

see no reason whatever why the legislature should have deliberately excluded illiterate persons as witnesses to testamentary dispositions in a country where the large majority of the people are illiterate.

For the above reasons we are of opinion that a will is validly attested within the meaning of the provisions of section 63 of the Indian Succession Act if either of the two necessary attesting witnesses has merely affixed his mark to the will. We answer the question referred to this Bench accordingly.

1936

MAIKOO LAL
v.
SANTOO

APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Smith
And on a reference

Before Sir Shah Muhammad Sulaiman, Chief Justice

MUNICIPAL BOARD, AGRA (DEFENDANT) v. RAM LAL
(PLAINTIFF)*

1936
March, 19

Municipalities Act (Local Act II of 1916), section 97—Written contract between Municipal Board and a contractor to execute unspecified repairs and constructions as might be ordered by municipal engineer during one year—Validity—Whether a separate written contract for each item of work necessary.

April, 22

A written contract, signed by a contractor as well as by the chairman and the executive officer of a Municipal Board, was entered into, by which the contractor undertook to execute such repairs and constructions as might be ordered by the municipal engineer from time to time during the period of one year; he was to be paid at the rates enumerated in the schedule of rates sanctioned by the Municipal Board; and on failure to carry out any such order he would forfeit the security deposit and the contract would be annulled. Details or specifications of the items of works that might be ordered by the municipal engineer during the said period were not given in the contract:

Held, (SMITH, J., contra) that the contract fulfilled the requirements of section 97 of the Municipalities Act and was valid, although it did not specify and detail the various items

*First Appeal No. 419 of 1932, from a decree of M. A. Nomani, Subordinate Judge of Agra, dated the 24th of June, 1932.

1936
MUNICIPAL
BOARD,
AGRA
v.
RAM LAL

of work that might be required to be done. In the case of such a contract the provisions of section 97 did not require that if any of the items of work ordered to be done exceeded Rs.250 in value a separate written contract for each such item was to be entered into.

Dr. *N. P. Asthana* and Mr. *B. N. Sahai*, for the appellant.

Messrs. *S. K. Dar* and *S. K. Mukerji*, for the respondent.

BENNET, J.:—This is a first appeal by the Municipal Board of Agra through its chairman against a decree of the learned Subordinate Judge of Agra in favour of the plaintiff, a contractor Babu Ram Lal. The plaintiff claimed that the plaintiff had constructed 23 works in the year 1930, the works being completed in April, May, June and July of that year, and that there was a balance due to the plaintiff of Rs.4,696 on these works and also three items of security of Rs.300, Rs.50 and Rs.50. Paragraph 3 of the plaint stated: "That in response to the orders placed with him by the Municipal Board, Agra, through the defendants Nos. 2 and 3, the plaintiff during the year 1930-31 executed repairs and the constructions of the work specified in annexure A, which also gives full particulars about the dates on which the respective works were completed and on which the bills relating thereto were delivered to the defendant Board as well as the amounts of the bills." Paragraph 2 of the plaint stated that on the 2nd April, 1930, the plaintiff and the defendant No. 1, acting through its chairman, executed an agreement providing that the plaintiff was to execute repairs and constructions of all works that might be ordered by the Municipal Engineer, Agra, from time to time during the period ending 31st March, 1931; that the plaintiff should be paid for the works done at the rates enumerated in the schedule of rates sanctioned by the Municipal Board, Agra, and that if the plaintiff refused to execute any work given to him by the Board's engineer, the defendant Board would have the power to cancel his contract and to forfeit his security deposit of

Rs. 300. These terms are embodied in a written agreement signed by the chairman and the executive officer and also by the contractor on a paper bearing a stamp of Rs. 3 value. Various pleas were taken in the written statement in regard to various works.

[Only those portions of the judgment are given below which relate to the point on which there was a difference of opinion and which was referred to a third Judge.]

In paragraph 15 an objection was taken against various serials that they were not sanctioned by the Public Works Committee and the Board as provided under section 97 of the Municipal Act and under Government Notification No. 1906/XI—6H, dated 15th July, 1916, and the Board was therefore not legally bound to pay the said amount.

* * * * *

The lower court had the argument chiefly addressed to it on issues Nos. 1 and 2: "(1) What works were constructed without the sanction of the Board? What is their value and which of the defendants is liable to pay? (2) Do the sections 96 and 97 of the Municipal Act bar the plaintiff's claim?" Under these issues the lower court alludes to the contract in writing of the 2nd April, 1930, and the argument was made before the court that this contract would not come under section 97 of the Municipalities Act, which provides as follows:

"(1) Every contract made by or on behalf of a Board whereof the value or the amount exceeds Rs. 250 shall be in writing.

"(2) Every such contract shall be signed (a) by the chairman or a vice-chairman and by the executive officer or a secretary, or (b) by any person or persons empowered under sub-section (2) or (3) of the previous section to sanction the contract if further and in like manner empowered in this behalf by the Board.

"(3) If a contract to which the foregoing provisions of this section apply is executed otherwise than in conformity therewith it shall not be binding on the Board."

1936

MUNICIPAL
BOARD,
AGRA
v.
RAM LAL

Bennet,
J.

1936

MUNICIPAL
BOARD,
AGRA
v.
RAM LAL

Bennet,
J.

It will be noted that sub-section (3) states that if a contract does not conform to these provisions, then it will not be binding on the Board, and therefore if the appellant can show that the requirements of section 97 are not satisfied, then it is not open to the plaintiff to claim under sections 65 and 70 of the Indian Contract Act that he should receive payment for the work done on the principle of *quantum meruit*. On the other hand in regard to section 96 there is no such provision, and the allegations of the appellant that the requirements of section 96 or of certain notifications of Government are not satisfied will not prevent the principle of *quantum meruit* under sections 65 and 70 of the Indian Contract Act from applying. The argument therefore addressed to the lower court was largely on section 97 and that argument has been part of the argument in appeal before us. Now the argument is that the written contract which was executed will not satisfy the requirements of section 97 because it makes provision for the contractor performing all works that are ordered by the municipal engineer, and the argument is that there ought to be a separate written contract for each work. Learned counsel on both sides have not been able to produce any ruling precisely on this point. The wording in section 97 is perfectly general and the reference is merely to "every contract". Now a contract is defined in section 2 of the Contract Act [clauses (a), (b), (e) and (h) of section 2 were here set forth.] Now examined by these considerations there is no doubt that the document, dated the 2nd April, 1930, is a contract. The argument, however, which has been addressed to us is that a separate contract must be made for each separate work, and apparently under this argument the contract in question would be of no validity at all because it does not relate to any special work. It is obvious that the evidence given orally that certain works were to be done would not offend against the principles of section 92 of the Evidence Act, because from the very nature of the agreement it is provided that instructions may be given as to what works

should be done. The works which the Board had in contemplation, as shown by annexure A to the plaint, consist of the construction of a number of drains and certain repairs and other small works for which it would be difficult to provide detailed plans and estimates. In particular the objection which has been taken to item No. 16 for constructing a *nala* in Tajganj is an objection which appears to me to be unsound. This drain was constructed, as shown by the bill of the contractor, in accordance with the scheduled rates of the Municipal Board, and it is not denied that the drain was constructed on the same plan and design as other municipal drains. In my opinion it would be extremely difficult to draw up a plan and estimate in advance to show exactly the amount of each kind of work, masonry work, excavation, brick work, concrete and lime, etc., which is detailed in this bill. It is much more practical to have an engineer indicate to a contractor in what place the drain is required and to allow the contractor to carry out this work according to the standard plan for drains and according to the standard rates. The Municipalities Act is intended to apply to municipalities all over the province and in these municipalities there frequently arise cases like the present where a contractor has to do a number of petty works and repairs. No doubt in the aggregate these petty works and repairs may total over Rs.250; but it does not appear to me that it is the intention of the section that every such item should require a separate written contract.

Now I may refer to certain rulings which have been given by this Court, although not precisely on the same point. One of these is contained in *District Board, Allahabad v. Baijnath Prasad* (1). That was a case where a point was raised on page 58 under the similar section 65 of the District Boards Act of 1922. This provides in similar terms that no contract shall be made on behalf of the Board of an amount exceeding Rs.100 except it is in writing and signed by similar officials. In that case

1936

 MUNICIPAL
BOARD,
AGRA
v.
RAM LAL
Bennet,
J.

(1) [1934] A.L.J., 55.

1930

MUNICIPAL
BOARD,
AGRA
v
RAM LAL

Bennet,
J.

a contract had been made and while the work was being done the sub-overseer of the Board gave on his own authority certain instructions to the contractor to use cement instead of mortar, and bricks of a better quality than third class bricks, and on account of this variation the contractor incurred an extra amount beyond the Rs.100 allowed by the section. The point was taken before this Court that as there was no written contract signed by a proper official for the extra amount incurred above Rs.100, therefore the contractor was not entitled to receive this amount under the bar in section 65(3). The Bench of this Court did not agree with this contention and observed: "The sub-overseer was acting for his superior officer, the District Board engineer, and it would certainly be inequitable if a contractor should suffer for carrying out the instructions of an officer of a District Board. In any case we do not think that section 65 applies to a case of this sort and the District Board cannot seek shelter under its provisions."

Another ruling which I desire to refer to is in *Munir Khan v. Municipal Board, Allahabad* (1). In that case the contract was that the contractor should receive a sum of Rs.325 per month for the supply of 13 animals and 11 carts to collect all night-soil and remove the same to *such place or places* as the Chairman, Public Health, of the Board *shall appoint*, and that such payment shall not be liable to any diminution or enhancement by reason of any variation in the number of animals, carts and drivers employed or in the amount of work required to be done by the contractor. Now in this agreement there was a provision that there could be an oral variation of the work to be done, that is the chairman could direct that the night-soil was to be taken to different places and there could also be a variation in the number of animals, carts and drivers employed. It was not shown or claimed that such a contract would be void under section 97 of the Municipalities Act. It is true that the point was not raised, but the case is of some value for showing

(1) [1930] A.L.J., 461.

that such a contract was before this Court and no such point was taken. It appears to me that although the parallel is not absolute, still there is a certain parallel between the present agreement providing for the contractor to construct the petty repairs and petty works of the nature in annexure A at the direction of the municipal engineer and the case where the sub-overseer orally varied the written contract and the case where the chairman was empowered to vary the contract for removal of night-soil. I am of opinion therefore that the present contract is one which sufficiently complies with the terms of section 97 of the U. P. Municipalities Act of 1916.

* * * * *

On my view of the law the appeal would be dismissed.

SMITH, J.:—I have heard the judgment just now delivered by my learned brother. I regret that I am unable to agree with the view he takes of the effect of section 97 of the Municipalities Act. It seems to me that the general agreement that was arrived at between the plaintiff Ram Lal and the Municipal Board of Agra on the 2nd April, 1930, could not take the place of a contract in writing whenever any definite piece of work had to be carried out. As is pointed out by learned counsel for the appellant, this agreement is in quite general terms, and relates to no definite and specific piece of work at all. In my opinion the provisions of section 97 are partly, at any rate, designed to prevent general agreements of this nature being pleaded as justification for the giving of contracts for the carrying out of definite works. In my opinion the items in excess of Rs.250 in the list appended to the plaintiff's plaint all required contracts in writing, as laid down by section 97 (1) of the Municipalities Act. These items are, apart from No. 2, which is not objected to on behalf of the appellant, six in number, namely Nos. 4, 6, 7, 8, 10 and 16 in the list. As regards No. 6 it appears that on the 3rd May, 1930, the plaintiff received from Mr. A. C. Sinha, the municipal engineer, a written "work order" to the following effect: "You are hereby informed that the work of

1936

MUNICIPAL
BOARD,
AGRA
v.
RAM LAL

1936
 MUNICIPAL
 BOARD,
 AGRA
 v.
 RAM LAL

*Smith,
 J.*

paving and draining a lane at Tajganj near the house of B. Bishamber Nath has been given to you; you are therefore directed to commence the work and receive necessary instructions from the overseer. (Sd.) A. C. Sinha, Municipal Engineer." This so-called "work order" may in my opinion be regarded as a contract in writing within the meaning of section 97(1) of the Municipalities Act, and in view of the fact that the Municipal Board has not shown that the municipal engineer was not empowered to sign such contracts, I think that as regards this particular item it cannot be urged that the contract was not binding on the Board by reason of the provisions of section 97(3) of the Act. As regards the remaining five items, however, it is not shown that the plaintiff received any "work orders" or anything else in writing in respect of them, and in my opinion the plaintiff is debarred from claiming any amount in respect of those works by reason of the provisions of section 97, clauses (1), (2) and (3), of the Municipalities Act. The rulings to which we have been referred by learned counsel for the respective parties have already been set forth in the judgment of my learned brother, and it is not necessary for me to mention any of them again.

BY THE COURT:—We state the following point of law on which we differ: Is plaintiff's claim for items Nos. 4, 7, 8, 10 and 16 of annexure A of the plaint barred by the provisions of section 97, U. P. Municipalities Act of 1916, and does the written contract of April 2, 1930, not satisfy the requirements of that section?

We refer this point of difference to whatever Judge shall be selected by the Hon'ble Acting Chief Justice under the provisions of section 98 of the Civil Procedure Code.

SULAIMAN, C.J.:—The plaintiff respondent is a contractor and the defendant appellant is the Municipal Board of Agra. Admittedly an agreement was duly executed between the plaintiff and the defendant on the 2nd April, 1930, and was signed by the plaintiff contractor, as also by the chairman and the executive officer

of the Municipal Board. The question of the validity of this agreement itself is not before me. The plaintiff's claim was for recovery of amounts due to him from the Board for work done in pursuance of this agreement. One of the defences to the suit was that there should have been separate agreements for each item of work done by the plaintiff, and in the absence of such separate agreements the contract was not binding on the Board. I am not concerned with the other points which arose in the case. The two learned Judges before whom this case came up for hearing differed on the point mentioned above, and have accordingly referred the following point of law to me under section 98 of the Civil Procedure Code: "Is plaintiff's claim for items Nos. 4, 7, 8, 10 and 16 of annexure A of the plaint barred by the provisions of section 97, U. P. Municipalities Act of 1916, and does the written contract of April 2, 1930, not satisfy the requirements of that section?"

The contention on behalf of the defendant Board is that the provision in section 97, that every contract made by or on behalf of a Board whereof the value or the amount exceeds Rs.250 shall be in writing, means that if any item of work to be done exceeds the value of Rs.250 then there should be a separate contract for such item of work, and that the Board cannot enter into one contract for a large number of items each of which in value exceeds Rs.250, but that there should be so many different written contracts. It seems to me that section 97 is not capable of such an interpretation. There is obviously a clear distinction between a contract between two parties and the work done by either party in pursuance of it. "Contract" is defined in the Contract Act, section 2, as being an agreement enforceable by law, and an agreement comes into existence when the offer made by one party is accepted by the other.

I have therefore to see whether the document in question embodied the contract between the parties which is required by section 97 to be in writing. The agreement stated that the said contractor agreed and

1936

MUNICIPAL
BOARD,
AGRA
v.
RAM LAL

Sulaiman,
C.J.

1936

MUNICIPAL
BOARD,
AGRA
v.
RAM LAL

Sulaiman,
C.J.

bound himself to execute the repairs and construction of all works that might be ordered by the municipal engineer from time to time during the period ending 31st March, 1931, and the said contractor agreed to execute and perform all works that might be ordered by the Board's engineer; that the said contractor shall be paid for the work done at rates enumerated in the schedule of rates sanctioned by the Municipal Board. There were other items in the contract as well, with which I am not just at present concerned. It also contained the covenant that if the contractor refused to execute any work given to him by the Board's engineer, the Municipal Board would have power to annul his contract and erase his name from the list of approved contractors, in which event the contractor would be liable to forfeit his security deposit. The plaintiff was, therefore, bound to execute repairs and construction of all works that were ordered by the municipal engineer at the peril of having his security deposit forfeited if he refused to execute any such work given to him by the Board's engineer. It is difficult to see why such an agreement cannot be the contract between the parties which is mentioned in section 97. The value of the work to be done for the period of one year was presumably to be in excess of Rs.250; therefore the contract was entered into in writing in order to fulfil the requirements of section 97. So far as the Board was concerned, it contracted to pay the contractor at the sanctioned scheduled rates for all repairs and construction of works that he might do on the orders given by the municipal engineer. No specifications and no restrictions were laid down. Very often it is impossible to know beforehand what sort of repairs would be required during the course of the following 12 months, and it may even be impossible to know beforehand what new constructions may be urgently required. It is therefore impossible to hold that unless a complete list of all the detailed items of work to be done during the whole period is given in the written agreement, there is no written contract as

required by law. In my opinion the contract was one and it is in writing, though the items of work to which the contract related were bound to be numerous.

With great respect, I am unable to agree with the view expressed by SMITH, J., that this written agreement by itself is not sufficient. I agree with the view expressed by BENNET, J., that this written contract fulfils the requirements of section 97. My answer to the question referred, therefore, is that the plaintiff's claim for the various items is not barred by the provisions of section 97 and that the written contract of April 2, 1930, satisfies the requirements of that section. Let the case be sent back to the Bench concerned for disposal.

1936

MUNICIPAL
BOARD,
AGRAv.
RAM LALSulaiman,
C. J.

Before Mr. Justice Bennet and Mr. Justice Harries

SECRETARY OF STATE FOR INDIA (DEFENDANT) *v.*
NURAN BIBI AND ANOTHER (PLAINTIFFS)*

1936
April, 23

U. P. Town Improvement Act (Local Act VIII of 1919), sections 57, 59(6)—Tribunal determining amount of compensation—One of the assessors absent on one day of hearing, when some witnesses were examined—Substantial error or defect in procedure—Jurisdiction.

A Tribunal constituted under the U. P. Town Improvement Act was engaged in hearing a case regarding the determination of the amount of compensation to be paid for an acquisition. One of the three members of the Tribunal was absent on one day, on which three witnesses were examined. On a subsequent day all the members were present and the case was argued and a judgment was given in which all the three members concurred:

Held, that owing to the absence of one of the members on a date when evidence was heard the Tribunal had no jurisdiction to give the judgment and it must be set aside. Section 59(6) of the U. P. Town Improvement Act shows that the Act contemplates that when one member is temporarily absent another member must be appointed in his place and it is not possible for the Tribunal to proceed in the absence of a member. Section 64(1)(b) empowers the President of the Tribunal to give a decision alone in certain matters, but the

*First Appeal No. 41 of 1933, from a decree of the Tribunal Improvement Trust, Allahabad, dated the 11th of September, 1932.