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RAM GOPAL BYSACK v. NURUMUDDIN.

The judgment of the Court (NORRIS and MACPHERSON, JJ.) was as follows:—

The only question argued in this second appeal by the learned pleader for the appellant is that the Lower Appellate Court has erroneously held that the *jalkar* right in dispute between the parties in this suit was immoveable property within the meaning of section 106 of the Transfer of Property Act.

We think that the decision is a correct one. We are of opinion that this *jalkar* right is immoveable property within the definition of immoveable property as set out in the General Clauses Act; that it is a benefit to arise out of land covered by water; and this conclusion we think is justified by the expression of opinion of at least three of the learned Judges who were parties to the Full Bench decision of *Fadu Jhala* v. *Gour Mohun Jhala* (1).

The appeal therefore fails and must be dismissed with costs.

*Appeal dismissed.*

J. V. W.

## CRIMINAL REVISION.

*Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.*

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*January* 27.

KHERODA PROSAD PAUL (PETITIONER) *v.* THE CHAIRMAN OF THE HOWRAH MUNICIPALITY (OPPOSITE PARTY).*

*Bengal Municipal Act (Bengal Act III of* 1884), *ss.* 44, 45 *and* 353—*Powers of Chairman, delegation of—Prosecution for obstructing drain.*

The proviso to section 45 of the Bengal Municipal Act, 1884, cannot be considered as altogether overriding the body of the section, and relates only to specific acts in which an oxpress or implied consent may have been given or held to have been given. It cannot be held to apply to a general authority, verbally given by a Chairman to a Vice-Chairman, to institute prosecutions under the Act, as such power can only, under the body of the section, be delegated by a written order.

* Criminal revision, No. 574 of 1892, against the order passed by G. A. Grierson, Esq., District Magistrate of Howrah, dated the 17th of September 1892, affirming the order passed by the Bench of Honorary Magistrates of Howrah, dated the 10th of August 1892.

(1) I. L. R., 19 Calc., 544.

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In a prosecution instituted by a Vice-Chairman for obstructing a drain, where it appeared that the Chairman had some months previously verbally given the Vice-Chairman general authority to institute all such prosecutions under section 353 of the Act, and it appeared that a conviction had been obtained before a Bench of Magistrates, and that on appeal to the Magistrate the conviction had been upheld, the Magistrate himself being the Chairman and hearing the appeal with the express consent of the accused, and where it was contended in revision before the High Court that although there was no written order by the Chairman delegating his powers, it must be taken upon the facts proved and the circumstances of the case that the prosecution had been instituted with the express or implied consent of the Chairman obtained, both previously and subsequently, within the terms of the proviso to section 45,

*Held*, that the proviso did not apply to the case, that the prosecution had not been properly instituted, and that the conviction and sentence must be set aside.

THIS was a prosecution, instituted at the instance of the Vice-Chairman of the Howrah Municipality, under section 218 of Bengal Act III of 1884 (The Bengal Municipal Act), for not complying with the terms of a notice for removing an encroachment on a drain. The accused, about two or three years prior to the date of the notice, built, with the permission of the Commissioners, a shed covered with tiles, and some time previous to the notice he constructed some brickwork in the shape of a *posta* or abutment beyond the water-fall mark of the shed, and thereby obstructed the drain in question and, as alleged by the prosecution, wholly stopped the flow of the water.

The notice, which was dated the 30th January 1892, was signed by the Vice-Chairman, and directed the removal within 8 days of the entire length of the *posta*. This notice not having been complied with, the prosecution was instituted on the 9th May 1892, the complainant's name being given as Audhor Chunder Ghose, an overseer of the Municipality. On the case coming on to be heard before a Bench of Honorary Magistrates, a preliminary objection was raised as to the authority of the Vice-Chairman, who issued the summons, to institute the prosecution. This objection was overruled by the Bench, who relied on section 45 of the Act. On the merits, the accused pleaded that as the drain and the land adjoining were private property, the Municipality had no right to interfere. The Bench, however, considered that, under

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section 190, the Municipality had power to control all drains, whether public or private, and convicted the accused and fined him Rs. 20 and directed him to pay the costs, Rs. 4.

A further objection was raised at the hearing to the effect that the proceedings were barred by limitation, but the Court held that the offence was a continuing one, and referred to the provisions of section 353 of the Act.

Against the conviction the accused appealed to the District Magistrate, who was also the Chairman of the Municipality. No objection was, however, taken by the accused on that ground to the appeal being heard by him, although the Magistrate himself called attention to his position before the appeal was argued.

The following was the judgment of the District Magistrate:—

"I drew the attention of Counsel for the appellant to the fact that the Appellate Court is also Chairman of the Municipality. Counsel said that he had no objection to my hearing the appeal. I therefore hear the appeal.

"The appellant has been convicted, under section 218 of the Municipal Act, with failing to comply with a requisition issued by the Municipal Commissioners of Howrah under section 202 of the Act to remove an encroachment from an open drain within the Municipality. The points to be decided in this case are (1) whether the notice was a legal one, (2) whether it was duly served, (3) whether the accused failed to comply with it.

"As regards the first point, there is the clearest evidence that the drain was an open one. It was also subject to the control of the Commissioners (section 190 of the Municipal Act). An attempt is made to argue that 'open' means 'public,' and that as the drain (as alleged by the appellant) is a private one, section 202 does not apply. An open drain is, however, a drain which is open to the air, as distinct from a covered drain, and the interpretation proposed is quite untenable. There is also ample evidence that the appellant made an obstruction or encroachment in this drain. Nay actually, since the case began, he has filled it up with earth. He says the drain is a private one, but that has nothing to do with the matter. All drains, public or private, are subject to the control of the Commissioners, and if open, are protected from obstruction (section 202). It would indeed be monstrous that a person should be allowed to infest a whole neighbourhood by stopping up a so-called private drain (the expression does not occur once in the whole Municipal Act). It is urged that the Municipality should have proceeded under section 191. It is, however, clear that the Municipality had power in this case to proceed under section 202, and it is

not for the appellant to dictate to the Commissioners what course they should pursue.

"As regards the service of the notice, the Lower Court accepted a written admission of the fact made by the appellant's pleader. It was hardly wise to do that, and so acting under section 428 of the Criminal Procedure Code I supplemented the record by taking formal evidence of the service. It clearly proved that the appellant failed to comply with the notice.

"Some points raised by Counsel may be noticed. The case was not barred, for the offence (failure to comply with a notice) is a continuing one and its occurrence was brought to the notice of Commissioners on the 6th May 1892.

"The Vice-Chairman had the implied consent of the Chairman to institute the prosecution, *vide* section 45 of the Municipal Act.

"I do not know what the petition of appeal means by a definition of 'encroachment' in the Municipal Act. There is no such definition. The wording of section 202 is 'obstruction or encroachment.'

"I dismiss the appeal."

Against this decision the accused then moved the High Court to send for the record and reverse the order of the District Magistrate on the following, amongst other grounds,—

(1) That the District Magistrate had erred in dealing with the case under section 218 of the Act.

(2) That the six hours' previous notice in writing, prescribed by section 191 of the Act, had not been given.

(3) That the District Magistrate ought to have considered that no sanction was given under section 353.

A rule was issued calling on the Magistrate to show cause why the conviction should not be set aside, and in reply thereto the District Magistrate stated, *inter alia*, that for some months previous the Vice-Chairman had his express consent to institute proceedings under section 353 of the Act, but did not allege that any written order had been given or any express permission granted to institute this case.

The only point material for the purposes of this report, having regard to the judgment of the High Court, was that relating to the power of the Vice-Chairman to institute the prosecution.

Mr. *T. A. Apcar* for the petitioner.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the opposite party.

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Mr. *T. A. Apear*, amongst other objections which it is not material to notice, contended that the conviction could not be upheld on the ground that the prosecution had been instituted without the order or consent of the Commissioners as required by section 353. Under section 44 the Chairman was vested with the powers of the Commissioners, but there was nothing to show here that the Chairman had ordered the prosecution or given his consent to it; the Vice-Chairman could only exercise the power of the Chairman when the latter had delegated his power by a written order, as provided by section 45, which was not alleged in this case, and the mere general sanction, given verbally by the Chairman to the Vice-Chairman, to institute all such cases was not sufficient.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) contended that the provisions of the second paragraph of section 44 were ample to cover this case. It was clear that the Chairman had given the necessary authority, and though not by written order, the prosecution could not be held invalid, if it appeared it had been instituted with the express or implied consent of the Chairman previously or subsequently obtained. Here the Chairman stated that he had given his consent previously, and apart from that he had himself heard the appeal and had undoubtedly sanctioned the prosecution subsequently, for he had upheld the conviction. The case was clearly covered by the terms of that paragraph of the section, and it could not, therefore, be held that the prosecution was improperly instituted.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

It is unnecessary, in the view we take of this matter, to consider more than the first objection raised to the conviction and sentence under section 218 of the Municipal Act of 1884. That objection is that the prosecution has been instituted without proper authority within the terms of section 353, read with sections 44 and 45 of the Act. It is not denied that no order or consent of the Commissioners was previously obtained before prosecution, nor has it been contended that the Chairman, exercising the powers of a Commissioner under section 44, ordered this prosecution, nor that the Chairman, by any written order, delegated to the Vice-Chairman this duty. But it has been stated by the District Magistrate, who heard the appeal—and this has been repeated in the explanation

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given on the issue of the rule—that some months past the Vice-Chairman had his express consent to institute proceedings under section 353 of the Act. It seems to us that the law requires not express consent, but a written order where such general powers are delegated by the Chairman. No doubt the proviso sets out that nothing done by the Vice-Chairman which might have been done under the authority of a written order from the Chairman, shall be invalid for want or defect of such written order, if it be done with the express or implied consent of the Chairman previously or subsequently obtained. But we do not understand that proviso to altogether override the body of the section to which it is annexed. It seems to us rather that the proviso relates to specific acts in which an express or implied consent may have been given or held to have been given. In this particular instance the authority contended for is a general authority which had been given many months previously. We think that is not the authority contemplated by the Act. We think, therefore, that the prosecution has been improperly instituted, and that the conviction and sentence should be set aside.

*Rule made absolute and conviction set aside.*

H. T. H.

## APPELLATE CIVIL.

*Before Mr. Justice Pigot and Mr. Justice Rampini.*

1892 *August* 20.

SHEO PERSHAD SINGH AND ANOTHER (DEFENDANTS NOS. 4 AND 5) *v.* SAHEB LAL AND ANOTHER (PLAINTIFFS)*

AND

RAJKUMAR LAL AND OTHERS (DEFENDANTS 2, 3 AND 4) *v.* SAHEB LAL AND ANOTHER (PLAINTIFFS).*

*Hindu law—Joint family—Mitakshara—Debts incurred by agent of joint family—Sale of joint family property in execution of decree—Suit and decree against managing members of a joint family business—Effect of sale against other members though not parties to decree—Execution proceedings, Setting aside of.*

The plaintiffs, who were the members of a joint Hindu family, sought to recover a share in certain properties on the allegation that they were

* Appeals from Original Decrees Nos. 271 of 1890 and 170 of 1891, against the decree of Baboo Amrita Lal Pal, Subordinate Judge of Gaya, dated the 21st of July 1890.