

ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

IN THE MATTER OF JOGENDRA NATH MUKHUTI
AND OTHERS.*

1908
August 13.

Lease—Covenant—Calcutta Municipal Act (Bengal Act III of 1890), s. 556—Tenders, invitation of, when not obligatory—Specific Relief Act (I of 1877), s. 45—Mandamus.

Section 556 of the Calcutta Municipal Act enables the Corporation to lease any property vested in them on any terms they think fit, without previously calling for any tenders: however the form of a lease cannot be given to a transaction, which properly falls under section 88 of the Act.

Although a covenant in a lease, or in respect of a lease, is in a sense a contract; if it relates to the demised premises and is not independent of them, it does not fall within the purview of section 88 of the Calcutta Municipal Act, and it is not obligatory upon the Corporation to call for tenders in respect of such a contract.

CIVIL RULE.

THIS was an application under section 45 of the Specific Relief Act for an order in the nature of a *mandamus* to compel the Municipal Corporation of Calcutta to call for tenders in terms of section 88 of the Calcutta Municipal Act, in respect of the removal of the city refuse, before giving effect to the proposals of the Special Committee appointed by it to consider the matter.

Certain lands and tenements situate at Dhappa, in the Suburbs of Calcutta, known as the "Dhappa Square Mile" with certain other lands, fisheries and fish hat contiguous thereto were vested in the Corporation of Calcutta, and had been used by them for a number of years for the purpose of depositing the refuse of the city.

On May 1st, 1879, one Bhoba Nath Sen obtained a lease of a portion of the said lands and of certain fishing rights from the Corporation and in the following May obtained a lease of the

* Original Civil.

1908
IN THE
MATTER OF
JOGENDRA
NATH
MUKHUTI.

remaining portion, thus becoming the sole lessee of the whole of the lands and tenements and fishing rights and fish hat for a period of 19 years ending with the 30th April 1899. On the expiry of the above lease, Bhoba Nath Sen obtained a renewal for a further period of 10 years from the 1st January 1900 to the 31st December 1909, at a consolidated annual rental of Rs. 13,263.

With regard to the deposit of the city refuse at the "Dhappa Square Mile," it was alleged that it had been the invariable practice of the Corporation to enter into separate agreements, independent of the lease of the premises, for unloading the waggons of refuse at the "Square Mile." Such a separate agreement was entered into with Bhoba Nath Sen for a period terminating with his renewed lease on December 31st, 1909, at the annual cost to the Corporation of about Rs. 42,000.

On the 29th October 1906, Bhoba Nath Sen proposed to the Chairman of the Corporation certain schemes for the improvement of the "Square Mile" and the fisheries attached, which he was willing to undertake, in consideration of the Corporation renewing the current lease on its expiry, for a further term of 20 years "on a fair and equitable rental." In connection with these proposals a report was submitted by the Secretary to the Corporation, dealing with the history, the character and the previous use made of the "Square Mile." On the 18th December 1907, at a meeting of the Corporation, a Special Committee was appointed to consider the proposed schemes, and on the 8th January 1908, the Corporation further referred to the Special Committee the question of the charges of unloading the refuse-waggons.

It appears that offers were received by the Corporation from others besides Bhoba Nath Sen, in respect of the lease of the premises and the work of unloading the waggons, including an application from Jogendra Nath Mukhuti on the 2nd March 1908. All these offers were rejected by the Special Committee, who finally decided on the 8th May 1908 that no tender should be invited for the lease of the premises and the work of unloading the waggons. Thereafter at the

1908
 IN THE
 MATTER OF
 JOGENDRA
 NATH
 MUKHUTI.

instance of the Special Committee, the Chairman drew up a report recommending to the Corporation that in order to save unnecessary cost and trouble the lease of the Square Mile and the contract to unload the waggons should be combined, and that a lease of the "Square Mile" should be granted to Bhoba Nath Sen for a period of 22 years, on certain terms, one of the terms being that the lessee should undertake to do the work of unloading the waggons without receiving any separate payment. This report was confirmed by the Corporation on the 22nd July 1908.

Thereupon, on the 28th July 1908, Jogendra Nath Mukhuti, with two rate-payers of the Corporation, alleging that the Chairman and the Corporation had acted *ultra vires*, applied for and obtained a rule on the Corporation of Calcutta, the General Committee, and the Chairman of the Corporation, and Bhoba Nath Sen to shew cause "why the Chairman and the Corporation should not forbear from accepting the offer of Bhoba Nath Sen, until after tenders had been invited in accordance with law and why the General Committee of the Corporation should not give notice by advertisement in local newspapers inviting tenders for the contract for unloading waggons of refuse at the lands called the Dhappa Square Mile, and for the lease of the lands and tenements situate at Dhappa known as and called the Dhappa Square Mile and also for the lease of certain other lands and fisheries and fish hat contiguous thereto and why the Chairman and the Corporation should not otherwise proceed in accordance with law."

The Rule came on for hearing on the 10th August 1908.

The Advocate-General, Mr. Sinha (Mr. Stokes with him) for the Corporation. In the circumstances of this matter, the Corporation has full discretion to grant a lease of the premises and to arrange for the unloading of the refuse-waggons without inviting tenders. Section 88 of the Calcutta Municipal Act has no application. The work of unloading is intimately connected with the demised premises, and the

1908
IN THE
MATTER OF
JOGENDRA
NATH
MUKHUTI.

contract for unloading is a covenant of the lease, and is not such as falls within the purview of section 88. *The Queen v. Gaskarth* (1) was referred to. A similar section in the Public Health Act (38 and 39 Vict. C. 35) has been held to be merely directory. See *Soothill Upper Urban Council v. Wakefield Rural Council* (2). Under section 556 of the Calcutta Municipal Act, the Corporation has full power to grant a lease of any premises vested in them, on such terms as they may think fit.

Mr. B. C. Mitter (*Mr. B. L. Mitter* with him) for Bhoba Nath Sen supported the argument of the Advocate-General.

Mr. Chakravarti (*Mr. Lahiri* with him) for Jogendra Nath Mukhuti in support of the rule. The Chairman and the Corporation have acted *ultra vires*, and this Court has jurisdiction to grant relief to a party aggrieved. The proper form of seeking relief is by an application under section 45 of the Specific Relief Act for an order in the nature of a *mandamus*. See *The Bank of Bombay v. Suleman Somji* (3), *In re Tarabai* (4), *London County Council v. Attorney General* (5). The facts of this case are covered not by section 556 but by section 88 of the Calcutta Municipal Act. The true nature and not the form of the transaction must be regarded. See *In re Watson* (6). Instead of the contract for the disposal of the refuse being a term in the lease, the lease itself was ancillary to the main provision in the engagement, which was for the disposal of the refuse of Calcutta. It was sought to evade the operation of section 88, by representing the transaction under the colour of a lease, thus committing a fraud on the Act. See Maxwell on Statutes, 3rd edition, pages 171, 186, 475; Craies on Statutes, 4th edition, pages 77, 223, 224.

Cur adv. vult.

(1) (1880) L. R. 5 Q. B. D. 321.

(2) [1905] 2 Ch. 516.

(3) (1908) 12 C. W. N. 825.

(4) (1905) 7 Bom. L. R. 161.

(5) [1902] A. C. 165.

(6) (1890) L. R. 25 Q. B. D. 27.

WOODROFFE J. This is an application for an order in the nature of a *mandamus* to compel the Corporation to call for tenders in respect of the removal of the city refuse before giving effect to the proposals of the Special Committee appointed by it to consider the matter. This work has been done by Babu Boba Nath Sen since 1879 and has been carried out to the satisfaction of the Corporation. He has also during this period held a lease of the Dhappa Square Mile into which the refuse is dumped. The Corporation consider that it is advisable that the benefit of the lease and the discharge of the work of unloading should go to and be done by the same person. As the present lessee's lease will expire next year the question of its renewal has been before the Secretary of the Corporation, the Estates and General Purposes Committee and a Special Committee, and they after a full consideration of the matter have reported that it is advisable that the lease of the Square Mile and the work of the removal of city refuse should go together and be granted and made over to Babu Boba Nath Sen. The present proposals are however for a different arrangement than heretofore. At the present time Babu Boba Nath Sen pays a rental for the land and receives a sum of money for the work done by him. It is proposed now to grant him a lease on the terms that he do the work of unloading without charge. This proposal is about to be put before the Corporation. Another person, who desires to get for himself the contract for the unloading of the city refuse, objects to this being done. He and a ratepayer, whom he has associated with himself, say that the proposal of the Select Committee cannot be accepted without first calling for tenders. If there is a discretion in the matter, then the Corporation have full discretion. They know far better than I do what is the best proposal to adopt in the public interest. There is no reason whatever to suppose that they are not guided solely by the requirements of such interest. The charges made on this head in the petition are ridiculous. The point however before me is this, and it is a bare point of law, *viz.*: Is the discretion of the Corporation

1908
 IN THE
 MATTER OF
 JOGENDRA
 NATH
 MUKHUTI.
 ———
 WOODROFFE
 J.

1908

IN THE
MATTER OF
JOGENDRA
NATH
MUKHUTI.

WOODROFFE
J.

controlled by the provisions of section 88 of the Municipal Act, which requires that in the case of contracts for the execution of any work involving an expenditure of over Rs. 10,000, tenders should be called for. Had there been simply a contract for the unloading of the refuse at a certain charge then no doubt that section would have applied. This is not disputed. But the proposal here is that Babu Bhoba Nath Sen should do the work without charge as a term and condition of a lease of the "Square Mile," which is granted to him upon this and other considerations. Section 556 enables the Corporation to lease any property vested in them (and the Square Mile is so vested) on any terms they think fit. No tenders are required before the property is leased. No doubt an agreement for a lease is a contract though the lease when completed is a conveyance. Further, a covenant in the lease is a contract, and in this sense the covenant in respect of the lease is a contract. The question, however, is whether it is a contract within the meaning of section 88 and governed by it. It is of course conceded that the law cannot be evaded by giving the form of a lease to a transaction which properly falls under section 88. Whether this has been done must be determined on the facts of each particular case. A test, which may be applied, is this:—Is the covenant one which relates to the demised premises, or is it independent of them. In this case it so relates. The covenant and the lease are closely related to one another. The refuse is unloaded into the Square Mile with a view not only to the disposal of the former, but the reclamation of the latter. And experience has shewn that this reclamation can be best effected when both the duty of unloading and the benefits of the lease of the land, are cast upon and vested in the same person. The fact which is relied on by the applicant that the lease is terminable upon a different mode being agreed to as to the disposal of the refuse so far from destroying the relation to which I have referred, on the contrary, confirms it. In my opinion the present case is not governed by section 88 and it is not obligatory upon the Corporation to call for tenders. To hold

otherwise would be to prohibit the Corporation from granting a lease without calling for tenders which the law does not require. The rule is accordingly discharged with costs.

As the rule was served on Babu Bhuba Nath Sen and as in my opinion the latter was entitled to be heard separately, separate costs are allowed to him and to the other party to the rule, the Corporation.

Rule discharged.

Attorney for the applicants : *S. C. Mitter.*

Attorney for the Corporation : *M. L. Sen.*

Attorneys for the lessee : *G. C. Chunder & Co.*

J. C.

1908
 IN THE
 MATTER OF
 JOGENDRA
 NATH
 MUKHUTI.
 ———
 WOODROFFE
 J.