Privy Council Appeal No. 115 *of* 1915.

Bengal Appeal No. 82 *of* 1913.

Mrs. Azeeza Joseph Solomon Joseph, since deceased (now represented by Elias Joseph Soloman and Others, the Executors under her Will) - - - - - - *Appellants,*

v.

The Corporation of Calcutta - - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JULY, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD ATKINSON.
SIR JOHN EDGE.

[*Delivered by* THE LORD CHANCELLOR.]

In this case the appellants are the owners of a bazaar in Kidderpur, which abuts upon two public streets known as Garden Reach Road and Diamond Harbour Road respectively. Along the frontages of these streets there are a number of verandahs or shops connected with the main buildings and erected upon culverts or platforms placed over drains which run by the side of the roads. The streets and drains are vested in the respondents as the Corporation of Calcutta, and they, on the 13th July, 1905, and the 21st April, 1908, served notices (under section 341 of "The Calcutta Municipal Act of 1899") upon the appellants, requiring the removal of these fixtures in Diamond Harbour Road and Garden Reach Road respectively. The provisions of section 341, so far as it affects service of the notices, is not material, but it contains, in subsection 3, certain provisions material to this dispute, which are in these terms:—

"If the owner or occupier of the building proves that any such "fixture was erected before the first day of June, one thousand eight "hundred and sixty-three, or that it was erected on or after that day

"with the consent of any municipal authority duly empowered in that "behalf, the Corporation shall make reasonable compensation to every "person who suffers damage by the removal or alteration of the "fixture."

The appellants paid no attention to the notices, and the respondents accordingly made application to the magistrate for demolition of the structures as to Diamond Harbour Road, on the 22nd November, 1905, and as to Garden Reach Road, on the 5th November, 1908. Orders were made on both these summonses—the first on the 22nd December, 1906, and on the second on the 27th May, 1909.

A rule *nisi* was obtained by the appellants to discharge the Order relating to Garden Reach Road, but this rule was set aside on the 22nd July, 1909.

On the 6th August, 1907, the respondents, in answer to an application of the appellants, offered 178 rupees as compensation for certain of the erections in Diamond Harbour Road; on the 6th August, 1909, a similar application was made in respect of Garden Reach Road, and no reply having been received by the 20th August, 1909, these proceedings were instituted. At this time no steps whatever had been taken by the respondents to enforce the order for demolition, nor, excepting in respect of the one set of premises in Diamond Harbour Road, had they made any offer for compensation if demolition took place. In fact, as appeared in the proceedings, the Corporation denied the right of the appellants to be compensated, upon the ground that, with a certain exception, the buildings in question had not been erected before the 1st June, 1863. The relief sought in the suit was ranged under five heads.

The first asked for a declaration that the structures in dispute had been affixed before the 1st June, 1863. The second, that the plaintiffs were entitled to compensation for the loss that they would suffer by their compulsory removal. The third, that the Corporation could not remove the structures until reasonable compensation had been paid. The fourth asked the Court to fix the amount of compensation. The fifth asked for an injunction restraining the Corporation from interfering with the structures until the compensation was paid.

The Corporation specifically denied the allegation that the structures in Garden Reach Road had been erected before the 1st June, 1863; but as to Diamond Harbour Road they gave a more qualified denial, and admitted that part of them had been erected before that date. They disputed that the payment of compensation was a condition precedent to the removal of the fixtures, and they alleged that under section 617 of the Calcutta Municipal Act the claim with regard to Diamond Harbour Road was bad in law, and that the suit could not be entertained by the Court.

The Subordinate Judge found in favour of the plaintiffs upon all the issues, and allowed compensation to the plaintiffs to the extent of 122,000 rupees. From his decree the

respondents appealed to the High Court, and on the hearing of the appeal for the first time they admitted that all the fixtures in dispute had been erected before the 1st June, 1863; this admission having been made, the High Court reversed the decree of the Subordinate Judge, and dismissed the action with costs. From this judgment of the High Court the present appeal has been brought, seeking to restore in all particulars the decree of the Subordinate Judge.

The two questions of law that arise for consideration can be briefly disposed of.

The *first* relates to the true construction of section 341. Their Lordships cannot find anything in this section which renders the assessment of compensation a condition precedent to the demolition of the structures. The words of the section, which have already been quoted only provide for compensation to the person "who suffers damage" by the removal. Until the removal is effected no damage is in fact suffered at all, and there is but little advantage to be gained in considering, as counsel for the appellants desired their Lordships to do, the questions of compensation under the Lands Clauses Act of 1845, or the consideration of whether, in certain circumstances, assessment of compensation ought to be a necessary condition precedent to interference with property. It is sufficient that, in their Lordships' opinion, the words of the statute, construed as they stand, do not furnish any ground upon which to support the appellants' claim.

The next point is whether, under section 617, the fixing of compensation in case of dispute is not placed in the Court of Small Causes, so that the question was not cognisable by the Court in which the present suit was instituted. Their Lordships think that, in this respect also, the judgment of the High Court was clearly correct. Omitting irrelevant and unnecessary words for the present purpose, section 617 provides this:—

"Where . . . . any municipal authority . . . . is required by . . . .
"this Act to pay . . . . compensation, the amount to be so paid, and,
"if necessary, the apportionment of the same, shall, in case of dispute,
"be determined . . . . by the Court of Small Causes."

Their Lordships find it quite impossible to understand how these words can be read so as to exclude the present dispute from their meaning; and, indeed, counsel for the appellants did did not contend that section 617 read alone would bear that interpretation, but they suggested that the effect of sections 618 and 619 would be to show that section 617 was not intended to apply to claims by a person against the municipality, but only by the municipality against other parties. Now sections 618 and 619 refer to the means to be taken in order to obtain payment and recovery of expenses or compensation awarded in 617. And in both of these sections reference is made to the claim being a claim enforceable only against a person, the words "municipal

authority" being omitted. The respondents say that in these sections, by virtue of certain interpretation clauses, the word "person" includes "municipal authority." It may be so, but in their Lordships' opinion it is quite unnecessary to decide the question. Even assuming the appellants' view of sections 618 and 619 to be correct, it amounts to nothing more than this—that a special means of recovery of the amount awarded is given to the municipality which is not given to the individual, but from this it does not follow that the amount of compensation payable by the municipality to the individual, when in dispute, should not be fixed and determined under the earlier section. So far, therefore, as the suit sought relief under any but the first two heads, it was misconceived, and the whole of the expenses thereby occasioned were thrown away.

Their Lordships think, however, that, in the circumstances of the case, the appellants were entitled to ask for relief under the first two heads of their claim. When the proceedings were started the Corporation was not prepared to admit the claim to compensation excepting in respect of a small portion of the premises in Diamond Harbour Road. Orders were outstanding for demolition. These orders might have been enforced at any moment, and, as the matter stood, they would have been enforced by the Corporation under an assertion that, except for a small amount, no compensation would be payable in respect of the damage done. This seriously affected the appellants' right of property in these structures, and they were entitled to ask for a declaration in respect of this right under the Specific Relief Act (section 42). It does not, of course, follow that the Judge would be bound to give the declaration sought, but their Lordships think that the discretion of the Subordinate Judge would have been rightly exercised in granting such a declaration or in making an equivalent order. When, however, the matter proceeded to the Court of Appeal, the whole of this dispute was abandoned. There was no longer any controversy as to the date when the buildings were erected, and the Corporation made a plain admission that they were all built before the 1st June, 1863. If the High Court had incorporated this admission into the actual form of their decree, instead of referring to it in the reasons which they gave, their judgment would have been correct in form, as it was, in their Lordships' opinion, correct in substance, and the appellants would have had no ground for complaint. This, however, they omitted to do, and though the matter is in one sense a matter of technicality, yet, upon the whole, their Lordships think that the appellants are right in saying that the decree ought to be amended in this particular.

The Corporation have really raised no objection to this step being taken, but complain that this was not the substance of this appeal and did not form the real substance of the original suit. This matter their Lordships have taken into consideration in dealing with the costs of the proceedings; and the order

which they will humbly advise His Majesty to make will be that the decree of the High Court be amended by introducing an admission on the part of the Corporation that all the structures affected were erected before the 1st June, 1863, and that the appellants are entitled to be paid reasonable compensation by the Corporation for the loss which the appellants would suffer, if and when, such structures are compulsorily removed by the Corporation, and that so amended it be confirmed.

The Corporation will pay the appellants' costs of the action upon the footing that the only relief this action asked was that contained in clauses (A) and (B) of the prayer in the plaint.

The appellants will be ordered to pay the respondents' costs of all the other issues in the suit. Those costs will be set off *pro tanto* one against the other. The order of the Court of Appeal as to costs will remain and no costs will be allowed of this appeal.

In the Privy Council.

MRS. AZEEZA JOSEPH SOLOMON JOSEPH, since deceased,

v.

THE CORPORATION OF CALCUTTA.

DELIVERED BY
THE LORD CHANCELLOR.

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