

APPELLATE CRIMINAL.

Before Tek Chand and Monroe JJ.

THE CROWN—Appellant

versus

SIDHU MAL AND ANOTHER (ACCUSED) Respondents.

1933

March 8.

Criminal Appeal No. 744 of 1932.

Punjab Small Towns Act, II of 1922, Section 4 (3): Committee—constituted by Notification—effect of—Section 4-A (as amended by Punjab Act IV of 1925): Failure of a member to comply with—whether affects existence of Committee—quorum.

Held, that on the publication in the *Punjab Government Gazette* of a notification under sub-section (3) of section 4 of the Small Towns Act, the constitution of the Committee is complete, and it is not dissolved by the death, resignation, removal or withdrawal of one or all the members, but is a continued entity, the personnel only being reconstituted.

Rao Bahadur K. S. Penkataramina Ayyar Janab v. Hamid Sultan Maracayar Sahib Bahadur (1), *Raghunandan Ramanuja Das v. Bibihuti Bhushan Mukerjee* (2), and *T. Sitharama Chetty v. Sir S. Subramania Iyer* (3), relied on.

Also, the mere fact that one of the persons elected or nominated as a member of the Committee omits or refuses to carry out the provisions of section 4-A of the Act does not affect the existence of the Committee or incapacitate the remaining members from performing their duties or holding meetings of the Committee provided three members, who form a quorum, are present.

Appeal from the order of Munshi Mohammad Bakhsh, Magistrate, 3rd class, Palampur, District Kangra, dated the 14th December, 1931, acquitting the accused-respondents.

(1) (1922) 70 I. C. 987. (2) (1912) I. L. R. 39 Cal. 304, 308.

(3) (1916) I. L. R. 39 Mad. 700, 711.

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CARDEN-NOAD, Government Advocate, for Appellant.

M. C. SUD, for Respondents.

TEK CHAND J.

TEK CHAND J.—This is an appeal by the Local Government against the order of *Munshi* Mohammad Bakhsh, Magistrate, 3rd Class, Palampur, district Kangra, acquitting the respondents of an offence under section 38 of the Punjab Small Towns Act. The case was started on a complaint filed by the Small Town Committee for alleged contravention of section 35 (*l*) and (*m*) of the Act by the respondents constructing a projection in front of their house without the permission of the Committee.

The Magistrate after recording the evidence on the merits acquitted the respondents on the short ground that the Small Town Committee was "not in existence" on the 20th June 1931 when the complaint was lodged on its behalf.

The relevant facts are few and simple and are not in dispute. In 1924 a Small Town Committee was established at Palampur under the provisions of the Punjab Small Towns Act. The Committee was to consist of five members, of whom four were to be elected by the inhabitants and one appointed by the Commissioner, Jullundur Division, the term of office of each member being three years. Early in 1931 elections were duly held and the Commissioner, by Notification Nos. 3042-3, dated the 24th of April 1931, published in the *Punjab Government Gazette*, Part 1-B, on the 8th of May 1931, in pursuance of the provisions of sub-section (3) of section 4 of the Punjab Small Towns Act, notified that the four persons named therein had been duly elected members of the Committee and that the Rev. C. R. H. Wilkinson had been appointed a

member by him. It appears that Mr. Wilkinson was either not in India at the time of the Notification, or he left the country very soon after, without taking the oath of allegiance or entering upon his duties as a member of the Committee. As he did not return to Palampur for some time, the Commissioner by Notification No. 5681, dated the 4th of September 1931 published in the *Punjab Government Gazette*, dated the 11th of September 1931, Part 1-B, cancelled his appointment as member with effect from the date of the publication of the Notification and in his place appointed *Lala Parduman Chand Sud*. On these facts the trial Magistrate has held that the Committee was not in existence between the 8th of May and the 11th of September 1931, as excluding the Rev. C. R. H. Wilkinson the number of its members was less than five, which is the minimum fixed under section 4 (1) of the Act, and consequently no complaint on behalf of the Committee could be lodged in a Court of law.

After examining the judgment and hearing both counsel I have no doubt that the view taken by the Magistrate is erroneous. Section 3 of the Small Towns Act lays down the procedure by which the Local Government is authorised to declare a particular area to be a "Small Town" for the purposes of the Act, and section 4 (1) provides that there shall be established for each "Small Town" a Committee to be known as the town committee, consisting of such number of members, not less than five, as the Local Government may fix. Sub-section (2) authorises the Local Government to fix the proportion of elected members, and sub-section (3) directs that the appointment and election of members shall be notified by the Commissioner in the *Punjab Government Gazette*. On the publication of such notification the constitution of the Committee is

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complete and if any casual vacancy in the personnel of the Committee arises thereafter, it shall be filled according to the procedure described in section 8. In section 5 it is laid down that every committee shall be a body corporate by the name of the town committee of the small town and shall have perpetual succession and a common seal, and may sue and be sued in its corporate name. The term of office of each member is fixed as three years by section 6, which also provides that on the completion of the term the outgoing member shall, unless the Local Government otherwise directs, continue in office until the election or appointment of his successor is notified.

From these provisions of the law it is clear that it is the Statute and the notifications issued thereunder, which constitute the Committee and the fact that there are one or more vacancies in the number of members constituting it does not make it an invalidly constituted corporation [*cf. Rao Bahadur K. S. Penkataramina Ayyar Janab v. Hamid Sultan Maracayar Sahib Bahadur & others* (1)]. The Committee is not dissolved by the death, resignation, removal or withdrawal of one or all the members, but is a continued entity, the personnel only being reconstituted. [*Raghunandan Rumanuja Das v. Bibihuti Bhushan Mukerjee* (2) and *T. Sitharama Chetty, etc. v. Sir S. Subramania Iyer, etc.* (3)].

The learned Magistrate appears to have been impressed by the provision of section 4 A, which requires every person, who is elected or nominated to be a member, to take the oath of allegiance before taking

(1) (1922) 70 I. C. 937.

(2) (1912) I. L. R. 39 Cal. 304, 308.

(3) (1916) I. L. R. 39 Mad. 700, 711.

his seat, and lays down that if he omits or refuses to do so, his election or appointment, as the case may be, shall be invalid and his place on the Committee will be filled in the manner laid down in clause (ii) of the section. But this does not and cannot affect the existence of the Committee. It only creates a vacancy just as would occur on the death, resignation or removal of a member, though the mode of filling the vacancy in this case would be somewhat different. It is conceded that if one of the five members suddenly died after he had taken the oath, the Committee would not cease to exist, nor would the surviving members be incapacitated from performing their duties or holding meetings of the Committee, provided three members who form a quorum are present. It seems to me that the position is exactly the same, if a person, who has been properly elected or appointed and whose election or appointment has been duly notified in the *Gazette*, omits or refuses to take the oath.

Mr. Mehr Chand Sud for the respondents frankly admitted that the Rev. C. R. H. Wilkinson became a member of the Committee on the 8th of May 1931 when the Notification of his appointment was published in the *Gazette*, and that at any time after that date he could take the oath and attend the meetings of the Committee until the 11th of September when the aforesaid Notification was cancelled. It cannot be said, therefore, that between these two dates the Committee consisted of less than five members, though one of them might not have been actually available for taking part in its meetings.

I have no doubt that the finding of the Magistrate, that the Committee was "not in existence" at the time when the complaint was filed is manifestly wrong.

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I would accordingly accept this appeal, set aside the order of acquittal and remit the case to him for disposal in accordance with law.

MONROE J.

MONROE J.—I agree.

N. F. E.

Appeal accepted.

PRIVY COUNCIL.

*Before Lord Blanesburgh, Lord Macmillan, and
Sir George Lowndes.*

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April 11.

FEROZ SHAH (PLAINTIFF) Appellant
versus
SOHBAT KHAN AND OTHERS (DEFENDANTS)
Respondents.

[and cross-appeal.]

**On Appeal from the Court of the Judicial Commissioner, North-
West Frontier Province.**

*Mortgage—Possessory Mortgage—Contemporaneous Lease
—Termination of Lease—Mortgagee's Right to Possession—
Evidence of Intention—whether admissible—Indian Evidence
Act, I of 1872, s. 92.*

A possessory mortgage accompanied by a lease of the mortgaged property to the mortgagor is not a transaction about which there is anything in itself suspicious, although there has been no handing over of the land to the mortgagee and back to the mortgagor as lessee. At the termination of the lease the mortgagee is entitled to possession, if that is the effect of the documents; the transaction should not be treated as a simple mortgage. The Indian Evidence Act by s. 92 forbids the admission of evidence as to the intention of the parties, or to contradict the express terms of the documents; no presumption can legitimately be drawn from the fact that there have been previous transactions of a similar character between the parties.

Decree reversed on the above point, but otherwise affirmed.