

1921

RAMDHANI  
LAL  
v.  
CHAIRMAN  
OF THE  
PATNA  
MUNICI-  
PALITY.

COURTS, J.

The plaintiffs have appealed and the whole question for consideration is, from what time the period of fifteen days referred to in section 238 should run. Section 238 of the Bengal Municipal Act is as follows :

"Should any person commence to erect or re-erect such house, not being a hut, without giving notice.....the Commissioners may, by notice, to be delivered within fifteen days require the building to be altered or demolished as they may deem necessary."

There is absolutely nothing in the section to suggest that the period should run from the date on which the Commissioners have knowledge of the building and the words of the section seem to me to be open to no other construction than that the period should run from the date of the commencement of the erection of the building.

I would set aside the decision of the learned District Judge and would decree this appeal with costs and restore the decree of the trial Court.

MACPHERSON, J.—I agree.

*Appeal decreed.*

## APPELLATE CIVIL.

*Before Das and Ross, J.J.*

BASANTA KUMAR BOSE

v.

CHAIRMAN OF THE MUNICIPAL COMMISSIONERS  
OF GIRIDIH.\*

1921

August, 4.

*Bengal Municipal Act 1884 (Bengal Act III of 1884), sections 237, 238, 239, 240 and 241—boundary wall, power of Municipality to frame bye-law relating to erection of.*

The question for decision being whether a bye-law passed by a Municipality under section 241 of the Bengal Municipal Act, 1884, forbidding the erection of a boundary wall within five feet from the road without sanction was *ultra vires* the Municipality, *held*, that where a house is being built for the

\* Appeal from Appellate Decree No. 250 of 1920, from a decision of Babu Suresh Chandra Sen, Subordinate Judge of Ranchi, dated the 13th January, 1920, reversing a decision of Babu Ram Krishna, Munsif of Giridih, dated the 6th December, 1918.

first time, or is being re-built, and it is proposed also to erect a boundary wall, then the boundary wall being part of the scheme for the house falls within section 237, and, therefore, within section 241, but when a house is neither being built nor re-built, the erection of a boundary wall does not fall within the scope of section 237, and, therefore, the Municipality had no power to frame a bye-law under section 241 relating to the erection of a boundary wall apart from its erection as part of a scheme for building or re-building the house itself.

*Keshub Chandra Sen v. Calcutta Municipal Corporation*(1) and *Corporation of Calcutta v. Benoy Krishna Bose*(2), referred to.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Das, J.

*Susil Madhub Mullick*, for the appellant.

*Bankim Chandra Dey*, for the respondent.

DAS, J.—This appeal arises out of a suit instituted by the appellant against the Chairman and the Commissioners of the Giridih Municipality for a declaration that the Bye-Law framed by the defendant Municipality prohibiting the erection of any boundary wall within five feet of any public road is *ultra vires* and that the plaintiff has an absolute right to erect his boundary wall on the edge of his land abutting on the public road.

The Court of first instance in a careful and able judgment came to the conclusion that the plaintiff was entitled to succeed. The Lower Appellate Court in a judgment which ought to be characterised as superficial and perfunctory has come exactly to the opposite conclusion.

Before dealing with the points which arise in the appeal I deem it my duty to record my emphatic protest against the manner in which the learned Subordinate Judge in appeal disposed of this question.

Certain cases were cited before him which it was his duty to consider and to distinguish them if he could.

1921

---

BASANTA  
KUMAR  
BOSE  
v.  
CHAIRMAN  
OF THE  
MUNICIPAL  
COMMISSIONERS OF  
GIRIDIH.

(1) (1902-1903) 7 Cal. W. N. 374.

(2) (1910) 12 Cal. L. J. 475.

1921

BASANTA  
KUMAR  
BOSE  
\*  
CHAIRMAN  
OF THE  
MUNICIPAL  
COMMISSIONERS OF  
GIRDHIL.

DAS, J.

The reasoning employed by the learned Subordinate Judge for declining to consider those cases may be given in his own words :—

"The judgment of the learned Munsif shows that the plaintiff materially changed his case at the trial. In the plaint the plaintiff never made the case that the word 'building' occurring in the bye-law cannot be intended to cover a bare compound wall of certain height and thickness and that the prohibition contained in the bye-law was not applicable to the erection for which plaintiff sought sanction. That being so, I should not be at pains to discuss the decisions in *Corporation of Calcutta v. Benoy Krishna Bose* (1) and *Corporation of Calcutta v. Jogeshwar Laha* (2). In the present case I should not enquire whether the wording 'building' should be taken in its derivative sense or to mean a habitation. For the purpose of the present suit I should hold that the bye-law No. 13(i) is not *ultra vires* and that plaintiff is not entitled to the declaration he seeks."

Now in my opinion even if the plaintiff had, to use the expression of the learned Subordinate Judge, "changed his case" as to the meaning of the word "building", or in other words given another interpretation to a word used in the Bengal Municipal Act, it was still the duty of the learned Subordinate Judge to consider the cases which were cited before him by the learned Pleader appearing on behalf of the plaintiff. He could not have recourse to so frivolous an excuse for avoiding the difficulty of the position : but as a matter of fact the allegations in the plaint are as clear as they can be. These allegations are that the Municipality has passed a bye-law preventing the erection of any boundary wall within five feet of any public road without its sanction and that the bye-law in question is *ultra vires* and cannot operate to the prejudice of the plaintiff's right to erect a boundary wall on the edge of his land abutting on the public road.

Coming now to the question at issue between the parties I think that the plaintiffs are entitled to succeed. Section 237 provides that

"Every person who intends to erect or re-erect any house not being a hut, shall give notice in writing of his intention to the Commissioners, and shall accompany such notice with a general description of the building which he intends to erect, and of the provision he intends to make in respect of drainage and latrine accommodation; and the Commissioners may, within six weeks after the receipt of such notice, either refuse to

(1) (1910) 12 Cal. L. J. 476.

(2) (1902 1903) 8 Cal. W. N. 487.

sanction the said building or may sanction the said building either absolutely or subject to any written directions which the Commissioners may deem fit to issue in accordance with the rules, if any, made under section 241. Provided that the Commissioners shall make full compensation to the owner for any damage which he may sustain in consequence of the prohibition of the re-erection of any house, or of their requiring any land belonging to him to be added to the street."

The expression "erect or re-erect any house not being a hut" has, for the purpose of section 238 and section 239, been defined to mean (a) any material alteration or enlargement of any building; (b) such alterations of the internal arrangements of a house as affect an alteration of its drainage or sanitary arrangements, or affect its stability. Now in my opinion sections 238 and 239 carry us back to section 237, and, therefore, in order to succeed on the question that the erection of a boundary wall means erection of any house not being a hut, it must be established that the erection of a boundary wall is (a) any material alteration or enlargement of any building or (b) that it amounts to such alteration of the internal arrangements of a house as effects an alteration of its drainage or sanitary arrangements or affects its stability. I do not think that it can for a moment be argued that it falls within (b). The only question is, is it any material alteration or enlargement of any building. In my opinion material alteration or enlargement of any building must mean erection of anything on a site attached to or detached from any buildings standing on it so as to alter the structure of the house with all the buildings standing on that site [see *Keshub Chandra Sen v. Calcutta Municipal Corporation*(<sup>1</sup>)]. In my opinion it cannot be argued that erection of a wall apart from its erection as part of a scheme for the erection of the house itself does not fall within section 237 at all and therefore it does not fall within section 241. I quite agree that if a person is building a house for the first time or is re-building it then the boundary wall which he proposes to build being part of the scheme of the house which he is erecting or

1921

BASANTA  
KUMAR  
BOSE  
or  
CHAIRMAN  
OF THE  
MUNICIPAL  
COMMISSIONERS OF  
GIRIDH.

DAS, J.

(1) (1902-1903) 7 Cal. W. N. 374.

1921

BASANTA  
KUMAR  
BOSE  
v.  
CHAIRMAN  
OF THE  
MUNICIPAL  
COMMISSIONERS OF  
GIRIDIH.

DAS, J.

re-erecting must fall within the scope of section 237 and therefore of section 241. In such a case the Commissioners may require any land belonging to the owner to be added to the street provided that they make full compensation to the owner for any loss caused to him: but when he is neither building nor re-building the house the erection of a boundary wall does not in my opinion fall within the scope of section 237. That being so, the Commissioners had no power to frame a bye-law under section 241 relating to the erection of a boundary wall apart from its erection as part of the scheme of erection or re-erection of the house itself. This view is supported by the decision of Mukherji, J. in *Corporation of Calcutta v. Benoy Krishna Bose*(<sup>1</sup>).

I would allow this appeal, set aside the judgment and decree of the Court below and restore the judgment and decree of the Court of first instance. The plaintiffs are entitled to their costs throughout.

Ross, J.—I agree.

## APPELLATE CIVIL.

*Before Coutts and Macpherson, J. J.*

MAHABIR PRASAD BHAGAT

v.

BALKRISHN DAS.\*

1921.

August, 4.

*Code of Civil Procedure, 1908 (Act V of 1908), Order V, rules 13 and 25, Order IX, rule 13, Order XXX, rule 3, Schedule II, paragraph 21—Suit against members of a firm—notice, method of service of—Arbitration—ex-parte decree, application to set aside—“Decree” whether includes decree passed on award—Review—whether judge’s successor may alter administrative order.*

In a civil proceeding by one of three members of a firm against the other two, Order V, rule 25, governs the service of notice, etc., and not Order V, rule 13, or Order XXX, rule 3.

\* Civil Revision No. 90 of 1921.

(1) (1910) 12 Cal. L. J. 476.