APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, and Mr. Justice Trevelyan.

1894
Jan. 18.

THE CORPORATION OF CALCUTTA (DEFENDANT) *v.* JADU LALL MULLICK AND OTHERS (PLAINTIFFS).*

Calcutta Municipal Consolidation Act (Bengal Act II of 1888), *ss.* 2, 252, 256, 257, 265—*Calcutta Municipal Act (Bengal Act IV of* 1876), *ss.* 280, 281, 282—*Basti land—Urgency—Trespass—Suit for damages.*

Section 2, paragraph 5 of Bengal Act, II of 1888, the Calcutta Municipal Consolidation Act (by which Act the former Calcutta Municipal Act Bengal Act IV of 1876 is repealed) provides that pending proceedings which may have been commenced under any repealed Act shall be deemed to have been *commenced* under the new Act; but though commenced before the passing of the new Act they must, to be effectual, be continued under its provisions, and can only be used to enforce rights and powers in existence at the time when it is sought to enforce them.

Where therefore before the passing of the Act II of 1888 and whilst Act IV of 1876 was in force, the Municipality took measures under the latter Act to cleanse *basti* land which was in an insanitary state, and notwithstanding the passing of Act II of 1888 which provided totally different preliminaries and procedure for the purpose, continued the improvements practically under the Act of 1876, *Held* that even if the proceedings could be considered, under section 2 of Act II of 1888, to have been commenced under the new Act, the action of the Municipality amounted to trespass for which they were liable in damages to the owner of the land.

THE plaintiffs in this case were the owners of a piece of tenanted land known as Raja Bagan *basti;* Jadu Lall Mullick being entitled to one equal undivided moiety therein and the other two plaintiffs being entitled to the other moiety. On the 19th October 1887 as the result of an application made by some of the residents of the *basti* to the Municipality to take over a certain narrow slip of land for the purpose of making a Municipal road (a piece of land not affected by this suit), the Officiating Chairman of the Corporation furnished to the Commissioners a written report in which he recommended the acquisition of the Raja Bagan *basti* under a drainage project.

* Original Appeal No. 32 of 1893 in suit No. 459 of 1891.

On the 22nd October 1887 the Commissioners in meeting resolved that an inspection of the *basti* should be ordered by two medical men under section 280 of the Calcutta Municipal Act (Bengal Act IV of 1876), and that the further consideration of the matter should be referred to the *Basti* Committee. On the 9th November 1887 at certain proceedings of the *Basti* Committee the Chairman moved for a medical inspection in order that subsequent proceedings under section 283A of Bengal Act IV of 1876 should be taken, but it was resolved that orders should be passed only for a medical examination under section 280 of the Act. This resolution was confirmed on the 26th January 1888 at a quarterly meeting of the Commissioners. On the 21st April 1888 a medical report by two medical gentlemen was made, in which they recommended (omitting such portions as do not refer to the land in suit) that the existing roads in Raja Bagan *basti* should be widened to 30 feet; that a new latrine and bathing place should be erected; that all the roads should be sewered; that a tank should be filled in, and that surface drains should be made in the place of existing drains. On the 31st May 1888 the owners of the *basti*, with the exception of Jadu Lall Mullick, agreed to make over to the Municipality sufficient land to make the existing roads 30 feet in width, and they suggested that the rest of the proposed improvements should be abandoned; and it was then resolved by the *Basti* Committee that a revised plan showing the new improvements desired by the owners should be prepared. On the 28th June 1888 at a proceeding of the *Basti* Committee the proposal of the Chairman that a revised plan should be accepted was carried. On the 8th September 1888 the Chairman of the Municipality submitted to the *Basti* Committee a report which on the 11th September 1888 was considered by that *Basti* Committee, who at a meeting agreed that the revised plan should be referred to the medical officers for adoption by them as an alternative recommendation in their report. The medical officers, however, refused to adopt the recommendation. On the 21st March 1889 the *Basti* Committee met and again considered the report of the 8th September 1888, and eventually adopted it, and submitted it to the Commissioners in meeting for orders under section 281 of Act IV of 1876.

1894

THE CORPORATION OF CALCUTTA v. JADU LALL MULLICK.

On the 1st April 1889 the Calcutta Municipal Consolidation Act (Bengal Act II of 1888) came into force. On the 4th April 1889 the first meeting of the Commissioners under the new Act was held, and at such meeting the resolution of the *Basti* Committee of the 21st March 1889 was confirmed. On the 20th June 1889 the Secretary of the Corporation wrote to Jadu Lall Mullick, requiring him within three months to make or complete two 30-feet roads on the north and east of his property, which were to be metalled and sewered with surface drains to the satisfaction of the Commissioners. On the 24th August 1889 the Secretary again wrote to Jadu Lall Mullick, informing him that unless he set to work within 15 days to carry out the improvements referred to in the last letter the Commissioners would step in and do the work at his cost. On the 9th September 1889 Jadu Lall Mullick through his Attorney protested against the threatened action of the Commissioners, but to this protest the Secretary replied that the matter could not be re-opened, it having been finally considered by the Commissioners, stating that if the land were not willingly given up for the improvement of the *basti* the Commissioners would execute the work without any further notice. On the 12th May 1891 notice of suit was given to the Commissioners, and on the 26th May 1891 the Corporation dug up 17 cottahs and 12 chittaks of land in the *basti* and converted it into roads. Jadu Lall Mullick, therefore, on the 25th August 1891 filed this suit against the Corporation asking for a declaration of his rights to the land entered upon by the Corporation, for an injunction restraining the Corporation from continuing to trespass on the land, and for Rs. 2,500 as damages, or in the alternative for Rs. 15,000, the value of the land taken up. The Corporation filed a written statement justifying their action under Bengal Acts IV of 1876 and II of 1888, setting out all the proceedings taken by the *Basti* Committee and by the Commissioners in meeting.

The case was heard by Mr. Justice Norris, who (after stating the facts as above) held that section 258 of Bengal Act II of 1888, assuming that the proceedings taken by the Commissioners were "proceedings pending" within section 2 of the Act, and that section 258 was applicable, required that the Commissioners in meeting should resolve upon whom a notice should be served,

1894

THE CORPORATION OF CALCUTTA v. JADU LALL MULLICK.

the time within which the works should be carried out, and which of the works should be carried out; and that the person called upon to execute the works was therefore entitled to the judgment of the Commissioners in meeting as to what was a reasonable time within which the works should be carried out and executed: but inasmuch as the resolution of the 4th April 1889 specified no time within which the works were to be carried out it was therefore bad. He also held that the notice (the letter of the Secretary to Jadu Lall Mullick of the 20th June 1889) was bad; and that as it was only after such notice as is mentioned in section 258 that the Commissioners had power to enter on the land and do the work themselves, the Corporation were trespassers in entering upon the plaintiff's land and widening the roads. The learned Judge, however, held that in his opinion the provisions of section 258 could not be made applicable to the condition of things existing before the section came into force, that there were in the case no "proceedings pending" within the meaning of section 2 of the Act. He therefore gave the plaintiff a decree for the value of the land taken by the Corporation, assessing the same at Rs. 800 a cottah, making a total of Rs. 14,200.

The Corporation appealed.

Mr. *Woodroffe*, Mr. *Pugh*, and Mr. *O'Kinealy* for the appellant.

Mr. *Phillips* and Mr. *Bonnerjee* for the respondent.

Mr. *Woodroffe* submitted (1) that the proceedings were properly initiated under the old Act; (2) the proceedings were saved under section 2, and that the Commissioners had power, therefore, to proceed under section 258 of the new Act; (3) that it cannot be said the proceedings were null and void, because the time has not been specified; (4) that the notice was valid, although it did not mention a time; (5) and as to the price of the land and the damages he referred to Mayne on Damages (8th Ed.), 410, and *Anundo Lall Dass* v. *Boycaunt Ram Roy* (1).

Mr. *Phillips* for the respondent:—In section 3 of the new Act the definition of a *basti* is given: the word "*basti*" is only defined where a separate procedure is prescribed; in other places in the Act

(1) I. L. R., 5 Calc., 283.

1894

THE CORPORATION OF CALCUTTA *v.* JADU LALL MULLICK.

it has its natural meaning, whatever that may be. The procedure of this Act is confined to *basti* land as defined in the Act. Proceedings commenced under the old Act could in no way be continued under the *basti* provisions of the new Act, as they must be according to a standard plan. The old Act had nothing to do with *bastis* within the meaning of the new Act; the old Act applies to blocks of huts. When a *basti* is in contemplation and there is urgency, then only it is that operations can be taken under the new Act. In detail the new Act as to *basti* procedure differs still more from the old Act: a standard plan has to be approved; the medical officers are to say whether the changes proposed are urgent or not. The report does not distinguish between what is urgent and what may be undertaken under the more dilatory procedure. Can these modes of procedure be applied to continue what has been begun under the old Act? How can they be fitted on? To fit them on, schedule A and the standard plan would have to be done away with. If there is this difficulty of fitting on the new procedure to the old, did the Legislature intend that proceedings commenced under the old Act should be continued under the new Act? And with regard to this I point out that abundant time has been allowed by the new Act for winding up all matters under the old Act; a year has been given before the new Act should come into force. There was here clearly no urgency sufficient to satisfy section 258 of the new Act.

The proceedings of the Commissioners were commenced by the Commissioners calling for the report; if it was called for under the new Act the report must have been one in accordance with the section, but here it was not; the medical report did not distinguish between urgency and non-urgency. Section 2 was never intended to apply to these proceedings at all. The section intends to save *legal proceedings* pending, but not such proceedings as these. What was meant by the section is that proceedings by the old body of Commissioners under the old Act should be legally continuable by the new body under the new Act. Under the old Act the Commissioners might act if there was a risk of disease, but the Legislature could not have contemplated that more than the year allowed before the new Act came into force should have been

required for it. Here no steps have been taken in relation to outsiders until after the new Act came into force. Therefore there was no necessity for the continuance of the old proceedings. As to whether the details ought to have been settled in meeting or out of meeting, the word "Commissioners" means "Commissioners in meeting" in section 258. The option is not to be exercised by one body and the original direction by the other body; here the Commissioners in meeting are to make an order first. I read the section that the Commissioners in meeting, and not the Chairman, should decide whether any steps should be taken after finding out that the *basti* is in an insanitary state. I say that the works that should be done should be decided by the body of the Commissioners. Section 262 shows that the works are to be approved by the Commissioners in meeting. In this case nothing has been decided as to who is to do the work, or the time within which it is to be done. At most all the Commissioners in meeting have done is to say that something is to be done. As to damages, it is not a question of shifting our ground at all; we have merely asked to be placed in the same position as we were before the land was taken. The title to the land passes to the Corporation under the decree. Under section 258 the Corporation do not acquire the land, but merely have a right to make a road. The decree has given damages not for the temporary disposession, but for the permanent disposession.

The following judgments were delivered by the Court (PETHERAM, C.J., PRINSEP and TREVELYAN, JJ.):—

PETHERAM, C.J.—The facts out of which this question arises are so fully stated by the learned Judge in the Court below that I need not relate them here.

I do not think it necessary to express an opinion as to whether the resolution of the Commissioners of the 26th of January 1888 and the report of the medical men submitted in pursuance of it constituted a "proceeding pending" within the meaning of section 2 of Act II of 1888, because I think that even if it were, and so must be deemed to have been commenced under the new Act, the subsequent proceedings were not in accordance with the new Act, and as the old Act was not in force when they were taken, the

1894

THE CORPORATION OF CALCUTTA v. JADU LALL MULLICK.

Municipality had no power by virtue of its provisions to deal with the plaintiffs' land, and that in doing so they committed a trespass.

All that section 2 provides is that pending proceedings which may have been commenced under any repealed Act shall be deemed to have been *commenced* under the new one, but though commenced before the passing of the new Act, they must, to be effectual, be continued under its provisions and can only be used to enforce rights and powers in existence at the time when it is sought to enforce them.

By sections 280, 281, 282 of Act IV of 1876 the Commissioners were empowered when they were satisfied that there was a risk of disease from the condition of an existing *block of huts* to call for a medical report, and to take steps upon it, with a view to the removal of the risk. The power to take steps for the sole purpose of removing the risk of disease in any existing block of buildings is not given by the new Act, and clearly the power given by the old one is taken away by its repeal, but in place of it an entirely new scheme for attaining what is practically the same end is provided by Part III of Chapter X of the Act (ss. 247 to 270). All these sections, except section 270, contemplate that whatever is done, whether it is done by the owners on the requisition of the Commissioners, or by the Commissioners themselves, under the powers created by the Act, shall be part of an entire scheme, under which the whole *basti* in which the works are to be done, shall be remodelled. Sections 257-264 deal with the case of a *basti* in which the huts are in an unhealthy condition, and provide that in such cases the Commissioners may call for a medical report, but the report must be accompanied by a standard plan dealing with the whole *basti*, and must indicate what portion of the work it is necessary to undertake at once in order to remove or abate the unhealthy condition of the *basti*, and if, and when the Commissioners have approved the entire scheme, they may take immediate steps to carry out the works so necessary, and after this has been done, may cause the rest of the scheme to be carried out under the earlier sections, and when the whole has been done the *basti* is to be deemed a remodelled *basti*, in the same way as it would have been if the whole of the proceedings had been under those earlier sections. The only other

power of interference given to the Commissioners is that contained in section 270 by which they are empowered under some circumstances to cleanse a *basti* which is in a filthy condition, and to recover the costs from the occupiers. It is evident that none of these sections contain powers at all similar to those contained in sections 280 *et seqq.* of the repealed Act, but only empower them to remodel the *basti* if it is in an insanitary condition or to cleanse it if it is filthy. What they have done in the present case is neither one nor the other of these things, as they have merely widened the road in a portion of the *basti* under a medical report such as is contemplated by the old Act, and which is not accompanied by anything in the nature of a plan for remodelling the entire *basti*, a work which would not prevent them from taking steps at any time to cause the entire *basti* to be remodelled under the powers of section 252 and the following sections, and to remodel it in such a way as to render all the work which has been done in widening these roads wholly useless. For these reasons I agree with the learned Judge in the Court below that the defendants were not justified in entering upon the plaintiffs' land and making new roads upon it, and that in doing so they committed a trespass for which the plaintiffs are entitled to recover damages. The plaintiffs are entitled for the reasons which I have given to a declaration that notwithstanding what has happened the land in respect of which the action has been brought is still their property, but not to an injunction, and the only other question is what is the measure of the damages to which they are entitled. The only evidence which is relied upon as evidence of damage which appears on this record is the evidence of the value of the land upon which the new roadway has been constructed, and the learned Judge has given judgment for what he finds to be its full value, on the ground that by the wrong which they have done the defendants have so effectually ousted the plaintiffs from the possession of their property that they can never regain it. In this view I am unable to agree. As I have said before I think the action of the defendants in making the road upon the plaintiffs' land was illegal and a trespass, and by such an act they could acquire no right to retain possession of the land trespassed upon as against the owners,

1894

THE CORPORATION OF CALCUTTA v. JADU LALL MULLICK.

and even if they had acted strictly within their rights the property in the land would still have remained vested in the plaintiffs under the provisions of section 265 of the Act, so that *the question is, what damages have they subtained by what the* defendants have done upon the slip of land which still remains their property.

No evidence has been given that what has been done to the land renders it more unfit for the purpose of building huts upon it, nor of what it would cost to restore the land to the same condition in which it was before the alteration was made. Under these circumstances the damages must be merely nominal as no evidence of any actual damage has been given, and the amount decreed must be reduced to Rs. 20: but inasmuch as I think the plaintiffs are also entitled to a declaration of their title to the land they will retain their costs as awarded to them in the Lower Court, and the decree will be modified to this extent. In this Court each party will pay their own costs on scale No. 2, including the costs of the application to add a fresh ground of appeal. This judgment will be dated as of the 18th of January 1894, being the last day of the hearing.

PRINSEP, J.—I am of the same opinion. Section 281 of the Act of 1876 is no doubt identical with section 252 of the Act of 1888, which by a repeal of the Act of 1876 replaces it, but section 252 contemplates either a standard plan for remodelling a *basti* by which all necessary improvements can be made, or by giving effect to some portion of that plan forthwith on an emergency such as set forth in the first part of section 257 being found to exist. The Act of 1876 does not contemplate the finality which would be the result of a *basti* remodelled under the Act of 1888. In order, therefore, to enable the Commissioners acting under the Act of 1888 to give effect to anything commenced under the Act of 1876, there must be some emergency of the nature stated in section 257. But having regard to the great length of time which has passed since it was under contemplation to take measures for the sanitary improvement of Raja Bagan, it cannot now be reasonably said that this is a matter of any emergency requiring a departure from the ordinary course. If this be so, the only course to bring the matter under the Act of 1888 is on

a plan to remodel the *basti*. This was at one time contemplated, and it so appears from the report of the medical officers appointed to consider the state of the locality. But the subsequent proceedings taken refusing to adopt this report, except in one particular, shows that there was no standard plan accepted.

It is unnecessary that I should refer to the other points raised on this appeal, because I agree in the judgment of the learned Chief Justice.

TREVELYAN, J.—I agree in thinking that the action of the Municipality amounted to a trespass.

The procedure under which the Commissioners were acting when the new Act came into force was of a kind wholly different from that provided under the new Act. The old Act was repealed, so the old procedure could not be continued. In its place there were substituted two systems, the one providing for remodelling *bastis* according to a standard plan, the other giving in section 257, and the following sections, a more peremptory procedure. These sections provide for more urgent cases, there being also in that case a standard plan.

After the repeal of the old Act, the action taken by the Municipality before the new Act came into force became fruitless unless the saving clause of section 2 can be held to be applicable.

That section provides that all proceedings pending at the commencement of the Act, which may have been commenced under the former Act, shall be deemed to have been commenced under the new Act.

Some argument was addressed to us as to the meaning of "proceedings" in this section, and it was contended that they referred only to proceedings in Courts of law. The use of the same word in sections 57, 58, 64, 66, and 67 of the Act would rather point to another construction of the section, but this question need not be decided in this case. For the purposes of argument, we may assume that what had been here done before the new Act came into force amounted to "proceedings" within the meaning of section 2 of the new Act. They could only have been continued under the new Act, if they had been such as could have appropriately been worked from the beginning under the new Act.

1894

THE CORPORATION OF CALCUTTA *v.* JADU LALL MULLICK.

At the time the new Act came into force the report contemplated by section 280 of the old Act had been referred by the *Basti* Committee to the Commissioners in meeting and nothing more had been done.

On the 4th of April 1889, *i.e.*, after the new Act came into force, the Commissioners made an order under section 258 of the new Act and thereafter purported to proceed under section 259 of the new Act.

Section 258 depends upon section 257. That section only applies when the Commissioners in meeting consider that the procedure provided by sections 252 to 256 will be too dilatory. Nothing of the kind took place here. The omission of this necessary preliminary prevents the application of the summary procedure provided in these sections. There was also no standard plan of the kind provided for in section 257 of the new Act. The matters which were necessary preliminaries to section 258 having any operation having been omitted, I think that section 258 had no application to these proceedings, and that the action which the Municipality purported to take under those sections was illegal.

I may remark that the procedure under section 257, *etc.*, is intended to provide a summary and quick remedy for evils requiring urgent attention. In this case from beginning to end the Municipality expended about 3½ years in this matter.

I agree in the decree referred to in the Chief Justice's judgment.

Decree modified.

Attorneys for appellants: Messrs. *Sanderson & Co.*

Attorneys for respondents: Messrs. *Morgan & Co.*

T. A. P.