1936 *Present :* **Abrahams C.J. and Dalton S.P.J.**

FERNANDO *v.* CHAIRMAN, MUNICIPAL COUNCIL, COLOMBO.

5—*D. C. Colombo, 2,025.*

Housing and town improvement—Improvement to street—Duty of Chairman in apportioning cost among frontage owners—Failure of respondent to give evidence of greater or less degree of benefit derived by respective premises—Right of appeal—Ordinance No. 19 of 1915. s. 25 (4).

In apportioning among the frontage owrers of a street the cost of improvements effected on it, there is no absolute duty imposed on the Chairman of a local authority by the proviso to section 25 (4) of the Housing and Town Improvement Ordinance to have regard to the greater or less degree of benefit to be derived by any premises from the work to be undertaken.

Where no objection was raised by a frontage owner to the apportionment and no evidence was placed before the Chairman of the comparative benefit to be enjoyed out of the improvement by the respective premises,—

Held, that the owner was not entitled to ask the Tribunal of Appeal to disturb the finding of the Chairman.

APPEAL from an order of the District Judge of Colombo.

Keuneman, K.C. (with him *Van Geyzel*), for appellant.

H. E. Amarasinghe, for respondent.

July 16, 1936. ABRAHAMS C.J.—

This is an appeal from the District Judge, Colombo, allowing an appeal from an order of apportionment made by the Chairman of the Municipal Council, Colombo, under section 25 of the Housing of the People and Improvement of Towns Ordinance, 1915. In allowing the

[1] *32 N. L. R. 92.*

appeal the learned District Judge made a new order of apportionment and subsequently stated a case for the opinion of this Court as to whether in the circumstances his order was correct or not.

The Municipal Council under section 25 (1) of the above-named Ordinance resolved to execute certain works of improvement to the street named Campbell Terrace and, having estimated the cost of the work provisionally, apportioned that cost among the frontage owners in that street assigning the largest share to the respondent in these proceedings, who had the longest line of frontage. The frontage owners were notified of the various assessments, and in pursuance of sub-section (2) of the above section they were given an opportunity to raise objections to the work or the proposed apportionment. Some half dozen of the frontage owners did appear and raise objections, but it cannot be ascertained from the notes of the Council's meeting whether any of them objected to his individual apportionment on the ground that he would be deriving less benefit from the projected work than some or other of his neighbours, and thereby that the proposed apportionment, which appears from an arithmetical examination of the figures to have been based according to frontage, was not fair. It is convenient here to refer to sub-section (4) of section 25 of the Ordinance, which shows the principle upon which the apportionment is to be made in such cases, and it reads as follows :—

> "The said expenses shall be apportioned to the frontage of the respective premises, provided that the Chairman may have regard to the greater or less degree of benefit to be derived by any premises from any work so undertaken."

The Council considered the objections, whatever they were, and approved the scheme of apportionment.

The responent to this appeal was not one of the objectors to the scheme of apportionment. His counsel says that he entered into negotiations with the Municipal Council subsequently to make a fresh apportionment, but he has not told us what these negotiations were. The work was completed in June, 1933, and in November, 1934, respondent appealed to the District Judge, Colombo, under sub-section (7) of the Ordinance, which reads as folows :—

> "Any person aggrieved by any apportionment under this section may appeal to the Tribunal of Appeal, and on any such appeal the tribunal may make a new apportionment or make such other order as it may deem just."

Certain issues were drafted for decision by the District Judge of which the following were the only ones which need be considered, namely :—

3. Did the respondent fail to have regard to the degree of benefit to be derived by the appellant's premises from the works of construction carried out by the respondent in settling the apportionment of expenses ?

3 (*a*). Was the respondent bound to have regard to such a degree of benefit as set out in issue 3 ?

3 (*b*). Is it open to the Tribunal of Appeal to decide the questions raised in issues 3 and 3 (*a*) ?

4. What is the quantum of benefit, if any, derived by the appellant's premises from the works of construction carried out by the respondent ?

The appellant mentioned in the issues is, of course, the respondent in the present appeal. A certain amount of evidence was taken as to the nature of the improvements. The learned District Judge stated that it was by no means clear, and there was no evidence to indicate that the question of apportionment was considered by the Chairman of the Council from the point of view of the greater or less degree of benefit to be derived from the different premises, and he held that it was open to him as a Tribunal of Appeal to decide the questions raised in issues 3 and 3 (*a*). It will, however, be observed that neither of these issues goes to the root of the matter because the true construction of the proviso to sub-section (4) of section 25 of the Ordinance is not, what is the degree of benefit to be derived from any particular premises, but whether premises owned by a person who says he is aggrieved by the apportionment derived a lesser benefit from those owned by the frontagers to such an extent that it would be unjust to assess his share of the apportionment according to the length of frontage. It is not clear to me why the learned District Judge did not give his decision on that ground. What he did was to accept the evidence of Mr. Eastman, who has a good deal of experience and skill in such assessments, to the effect that so far as the sale or site value of the property was concerned the actual benefit derived from the work was practically negligible, that there was a possible remote future benefit to the property, but that benefit could only be estimated on a percentage of the site value, and he estimated that benefit at 5 per cent. of the site value. The learned District Judge, therefore, finally held that the quantum of benefit derived by the appellant's premises from the work of construction amounted to Rs. 750 and he ordered the Chairman to make a fresh apportionment to that extent whereas the proviso figure at which the respondent had been assessed by the Chairman was Rs. 2,484.33. It is obvious that this order based as it is on a misconstruction of the Ordinance, was bad, and on this ground, if on no other, the appellant is entitled to succeed.

It is however, desirable that as this appeal has been fought on the obligations imposed upon the Chairman of the Municipal Council this Court should give a decision as to whether, in the circumstances disclosed in the case, the respondent was actually an aggrieved party by the apportionment. It has been argued by learned Counsel for the appellant that on the words of the proviso to sub-section (4) of section 25 of the Ordinance, the Chairman is given an absolute discretion and that, provided in respect of that discretion he does not behave capriciously or arbitrarily, the decision he arrived at cannot be made the ground for an appeal, and that in the circumstances it has not been shown that he did not exercise his discretion properly. Personally, I am unwilling to say conclusively whether or not the Chairman has that discretion which is claimed for him, since I am unable to envisage every set of circumstances that might arise to determine his duty under the Ordinance. I think it is sufficient for the purposes of this case to say that I reject what appears to be the contention of the respondent that an absolute duty was

imposed on the Chairman to have regard to the greater or less degree of benefit to be derived by the premises. The word "may" has been interpreted in a large number of English cases, the principal of which is *Julius v. Bishop of Oxford*[1]. The overwhelming balance of judicial opinion is that it can never mean "must" or "shall". It was said by Cotton L.J., *In re* Baker[2] at page 270, "I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must' so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word 'may', it becomes his duty to exercise it." I do not think that it was the duty of the Chairman of the Municipal Council in these present circumstances, where no objection was raised by the respondent to the apportionment, and when no evidence was either placed before the Chairman or placed itself in some way before him himself, to search in making his apportionment for evidence of the comparative benefit to be enjoyed out of the improvements by the respective premises. There was an obligation imposed upon him to make the apportionment according to the length of the respective frontages and, in my opinion, the Ordinance does not say, neither does it imply, that in such circumstances the Chairman has to do anything more.

Before us the respondent relied on the case of *Rex v. The Minister of Health* (*Ex parte Aldridge*[3]) in support of his contention that the Chairman was obliged to consider the degree of benefit derived by the respondent by the improvements, and the learned District Judge considered that that case sufficiently resembled this case to justify his finding that he had the power to form his own conclusions on the degree of benefit to be entailed by the improvements. There is, of course, a resemblance between the two cases. I have given careful consideration to it, but I do not think it is a conclusive resemblance. In *Aldridge's Case* the appellate authority, the Minister of Health, was given power when a party appealed on the ground that he was aggrieved by an apportionment to make any order that he thought equitable. That order was stated in the enabling Act to be binding and conclusive on all parties. It seems to me that this power is so wide that there can be no interpretation of the enabling Act in derogation of it. Further, and this is very much more important, the scheme of the enabling Act was, that after notice to the Urban Authority, objections to the proposed works were to be taken in a particular way, and it set out with the most careful detail grounds upon which objections were to be taken and the time within which objections were to be made. It seems obvious, therefore, that if an objector had done all that was required of him he had a distinct right to complain that a prejudicial apportionment had been made and appeal for a rectification. But to construe the local Ordinance so as to give such a right of appeal as the respondent claims, will be to impose upon the Chairman of the Council a duty which I do not think the Legislature contemplated, since no matter how conscientiously he might have done his work on the materials which he had before him,

[1] *5 App. Cas. 214.* [2] *44 Ch. D. 262.*
[3] *(1925) 2 K. B. 363.*

any frontager, who like the respondent in this case, held his hand till after the final apportionment could claim the right to come into the Court a considerable time afterwards and disturb his finding by persuading the Tribunal of Appeal to give a contrary decision based upon matters which were never before the Chairman. I cannot sanction so unreasonable a construction of the Ordinance. I am of opinion that this appeal should be allowed with costs here and in the Court below.

DALTON S.P.J.—I agree.

Appeal allowed.