*Before the Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Sharfuddin.*

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Aug. 2.

# CHAIRMAN, SOUTH BARRACKPORE MUNICIPALITY
*v.*
# AMULYA NATH CHATTERJEE.*

*Lease—Contract in violation of the Bengal Municipal Act—Commissioners, power of, under the Bengal Municipal Act (III of 1884, B. C.) ss. 34, 37—Ultra vires—Fraud.*

Section 34 of the Bengal Municipal Act must be read along with s. 37 of the said Act.

Where in a suit by the Chairman of the Municipality to set aside a permanent lease executed by the defendant it was found that the contract was sanctioned by the Commissioners at a meeting and that it involved a value exceeding Rs. 500, but that the *kabuliyat* executed on behalf of the Municipality was signed only by the Chairman, and although two of the Commissioners witnessed it they did not sign it as contracting parties, and, furthermore, it was not sealed with the seal of the Commissioners:—

*Held*, that the contract was not binding on the Commissioners.

APPEAL by the plaintiff, the Chairman of the Municipal Commissioners of South Barrackpore.

The suit was brought by the South Barrackpore Municipality against the defendant-respondent, Amulya Nath Chatterjee, for the cancellation of a contract of *maurasi mokurrari* lease granted by the defendant to the then Chairman of the Municipal Corporation in respect of about 35 bighas of land, on the 22nd March 1902. On the 9th August 1903 a new Board of the Municipality of South Barrackpore was formed. The new Chairman impugned the lease executed by the Chairman of the last Board, on the grounds that all the facts in connection with the transaction of the *kabuliyat* were not correctly and fairly placed before the Commissioners, that the terms of said lease were not approved by the Commissioners, that the said lease was unfair and unreasonable in its terms, and was taken without a previous provision in the

* Appeal from original Decree, No. 352 of 1905, against the decree of Jogendra-nath Mitter, Subordinate Judge of Alipur, dated June 13, 1905.

budget for the same or any sanction of the Divisional Commissioner as contemplated by law. The plaintiff also prayed for a declaration that the said Municipality was not bound to pay rent to the defendant, for a refund of the money already paid, and for damages.

The Subordinate Judge dismissed the suit. The plaintiff thereupon appealed to the High Court.

*Mr. A. Caspersz* and *Babu Kali Kissen Sen*, for the appellant.

*Babu Dwarka Nath Chuckerbutty* and *Babu Shibaprasanna Bhuttacharjee*, for the respondent.

RAMPINI, A.C.J., AND SHARFUDDIN, J. This is an appeal against a decision of the Subordinate Judge, Second Court, Alipore, dated the 13th June 1905.

The appeal arises out of a suit brought by the South Barrackpore Municipality against the defendant Amulya Nath Chatterjee to set aside a permanent *maurasi mokurrari lease* granted on the 22nd March 1902 by the latter to the former in respect of 35 bighas, 15 cottahs of land. The Municipality had to pay a *salami* of Rs. 357 8 annas to the defendant and the rent reserved was one rupee per bigha per month. The Municipalty in this suit prayed for cancellation of this lease; but the suit was dismissed by the Subordinate Judge.

The Municipality now appeal, and on their behalf it is contended, *first*, that the lease entered into by them with the defendant was *ultra vires; secondly*, that it binds the executing persons, but not the rate-payers; *thirdly*, that it is a contract entered into in fraud of the Bengal Municipal Act; *fourthly*, that it was not duly executed; *fifthly*, that it was illegal, because the Commissioners had no power to enter into any such contract without budgetting for it and obtaining the sanction of the higher authorities; *sixthly*, that the defendant had no permanent right to convey to the Municipality, but only a temporary right; and *seventhly*, that the higher authorities refused to sanction the expenses incurred in the transaction and declared all such expenses to have been illegally incurred and the transaction void.

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In our opinion the first of these grounds of appeal cannot be sustained. The lease was taken by the Municipality for the purpose of using the land to which it related as a trenching ground, and it does not appear to us that to enter into such a lease is beyond the powers of the Municipality. The lease therefore was not invalid on this ground and does not seem to us to be one which binds only the executing parties and not the Municipal Commissioners who represent the rate-payers. Then we have not been shown any clause in the Municipal Act, which prohibits the execution of such a lease.

The fourth contention of the learned counsel for the plaintiff-appellant is that the lease has not been duly executed in accordance with the provisions of section 37 of the Municipal Act. That section lays down that "The Commissioners may enter into and perform any contract necessary for the purposes of this Act." But it goes on to say:—"Every contract made on behalf of the Commissioners of a Municipality in respect of any sum exceeding five hundred rupees or which shall involve a value exceeding five hundred rupees, shall be sanctioned by the Commissioners at a meeting and shall be in writing and signed by at least two Commissioners, one of whom shall be the Chairman or Vice-Chairman, and shall be sealed with the common seal of the Commissioners." And the section winds up by saying:—"Unless so executed such contract shall not be binding on the Commissioners."

Now, there can be no doubt that the execution of the present contract was sanctioned by the Commissioners at a meeting and that it involves a value exceeding Rs. 500. The amount of the *salami*, the payment of which was stipulated for in the lease was Rs. 357 8 annas. The amount of rent agreed to be paid for the 35 bighas 15 cottahs was Rs. 429 per annum. So that even one year's value of this contract constituted a value exceeding Rs. 500 and therefore the contract comes within the provisions of section 37 of the Act. That being so, it must be admitted, as it is admitted by the respondent that the *kabuliyat* executed on behalf of the Municipality was not duly executed in accordance with the provisions of section 37, because it was signed only by the Chairman and although two of the Commissioners witnessed it

they did not sign it as contracting parties. Furthermore, it was not sealed with the common seal of the Commissioners. Hence, it would seem that under the last clause of section 37, the contract is not binding on the Commissioners.

The learned pleader for the defendant-respondent, however, contends that the provisions of section 37 do not apply to leases or counterparts of leases, but merely to contracts executed on behalf of the Municipality for the execution of Municipal works; and he urges that under section 34 "the Commissioners at a meeting may purchase or take a lease of any land for the purposes of this Act, and may sell, let, exchange or otherwise dispose of any land not required for such purposes;" and that, therefore, such a lease, or counterpart of a lease, executed under section 34 does not require to be executed with all the formalities prescribed by section 37. We think, however, that this is not the case. Section 34 in our opinion, must be read along with section 37. Section 34 refers no doubt to certain clauses of contracts and then section 37 applies to all contracts, of whatever nature, and provides that if these contracts involve a value exceeding Rs. 500 they shall be executed in accordance with the terms of that section.

That being the view we take, we must hold that the lease in this case was not duly executed and is, therefore, not binding on the Commissioners.

We do not however find it necessary to rest our decision upon this ground only. There are other grounds on which the contract must be set aside.

We may here allude, however, to the further contention of the pleader for the respondent which is to the effect that whether the lease was valid or not, it was ratified by the Commissioners' subsequent conduct. It is no doubt the case that the Commissioners, after executing the contract, endeavoured to enter into possession of the land which formed the subject of it. They sub-let a few cottahs of it. They let a portion of it for the throwing of the carcasses of animals, and used another portion as a burying ground. But, as soon as they did so, they were resisted by the tenants of the land; and they were ejected from some of the land by two tenants suing them. So that it appears that circumstances occurred, after they took possession of the land, which

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justified the Municipality in praying for the cancellation of the lease.

The next contention of the appellant is that the Municipality had no power to enter into this lease without having the expenditure provided for by budget and sanctioned by the superior authorities. We need only say that there is no provision in the Act to this effect; nor do we think the lease is invalid for this reason.

The sixth contention of the learned counsel for the appellant is that the defendant had only a temporary right in the land and no power, therefore, to convey a permanent right to his client. We think that this plea also is a good one. It is quite clear from the terms of the lease, that the lessor, the defendant, purported to convey to the plaintiff a permanent *mourasi mokurrari* lease of the land. Then the lease goes on to say:—"From this day becoming possessor of the land, you shall continue to enjoy and possess the land peaceably by making mehter-depôt, trenching ground, preparing bricks and excavating tanks, settling tenants on the said land and using it in any other way you like." Finally, the lease concludes by saying that the lessor grants this permanent *mourasi mokurrari pottah* counterpart of the *kabuliyat* for the land. Now it is evident that the defendant had no such right to convey to the plaintiff. His title deed is produced (see page 79 of the paper-book) and this shows that what he purchased from Bepin Behary Chatterjee on the 15th October 1901 was a *mourasi mokurrari ganti jama* which was, apparently, of an agricultural nature, and what he had apparently (which is shown by the proclamation of sale) was only an occupancy right. Then, it further appears from the evidence that the land was not only of an agricultural nature but was in the occupancy of tenants, and as already observed as soon as the plaintiff endeavoured to take possession of the land and make use of it for the purpose of throwing carcasses and as a burying ground, two of the tenants, a t, resisted the plaintiff, brought suits against him and obtained decrees for ejectment. The defendant had, therefore, no right to convey to the plaintiff *khas* possession of the land, as he did in the passage of the lease already cited: see page 8 of the paper-book. In these circumstances, as the defendant purported

to convey to the plaintiff a permanent lease of the land and *khas* possession thereof, which he evidently had no right, and must have known he had no right to do, and as the rent, moreover, was very excessive, it may well be held that the defendant has been guilty of fraud. He must have known that there were tenants on the land, and he should not have given the plaintiff *khas* possession or the right to use it in any way he liked. When he did so, he certainly was guilty of fraud. Furthermore, the zemindar of the land has served notice on the plaintiff forbidding the use of the land as a trenching ground and pointing out that the defendant had no permanent right to convey to the plaintiff, which is further apparent from the fact established by the evidence that the rent of the land had recently been increased. That being so, the action of the defendant was fraudulent, and the lease should be cancelled on this ground.

The learned pleader for the respondent urges that no such plea was raised in the plaint nor was fraud of this nature alleged. But in paragraph 11 of the plaint it has been expressly pleaded that the defendant had really no permanent right and therefore could not grant such right to the Corporation, and that his representation that he had a permanent right was fraudulent. Then in paragraph 12 it is said "that the Commissioners of the South Barrackpore Municipality have subsequently in the course of the current year enquired into facts relating to the said lease and have come to know of fraud in the matter." Further, in paragraph 14 (*a*) the plaintiff prays:—"That the said lease be cancelled and declared illegal, fraudulent, and inoperative." And in clause (*c*) of the same paragraph it is prayed, "That the defendant be directed to refund to the said Corporation the moneys paid under the said lease and the sums expended from the Municipal fund in connection with which the said land and that a decree for the recovery of the total amount of Rs. 762-10 annas be passed against the defendant." Then, in the particulars of the plaintiff's pecuniary claim the expenses incurred in defending suits Nos. 772 and 774 of 1902 in the Court of the Second Munsif of Sealdah, instituted by Bepin Behary Das and Upendra Nath Das, that is the tenants who sued the plaintiff for ejectment which expenses amount to Rs. 50, 11 annas, 3 pies have been

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claimed. The plaintiff further claims Rs. 139, annas 8, 6 pies, paid to Bepin Behary Das and Upendra Nath Das in satisfaction of the decrees in the abovementioned suits; the plaintiff altogether claims Rs. 50, annas 9, 6 pies on this account. The fact, then of the plaintiff having been ejected from the land demised by the defendant has been expressly brought to the notice of the latter in the present suit; and as the plea of fraud has been thus raised in the plaint and as, moreover, the second issue framed by the Subordinate Judge is, "was the defendant guilty of any fraudulent act, if not is the lease liable to be cancelled?" we do not think we are debarred from decreeing this appeal on this ground. We accordingly do so, as prayed, setting aside the decree of the lower Court. This order will carry costs in both the Courts.

*Appeal allowed.*

S. M.