1926

USUF ALI BEG v. NATHU.

trarily, but only on judicial grounds. I should be prepared to make the declaration that the case is a fit one for further appeal if I were satisfied that the decision from which a further appeal is proposed to be preferred is (1) opposed to any general principle of law, or (2) it involves a question of public interest or (3) is contrary to any recognized precedent. The present case does not fall under any of those heads. My decision turns upon the interpretation of a particular deed of sale and the rule of interpretation on which I have acted is a well understood rule.

I wish to guard myself against being understood that I lay down in this decision any exhaustive list of grounds on which a certificate of fitness for further appeal may be granted under the provisions referred to above.

The application is rejected.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Gokaran Nath Misra.

1926
March, 2.

MUNICIPAL BOARD, LUCKNOW (DEFENDANT-APPELLANT) *v.* DEBI DAS (PLAINTIFF-RESPONDENT).*

United Provinces Municipalities Act (II of 1916), sections 96, 97, and 326—Contracts requiring sanction of the Municipal Board, whether enforceable without such sanction—Board noting proceeding of a sub-committee, whether amounts to "sanction"—Contract bearing only one of two required signatures, how far binding—Unenforceable contract, whether becomes enforceable by acquiescence or part performance—Contract Act (IX of 1872), sections 65 and 70, scope of—Benefit received under an unenforceable

* First Civil Appeal No. 32 of 1924, against the decree, dated the 6th of March, 1924, of Bishambhar Nath Misra, Subordinate Judge of Lucknow, decreeing plaintiff's suit.

1926

MUNICIPAL BOARD, LUCKNOW v. DEBI DAS.

contract, Board's liability for—Section 326 of the United Provinces Municipalities Act, scope and interpretation of.

Held, that the word "required" in section 96 of the United Provinces Municipalities Act (II of 1916) is clearly mandatory and a contract, the terms of which require the sanction of the Board, cannot be binding on the Board without such sanction. The fact that the Board passed a resolution that the proceedings of a sub-committee purporting to confirm a contract were noted or that it sanctioned the payment of money under the contract cannot amount to "sanction of the contract."

Where a contract was signed by the Chairman but was not signed by the Executive Officer or the Secretary, the place for the signature of the second officer being left blank, *held*, that the contract was unenforceable by reason of incomplete signatures on the contract unless it was shown to fall within any exception in section 97 of the Act.

Held, that in India the doctrine of acquiescence, which could only be invoked as being a rule of justice, equity and good conscience, cannot qualify the law as enacted in sections 96 and 97 of the Municipalities Act. So a contract which was initially unenforceable could not become enforceable by part performance or by acquiescence of the defendant Board.

Held further, that in the present case it was not ignorance of the law which led the parties to believe the contract to be enforceable but a mistake as to what had been done and so section 65 of the Indian Contract Act was applicable to the case. As sections 69 and 70 of the United Provinces Municipalities Act cannot be held to have repeated section 65 of the Contract Act, that section being a rule of statutory law must be given effect to.

Held also, that the exceptions provided for in sub-sections 3 and 4 of the Act show that section 326 of the Municipalities Act was meant to include suits of every description, even suits based on contract.

Section 326 of the United Provinces Municipalities Act should be interpreted according to the terms of that section, and no decisions as to the differently worded terms of other sections of other Acts are of assistance in interpreting this section. The words "in respect of an act done" in that

1926

MUNICIPAL BOARD, LUCKNOW v. DEBI DAS

section appear to include an omission because every omission must have reference to some act or series of acts. Further a Board must be deemed to have acted in its official capacity, even though its action was not taken directly under any provision of the Act but indirectly in pursuance of a contract executed directly under the provisions of the Act, for even in the latter case it must be held to have acted in an official capacity. A Board in deed can only act in an un-official capacity when it acts otherwise than under colour of any power conferred on it. [L. R., 8 A. C., 517 and I. L. R., 27 All., 592, relied upon. L. R., 1 K. B. D., 772; I. L. R., 50 Calc., 929; L. R., 50 I. A., 239; I. L. R., 45 All., 179 (P. C.); and L. R., 50 I. A., 69, referred to.]

Mr. *Bisheshwar Nath Srivastava*, for the appellant.

Messrs. *M. Wasim*, *Hakimuddin* and *Naziruddin*, for the respondent.

February, 10.

ASHWORTH and MISRA, JJ. :—This is a defendant's appeal, but there are cross-objections by the plaintiff. The plaintiff has sued the Municipal Board of Lucknow on the basis of four contracts, exhibits 57, A26, A27 and A28, dated the 7th of December, 1917, the 30th of April, 1918, the 8th of June, 1918 and the 4th of February, 1919, respectively, which are printed on pages 118, 140, 147, and 180 of the printed book of exhibits and documents, and also on the basis of two written contracts executed in December and January, 1918, which, although not produced, were held to be proved by the lower court by secondary evidence. The contracts provided for the supply and consolidation of *kankar*. The Board admits in its written statement liability for Rs. 31,331-15-1, which has been paid. During the case it has admitted liability for a further sum of Rs. 2,337-2-4. The lower court has given a decree for Rs. 16,534-2-9 out of the total claim for Rs. 35,145-10-2. By his

cross-objections, the plaintiff-respondent claims an additional sum of Rs. 5,812-14-0.

The main grounds on which the claim was resisted in the lower court originally were that the suit was barred by limitation under section 326 of the United Provinces Municipalities Act (Act II of 1916), and that the Municipality had paid a sufficient sum to cover the work done, in any case. After the evidence had been recorded on these two points, and during the progress of arguments, the defendant Board was allowed to set up a new plea that the contracts comprised in exhibits A26 and A27 were unenforceable by reason of their not having received the sanction of the Board by a resolution, and that the contract comprised in exhibit A28 was further not binding on the Board as it was not properly signed. Reliance was placed on sections 96 and 97 of the Act. We think that the court should not have allowed this plea to be taken at this late stage in proceedings, but as no objection has been raised by the respondent on this account either in the court below or by cross-objections before us, the plea must be considered on its merits by us. It will thus be seen that two questions of law arise. The first is whether the claim is barred on the ground of limitation by section 326 of the Act, and the second is whether the claim is untenable by reason of being based on agreements which are unenforceable against the Board. We will decide these two questions before the matters of work done and payments made. In the event of our holding that the contracts were unenforceable by reason of want of proper sanction or proper signature, the third question arises whether the claim can be sustained under the provisions of section 65 of the Contract Act (IX of 1872). It will be convenient to consider the latter two questions before the first.

1926

MUNICIPAL BOARD, LUCKNOW v. DEBI DAS.

Is the claim so far as it is based on exhibits A26 and A27, unsustainable by reason of the provisions of section 96 of the Act? Exhibit A26 is a contract for the supply and arrangement (not consolidation) of one lakh cubic feet of *kankar*. It is printed on page 140 of the book of exhibits and documents. Exhibit 77, printed on page 153, is a copy of a resolution of the Public Works Committee, dated the 17th of June, 1918, confirming this contract, which apparently was negotiated by Mr. Kaul, the Municipal Engineer. Exhibit A27 is a copy of a similar agreement for the collection of one lakh cubic feet of *kankar*. It was confirmed by resolution No. 104 of the Public Works Committee, dated the 12th of July, 1918, which is also contained in exhibit 77. These proceedings of the Public Works Committee were laid before the Board as shown by exhibit 79, printed on page 155. The proceedings of the Board as shown by that exhibit run as follows:—

> "*Resolution No. 229.*—Proceedings of the following committees held since the meeting of the Board held on the 30th of May, 1918—Noted."

The proceedings so noted included as item No. 3—Public Works Committee, Monday, the 17th of June, 1918. Then we have resolution No. 284 with a similar entry as to proceedings of committee since the meeting of the Board held on the 28th of June, 1918. This includes as item No. 5, Public Works Committee, Friday, the 19th of July, 1918. The date "19th" appears to be a mistake for "12th". Now the question arises whether the fact of the Board passing a resolution that they had noted certain proceedings of the Public Works Committee, can be construed as a resolution sanctioning contracts which were confirmed

in the course of the proceedings of the said committee. We have no hesitation in deciding that it cannot. Section 92 of the Act provides that all questions which may come before a meeting of a Board shall be decided by a majority of the votes of the members present and voting. It is clear that before a contract can be said to have been sanctioned by the Board by a resolution, the members of the Board should have been asked whether they agreed to the contract, and, if they did so agree, the entry should be that the contract had been sanctioned. It cannot be held sufficient that the Board merely noted proceedings of a sub-committee purporting to confirm a contract. But it is urged that there is evidence to show that subsequently the Board sanctioned the payment of money under the contract. This again cannot amount to sanction of the contract. Such payment must have been sanctioned under the mistaken idea that the contract had been previously sanctioned by the Board. It is urged that the provision of section 96 of the Act, that a contract involving an amount exceeding one thousand rupees should be sanctioned by the Board, is merely directory and not mandatory. Section 96 runs as follows :—

> "The sanction of the Board by resolution is required in the case of every contract . . . etc."

It is admitted by the respondent that this language would be mandatory but for sub-section 3 of section 97 which follows. That sub-section provides that where a contract is not properly signed it shall not be binding on the Board. The argument is that, there being no such provision attached to section 96, it must be held that a contract, though unsanctioned by the Board, may be binding on the Board. We cannot accept this argument. It is contrary to reason to

1926

MUNICIPAL BOARD, LUCKNOW v. DEBI DAS.

suppose that a contract, the terms of which require the sanction of the Board, can be binding on the Board without such sanction. The word "required" is clearly mandatory. On the other hand, it was not beyond argument that a contract bearing only one of two required signatures might be binding in spite of this formal defect. Consequently, sub-section 3 may be deemed to have been added to section 97 *a majore cautela*. We hold that the lower court was wrong in holding that the contracts contained in exhibits A26 and A27 were sanctioned by the Board, and we hold that they are unenforceable by reason of want of sanction.

Is the claim, so far as it is based on exhibit A28, unenforceable by reason of incomplete signatures on the contract under section 97 of the Act? We hold that it is. The contract was signed by the Chairman, but was not signed by the Executive Officer or the Secretary, the place for the signature of the second officer being left blank. An exception is made under section 97 in respect of contracts executed in pursuance of a general project already sanctioned by the Board. In such a case the Board may, with the previous sanction of the Commissioner, empower the engineer to sign a contract. It has been urged that the present contract is signed by the engineer at one portion of it, namely, after the entry as to the amount of metal to be collected, that the contract in question may have been executed in pursuance of a sanctioned general project, and that it was for the Board to prove that it was not, the burden of proving the contract to be irregular being on the Board. This argument we reject for two reasons. The first is that the engineer's signature is not affixed at the proper place on the contract. Its position merely shows that the engineer certified the amount of *kankar* in respect of

which the agreement was executed. The other reason is this. The burden of proving that the contract was improperly executed was originally on the Board, but they have put in court all their printed proceedings, and have stated that collection of this *kankar* was not in pursuance of any sanctioned project. This was sufficient to sustain the initial burden of proof. The respondent has not been able to show that the case fell within any exception in section 97. The lower court has held that the plaintiff could not be penalized by the failure of the Board to carry out the necessary formalities. With this view we cannot agree. The provisions of that Act are for the protection of the public, and cannot be rendered nugatory on the ground stated by the lower court. No resolution of the Board, moreover, appears to have been passed in respect of the contract A28. Accordingly, we hold that the claim, so far as it is based on the contract in exhibit A28, is unenforceable.

Was the lower court right in holding that the contracts, though initially unenforceable, became enforceable by part performance or by acquiescence of the defendant Board? It is common ground that *kankar* was supplied, and stacked under colour of these contracts and that payments were made at least in part for such *kankar*. The lower court relies on the English doctrine of acquiescense as enunciated in *Lawford* v. *Billericay Rural District Council* (1). We hold, however, that the doctrine of acquiescence cannot be invoked to defeat a clear statutory provision such as is contained in section 96 or 97 of the Municipalities Act. It was finally decided in the case of *Young & Co.* v. *Mayor and Corporation of Royal Leamington Spa* (2), that the doctrine of acquiescence cannot be invoked as against a statutory provision,

(1) L.R., 1 K.B.D., 772. (2) L.R., 8 A.C., 517.

1926

MUNICIPAL BOARD, LUCKNOW v. DEBI DAS.

though it may be invoked as a part of the common law to qualify the law as to the powers of a corporation in respect of contracts, the latter itself being common law. So in India the doctrine of acquiescence, which could only be invoked as being a rule of justice, equity and good conscience, cannot qualify the law as enacted in sections 96 and 97 of the Municipalities Act. The matter is fully discussed in *Radha Krishna Das* v. *The Municipal Board of Benares* (1), with which we agree on this matter. We hold, therefore, that the claim cannot be supported by the doctrine of acquiescence or part performance.

The next question to be decided is whether the claim can be sustained under the provisions of section 65 of the Indian Contract Act? We hold that it can. The lower court held that the Board is not liable to pay in respect of the work done for its benefit under section 70 of the Contract Act. It relied upon the decision already mentioned *Radha Krishna Das* v. *The Municipal Board of Benares* (1). That decision, however, is authority for holding that section 65 does not apply. But on consideration we are constrained to differ from that view and are of opinion that section 65 does apply in a case like this. In our opinion, out of the two sections, namely, sections 65 and 70, the latter section covers a wider ground and should not be invoked in the case of a benefit received under a contract. To such a case section 65 would be clearly the more applicable section. Section 65 of the Contract Act runs as follows :—

> " When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for

(1) (1905) I.L.R., 27 All., 592.

it, to the person from whom he received it."

The view taken in *Radha Krishna Das* v. *The Municipal Board of Benares* (1), is that an agreement can never be said to be discovered to be void (i.e., unenforceable by law), within the meaning of section 65, when at the time of its execution it was believed enforceable not owing to a mistake of fact but to a mistake of law. This argument was advanced in the Privy Council case *Annada Mohan Roy* v. *Gour Mohan Mulick* (2). The following passage from the judgment of Lord SUMNER will show that it was not dissented from :—

> " The object being to show that there were, or might be, circumstances in which it possibly could be held that the time of the discovery of the illegality of the contracts was not the time when the contracts were made, and the parties knew the law or must be presumed to have known it, but at a later date (what date, their Lordships are not exactly told). It was urged that, if such circumstances could be suggested here, a view similar to that which the Board took in the case above mentioned [*Harnath Kuar* v. *Indar Bahadur Singh* (3)], might be taken in favour of the present appellant also. In that case, however, there were special circumstances, wholly different from those in the present case, circumstances which were proved in evidence and were sufficient for their Lordships to act upon and to enable them to say that the discovery in the case was later than the date of the contract itself."

(1) (1905) I.L.R., 27 All., 592. (2) (1923) 28 C.W.N., 713 (719).
(3) L.R., 50 I.A., 69.

1926

MUNICIPAL BOARD, LUCKNOW v. DEBI DAS

The case of *Harnath Kuar* v. *Indar Bahadur Singh* (1), referred to by Lord SUMNER was one where, according to the prevalent view of the courts in India, at the time of the contract it was a valid one, although subsequently held by the Privy Council to be invalid according to the view of the law stated by their Lordships. This decision (as regards the correctness of which Lord SUMNER's language suggests a doubt) can, at the best only, be authority for qualifying the view of the Allahabad High Court, with which we have expressed agreement, by making an exception in the case of a contract which, though according to the law as finally understood, invalid, was valid according to the generally accepted view of the law existing at the time when the contract was executed. This was not the case here. We agree, therefore, with *Radha Krishna Das* v. *The Municipal Board of Benares* (2) that, if the present case of discovery was discovery merely of an erroneous view of law, section 65 would not be applicable.

In the present case, we hold that it was not ignorance of the law which led the parties to believe the exhibits A26 and A28 to be enforceable, but a mistake as to what had been done. The fact that in the case of exhibits A26 and A27 the Board merely "noted" without sanctioning is no proof that it thought this enough, as we find cases where such noting was followed or accompanied by a sanction. Again the omission to get the second signature on exhibit A28, or to get it confirmed were clearly due to ignorance of the fact that what was necessary had not been done, and not to ignorance of what was necessary. But we do not agree with the view expressed in *Radha Krishna Das* v. *The Municipal Board of Benares* (2) that to hold section 65 applicable would render nugatory the statu-

(1) L.R., 50 I.A., 69. (2) (1905) I.L.R., 27 All., 592.

tory provisions of sections 69 and 70 of the Municipalities Act. These sections would still apply except where the Board had received benefit. Section 65 may be based on the English doctrine of acquiescence, and this latter doctrine may be inapplicable as a rule of justice, equity and good conscience in the face of sections 69 and 70. But as these sections cannot be held to have repealed section 65 of the Contract Act, that section being a rule of statutory law must be given effect to.

The next question is whether the suit is within limitation having regard to the provisions of section 326 of the Municipalities Act. The discovery that the contracts were void was only made during the progress of the suit, and notice of the suit had already been given to the Board. The suit, was, therefore, according to our findings above, clearly within time. Much argument was directed to show that section 326 would not apply to the case of a suit based on a contract. This question does not arise in view of our findings as above. We would only say that section 326 should be interpreted according to the terms of that section, and that no decisions as to the differently worded terms of other sections of other Acts are of assistance in interpreting this section. It is noticeable that section 326 speaks of suits " in respect of an act done or purporting to have been done by a Board in its official capacity." The words " in respect of an act done " would appear to us to include an omission because every omission must have reference to some act or series of acts. We also consider that a Board must be deemed to have acted in its official capacity, even though its action was not taken directly under any provision of the Act, but indirectly in pursuance of a contract executed directly under the provisions of the Act, for even in the latter case it must be held to have acted in an

1923

MUNICIPAL BOARD, LUCKNOW v. DEBI DAS.

official capacity. A Board indeed can only act in an unofficial capacity when it acts otherwise than under colour of any power conferred on it. The exceptions provided for in sub-sections 3 and 4 of the Act show that the section was meant to include suits of every description, even suits based on contracts. We do not consider it necessary to elaborate our reasons further, because in view of our earlier findings the decision as to the ambit of section 326 is not necessary for this case.

For the above reasons, we decide all these three preliminary questions in favour of the respondent. The further questions involved in this appeal and the cross-objections will be decided after further arguments.

April, 26. ASHWORTH and MISRA, JJ. :—After having delivered our judgment on the points of law involved in the case we fixed a date for hearing the parties on the question of the amount of money to which the plaintiff would be held entitled. We heard the parties at great length and we now proceed to give our finding both in respect of the defendant's appeal as well as the cross-objections filed by the plaintiff-respondent.

[The learned Judges then discuss the various items and proceed—EDITOR.]

Our conclusions, therefore, are that on the defendant's appeal,

(1) the plaintiff's claim as decreed by the learned Subordinate Judge for Rs. 3,316-14-9 on account of Lists 2, 10, 11 and 12 attached to the plaint, should be dismissed;

(2) the plaintiff's claim as decreed by the court below for Rs. 1,582-3-2 on account of Lists 3, 7, 9, 13 and 20 attached to the plaint should also be dismissed; and

(3) the plaintiff's claim as decreed by the court below for Rs. 1,799-7-11 on account of Lists 4 and 17 attached to the plaint should also be dismissed.

Similarly on the cross-objections filed by the plaintiff we have come to the conclusion that plaintiff is entitled to a decree for the sum of Rs. 2,791-13-8 on account of work entered in List 1, attached to the plaint, which has been disallowed by the learned Subordinate Judge.

The result of the above findings is that the defendant's appeal will be decreed to the extent of Rs. 6,698-9-10, and the plaintiff's cross-objections will be decreed to the extent of Rs. 2,791-13-8; in short the plaintiff's claim will finally stand decreed for Rs. 12,627-5-10, with future interest at 6 per cent. per annum from the 20th of September, 1920, the date of resolution passed by the Board, until realization.

As to costs we would order that the plaintiff will get his proportionate costs in the lower court on the sum now decreed to him by this court and pay to the defendant costs on the sum for which his (plaintiff's) claim has been dismissed. The defendant-appellant will get his costs in this Court on the sum for which his appeal has been decreed and pay the costs of the plaintiff-respondent on the sum for which his (defendant's) appeal has been dismissed. Similarly the plaintiff-respondent will get costs on his cross-objections to the extent that they have succeeded and pay costs of the defendant-appellant to the extent to which they have failed.

Appeal decreed.