1937 *Present :* **Poyser S.P.J. and Koch J.**

IBRAHIM *et al. v.* COLOMBO MUNICIPAL COUNCIL

*103—D. C. Colombo (Special), 2,078.*

*Housing and Town Improvement Ordinance—Scheme for lighting, sewering, draining, and metalling lane—Apportionment of cost—Appeal to special tribunal—Jurisdiction of Court to canvass the decision of Council regarding construction of work—Ordinance No. 19 of 1915, ss. 25 (7), 93, and 94.*

Where the Municipal Council acting under section 25 of the Housing and Town Improvement Ordinance approved of a scheme for the lighting, sewering, draining, metalling, &c., of a lane and the apportionment of the cost thereof among the owners of the premises affected,—

*Held,* that the tribunal of appeal appointed under section 93 of the Ordinance is limited to the question of the apportionment of cost among the owners, and is not entitled to inquire whether the resolution of the Council as to the necessity for the works of construction was *ultra vires.*

A party, who is aggrieved by the decision of the Council with regard to a work of construction, may proceed by way of a writ of prohibition or similar mandate to the Supreme Court.

THIS was a case stated by the District Court under section 92 (1) of the Housing and Town Improvement Ordinance, No. 9 of 1915.

The question submitted was whether the tribunal of appeal appointed under the Ordinance in considering the question of the apportionment of expenses among the owners of a scheme for lighting, sewering, draining, and metalling a lane, approved by the Municipal Council of Colombo, has jurisdiction to inquire into the necessity of the works of the construction approved by the Council.

The District Judge after finding that the right of appeal was not restricted to the question of apportionment held that he had the power to determine whether the provision of soil sewer came within the definition of "Construction" in section 2 of the Ordinance.

*H. V. Perera* (with him *J. L. M. Fernando*), for the appellant.—The appeal contemplated by section 25 (7) is an appeal against the apportionment, *i.e.*, the proportion of the total expenses settled by the Chairman as the share to be paid by the various frontagers. Here the frontagers challenge not "the apportionment" of the expenses *inter se* but (*a*) the inclusion in the amount of these expenses of the cost of the 9-inch soil sewer and (*b*) the necessity for a metalled roadway, their contention being that a gravelled roadway was sufficient. In short the frontagers attack not

[1] *3 C. W. R. 294.* [2] *3 C. W. R. 326.*

the apportionment by the Chairman, but the resolution of the Council. The frontagers say that the part of the resolution regarding the soil sewer was *ultra vires* and the part of the resolution dealing with the metalled roadway required something that was unnecessary. These matters may be questioned by some appropriate procedure but they cannot be raised in an appeal against "the apportionment". These submissions are supported by cases decided under section 157 of the Public Health Act, 1875—*Cook v. Ipswich Local Board*[1]; *In re an Arbitration between Stoker and Mayor, &c., of Morpeth*[2] . If "apportionment" be construed in this sense, the second and third points stated for the opinion of this Court must be answered in the negative.

The fourth point stated for the opinion of this Court is whether the soil sewer falls within the definition of the term "construction" in section 2. The word "sewering" in the definition of "construction" includes the laying of the 9-inch soil sewer.

*J. R. V. Ferdinands* (with him *D. Jansze*), for respondent.—The District Judge rightly held that the Council had clearly acted *ultra vires* in passing a resolution to include the construction of the 9-inch soil sewer. But for the purposes of this matter it is not necessary to inquire whether or not the Council had jurisdiction to resolve on the construction of the sewer; it is sufficient to show that the Chairman had no jurisdiction to apportion the cost of the sewer to the frontagers. The frontagers contend that the Chairman acted *ultra vires* in apportioning the expenses of constructing the sewer—the very act of apportioning aggrieves them, quite apart from any question of the proportion or share of those expenses—and they are therefore entitled to appeal against the apportionment, *i.e.*, the act of apportioning. Section 25 (1) reads ". . . . and the expenses incurred by the local authority in executing *any such work* shall be apportioned by the Chairman . . . ." The Chairman has jurisdiction to apportion only expenses incurred in executing "any such work" meaning any such work as is (i) covered by the resolution and (ii) comprised in the definition of "construction" in section 2. "Such work" relates back to the words "works comprised in the definition of construction in section 2 of this Ordinance" occurring earlier in the section. If therefore the sewer is not a work comprised in the definition of "construction" then the Chairman had no jurisdiction to apportion the cost of the sewer. Two conditions must be present before the Chairman had such jurisdiction, viz., (i) the work had to be covered by a resolution and (ii) the work had to be a "work of construction". Here only the first condition is present. The 9-inch soil sewer does not sewer the street within the definition of the term "street" in section 2. The evidence shows that this sewer was constructed to serve the houses abutting on the street. The street is served by channels running on either side of the street; these channels deal with the street water. It follows then that, as this sewer was not a work of construction within the meaning of the Ordinance, the act of the Chairman in apportioning the cost of the sewer enables the frontagers to appeal against the apportionment, and so far as this matter at any rate is concerned an appeal lies to the tribunal of appeal.

[1] *24 Law Times Rep. 579.*

[2] *112 Law Times Rep. 753.*

The decision in the *Sandgate District Local Board of Health v. Keene* [1] shows that an appeal against the apportionment will extend to any and every matter arising upon or affecting the apportionment. According to that case in an appeal against the apportionment, the tribunal of appeal can inquire into the sufficiency and adequacy of a gravelled roadway. In this case the evidence shows that the Council did not consider this street on its own merits; it did not arrive at the decision to metal the street after considering the requirements of the street; it merely followed "a standard form of construction".

(Counsel elaborated his contention that the 9-inch soil sewer was not a work of construction by showing that Ordinance No. 19 of 1915 was concerned only with the provision of street sewers which was something quite separate and distinct from the construction of soil sewers, *i.e.*, sewers to deal with the soil sewage and the houses fronting on the street. He referred to the Municipal Councils Ordinance, No. 6 of 1910 (Part XI. A.) section 188 *et seq.*, which provided for soil sewage, the Public Health Act, 1875, and also to certain decisions.)

*H. V. Perera*, in reply.—"Such work" means the work referred to in the Councils' resolution, and the Chairman has merely a ministerial duty to apportion the expenses of the works mentioned in the resolution. The Chairman cannot examine whether the Council had authority to resolve to carry out an item or items of work mentioned in such resolution.

The *Sandgate case* though not overruled has, according to more recent authorities, gone too far. (Vide *the Morpeth case.*)

The 9-inch soil sewer is a work of construction comprised in the definition of construction in section 2. The soil sewer serves the street, for a street must be considered in relation to its inhabitants.—*Vide* the preamble to Ordinance No. 19 of 1915.

March 16, 1937. POYSER S.P.J.—

The District Court Colombo is, under the provisions of sections 83 and 84 of the Housing and Town Improvement Ordinance, No. 19 of 1915, the special tribunal of appeal for the administrative limits of the Municipal Council of Colombo, and this is a "case stated" by the District Judge under section 92 (1) of the Ordinance.

The material facts are as follows:—The Municipal Council, acting under section 25 of the Ordinance, resolved, on October 2, 1929, to carry out a scheme of lighting, sewering, draining, metalling, and bitumen painting in 42nd lane, Wellawatta, at an approximate cost of Rs. 40,687.

Notices were served on the owners of all premises affected (section 25 (2) ), objections to the scheme were heard, and, finally, on January 21, 1931, the Council, having considered further objections, approved the scheme and the apportionment of the cost made by the Chairman and published in the *Government Gazette* of October 25, 1929.

The work was commenced in accordance with the latter resolution and completed in June, 1932, at a total cost of Rs. 36,869.16. In September, 1933, certain of the owners of the premises affected, appealed, in accordance with section 25 (7) of the Ordinance, against their apportionments and after a considerable delay the matter duly came up for inquiry in the District Court.

[1] *(1892) 1 Q. B. 831.*

The principal grounds for the appeal, as set out in the amended petition of appeal, dated August 1, 1935, were that " (*a*) the cost of a 9-inch soil sewer cannot in law be apportioned amongst the appellants and the appellants are not liable for the cost of the said sewer "; " (*b*) the provision of a rubble and metalled and surface painted carriageway was a highly extravagant and unnecessary work of construction, having regard *inter alia* to the location and importance of the said lane, the nature and volume of traffic using the said lane and other relevant factors and considerations, it was quite sufficient to construct a gravelled roadway and the difference between the estimated cost of such a roadway and the actual cost of the said rubble and metalled and surface painted carriageway, to wit, a sum of Rs. 13,469.16, cannot and should not be apportioned amongst the appellants ".

The District Judge, after holding that the right of appeal was not restricted to the question of apportionment only, viz., the proper division of the sum of Rs. 36,869.16 among the owners of the premises affected, considered he could determine whether the provision of a soil sewer came within the definition of " construction " in the Ordinance and also whether the provision of a metalled macadamized road was necessary.

These matters were exhaustively dealt with by the District Judge and he finally held that the soil sewer was not a work of " construction ", and that the provision of a metalled and macadamized road was unnecessary and he accordingly made a substantial reduction of the sum to be apportioned, but, acting under the provisions of section 92 (1) of the Ordinance, stated the following case :—

" (1) As to whether, under section 25 (7) of the Housing and Town Improvement Ordinance, No. 19 of 1915, this Court as a tribunal of appeal is only empowered to consider under section 25 of the said Ordinance the question of apportionment amongst the owners of the premises liable under the Ordinance to pay for works of construction.

" (2) As to whether the question of alleged extravagance and lack of necessity in this case with regard to a rubble, metalled, and surface painted road is a question which could be inquired into by this Court as a tribunal of appeal in considering the apportionment of costs as being a matter coming within the scope and meaning of 'cost' under the provisions of the Ordinance relating to the apportionment of costs.

" (3) As to whether the decision of a local authority with regard to works of construction as to the necessity for works of construction can be made the subject of an appeal to this Court as a tribunal of appeal.

" (4) As to whether the provision of soil sewerage was rightly held by this Court not to be included or to fall within the definition of 'construction' contained in the said Ordinance."

The first point that was argued in appeal on behalf of the Council was that the tribunal of appeal could not inquire into whether the resolution of the Council was *ultra vires*, the only matter they could deal with was the Chairman's apportionment of the cost of the work carried out, *i.e.*, whether a proper proportion of the expenses had been apportioned among the frontagers in accordance with section 25 (4), whether other premises, not fronting 42nd lane would be benefited, (section 25 (5)), and other matters in regard to apportionment.

Mr. Ferdinands argued that the expression "such work" in section 25 means "such work of construction". Consequently the Chairman had only power to apportion the expense of work which could properly be included in the definition of construction, and, if he included the expense of any work which did not come under that definition, the tribunal of appeal could properly delete such expense from the apportionment.

This point involves the true construction of section 25 (1) of the Ordinance and the definition of "construction" which are as follows :—

"25 (1) If any street, not being a public street, or any part thereof be not constructed or maintained to the satisfaction of the local authority, the local authority may from time to time resolve with reference to such street or part thereof to do any one or more of the works comprised in the definition of "construction" in section 2 of this Ordinance ; and the expenses incurred by the local authority in executing any such work shall be apportioned by the Chairman among the premises fronting, adjoining, or abutting upon such street or part thereof, and shall be recoverable from the owners of all such of the aforesaid premises as are liable to be assessed for local rates in the same manner and by the same process as a rate."

"2 '*Construction*' in the case of any street or thoroughfare includes provision for the lighting of the street or thoroughfare and the supply of water to its inhabitants, and its sewering, draining, levelling, paving, kerbing, metalling, channelling, and every method of making a carriageway or footway, and the provision of access to the street or thoroughfare."

I think the contention of the Council is correct and I consider Mr. Ferdinands' construction is incorrect. The words "such work", in my opinion, mean the work of construction resolved on by the Council. It will be seen that in this Chapter of the Act the Council have various powers, and the Chairman, who is the executive officer of the Council, has various powers and duties.

There is not only an appeal against the Chairman's apportionment of the expenses of "work of construction" but there is also, section 26, an appeal against any order of the Chairman under this Chapter in respect of which an appeal is not otherwise provided.

I can see nothing in this Chapter or in the Act as a whole to indicate that a resolution of the Council could be made the subject of an appeal and this in effect what the petitioners have sought to do.

Further, if the Chairman had refused to include in his apportionment the cost of the soil sewer, he would, in effect, be amending a resolution of the Council and that he obviously has no power to do.

There are no authorities directly in point. A number of English cases were referred to but such cases related to the true construction of section 150, the Public Health Act, 1875. The material part of this section is as follows :—

"Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway, footway or any other part of such street is not sewered, levelled, paved, metalled, flagged, channelled, and made good or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the

respective owners or occupiers of the premises fronting, adjoining or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel or make good or to provide proper means for lighting the same within a time to be specified in such notice" . . . .

"If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses".

It will consequently be seen that the provisions of this section vary considerably from those of section 25 of the local Act, but it is of interest to note that in the case of *In re an Arbitration between Stoker and Mayor, &c., of Morpeth* [1] Shearman J. (page 758), after consideration of earlier authorities held " (1) that the arbitrator has only power to decide the question of apportionment, and the meaning of that must be to decide, where there is a disputant, what is the proper proportion of the whole sum to be paid by the disputant; and (2) that the arbitrator has no power to inquire into the reasonableness of the whole amount he has to apportion between the frontagers".

A further point taken on behalf of the appellants was that if the Council had wrongly included the cost of a soil sewer in "work of construction" and such work could not be inquired into by the Tribunal of Appeal, the petitioners had no remedy even if the Council had acted *ultra vires*, and such a state of affairs could never have been intended by the Legislature.

I cannot agree; if the Council were to act *ultra vires*, the Supreme Court would have power, under section 46 of the Courts Ordinance, to issue a writ of prohibition or other suitable mandate. See *The King v. Electricity Commissioners* [2].

For the reasons above stated, I would answer the first paragraph of the case stated in the affirmative. It consequently follows that paragraphs 2 and 3 must be answered in the negative. In regard to paragraph 4 there was a long and interesting argument and we were invited to express an opinion thereon even if such opinion were to be "*obiter*". In view however of the answer to paragraph 1, I do not think it necessary or desirable that we should express opinions that are not material to the decision of this appeal.

I would allow the appeal and direct that the Chairman's final apportionment shall be treated as the correct apportionment.

The Council will have the costs of this appeal and the proceedings in the District Court.

KOCH J.—I agree.

*Appeal allowed.*

[1] *112 Law Times Rep. 753.*

[2] *(1924) I. K. B. 171.*