1939-40.

RAJA SRI SRI JYOTI PRASAD SINGH DEO BAHADUR v. SAMUEL HENRY SEDDON.

CHATTERJI, J.

the land cannot be charged in an action of debt with the whole rent, but only for a proportionate part thereof". I am inclined to adopt the reasoning of Greer, J. stated above and hold that the defendants 7 and 9 are liable jointly and severally with the other defendants for the plaintiff's entire claim.

Upon the above findings the appellant is entitled to judgment against all the respondents except respondent no. 8 for the amount decreed by the Court below. But for the reasons given by my learned brother the decree against respondents 7 and 9 (defendants 7 and 9) should be subject to the conditions set forth in his judgment.

I accordingly agree that the appeal should be allowed in part as against the respondents 7 and 9 and dismissed against the other respondents.

Appeal allowed in part against respondents 7 and 9 and dismissed against others.

K. D.

APPELLATE CIVIL.

Before Harries, C.J. and Wort, J.

1939-40.

April, 28.
Feb., 7.

COMMISSIONERS OF THE ARRAH MUNICIPALITY

v.

INDER CHAND.*

Bihar and Orissa Municipal Act, 1922 (*Bihar and Orissa Act VII of* 1922), *sections* 82 *and* 180—*resolution fixing scale of fees for all platforms—sanction of Local Government not obtained—imposition of fee, whether ultra vires—imposition of fee under section* 180, *whether controlled by the provisions of section* 82(2).

* Appeal from Appellate Decree no. 133 of 1938, from a decision of Babu Kshetra Nath Singh, Subordinate Judge of Arrah, dated the 22nd of December, 1937, reversing a decision of Babu Ram Ratna Singh, Munsif of Arrah, dated the 9th of March, 1937, the judgment after remand being delivered by Babu A. N. Banerji, Subordinate Judge, 2nd Court of Arrah, on the 12th of September, 1939.

1939-40.

COMMISSIONERS OF THE ARRAH MUNICIPALITY v. INDER CHAND.

Section 82 of the Bihar and Orissa Municipal Act, 1922, provides :

" (*1*) The Commissioners may, from time to time, at a meeting convened expressly for the purpose, of which due notice shall have been given, subject to the provisions of this Act and with the sanction of the Local Government, impose within the limits of the Municipality the following taxes and fees, or any of them :—

.....

(*2*) The Commissioners may, from time to time, at a meeting convened as aforesaid, and in accordance with a scale of fees to be approved by the Local Government, charge a fee in respect of the issue and renewal of any license which may be granted by the Commissioners under this Act and in respect of which no fee is leviable under sub-section (*1*)."

Section 180 of the Act lays down :—

"(*1*) No platform shall be erected, re-erected or extended upon or over any public road or drain without the previous sanction of the Commissioners.

(*2*) The owner of every platform, except platforms which are used for giving such access to the houses as the Commissioners may consider necessary, shall, if the Commissioners at a meeting so direct, take out a licence for keeping the platform.

(*3*) Every such licence shall remain in force for one year and shall be renewable annually.

(*4*) For every such licence there shall be paid a fee to be fixed by the Commissioners at a rate of not less than two annas nor more than eight annas for each square foot of the superficial area of the platform except such portion thereof as is used for giving such access to a house as the Commissioners may consider necessary....."

The Municipal Commissioners, at a meeting, resolved that " two annas six pies per square foot per year be levied on the platforms abutting on the Municipal drains " in a certain area described in the resolution, and further resolved that " fees on the platforms on Municipal roads, lanes, drains of lands within the rest of the area be levied at the rate of two annas per square foot per year ". In pursuance of this resolution the Commissioners imposed a fee in respect of a platform kept by the plaintiff. The consent of the Local Government was not taken. The plaintiff sued the Municipal Commissioners, inter alia, for a declaration " that the imposition of a fee by the defendants for taking license for plaintiff's keeping platform is illegal and *ultra vires* ";

Held, that the Commissioners had not acted *ad hoc* under section 180, in fixing fee for the license with regard to the particular platform of the plaintiff, and that what they

apparently purported to do by the resolution was to fix a scale of fees for the issue and renewal of any license which might be granted under the Act:

(*ii*) that the imposition of the fee came within the mischief of section 82(2) of the Act, and, as the consent of the Local Government was not obtained, it was *ultra vires*.

Query: Whether the license fee imposed under section 180 of the Bihar and Orissa Municipal Act, 1922, is controlled by the provisions of section 82(2) of the Act?

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Wort, J.

The appeal was in the first instance heard by Manohar Lall, J. who referred it to a Division Bench by the following judgment.

MANOHAR LALL, J.—I think it is desirable that this case should be heard by a Division Bench. The question as to whether section 82 of the Municipal Act controls section 180 has not been the subject of a decision by this Court. There is merely a stray observation of Mr. Justice Rowland in the case of *Seth Ghadsiram* v. *Vice-Chairman, Sambalpur Municipality*(1). I am doubtful as to the correctness of that observation. The matter is of considerable importance to the Municipality and to the rate-payers in this province.

With these remarks the case is referred to a Division Bench for disposal.

On this reference

Baldeva Sahay (with him *Mahabir Prasad, Harinandan Singh* and *Tarkeshwar Nath*), for the appellants.

Dr. D. N. Mitter (with him *D. N. Varma* and *S. Sundar Sinha*), for the respondent.

WORT, J.—This appeal comes before this Court after remand. The case was remanded for the purpose of deciding a question of fact relating to a drain in Arrah. The Municipal Commissioners, who are the appellants, were the defendants in the trial

(1) (1936) A. I. R. (Pat.) 101.

1939-40.

COMMISSIONERS OF THE ARRAH MUNICIPALITY v. INDER CHAND.

WORT, J.

Court in a case in which the plaintiff claimed the following reliefs:

"That on the facts and circumstances stated it be declared that the imposition of a fee by the defendants for taking license for plaintiff's keeping platform is illegal and *ultra vires* and the defendants have no right to realize the same from the plaintiff and that the said levy of platform-tax is illegal, *ultra vires* and beyond the power of defendants and the defendants are not entitled either in law or in equity to do the same and demand the same from the plaintiff."

The second relief claimed was:

"That the defendants be restrained from realizing platform-fee or taking proceedings against the plaintiff under the Municipal Act or by-laws of the Municipality for not taking a license or compelling the plaintiff to remove his platform (if any) during the pendency of the suit."

The plaintiff further claimed a refund of the amount paid with interest.

Several questions were raised in the Courts below, and in the lower appellate Court the plaintiff succeeded. The learned Judge in the appellate Court came to the conclusion, contrary to the contention of the Commissioners, that the drain was not a Municipal drain and that, therefore, the Municipal Commissioners had no jurisdiction over it. He also decided two questions of law in favour of the plaintiff, which will be indicated by the points to which I shall refer in this judgment.

This Court, being in doubt as regards the findings of fact, remanded the case to the Subordinate Judge for the determination of the question whether the drain was the Municipal drain, or whether it was within the limits of the District Board road. The contention of the plaintiff was that the District Board road was 38′—8″ in breadth and that the drain in question came within those limits. The learned Judge in the Court below, after remand, has come to the conclusion that the drain is beyond the limits of the District Board road.

A Commissioner was appointed.

" His report "

says the learned Judge

" shows that the road in front of the plaintiff's house was 44 feet 4 inches wide from the south-east corner of the plaintiff's house, 44 feet 3 inches wide from the southern stairs of the plaintiff's house, and 44 feet 5 inches wide from the north-east corner of the plaintiff's house.....From the measurements made by the Commissioner it will appear that at 20 places, where the plaintiff wanted the width of the road to be measured, it varied from 24 feet to 38 feet 6 inches, the average coming to 29 feet 10 inches."

The learned Judge has come to a conclusion in accordance with this report, and it will be seen therefore that the drain is beyond the limits of the District Board road. On that conclusion it seems to be abundantly clear that, contrary to the plaintiff's contention, the drain is that of the Municipal Commissioners and not of the District Board. However, that matter does not dispose of the case.

Dr. Mitter, on behalf of the respondent, raises several questions of law. The first is on the construction of section 82 of the Bihar and Orissa Municipal Act, 1922. Section 82 provides that

" the Commissioners may, from time to time, at a meeting convened expressly for the purpose, of which due notice shall have been given, subject to the provisions of this Act and with the sanction of the Local Government, impose within the limits of the Municipality the following taxes and fees, or any of them."

Then a list in clauses (*a*) to (*l*) of the matters with regard to which fees are chargeable under the first sub-section is given. It is with regard to the second sub-section that the question arises. The second sub-section runs thus:

" The Commissioners may, from time to time, at a meeting convened as aforesaid, and in accordance with a scale of fees to be approved by the Local Government, charge a fee in respect of the issue and renewal of any license which may be granted by the Commissioners under this Act and in respect of which no fee is leviable under sub-section (*l*)."

Shortly stated the contention is that the tax which the Commissioners here purported to impose by their Resolution of the 18th January, 1935, comes within the mischief of that sub-section. Section 180,

1939-40.

COMMISSIONERS OF THE ARRAH MUNICIPALITY v. INDER CHAND.

WORT, J.

which is the warrant to the Commissioners to impose the tax, is as follows:

"No platform shall be erected, re-erected or extended upon or over any public road or drain without the previous sanction of the Commissioners."

Sub-section (2) of section 180 of the Act provides:

"The owner of every platform, except platforms which are used for giving such access to the houses as the Commissioners may consider necessary, shall, if the Commissioners at a meeting so direct, take out a license for keeping the platform."

Sub-section (3) provides that such license shall remain in force for one year. Sub-section (4) provides that

"for every such license there shall be paid a fee to be fixed by the Commissioners at a rate of not less than two annas nor more than eight annas for each square foot of the superficial area of the platform except such portion thereof as is used for giving such access to a house, etc."

Sub-section (5) is a penalty clause making a person who contravenes the provisions of the section liable to a fine not exceeding fifty rupees.

At first it was thought that in this case the Commissioners had acted *ad hoc* in fixing fee for the license with regard to this particular platform. But that view of the matter is clearly wrong when the Resolution of the 18th of January, 1935, is looked into. It was passed at a meeting of the Commissioners at which the Chairman, the Vice-Chairman, and four other members were present and the resolution which was passed unanimously on that occasion was that

"two annas six pies per square foot per year be levied on the platforms abutting on the Municipal drains"

in a certain area described in the resolution. It was further resolved that

"fees on the platforms on Municipal roads, lanes, drains or lands within the rest of the area be levied at the rate of two annas per square foot per year."

It seems to me quite clear, therefore, that whether the Commissioners were entitled under section 180 of the Act to act *ad hoc* as I have described it, they certainly did not purport to do so by the Resolution of the 18th of January, 1935. What they were apparently doing was fixing a scale of fees for the issue and renewal of any license

"which might be granted by the Commissioners under this Act and in respect of which no fee was leviable under sub-section (1)"

(of section 82). To repeat myself, it is clear that the Commissioners were fixing a scale of fees for licenses with regard to platforms erected over Municipal drains. Now, it is contended by Dr. Mitter, therefore, that unless they have the previous sanction of the Local Government the tax so charged was *ultra vires* the Commissioners. It is admitted that the consent of the Local Government was not obtained. The words of the sub-section I shall repeat:

"The Commissioners may, from time to time, at a meeting convened as aforesaid, and in accordance with a scale of fees to be approved by the Local Government, charge a fee in respect of the issue and renewal of any license which may be granted by the Commissioners."

I used the words "previous sanction of the Local Government", and although the expression may be to some extent inaccurate, it is quite clear that if the sub-section applies, the imposition of the tax without the consent of the Local Government would be illegal; and that is the question which arises for determination in this appeal. It was contended, as I have already stated, that the Commissioners could act in each case and fix a fee according to the circumstances of each case, and that as the Legislature had fixed the limits within which the tax should be imposed, no consent of the Local Government was necessary. Sub-section (2) of section 82 speaks of the issue and renewal of fees for licenses charged under sub-section (1). Instances of this are to be found in three sections.

1939-40.

COMMISSIONERS OF THE ARRAH MUNICIPALITY v. INDER CHAND.

WORT, J.

Section 256 of the Act provides that

"the Commissioners may, from time to time, grant licenses to persons applying for the same."

It is true that the section does not appear on the face of it to warrant the Commissioners charging any license fee, the Act merely referring to a license to be granted by the Commissioners and the power of the Commissioners to prescribe a scale of the rates for the sale of such articles referred to in the section. But I assume that authority is given to the Commissioners that fees would be chargeable for the grant of that license.

Section 259 of the Act gives power to the Commissioners to license premises used for trades described in the various sub-clauses of the section, and sub-section (*3*) of the same section provides:

"The Commissioners at a meeting may, subject to a maximum to be fixed by the Local Government, levy a fee in respect of any such license and the renewal thereof, and may impose such conditions upon the grant of any such license as they may think necessary."

Section 261 provides power to Commissioners to license premises occupied by cartman, livery stable-keeper or keeper of vehicles, and sub-section (*2*) gives them power to license places for such purpose and may levy a fee not exceeding one rupee on the issue and renewal of any such license.

It is to be noted that there is a distinction between sub-section (*2*) of section 261 and sub-section (*3*) of section 259 of the Act. Sub-section (*2*) of the former makes no reference to the consent of the Local Government, whereas under sub-section (*3*) of section 259 the Commissioners at a meeting may, subject to a maximum to be fixed by the Local Government levy a fee. I apprehend, therefore, that although the consent of the Local Government is to be obtained under sub-section (*3*) of section 259, it is not the consent referred to in sub-section (*2*) of section 82. But the same cannot be said in my

judgment with regard to section 261(2) which provides that

> "the Commissioners may license places for such purpose, and may levy a fee not exceeding one rupee on the issue and renewal of any such license. Such license shall be renewed in the first and seventh months of each year."

The language of section 261 and section 180(2) are not materially different, and it seems to me that it would be difficult, if not impossible, to contend that the license fee chargeable under section 261 would not be subject to the consent of the Local Government under sub-section (2) of section 82. And if that argument is well-founded, it seems equally impossible to exempt from the provisions of sub-section (2) the license fees to be imposed under section 180 of the Act, the section with which we are dealing in this case. It is clear, as I pointed out at the commencement of my observations, that the Commissioners purported to fix a scale of fees and that would seem in any event to come specifically within the mischief of sub-section (2) of section 82.

I do not pretend to say that the matter is without difficulty, but in my judgment it was necessary in this case to have the approval of the Local Government to the scale of fees chargeable under the Resolution of the 18th of January, 1935.

Another question of law arose, and that is that the Resolution fixed no time for which license fees would come into operation. In the circumstances of the case it is unnecessary to come to a conclusion with regard to that matter, but I may add that in passing a Resolution of this kind the Commissioners would be well advised to fix such a date.

The remaining point is whether the plaintiff is in the circumstances entitled to the relief which he claimed in the suit. In the second item he asked for an injunction restraining the Commissioners from taking proceedings against the plaintiff. That, it is

1939-40.

COMMISSIONERS OF THE ARRAH MUNICIPALITY v. INDER CHAND.

clear, is relief to which the plaintiff is not in any circumstances entitled; but in my judgment he was entitled to a declaration that the imposition of the fees for the plaintiff's keeping the platform was *ultra vires* the Commissioners and that the plaintiff was entitled to a refund of the fees which, as I understand, were paid into the Court of the Munsif.

WORT, J.

The appeal of the Commissioners is dismissed and the judgment of the Court below set aside, the plaintiff being entitled to a decree for the relief indicated in this judgment.

HARRIES, C.J.—I agree.

Appeal dismissed.

Decree modified.

S. A. K.

APPELLATE CIVIL.

Before Harries, C.J. and Manohar Lall, J.

1940.

January, 9, 10, 23.

RAMRUP RAI

v.

FIRM MAHADEO LAL NATHMAL.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rules 58 and 63—objection to attachment under rule 58—question of benami, whether can be raised—claim allowed on decree-holder's admission—suit by decree-holder under rule 63, whether maintainable.

A party who realises the hopelessness of resisting a claim in summary proceedings and consents to the claim under Order XXI, rule 58, Code of Civil Procedure, 1908, being allowed is nevertheless a party against whom an order is made and consequently he can bring a suit under Order XXI, rule 63, Code of Civil Procedure, 1908. The fact that a

* Appeal from Original Decree no. 73 of 1937, from a decision of Babu Jadunath Sahay, Subordinate Judge of Bhagalpur, dated the 31st March, 1937.