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to make appointments of headmen. It may be assumed that a Magistrate may dismiss the headman when he is satisfied that he is not a fit person. But the principal question is whether he had power to administer oath to the accused when he was examined as a witness before him. In our opinion he had no such powers. The orders of a Magistrate in respect of such matters are executive orders, as held in a ruling of this Court in *In the matter of the petition of Damma* (1). We are, therefore, clearly of opinion that the conviction of the accused is bad and must be set aside.

We accordingly allow the revision, set aside the conviction and sentence and direct that the accused be acquitted.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

UPENDRA NATH BASU (DEFENDANT) *v.* MUNICIPAL BOARD, BENARES (PLAINTIFF)*

1934
August, 17

Municipalities Act (Local Act II of 1916), section 151—Remission of taxes for period of non-occupation—"Remain vacant"—"Unproductive of rent"—House situated within large compound—House unoccupied but compound maintained and produce of trees realised—Whether remission of taxes admissible.

The words "remained vacant" in section 151 of the Municipalities Act do not mean that the land should be barren land, uncovered by trees or vegetation, but the words are used in the sense of non-occupation, that is to say, although there may be a garden on the land it may nevertheless be in some cases unoccupied.

A building is "vacant" and "unproductive of rent" within the meaning of section 151 of the Municipalities Act when neither the owner nor his relations or friends occupy it, nor is it let out to any tenant or lessee; the words "unproductive of rent"

*Second Appeal No. 211 of 1931, from a decree of Mathura Prasad, Second Additional Subordinate Judge of Benares, dated the 27th of October, 1930, confirming a decree of Maheshwari Dayal, City Munsif of Benares, dated the 25th of February, 1930.

(1) (1907) I.L.R., 29 All., 563.

do not mean a building which is not capable of producing rent.

In a case where a compound is a mere appurtenant to a building situate within it, and while waiting for the building to be rented the owner maintains the compound in order that the house may not deteriorate, then if he takes the produce of the compound, like flowers and fruits, while waiting for some tenant to take the house, it can not be said that he is occupying the premises or that the premises are productive of rent, for purposes of section 151 of the Municipalities Act. It is not correct to say that if the owner takes any produce, howsoever small, he occupies the whole building with the compound. On the other hand, if he deliberately neglects the house but prefers to make profit out of the maintenance of the garden in the large compound, it can not be held that he is not occupying the land but keeping it vacant. Each case has to be considered on its own circumstances, much depending on the relative value of the garden and the house, the ratio of the income which the garden can yield and the amount of rent which the house can fetch, as well as the intention and object of the owner.

Mr. *B. Malik*, for the appellant.

Mr. *Harnandan Prasad*, for the respondent.

SULAIMAN, C.J., and RACHHPAL SINGH, J.:—This is a defendant's appeal arising out of a suit brought by the Municipal Board for recovery of house and water taxes assessed on the defendant's house and garden. For a part of the period in dispute the defendant did not personally occupy the premises, in the sense that neither he nor his relations lived there. It is also a fact that during part of the period no tenant ever occupied the premises. But during this time the defendant maintained the garden in the compound. He had a gardener whom he naturally paid a monthly salary and who was living in a hut in the compound, and he also had bullocks working in order to irrigate the numerous fruit trees and plants in the compound. During this time he also appropriated the produce of the garden. There is no suggestion that he sold the produce. Certainly he did not let out the fruit trees during part of the period.

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But inasmuch as the defendant got some produce from his garden, although he spent money in maintaining the same, the courts below have held that the building with the compound did not "remain vacant" and "unproductive of rent" and that accordingly the defendant was liable to pay the municipal taxes.

The case depends on an interpretation of section 151 of the Municipalities Act. It is headed as "Remission by reason of non-occupation" and provides that when a building or land has remained vacant and unproductive of rent for 90 or more consecutive days during any year the Board shall remit or refund a proportionate amount of the tax.

The important words are "remained vacant" and "unproductive of rent". Obviously the word "vacant" does not mean that the land should be barren land and be not covered by trees or vegetation. Obviously the word "vacant" is used in the sense of non-occupation, that is to say, although there may be a garden on the land, it may nevertheless be in some cases unoccupied. Similarly the words "unproductive of rent" would not mean a building which is not capable of producing rent. If that were the meaning attributed to them, then the result would be that so long as the building is habitable and therefore capable of producing rent it would be liable to taxes, although it remains unoccupied. We do not think that that is the meaning of the section. It means that a building is vacant and unproductive of rent when neither the owner nor his relations or friends occupy it; nor is it let out to any tenant or lessee.

The difficulty in the present case arises from the fact that the compound covers a large area within which the building is situated. The building has no doubt remained unoccupied and unrented during the period in dispute; but the garden has been maintained by the owner, and on the one hand the owner has spent money in maintaining it and on the other he has taken the produce from this garden. The question then arises

whether the building with the land has remained vacant and unproductive of rent or not.

There would be no difficulty in deciding the point in extreme cases. The difficulty, of course, arises in cases which are on the border line. In a case where a compound is a mere appurtenant to a building, and while waiting for the building to be rented the owner maintains the compound in order that the house may not deteriorate, then if he takes the produce while waiting for some tenant to take the house it would be difficult to say that he is occupying the premises or that the premises are productive of rent. On the other hand, if he deliberately neglects the house but prefers to make profit out of the maintenance of the garden in the large compound, it would be difficult to hold that he is not occupying the land but keeping it vacant. It, therefore, follows that each case has to be considered on its own circumstances, and it is impossible to lay down any hard and fast and inflexible rule applicable to all cases. Much will depend on the relative value of the garden and the house and the ratio of the income which the garden can yield and the amount of rent which the house can fetch. The intention of the owner may also have to be taken into account, and the position would vary according as he is maintaining the garden and taking the produce under pressure of necessity because his house remains unrented, or whether he neglects the house and deliberately makes profit out of his garden.

The courts below have not approached this case from this standpoint and have assumed that if the owner takes any produce, howsoever small, he occupies the whole building with the compound. This, in our opinion, is not the correct view to take. There ought to be a clear finding whether in the special circumstances of this case the premises can be said to have remained vacant or whether they were occupied by the owner.

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We accordingly send down the following issue to the trial court through the lower appellate court for determination in the light of the observations made above: Did the premises, which constitute one tenement, remain vacant and unproductive of rent during the periods in dispute?

As the issue is practically a new one, we direct that the parties would be at liberty to produce any fresh evidence which they may choose to offer. The findings are to be returned within three months, if practicable.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Kendall and Mr. Justice Bajpai

1934
August, 20

EMPEROR *v.* MUHAMMAD MEHDI AND OTHERS*

Registration Act (XVI of 1908), *sections* 82, 83—*Offences under the Act—Sanction to prosecute—Previous permission of registration authorities essential for prosecution—Permission subsequent to inquiry and commitment by Magistrate, although prior to the sessions trial, is invalid—Defect whether curable—Criminal Procedure Code, sections* 532, 537.

Permission of the authorities mentioned in section 83 of the Registration Act is necessary before an accused can be prosecuted under section 82 of the Registration Act.

Where no such permission had been obtained until after the accused had been committed for trial to the sessions court, and the Sessions Judge at the trial acquitted the accused on that ground, and Government appealed from the acquittal, it was *held* that permission accorded after the inquiry and commitment by the Magistrate, although before commencement of the hearing at the sessions trial, did not validate the trial, because the commitment to the sessions court was itself illegal. The defect could not be cured by invoking section 532 or section 537 of the Criminal Procedure Code; for section 532 did not apply to a case where there was no question of the competence of the particular Magistrate to make the commitment but the prosecution was illegal on the ground of want of permission to prosecute; and section

*Criminal Appeal No. 102 of 1934, on behalf of the Local Government, from an order of acquittal passed by Farid-uddin Ahmad Khan, Sessions Judge of Fatehpur, dated the 25th of September, 1933.