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against Survey No. 19. He gave up his claim against that part of the property. He did not make Gánsing a party to the suit. The plaintiff was a party to that suit and he ought to have insisted that Gánsing should be joined. If he had done so, then his due proportion of the mortgage-debt would have been required from Gánsing. But the plaintiff is now estopped from making this claim.

PARSONS, J.:—This case is on all fours with that of *Jagat Nárán* v. *Qutub Husain*[1] and we follow the decision. The correct finding on the second issue raised in the lower Appellate Court is, therefore, in the affirmative. As the lower Appellate Court wrongly found on this issue, and disposed of the appeal on a preliminary point, we reverse its decree, and remand the appeal to be disposed of on the merits. Costs to abide the result.

Decree reversed and case remanded.

(1) I. L. R., 2 All., 807.

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Ránade.

THE MUNICIPALITY OF BOMBAY *v.* SHA'PURJI DINSHA.*

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Bombay Municipal Act (III of 1888), *Sec.* 248—*Fazendár—Fazendár not liable to provide privy accommodation—"Owner"—"Premises"—Meaning of the words—Construction—Construction of statutes.*

A fazendár is not the person liable, as owner of the premises, to provide privy accommodation under section 248 of the Bombay Municipal Act (III of 1888(1)), the beneficial owner of the house built on the fazendár's land being "the owner" within the meaning of the section.

Per RÁNADE, J.:—The word "premises" in section 248(1) of the Municipal Act is used with reference to the building to which the privy belongs.

THIS was a reference by W. R. Hamilton, Second Presidency

* Criminal Reference, No. 66 of 1895.

(1) Section 248 of Act III of 1888 (Bombay):—

(1) If it appears to the Commissioner that any premises are without a water-closet or privy or urinal, or that the existing water-closet or privy or urinal available for the occupiers of any premises is insufficient, inefficient or, for sanitary reasons, objectionable, the Commissioner shall, by written notice, require the owner of such premises to provide a water-closet, or privy or urinal or an additional water-closet, privy or urinal, as the case may be, to his satisfaction.

(2) Provided that where a water-closet, privy or urinal has been or is used in common by the occupiers of two or more premises, or if in the opinion of the Commissioner a water-closet, privy or urinal may be so used and is sufficient for all the occupiers of the two or more premises using or intending to use the same, he need not require a separate water-closet or privy or urinal to be provided on or for each of the said premises.

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Magistrate, under section 432 of the Code of Criminal Procedure (Act X of 1882).

The reference was as follows :—

"Under section 432, Criminal Procedure Code, I have the honour to refer for the opinion of the High Court a question of law, namely, the precise meaning which should be attached to the words 'owner' and 'premises' in section 248 of the Bombay Municipal Act.

"2. Some time ago a native gentleman complained to the Municipal Commissioner of the filthy state of an oart or *wádi* in Máhim which was used for natural purposes by the residents in the *wádi* more than 100 in number. The Commissioner in consequence required several of the owners of the huts to construct suitable privies, and on their failing to comply prosecuted them. It then appeared that these persons were tenants of a fazendár, and that while they were owners of these huts, the land on which the huts stood, belonged to the fazendár to whom they paid ground-rent. None of these persons had any land appurtenant to the huts where they could build a privy, and under the circumstances it was impossible for them to carry out the orders of the Commissioner, unless they pulled down a part of the huts for the purpose of a privy.

"3. It will be noticed that section 250 (*e*) of the Municipal Act prevents the Commissioner from destroying any portion of a permanent building for the improvement of an existing privy, and this would indicate very strongly that he could not destroy a building in order to erect a privy where none ever existed before. The charge against the tenants was, therefore, withdrawn, and the owner of the *wádi*, the fazendár himself, was called upon to provide a privy for the use of the tenants in the *wádi*. He has not done so and disputes his liability.

"4. Mr. Roughton, his solicitor, has argued that the fazendár gets a ground-rent or quit-rent only for the sites occupied by the huts, and he has no rights over the huts themselves, which may be inherited or sold without interference on his part. He referred to Perry's Oriental Cases as explanatory of the limited rights of a fazendár, and contended that 'owner' is defined in the Municipal Act to mean the person who receives the rent of the premises, and that rent does not mean ground-rent; that he is not the owner of the premises, but merely of a ground-rent issuing out of the premises, and he concluded by stating that the fazendár would not object to allow tenants more lands for the purpose of a privy, provided they would pay a ground-rent for the land so assigned.

"5. Mr. Crawford for the Municipality urged that if the fazendár cannot be compelled to build privies, the Act would be a dead letter. Section 248 empowers the Commissioner to call upon owners of premises to provide privies, and 'premises' may mean either the whole *wádi* or the separate occupancies of each tenant. He cited an unreported case, *Smith* v. *The Municipal Commissioner* (Suit 41 of 1891), in which the meaning of the word 'premises' was discussed by the High Court in connection with section 142 of the Municipal Act, when it was held that it may mean a single building, a piece of land, or several buildings or pieces of land constituting in the aggregate a distinct property. The object of the section was to protect the munici-

pal revenue, and a construction was not to be adopted which would make it nugatory if any other constructions which will effect the object of the Act can fairly be placed on the language of the clause. In the same sense Mr. Crawford contended that a construction should be put upon the word 'premises' in section 248 which should compel the fazendár to carry out the Act and provide a privy where a privy is necessary. He also argued that as the fazendár received the ground-rent for the sites occupied by huts, he, in fact, received rent within the meaning of the word 'owner' in section 3 (*m*), and he pointed out that if the fazendár cannot be compelled to build a privy, the nuisance must continue for ever, and he, therefore, urged that a construction should be put upon the section which would make it workable. He urged that, considering the importance of the case, the question might be referred to the High Court for decision.

"6. The question is certainly important, for there are many properties held on *fazendári* tenure in which tenants have no land upon which to build privies, and the effect of a decision against fazendárs would be to compel them to provide privies and privy sites for a large number of huts with which they have no concern except as recipients of a ground-rent. It was pointed out that the buildings at Dhobi Taláo stand on ground belonging to fazendárs, and that they might be compelled to provide costly privies in large buildings occupied by hundreds of people where the only income they derive from these properties is a nominal ground-rent. In the interests of fazendárs, it would be important to define rent as the full competitive rent depending upon contract and not as the nominal and customary rent paid merely in recognition of the alternate interest of the fazendárs in the land.

"7. On the other hand it is impossible to compel tenants to build privies where they have no land on which to build. In this particular case the fazendár professes his willingness to assign land for privies, provided the tenants pay an additional rent, and the difficulty might be got over by mutual arrangement. But there may be cases in which the fazendár might refuse to assign land, and then as long as such places are without privies, there must be a nuisance. But this state of things would disappear gradually as old huts or houses require to be rebuilt, for under section 247 the new building must be provided with a privy. In this very *wádi* the houses which have been rebuilt have privies attached to them, and in course of time the whole must have privies. The nuisance is, therefore, being quietly, although slowly, abated, and I am not prepared to say that a construction should be put upon the Act which would suppress the mischief and provide the remedy at the expense of fazendárs who have a very limited and nominal interest in the sites occupied by tenants. The tenants create the nuisance, and primarily they should provide the remedy where this can be done, but where it cannot be done, it may be left to stand over until the tenant is obliged to rebuild.

"8. In section 234 (*b*) the word 'building' is used as distinct from the 'premises appurtenant thereto.' In section 247 the word 'building' alone is used. It seems, however, to be implied that the building and the premises should be, under the contract, of one and the same owner. In section 248 the word 'premises' is used and appears to mean the building and premises appurtenant thereto held by one and the same owner. In the case of the *wádi* the buildings belong to tenants, but the land on which they stand belongs to the fazendár, and there are no premises appurtenant to the build-

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ings. The action of the Municipality is intended apparently to force the owner of adjoining premises to provide privies for the use of other people. These buildings may be assumed to have stood in this *wádi* for generations, and they were built without privies long before the Municipal Act was passed. The common practice in suburban or rural places is to use the adjoining fields or jungles for the purposes of nature, and the Municipal Act is hardly applicable to such places. It is designed for the ordinary conditions of urban residences and workshops, and it would be a hardship to enforce the law in suburban places more strictly than the occasion warrants. The Act itself provides in section 250 that improvements in existing privies should be made gradually and considerately, and when there are no privies, they may be required to be built, but every new building must have a privy. Under the circumstances it would seem to be prudent to wait until the buildings in the *wádi* are rebuilt, when the municipal requirements might be enforced."

Under the circumstances above stated the Magistrate referred the following questions for the opinion of the High Court:—

"1. Whether under the circumstances disclosed the fazendár (accused) is liable under section 248, Bombay Act III of 1888, to provide a privy in this *wádi* for the use of the owners and occupiers of the huts which have no privies attached to them?

"2. Does the word 'owner' in section 248 include a fazendár who receives the ground-rent of sites occupied by huts and who has no interest in the huts or the rents of the huts? The word 'owner' is defined in section 3 (*m*) as the person who receives the rent of the premises."

The reference was heard by a Division Bench (Jardine and Ránade, JJ.).

Russell (with Messrs. *Roughton and Byrne*) for the fazendár:—The question is whether a fazendár in the island of Bombay is "owner of the premises" within the meaning of section 248, so as to be liable to provide privy accommodation. A fazendár as owner of the soil is only entitled to a nominal quit-rent, which is not liable to enhancement—*Doe dem. Dorábji Dáji Santuk* v. *The Bishop of Bombay*[1]. The huts built on the *fazendári* land belong to the tenants. They live there, and can realise rent if they let those huts. They are, therefore, the beneficial owners of the premises, and as such liable to provide the necessary accommodation. The word "owner" in section 3, clause (*m*), of the Municipal Act is used in a sense similar to that in which the same word is used in section 3 of Stat. 18 and 19 Vict., c. 122. It applies to every person who is in possession or receipt of the whole or any part of the rents and profits of any land or tenement. It applies to the case of buildings which are either

(1) Perry's O. Cases, 498.

actually let or are capable of being let. And the person is called "owner" who has the immediate right of letting them: see *Caudwell* v. *Hanson*(1); *Evelyn* v. *Whichcord*(2); *Mourilyan* v. *Labalmondiere*(3). The word "owner" is also held to include an occupier: see *Lewis* v. *Arnold*(4); *Parker* v. *Inge*(5); *Cook* v. *Montague*(6); *Woodard* v. *Billericay Highway Board*(7). I submit, therefore, that "*the owner*" contemplated by section 248 is owner of the buildings to which a privy, urinal, &c., is attached. The Legislature could not have meant to attack the whole class of fazendárs. If a fazendár were compelled to build a privy, he would have to alter the houses built on his land by his tenants, thereby rendering himself liable for trespass. The proper construction to put on this section would be to apply the expression "owners of such premises" to owners of buildings for which a privy accommodation has to be made.

Macpherson (Acting Advocate General) (with Mr. *L. Crawford*) for the Municipality:—The expression "premises" in section 248 should be read as applicable to the whole oart and not merely to the huts built therein. The oart is walled round on all sides, contains twenty-two houses and is held on *fazendári* tenure. The tenant gets merely his house and nothing more and pays quit-rent. Of course I cannot argue that a fazendár is an owner A fazendár gets a quit-rent. Unless "premises" means the whole oart, section 248 of the Act will often remain a dead letter. The Public Health Act, 1875 (Stat. 38 and 39 Vict, c. 55), s. 4, gives a wide definition; Stat. 31 and 32 Vict, c. 130, Artizans Act, has a narrower one. The twenty-two tenants use the whole oart, the fazendár is the owner of the whole oart, and it will be no hardship to him if he is compelled to provide privy accommodation.

JARDINE, J.:—The Presidency Magistrate has referred two questions of law under section 432 of the Code of Criminal Procedure (X of 1882) along with some statement of the case and of the particular facts found. We take these to be that there is no

(1) L. R., 7 Q. B., 55.
(2) E. B. and E., 126.
(3) 1 E. and E., 533.
(4) L. R., 10 Q. B., 245.
(5) 17 Q. B. D., 584.
(6) L. R., 7 Q. B., 418.
(7) 11 Ch. D., 214.

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privy accommodation for the families dwelling in the twenty-two houses built under the palm trees in an oart at Máhim, which oart belongs to the accused fazendár, and that these families use the land of the oart as a privy, as in *Esubái* v. *Dámodar* [1]. The Municipal Commissioner on complaint by a neighbour of the stench and nuisance so caused has called on the fazendár to provide privy accommodation. The Magistrate assumes in his second question that the fazendár is not the owner of the houses, though he is the owner of the land on which they stand, for which he receives ground rents from the owners of the houses. The latter do not own or rent any of the land there, except what their houses cover. Section 3 (*m*) of Bombay Act III of 1888 being evidently modelled on similar sections in Acts of Parliament dealing for sanitary purposes with owners and occupiers of property, Mr. Russell, as counsel for the fazendár, rightly rested his argument on English cases dealing with the word "owner," and the question which in a variety of ways has occupied the Judges of England in construing divers statutes as to which of the persons holding an interest in a property is primarily liable as owner to fulfil the requirements of the statute. It was admitted at the hearing in this Court that section 248 is enabling; the object is clearly to give powers to the Municipal Commissioner to get these nuisances abated. The suggestion that in the slow course of years the nuisance may disappear as new houses replace the present ones, is not relevant to the questions of law, and we cannot interfere with the Commissioner or tell him how to use his discretion. The families must not be clothed with a privilege to commit a nuisance which it is the object of the impartial law to abate; and the Magistrate may have to put that law in force, even if its provisions will have a harsh operation. See *In re Ganesh Náráyan Sáthé* [2]. Still it does not appear that the person liable will be put to any hardship more than usual, as everybody who improves his premises is put to some expense. As the law does not require each person to erect a privy on his own premises, it does not appear that there is any need to pull down the houses. If the house-owners are the persons liable, they can apparently combine to hire land for erecting proper privies.

(1) I. L. R., 16 Bom., 552. (2) I. L. R., 13 Bom., 600 at p. 608.

The real question is whether the fazendár as owner of the land or the tenant paying ground rent as owner of the house is the person primarily liable as owner of the premises. The word "owner" is elastic in meaning, as is said in the English cases, where arguments from convenience and common sense have always weighed with the Judges. Mr. Russell relied on *Caudwell* v. *Hanson* (1), *Evelyn* v. *Whichcord* (2), *Mourilyan* v. *Labalmondiere* (3). We agree with him that the application of the word "owner" in section 3 of 18 and 19 Victoria, Chapter 122, has a resemblance to the construction of the same word in section 3 of the Bombay Act. The effect of these cases is that the owner in fee entitled to a ground-rent or quit-rent is not to be taken to be the person primarily liable as owner, where there is a lessee or other person in beneficial occupation actually getting the rents or capable of getting it if he chooses to let the premises. The reasons given by Lush, J., in *Caudwell* v. *Hanson* (1), that the statute was not intended to require investigations into titles, and that the owner of the house was the beneficial owner, may be reasonably extended to the present case.

I will now refer to several other cases which may perhaps assist the Magistrates in the like perplexities. *Cook* v. *Montague* (4) is authority for inferring that, in regard to notice about defective construction of a structural work, a privy, the beneficial owner of a house should be treated as the person first to be served. He was held by Blackburn, J., to be the "owner of the premises." This case does not conflict with *Parker* v. *Inge* (5), which deals with the remedy the procedure affords to an owner served with a notice to improve a structural defect in a privy in his house, and who, after using due diligence to get his lessee to allow him to put it right, is baffled by the absence of power to enter the premises during the period of the lease. The case also affirms the principle that the beneficial owner of the house is the person who ought to incur the expense of altering the structure; that principle appears to fix the house-owner here who would get the whole benefit, and not the fazendár, who on

(1) L. R., 7 Q. B., 55.
(2) E, B. & E., 126.
(3) 1 E. & E., 533.
(4) L. R., 7 Q. B., 418.
(5) 17 Q. B. D., 534.

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the statement sent up by the Magistrate has no interest in the house, whose interest is confined to a quit-rent for the soil. That the person who gets the benefit should bear the burden is affirmed in *Lewis* v. *Arnold*(1), where the phrase "owner of lands and buildings" is treated as meaning the occupier, and is applied in regard to expenses of a fire-brigade to the farmer whose haystack had been burnt, and not to his landlord. The same interpretation to avoid certain inconveniences mentioned by the Judges was applied in *Woodard* v. *Billericay Highway Board*(2), as to the lopping of trees overhanging a highway. There Jessel, M. R., remarked that every man in occupation of land has a kind of limited ownership, and he read the word "owner of the lands" along with an interpretation clause which stated that "owner shall be understood to include occupier," showing the word means occupier when the person in occupation is not the full owner. The Advocate General, who appeared for the Municipality, argued that in section 248 the word "premises" should be treated as meaning the whole oart, so as to fix the fazendár as owner. This would be contrary to the spirit of the decisions I have reviewed.

The Magistrate should, therefore, be informed that the fazendár is not the person liable, as owner of the premises, to provide the privy accommodation, the beneficial owner of the house built on the fazendár's land being the owner within the meaning of the statutable provision. Under section 433 of the Code of Criminal Procedure the Municipal Commissioner is directed to pay the costs of this reference.

RA'NADE, J.:—I concur. As the reasons which lead me to this conclusion are, however, somewhat different from those stated by Mr. Justice Jardine, I deem it necessary to state them here with some fulness. In my opinion, the decision of the question referred to this Court depends not so much upon the proper construction of the word "owner" by itself, but of the words "owner of such premises" used in section 248 of the Municipal Act. If the word "owner" stood by itself, it might, as defined in clause (*m*) of section 3, apply equally to the fazendár who owns the land as to the owners of the

(1) L. R., 10 Q. B., 245. (2) 11 Ch. D., 214.

huts built on that land, for he receives the rent of his land just as much as the owners of the huts might receive the rent of the huts if they let them to others and did not occupy them.

The proper construction of the section thus turns more upon the interpretation of the words "such premises," which limit the wider scope of the word "owner" used in it. Section 248 enacts that "if it appears to the Commissioner that any *premises* are without a water closet, privy, or urinal, or the existing water closet, privy, or urinal available for the *occupants* of any *premises* is insufficient or inefficient, . . . the Commissioner shall by written notice require the *owner of such premises* to provide a water closet, privy, or urinal. . . . A clear distinction is made here between the owner and occupier of the premises, and the obligation to construct the privy is placed on the owner of *such* premises. Taken in its context, the word "premises" here cannot properly be applied to the land, and obviously applies to buildings erected on the land. The preceding section 247 makes it unlawful to erect any new building, or rebuild any building, without a sufficient water closet, privy, or urinal. New erections being thus provided for, the next two sections relate to old buildings, section 248 to buildings for private residence, and section 249 to buildings intended for public use, such as markets, railway stations, factories, docks, wharfs, &c. In the first case, the responsibility is placed on the *owners* of such premises, and in the second, on account of their importance, on the *owners or occupiers* of the said premises, *i.e.*, factories, &c., to provide sufficient accommodation in the way of water closets, privies, &c. Section 250 lays down the conditions which regulate the efficiency of existing privies in both cases. The words used are: "The owner or occupier of any *premises on which there is a privy* shall leave between such privy and any building or place used or intended to be used for human residence (section 248), or in which any persons may be employed in any manufacture, trade, or business (section 249) an air-space of a certain width, &c." The next section (251) refers to similar regulations about water closets. All these provisions seem to confine and narrow the more general meaning of the word "premises" used in section 248 to buildings, *i.e.*, the huts in the land in dispute. A careful perusal of other parts of the Act satisfies me that the word "premises" is not used throughout the Act in one and the same sense, and that its sense

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has to be determined in connection with the context. It is used in a more general sense so as to include lands and buildings in the sections which relate to the taxation of property (sections 159, 170, 209, and 226). In section 172 it is used in the narrower sense, coming as it does after hotel, club. In sections 174-175 it is used in the wider sense in juxtaposition with "land" and "building," as being a taxable unit defined in section 158. In the sections which relate to drainage the word is used in the larger sense (sections 227-228, 230-233, &c.). Section 234 is important in this connection; for, in respect of drains, it is the parallel section to section 248, which relates to water closets, privies, and urinals. In this section the word "premises" is mentioned as something appurtenant to the building newly built or rebuilt. The context determines its sense and narrows it. It is used in this same narrow sense in section 242, so as to limit it to land unbuilt in which drains are constructed. In the sections relating to buildings the word is intended to have reference thereto. In the sanitary regulation sections, such as 377, it obviously has reference to the land overgrown with vegetation, &c. It is hardly necessary to notice the other sections of the Act in which the word "premises" occurs.

The instances given above will show clearly that the word is not used throughout in the same sense, and may signify land or building, or land and building, or land appurtenant to a building, according as the context requires it. In the section now under consideration, it is obviously used with reference to the building to which the privy belongs. Quite apart from the provisions of the Act, the primary liability to have a privy, water closet, or urinal must attach to the owner of a building, and not to the owner of the land in which the building is situated, when the two owners happen, as in this case, to be different persons. The words "such premises" must, therefore, be construed in this case to refer to the huts for whose residents privy accommodation is necessary. The owners of the huts, therefore, are the persons directly contemplated in this section as the persons on whom the obligation rests to comply with the Commissioner's notice. They were, in fact, accordingly in the first instance served with notices, and it was chiefly on account of the difficulty created by section 250 (*a*) of finding room in the small huts and of getting unbuilt land outside the huts on which to erect

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the privies, that proceedings appear to have been taken against the owner of the land, though he had no interest or property in the huts, receives no rent therefrom, and could not pull them down. The argument based on inconvenience may be a matter for executive consideration. We do not think it is insuperable, for the Commissioner may erect public privies under section 252. Any how we cannot take it into consideration in interpreting the precise words of section 248. The same reasoning which would seek to make the fazendárs liable under this section might be applied with equal effect to Government, where it has let State lands on long leases to private persons for building purposes. Such an application could never have been in contemplation in enacting these regulations for promoting the sanitary efficiency of private houses.

For the reasons stated above, I am of opinion that the questions referred to this Court must be answered in the negative.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

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NA'NA' BIN BHIKA'PPA' RAHA'TE (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* APPA' BIN BA'BA'JI RAHA'TE (ORIGINAL PLAINTIFF), RESPONDENT.*

Possession—Joint property—Suit by co-owner for exclusive possession—Practice—Procedure.

The plaintiff sued for possession of certain land. The lower Court held that the land was the joint property of the plaintiff and defendant, but finding that the plaintiff had been in exclusive possession allowed his claim and gave him a decree. On second appeal,

Held, that exclusive possession could not be awarded unless exclusive title was proved. On plaintiff's application, which was not opposed by the defendant, the decree of the lower Court was varied, and the plaintiff was awarded joint possession of the property in suit.

SECOND appeal from the decision of Ráo Bahádur Chintáman Náráyan Bhat, Joint First Class Subordinate Judge of Sátára, with appellate powers. Suit for possession of land. The plaintiff alleged that he had purchased it in the year 1889 and had

* Second Appeal, No. 878 of 1893.