

1911
 MOZELLE
 JOSHUA
 v.
 SOPHIE
 ARAKIE.

The suit must be dismissed and the plaintiff must pay costs to the defendant on scale No. 2.

G. M. F.

Suit dismissed.

Attorney for the plaintiff: *N. C. Bose.*

Attorney for Mrs. Arakie: *R. Westmacott.*

Attorneys for the Administrator-Genl.: *Orr, Dignam & Co.*

CRIMINAL REFERENCE.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

1911
 June 12.

CORPORATION OF CALCUTTA

v.

HAJI KASSIM ARIFF BHAM.*

Bustee land—Owner of bustee—Receiver—Liability of actual owner to carry out bustee improvements when his estate is under a Receiver appointed by the High Court—Calcutta Municipal Act (Beng. Act III of 1899) s. 408.

When a notice under section 408 of the Calcutta Municipal Act has been served on the actual owner of an estate in the hands of a Receiver appointed by the High Court, he is liable under the section as such, and not the Receiver, to carry out the requisitions made therein. It is incumbent on the owner in such a case to request the Receiver to comply with the notice, after taking the directions of the Court, and on the latter's failure to do so he should himself apply to the High Court making the Receiver a party. If the Court refuses the application, the owner would be enabled to satisfy the Magistrate that he had used all diligence to carry out the requisitions, and in the event of a conviction the penalty would be merely nominal. If the owner is helpless in the matter the General Committee may proceed under the section against the occupiers.

Parker v. Inge (1) referred to.

A Receiver appointed by the High Court is not the "owner" of the premises he holds as such, nor is he an "agent or trustee" within the definition of the term in section 3 (32) of the Calcutta Municipal Act.

Fink v. Corporation of Calcutta (2) followed.

* Criminal Reference, No. 2 of 1911, by N. C. Ghattack, Municipal Magistrate of Calcutta, dated May 3, 1911.

(1) (1886) 17 Q. B. D. 584.

(2) (1903) I. L. R. 30 Calc. 721.

THE facts of the case are as follows. One Haji Kassim Ariff was, on the 14th November, 1910, served with a notice, under section 408 of the Calcutta Municipal Act, calling upon him, as owner of the bustees No. 7 and 7/1, Wellesley Street, to execute within three months certain improvements as specified in Schedule A of the report attached to the standard plan. It appeared that his estate was then under a Receiver appointed by the High Court. Haji Kassim did not object to the notice, nor did he take any steps to induce the Receiver to comply with it, nor did he move the High Court to direct the latter to do so, but failed to carry out the requisitions made on him. He was prosecuted in consequence before the Municipal Magistrate, and an objection was then urged on his behalf that he was unable to comply with the terms of the requisition as his estate was in the hands of the Receiver. The Assistant Solicitor to the Corporation contended that Haji Kassim was, as owner, liable under section 408 of the Act, and that he should have moved the High Court to direct the Receiver to carry out the requisitions contained in the notice. The Magistrate thereupon made a reference to the High Court, under section 432 of the Criminal Procedure Code, for the decision of the question set forth in the judgment of the High Court.

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Mr. Mehta (with him *Babu Debendra Chandra Mallick*), for the Corporation. In *Fink v. Corporation of Calcutta* (1), it was decided that a Receiver of the Court is not the "owner" of the premises within the definition of the term in the Municipal Act, nor is he the trustee or agent of the owner. The proper person to be served with the notice is the actual owner, and it is incumbent on him to move the Receiver or the Court, which appointed the Receiver, to enable the Receiver to comply with the notice of the Corporation: see *Parker v. Inge* (2).

CASPERSZ AND SHARFUDDIN JJ. The question of law referred for the opinion of this Court, under section 432 of the Criminal Procedure Code, is "whether the accused is bound to

(1) (1903) I. L. R. 30 Calc. 721. (2) (1886) 17 Q. B. D. 584.

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move the High Court for taking steps for the carrying out of the requisitions of the notice under section 408 of Bengal Act III of 1899, or whether the Corporation should have, with the leave of the High Court, served the notice under section 408 upon the Receiver.”

The estate of the accused Haji Kassim Ariff Bham is in the hands of a Receiver appointed by this Court. It is beyond dispute that some one must carry out the requisitions under the Act. It was held in *Fink v. Corporation of Calcutta* (1), that the Receiver is not the “owner” of the premises he holds as Receiver, within the definition of the term as contained in the Municipal Act, and that he is not an agent or trustee in that behalf. It follows that the actual owner, Haji Kassim Ariff Bham, is the only person liable, *as owner*, to carry out the requirements of the law. The learned counsel for the Corporation has cited section 613 of the Act which affords relief to agents and trustees. It is sufficient to repeat that the Receiver is not a person falling within that category.

The real question is whether the owner or the Receiver ought to have moved this Court for directions to carry out the work. In our opinion, as the notice was duly served on the owner, and as the Receiver cannot be lawfully served with such a notice, it was incumbent on the accused, Haji Kassim Ariff Bham, to request the Receiver to comply with the notice, after taking the directions of this Court, and, on his failure to comply, to apply to the High Court, making the Receiver a party to his application. A similar liability was imposed on the owner as against his tenant in a case under the English Public Health Act, 1875, namely, in *Parker v. Inge* (2). Applying the reasoning of the learned Judges in that case, if we suppose that this Court had refused the application of the accused, the latter would be entitled to satisfy the Magistrate that he had used all due diligence to carry out the requisition, and, in that event, if a conviction were had, the penalty would be nominal. On the same supposition, if the owner were helpless in the matter, the General Committee might, under sec-

(1) (1903) I. L. R. 30 Calc. 721.

(2) (1886) 17 Q. B. D. 584.

tion 408 of the Act, proceed against the occupiers of the premises. We offer these observations because, as it seems to us, ample machinery exists, even in the present complication, for the carrying out of the improvement of *bustees*. In this case, the owner did nothing except plead his inability. That is not enough.

Let a copy of our order be transmitted to the Municipal Magistrate who will now proceed to dispose of the case conformably thereto.

E. H. M.

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OF CALCUTTA
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BHAM.

PRIVY COUNCIL.

KO THA HNYIN

v.

MA HNIN I.

P.C.*
June 13.

[On appeal from the Chief Court of Lower Burma, at Rangoon.]

Appeal—Order in execution of decree—Order refusing decree-holder permission to bid at sale in execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 2, 244 cl. (c), 294 cl. (16), 540, 588 and 617—Act VII of 1888, s. 75—Revision where no appeal lies.

No appeal lies from an order refusing an application by a decree-holder for permission to bid at a sale in execution of a decree.

Jodoonath Mundul v. Brojo Mohun Ghose (1) approved.

APPEAL from two orders (8th and 20th September, 1909) of the Chief Court of Lower Burma, made in proceedings in execution of a decree, the former of which orders rejected an appeal from an order (25th August, 1909) of the District Judge of Amherst, and the second refused an application for revision of the same order of the District Judge.

The decree-holder was the appellant to His Majesty in Council.

* Present: LORD MACNAGHTEN, LORD SHAW, LORD MERSEY AND MR. AMEER ALI.

(1) (1886) I. L. R. 13 Calc. 174.