1921

KHUB LAL UPADHYA v. JUGDISH PRASAD SINGH.

DAS, J.

property and in order to enable the Courts below to determine this point we would have to remand the case to the Court below.

The same argument may be advanced with reference to the point as to Article 137. It is true that the Court of first instance did say that even from the point of view of Article 137 the suit was within time but still the necessary allegations were not made in the written statement, and I do not think it proper to remand the case for the ascertainment of the facts upon which alone these questions of law can be determined. It has been held by the Court below that the purchase made by the appellant did not give them any title at all and that the respondents have a perfectly good title to the property, having purchased it in execution of a mortgage decree against the parties who are entitled to the property. In my opinion it is not open to the appellant to raise the question of limitation in this Court, and I would dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Coutts and Macpherson, J J.

1921.

August, 2.

BRIJBEHARI LAL

v.

CHAIRMAN OF THE MUNICIPALITY, DALTONGANJ.*

Bengal Municipal Act, 1884 (*Bengal Act III of* 1884), *sections* 237 *and* 241—*verandah, whether is an "erection or re-erection"—building sanctioned subject to reservation, whether reservation valid in absence of bye-laws.*

A municipality which has not framed any bye-law under section 241 of the Bengal Municipal Act, 1884, is not competent to insert reservations in a sanction to build but must either refuse the sanction or grant it without reservation.

* Appeal from Appellate Decree No. 867 of 1920 from a decision of A. Tuckey, Esq., Judicial Commissioner of Chota Nagpur, dated the 11th August, 1920, confirming a decision of Babu Lakshmi Narayan Patnaik, Munsif of Palamau, dated the 13th June, 1919.

1921

BRIJBEHARI LAL v. CHAIRMAN OF THE MUNICIPALITY, DALTONGANJ.

The erection of a verandah is the erection of a building within the meaning of section 237.

Chairman of Gaya Municipality v. Shamlal Gupta(1), distinguished.

The facts of the case material to this report were as follows :—

In 1910 plaintiff obtained sanction from the Municipality to build a two-storeyed house in the place of his old house which he had demolished. The order of the Municipality sanctioning the building did not convey any sanction for the construction of a verandah. In 1918 the plaintiff applied for sanction to build a verandah to the house. The Building Committee of the Municipality thereupon sanctioned the construction of a platform only instead of the verandah. The plaintiff requested the Municipality to reconsider this decision, and, on the 3rd March, 1918, was given permission to build a verandah, with a reservation that it should only extend up to a line marked on the site-plan, which was not the line up to which the plaintiff had sought permission to build it. The site of the verandah erected by the plaintiff did not correspond to the site sanctioned by the Municipality, and, on the 2nd June, 1918, the Municipality ordered him to demolish the verandah. The plaintiff then instituted the present suit for a declaration that he had the right to construct the verandah and that the Municipality had no right to demolish it. The suit was dismissed in the lower court and that decision was affirmed in appeal.

The plaintiff appealed to the High Court. He contended that the building of the verandah was not an erection or a re-erection within the meaning of section 237 of the Bengal Municipal Act, 1884, and that therefore no sanction was necessary. He also contended that the reservation in the sanction was *ultra vires* and not binding on him.

(1) (1918) 3 Pat. L. J. 33

1931

BRIJBEHARI LAL v. CHAIRMAN OF THE MUNICIPALITY, DALTONGANJ.

COUTTS, J.

Kailaspati and *Sivishwar Dayal*, for the appellant.

Kalwant Sahay, for the respondent.

COUTTS, J.—This was a suit for a declaration that the plaintiff had a right to build a verandah on to his house in the Daltonganj municipality and for a permanent injunction restraining the municipality from demolishing it or any part of it.

It appears that the plaintiff had an old house which he pulled down and in the year 1910 he obtained sanction to build a two-storeyed house in its place. In 1918 he applied for sanction to build the verandah in question in this suit and sanction was given with the reservation that it was not to extend towards the road beyond a certain line marked *AA* in the map. The plaintiff disregarded the reservation and built the verandah. The municipality then ordered him to demolish it and it is on account of this order that the present suit has been brought. The suit was dismissed by the Munsif and on appeal to the District Judge that decision was upheld. The plaintiff appeals to this Court on two grounds: (1) that the building of the verandah is not an erection or re-erection within the meaning of section 237 of the Bengal Municipal Act and therefore no sanction is necessary, and (2) that the reservation in the sanction is *ultra vires* and the plaintiff is entitled to disregard it.

So far as the first point is concerned there is no difficulty. The verandah, it is true, was erected on the site of an old verandah but that old verandah had disappeared even before 1910. We have been referred to *Chairman of Gaya Municipality* v. *Shamlal Gupta* (1), but the circumstances of that case were entirely different to those of the present case which clearly comes within the provisions of section 237. This contention therefore fails.

(1) (1913) 3 Pat. L. J. 33.

The second point, however, is a more difficult one, and on this, I am of opinion, that the appellant must succeed. Section 237 enacts that the Commissioners—

> "May sanction the said building either absolutely or subject to any directions which the Commissioners may deem fit to issue in accordance with the rules, if any, made under section 241."

In the Daltonganj municipality no rules have been framed under section 241 and the contention is, that this being so, the Commissioners must either refuse or grant sanction absolutely and without reservation. There can, I think, be little doubt that this is so. It is urged on behalf of the respondent-municipality that if the Commissioners can sanction absolutely they can certainly sanction subject to reservation. This at first sight seems plausible, but if it were the correct view, the words

> "to issue in accordance with the rules, if any, made under section 241 "

would be superfluous. It is further urged that the words "if any" mean that if no rules are made under section 241 the Commissioners may make any reservation they like. I am unable to accept this interpretation because if it were correct there would be no object in the Commissioners making rules under section 241 and thus fettering their discretion. The question is by no means free from doubt, but in my opinion the correct interpretation of the law is that unless rules are made under section 241 the municipality must either grant or refuse sanction without reservation.

Lastly, it is contended on behalf of the respondents that the plaintiff having accepted the sanction subject to the reservation, he is not entitled now to say that the reservation is *ultra vires*. This cannot be so, because if the restriction is *ultra vires* he is not bound by it and is entitled to disregard it; so that the whole question depends upon whether the restriction is *ultra vires* or not. In the present case, in the absence of rules made

1921

BRIJBEHARI LAL v. CHAIRMAN OF THE MUNICIPALITY, DALTONGANJ,

COUTTS, J.

under section 241, I am of opinion that it was *ultra vires*.

For this reason, therefore, I would set aside the decrees of the lower courts and I would decree the suit with costs. The plaintiff-appellant will have a declaration that he is entitled to erect buildings in accordance with his notice under section 237(1) and the defendant will be restrained by injunction from demolishing such buildings on the plea that they have, or are being constructed in contravention of a legal order of the Commissioners passed under section 237(1).

MACPHERSON, J.—I agree. The appellant fails on the first point because in building the verandah and rooms he certainly erected or re-erected a house within the meaning of the enactment. But his second contention succeeds. Appellant duly gave notice to the Commissioners under section 237(1); the Commissioners accorded sanction to the erection not absolutely but subject to "written directions"; the only clog on a sanction which is contemplated by that section consists of "written directions" issued "in accordance with the rules if any made under section 241"; the existence of rules under section 241 regulating "the erection or re-erection of houses not being huts" is therefore a condition precedent to the issue of "written directions" under section 237(1); no such rules having been made by the Commissioners of the Daltonganj municipality the order of the Commissioners upon the appellant's notice was not a "legal order" within the meaning of that expression in section 238(1), since having failed to utilize the enabling section 241 they could only either refuse or sanction absolutely; as he had not contravened "a legal order" no action could be taken by the Commissioners against appellant under section 238(1). The provision applicable is section 238(2) and the Commissioners having neglected or omitted within six weeks after the receipt of appellant's valid notice under section 237(1) to make and deliver to the appellant any

legal order, that is, an order of refusal or of absolute sanction in respect of his notice, they are deemed to have sanctioned the proposed "house" absolutely. On the above findings section 242-A also has no application at all. The Commissioners have therefore no right to interfere with the erection of the verandah and rooms so long as it is in accordance with the plaintiff-appellant's notice under section 237(1).

Suit decreed.

REVISIONAL CRIMINAL.

Before Coutts and Macpherson, J.J.

MIR TILAWAN

v.

KING-EMPEROR.*

1921.

August, 2.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 342—*accused not examined after examination of prosecution witnesses—written statement filed after examination of defence witnesses—Revision.*

Where the accused persons were not examined under section 342 of the Code of Criminal Procedure, 1898, after the examination of the prosecution witnesses, but they filed written statements at that stage and also after the examination of the defence witnesses, *held*, that the accused not having been prejudiced, and there having been no miscarriage of justice, the High Court would not interfere in revision.

The facts of the case material to this report are stated in the judgment of the Court.

W. H. Akbari (with him *Lakshmi Kant Jha*), for the petitioners.

Kulwant Sahay, Government Pleader, for the Crown.

COUTTS AND MACPHERSON, J.J.—This is an application in revision in regard to an order of the Sessions

* Criminal Revision No. 334 of 1921, against an order of F. G. Rowland, Esq., Sessions Judge of Muzaffarpur, dated the 25th June, 1921, affirming an order of P. T. Mansfield, Esq., Subdivisional Magistrate of Sitamarhi, dated the 28th May, 1921.