 128 and 857 *Acquisition of Surplus Lands out of Loan Funds.* (concld.)

in doing so, and it would virtually amount to making it compulsory for the Corporation to borrow, though it had funds of its own.

S. P. SINHA,
Advocate-General.

23*rd March* 1909.

Sec. 132 & Sch. VI. *Debenture Form, Benefit of Survivorship.*

Debenture Form—Benefit of Survivorship.

CASE.

As to Municipal Debentures Counsel's attention is drawn to sec. 132 and Schedule VI of the Calcutta Municipal Act referring to the form and effect of the debentures.

The debentures are made transferable by endorsement and the right to sue is vested in the holders thereof for the time being. Counsel's attention is also invited to sec. 45 of the Indian Contract Act.

Having regard to the aforesaid provisions of the Act, Counsel will be pleased to advise :

(1) Whether a Municipal Debenture can be issued to two or more persons jointly with benefit of survivorship, *i.e.*, to say to A, B, C, jointly or any of them or the survivors or survivor of them ?

(2) Whether a debenture holder can by endorsement make the debenture payable to two or more persons jointly or either of them or the survivors or survivor of them and whether such endorsement is binding on the Corporation.

OPINION.

(1) Having regard to the form in Schedule VI, I do not think the Municipality can issue such debentures as it

OPINION—(*Concld.*)

cannot vary the form. It is desirable to get the form varied by the proper authority.

Sec. 132 & Sch. VI. *Debenture Form. Benefit of Survivorship.* (concld.)

(2) Yes. There is nothing to prevent such an agreement and the Municipality will get a valid discharge in paying according to the tenor of such endorsement.

S. P. SINHA,
Advocate-General.

20th September 1908.

Exemption of Places of Public Charity or Worship from Rates—Test for a Place of Public Charity.

Sec. 150. *Exemption from Rates. Test for a Place of Public Charity.*

CASE.

A question has arisen as to the determination of a sound and just basis on which buildings and lands, used exclusively for purposes of public worship or for purposes of public charity, should be exempted, either wholly or partly, from the consolidated rate.

The only section bearing on this question is sec. 150 cl. (1) of the Calcutta Municipal Act and the proviso thereto.

It is to be noted that rates which may be imposed are indicated in sec. 147 and the amounts thereof to be fixed annually under sec. 148, and the said rates are levied as one consolidated rate under sec. 149. Sec. 124 may also be referred to shewing as to how rates are fixed.

Section 171 provides that one-half of the consolidated rate is payable by the owner and the other half by the occupier of any land or building as therein mentioned.

Exemptions have hitherto been allowed either wholly or partly to schools, hospitals and other premises, even when such schools and hospitals levy some charges in some

Sec. 150. *Exemption from Rates. Test for a Place of Public Charity.* (contd.)

shape or other, and are not open to the public free of charge.

Also partial exemptions have hitherto been allowed in respect of buildings, the whole of which is not used for purposes of public charity but only a portion is being so used, as portion of a building admits of being separately assessed (*vide* sec. 155).

In some cases the occupier's share of the rates have been remitted. Whether this is justifiable is doubtful, having regard to the fact that exemption from the rate is to be allowed either wholly or partially and not in respect of the owner or occupier's share of the rate which can only be determined when the building has been assessed to the rates.

There are other cases also in which the Corporation make some contribution to institutions equivalent to the amount of the rates imposed on and payable in respect of the building.

Some Commissioners think that unless the whole of the building or land is used exclusively for public worship or for purposes of public charity, no exemption could be allowed under sec. 150. Reference is solicited to a note of a Commissioner submitted herewith. He raises four points and refers to concrete cases.

It is to be noted that the proviso (*a*) to section 150 (1) refers to buildings or land in or on which any trade or business is carried on. Therefore, if there be no trade or business carried on the rest of the premises 79, and 82-2, Chitpur Road, referred to in the said note, it is not quite clear why partial exemption should not be allowed.

CASE—(*Contd.*)

Sec. 150. *Exemption from Rates. Test for a Place of Public Charity.* (contd.)

Point II referred to in the said note is with reference to proviso (*b*) to section 150. It is submitted that it is based upon the principle that if a charitable institution derives rent or can afford to pay rent, there is no reason why such an institution should be exempted from payment of the consolidated rate. *Points III and IV* may be considered together.

As against the statement in the note, it is submitted that because a fee is charged it does not necessarily follow that the school or institution is not used for the purpose of public charity. The founder of a charitable institution may provide for the levying of a reasonable fee for the upkeep and maintenance of the institution or in the absence of any direction the trustees or other authorities of the school may levy a fee in the exercise of their discretion. Whether the fees realised be sufficient for the upkeep and maintenance or not is a different question. This imposition of fees, it is submitted, does not alter the character of the institution. It will nevertheless continue to be a public charitable institution. The test to be applied, it is submitted, is whether it is being run on trading or business lines, in other words for profit or gain.

There may be charitable schools where there are a few boys of the well-to-do class who pay fees, the majority being free pupils. In such a case, it is submitted, the Corporation would be justified in exempting the building or land wholly or partially as they may think fit.

Sometimes question arises regarding buildings used exclusively for purposes of public worship, rent being paid either for the building or for the land on which

CASE—(*Contd.*)

Sec. 150. *Exemption from Rates. Test for a Place of Public Charity.* (contd.)

the building stands, whether in a case like this building should be exempted from payment of the rate.

Counsel will be pleased to advise on the points raised in the said note and also whether a building used exclusively for purposes of public worship, can be exempted from payment of the consolidated rate under section 150 (1), when rent is paid for such building or for land on which the building stands?

If it is held that the owner receiving rent cannot be exempted from payment of the owner's share of the consolidated rate, can the occupier paying rent and using the building exclusively for purposes of public charity claim exemption from payment of occupier's share of the consolidated rate?

And generally as to the circumstances to be taken into consideration in applying section 150 (1) with the provisos (*a*) and (*b*).

Note by Babu Bepin Chandra Mallik, a Commissioner.

Before proceeding to deal with the question whether particular buildings are to be exempted from payment of rates, the Committee should decide upon what principles the exemption is to be allowed. I would therefore propose that before the Committee decides to exempt any building, the following points should be settled :—

I. Can a building be partially exempted from payment of rates, if part of it only be used for charitable purposes?

The case of premises Nos. 79 and 82-2, Chitpore Road, in Ward No. 6, is in point. In the above it is noted that "a small part of the ground floor is occupied by the

CASE—(*Contd.*)

Sec. 150. *Exemption from Rates. Test for a Place of Public Charity.* (contd.)

District Charitable Society." It is not known to what use the other part is used. If the other part is not used for charitable purposes, I do not think the premises can, under the law, be partially exempted. Section 150 of the Calcutta Municipal Act lays down that the Corporation may, either wholly or partially, exempt from the consolidated rates any building or land used for purpose of public charity. So unless the whole of the building is used for purpose of charity, the same cannot be exempted.

II. Can a rented house be wholly or partially exempted?

In the case of premises No. 169, Dhurrumtolla Street, the Loreto School pay rent to the Archbishop. Section 150 provides that "building or land, in respect of which rent is derived whether such rent is or is not applied exclusively to purposes of public charity shall not be deemed to be used for purposes of public charity." The section makes no restriction regarding the party deriving the rent. Whenever rent is derived, no matter by whom and even in case where the rent derived is itself devoted to public charity, the building or land cannot be exempted.

III. Can the premises of a school which charges fees be exempted?

A school which charges fees cannot be considered a charitable institution. In this connection the reasons noted in the list for exempting the Metropolitan Institution (Ward No. 4) and Mohamed Laik Jubilee Institution (Ward No. 9) may be examined. The reason for exempting the former is that "it is an educational institution and maintains a number of free and half-free students," while that of the other is that "it imparts cheap education to Hindu and Mohamedan youths." The same

Sec. 150. *Exemption from Rates. Test for a Place of Public Charity.* (contd.)

reason may be applied for the exemption of all private schools and colleges in Calcutta. Unless the school is entirely a free one, the building in which it is placed can hardly be said to be used for purposes of public charity.

IV. Can any institution where any fee is charged to the inmates be exempted?

The cases of Sailors' Home and Seamen's Institute are in point. If fees are charged to the inmates, the building is, in my opinion, not used for public charity.

In conclusion, I need only add that buildings or land used for purposes of public charity *may* and not *shall be* exempted by the Corporation. So in exercising the discretion vested in the law, the Corporation should examine the accounts of all the institutions asking for exemption from rates. Before granting further exemption the Committee should call for the accounts of all the institutions that have been already exempted.

With the above objects in view I would suggest to the Committee to reconsider the resolutions arrived at in the first meeting, first of all taking the Advocate-General's opinion.

Assessor's Questions.

Whether a building used exclusively for purposes of public worship can be exempted from payment of the consolidated rate under section 150 (1) when rent is paid for such buildings or for land on which the buildings stand?

In the above cases, if it is held that the owner receiving rent cannot be exempted from payment of the owner's share of the consolidated rate;

Can the occupier paying rent and using the buildings exclusively for purposes of public charity, claim exemption from payment of occupier's share of the consolidated rate?

Opinion.

Sec. 150. *Exemption from Rates. Test for a Place of Public Charity.* (contd.)

Before answering the questions put in the Commissioner's note and the case, I should like to observe generally that it is not possible, even if it were desirable, to lay down any hard-and-fast rule in accordance with which the Corporation should exercise its discretion under section 150, Act III (B.C.) of 1899 to exempt from assessment buildings or lands used for purposes of public charity. Each case should be dealt with on its individual merits and as it arises.

As regards what are purposes of public charity, I think the safest guide is to follow the cases decided in England under the Statute 43 Eliz. C. 4, commonly called the Statute of Elizabeth. The purposes which have been held charitable under that Statute may be grouped under four heads: (1) the relief of poverty, (2) education, (3) the advancement of religion, (4) other purposes beneficial to the community not falling under any of the preceding heads and conveniently termed general public purposes. See Tudor on Charities, 4th Edn., p. 37. Institutions for the promotion of the above objects are public charitable institutions, though fees may be charged. The test is whether the object is gain or profit to be divided among the members of the institution or the provision of funds for the benefit of the institution itself. In the former case it is not charitable, in the latter it is.

Taking now the questions in the note, in their order, my answers are as follows :—

I. Having regard to section 150 of the Act I think the Corporation has the power to exempt wholly or partially a building which is used partially for charitable purposes. The word "exclusively" used with reference to