Mathura Mohan Saha and ors. Vs. Ramkumar Saha and Chittagong District Board

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Court : Kolkata

Decided On : Nov-24-1915

Reported in : 35Ind.Cas.305

Judge : Asutosh Mookerjee and ;N.R. Chatterjea, JJ.

Appellant : Mathura Mohan Saha and ors.

Respondent : Ramkumar Saha and Chittagong District Board

Judgement :

Asutosh Mookerjee, J.

1. The history of the litigations, which have culminated in these appeals, consists principally of matters of record, and has not. formed the subject of controversy in the elaborate arguments addressed to this Court. In 1895, one Ram Kamal Saha made over a sum of money to the District Board of Chittagong for the acquisition of a tract of land, in order that a tank might be excavated thereon for the benefit of the inhabitants of the locality. On the 15th June 1897, the usual declaration was published under the Land Acquisition Act; the land was, in due course, delivered to and became vested in the District Board on the 11th and 21st February 1S98. It subsequently transpired that Ram Kamal Saha, the donor, was not moved by motives of public philanthropy, but that his real object as also the object of Ramsundar Saha, now represented by the appellants, his three sons, was to spite bis relation Ramkumar Saha (the respondent in these appeals), who was owner of a substantial portion of the property acquired. As Mr. Skrine, the then Commissioner of the Chittagong Division, observed, the country was honeycombed with tanks, and it was simply monstrous to wish to pull down godowns and buildings to excavate another tank. The result was that, on the 7th March 1898, the District Board decided to abandon the project; but as possession of the land acquired had already been taken, the Government was not at liberty to withdraw from the acquisition under Section 48 (1) of Act I of 1894. The Bengal Government accordingly informed the Commissioner, on the 21st May 1898, that the Government could not withdraw from the acquisition of the land at that stage, and forwarded the opinion of the Superintendent and Remembrancer of Legal Affairs, that if the Board did not want the land, they could arrange with the original owners or others to take the land off their hands at the price paid for its acquisition. On the 29th August 1898, the Board intimated to Ramkumar Saha that as they had abandoned the project, it had become necessary to return the land to its original owner, and they enquired of him, whether he was willing to take back the land on payment of Rs. 25 as the expenses of acquisition. The owner, who was obviously anxious to get back the land, which he had lost by reason of what was essentially an unwarrantable misuse of the machinery provided in th.e

Land Acquisition Act, deposited the amount in the Treasury on the 6th September 1898. The Land Acquisition Collector, apparently in ignorance of those proceedings, called upon Ramkumar Saha on the 16th December 1398 to receive Rs. 538-5-6 as complnsation for that portion of his land which had been acquired for the benefit of the District Board. On the 10th January 1899, Ramkumar Saha wrote to the Land Acquisition Collector and refused to take the compensation money on the ground that he had already accepted and acted- upon the offer of the Board to re-transfer the land to him on payment of Rs. 25. The sum held in deposit by the Land Acquisition Collector as compensation was subsequently made over by him to the District Board. The District Board, however, did not execute a conveyance in favour of Ramkumar Saha, and, so far as we can gather, the latter also did not press for a regular deed. The reason, no doubt, was that notwithstanding the proceedings for acquisition, he continued in actual occupation of the land. More than two years later, on the 27th November 1900, the Land Acquisition Collector intimated to Ramkumar Saha that Rs. 957-11-1, had been spent for acquisition of the land, that Rs. 538-5-6, which at one time stood to his credit as owner of the land acquired, had been made over to the District Board, and that the land would be given to him on payment of the balance, Rs. 419-5-7, This offer, so far as can be made out from the record, covered not only the land of Ramkumar Saha which had been acquired for the District Board, but also other lands in the neighbourhood which had been acquired for the purposes of the same project of excavation of a tank. On the 4th December 1900, Ramkumar Saha deposited in the Treasury the entire sum of Rs. 957-11-1; and on or about the same date, a draft conveyance in his favour was drawn up on a stamped paper purchased at his cost for Rs. 10. The conveyance, however, for some unexplained reason, was neither executed nor registered. About a year later, on the 2nd August 1901, the Bengal Government intimated to the Commissioner of the Chittagong Division that the land should be offered to the original owners at cost price, and that if they declined it should be sold by public auction. The letter added that in either case, the net sale-proceeds should be given to the donor or his personal representatives, who had paid the cost of acquisition. On the 24th February 1902, the District Board issued a letter to Ramkumar Saha and informed him that if he did not, within thirty days, deposit Rs. 538-5-6 as price of the land and Rs. 13-9-6 as cost of acquisition (total Rs. 551-150) to take back his land, the land would be sold by public auction. Obviously, the District Board authorities overlooked that a much larger sum than what was demanded had already been deposited by Ramkumar Saha. The record does not show what reply was submitted by the latter. We know, however, that on the 20th October 1902, the Land Acquisition Collector intimated to Ramkumar Saha and several other persons (some of them apparently his superior landlords and other his tenants) that they should, on payment of Rs. 872-2-3 within 6th November 1902, take back the land, and that, otherwise, it would be sold by public auction. The notice explained, on the face of it, that the sum demanded was obtained by deduction of Rs. 118-9-9, that is, 15 per cent, from Rs. 990-12-0 (which was the cost of acquisition of the land in four parcels under four declarations; the respective amounts were Rs 50-8-3, 36-11-0, 62-8-10, and 841-10-0). The record does not show what followed upon this notice; but it is plain that the Land Acquisition Collector overlooked that a much larger sum than what he demanded had been deposited nearly two years before. The position now was that Ramkumar Saha did not get a title-deed for the whole land, although he had fully complied with the requisition of the District Board and of the Land Acquisition authorities. Meanwhile on the 17th May 1903, the Commissioner of Chittagong had asked permission of the Board of Revenue to restore the acquired land to the original owners. Why this was done is not explained, because we know that on two previous occasions, namely, on the 21st May 1898 and on the 2nd August 1901, the Local

Government had, expressly or impliedly, approved the proposal for re-transfer of the land to the original owners; it is useless to speculate whether the letter of the 17th May 1903 was written because the previous correspondence and the orders contained therein were overlooked. The record shows that on the 29th May 1903 the Board of Revenue held that their sanction was not necessary, and that as the land had vested in the District Board, the latter were competent to effect the proposed re-transfer to the original owners. What action was taken by the District Hoard on receipt of this reply does not transpire from the evidence on the record; but we find that on the 24th March 1904, Ramkumar Saha petitioned to the District Board for return of Rs. 992-11-1, which had been in deposit then for several years (the sum was made up of Rs. 25 paid on the 6th September 1898, Rs. 10 paid on account of stamp on the 3rd December 1900, and Rs. 957-11-1 deposited on the 4th December 1900). No notice was taken of this application by the District Board authorities. Ramkumar Saha waited for three years and renewed his application on the 9th June 1907, but with no better result. He again renewed his application on the 12th August 1907. Upon this application, the Chairman of the District Board, on the 26th December 1907, directed that the sum might be refunded, because, in his opinion, the land should be retained and the tank constructed; he added in his note that the acceptance of the refund by Ramkumar Saha would estop the latter in any claim on the unexecuted conveyance; and he specifically directed that the applicant might be asked to take the money. This instruction, however, was not carried out; the order of the Chairman was not notified to Ramkumar Saha, nor was the money ever paid or tendered to him, though an attempt is made in the oral evidence to show that a clerk of the District Board Office verbally communicated the substance of the order of the Chairman to an officer of Ramkumar Saha. The fact remains that the money is even now in the hands of the District Board authorities. On the 22nd February 1909, the District Board put the land to auction. Ramkumar Saha, who was in occupation all this time, as scon as he was apprised of the intentions of the Board, appeared and objected to the sale, on the ground that the Board had already contracted to sell the property, to him. The objection was summarily overruled and the property was sold to Ramsundar Saha as the highest bidder for Rs. 1,280. On the 14th May 1909, what is called a sale certificate was issued to the purchaser; as the property was not specifically described in this document, the. Chairman of the District Board executed in favour of the purchaser a deed of release on the 12th July 1909. Symbolical possession of the property is said to have been delivered to the purchaser on the 17th August 1909; but he was not able to obtain actual possession. The result was that on the 28th September 1909, the purchaser instituted four suits in the Court of the Munsif of Chittagong for declaration of title by purchase and for recovery of possession from Ramkumar Saha; the District Board of Chittagong was not joined as a party defendant to these suits. The purchaser instituted four different suits, apparently on the ground that the land had been acquired in four distinct parcels on the basis of four declarations under the Land Acquisition Act. On the 16th December 1909, Ramkumar Saha instituted a cross suit in the Court of the Subordinate Judge of Chittagong against Ramsundar Saha, the purchaser, and the Chairman of the District Board. The suit relates only to that portion of the land which had, originally belonged to Ramkumar Saha. The plaint formulates the reliefclaimed as follows: first, that the title of the plaintiff in kaemi dartapa right and right by adverse possession be declared; secondly, that the purchaser defendant be restrained in his attempt to take possession; thirdly, that the District Board be made to execute a conveyance in his favour and that his possession be confirmed; fourthly, that he be awarded a decree for damages for Rs. 1,957-11-1 with interest and costs; fifthly, that he be granted such relief as the Court might think fit. Subsequently to the institution of this suit, the suits

in the Court of the Munsif were transferred to the Court of the Subordinate Judge, and the five suits were tried together. The Subordinate Judge, in the suit of Ramkumar Saha, allowed him a decree for Rs. 992-11-1 against the District Board, with interest thereon from date of judgment until payment. In the suits by Ramsundar Saha, the Subordinate Judge gave him a decree for possession with mesne profits and costs against Ramukmar Saha. Four appeals were then preferred to the District Judge by Ramkumar Saha, namely, one appeal by him in his suit, and three appeals by him in three of the four other suits; the lands comprised in these three suits were identical with what was comprised in his suit. Consequently, the subject-matter of the controversy before the District Judge was restricted to that portion of the land which originally belonged to Ramkumar Saha. The District Judge, in the suit of Ramkumar Saha, modified, to his detriment, the decree of the primary Court. He confirmed the decree in his favour for Its 992-11-1; but he made the recovery of this sum from the District Board conditional on his making over possession of the land to the Board within 6 months. In the other three suits, brought by Ramsundar Saha, he allowed the appeals of Ramkumar Saha and dismissed the claim for possession on the ground that the sale of the 22nd February 1909 was inoperative in law. The representatives of Ramsundar Saha, who had died in the interval, have perferred four appeals to this Court and have contended that the sale mentioned was valid and operative. Ramkumar Saha has preferred a memorandum of cross-objections in the appeal which arises out of his suit and has argued that he had a good title to the land and was, at any rate, entitled to a decree for specific performance against the District Board. Notice of the memorandum of cross-objections was, however, served at first only on the appellants, and when this was brought to the notice of the Court, the hearing of the appeals was adjourned, at the request of the Counsel for the District Board, to enable him to consider the position and to receive adequate instructions; it was ultimately intimated to the Court that the District Board supported the contention of the appellants and opposed the cross-objections of their co-respondent, Ramkumar Saha. The appeals have been elaborately argued on both sides, and the points which emerge for consideration as also the facts whereon they are based may be briefly summarised.

2. The land now in dispute admittedly belonged originally to Ramkumar Saha. At the instance of Ramkamal Saha and Ramsundar Saha, the land was acquired under the Land Acquisition Act and was vested in the Chittagong District Board for the excavation of a tank. The project was subsequently abandoned, and the District Board, with the concurrence of the Local Government, decided to return the land to the original owner on payment of the actual expenses of the acquisition, as no, compensation had been previously paid to him. The District Board, through their Vice-Chairman, then made an offer to Ramkumar Saha to return the land to him, if he paid Rs. 25 as the expenses of the acquisition. This offer was forthwith accepted, and the money was deposited in the Treasury. Though no formal conveyance was executed, Ramkumar Saha continued in occupation presumably on the strength of this agreement. Two years later, a second offer was made to Ramkumar Saha by the Land Acquisition Collector, on behalf of the District Board, to transfer to him the whole of the land acquired (inclusive of the land cbvered by the previous agreement) if he would pay Rs. 957-11-1, which had been assessed as compensation. This offer also was accepted, and the amount demanded was forthwith deposited. A draft conveyance was prepared, but was not executed for some unexplained reason. More than a year later, the District Board, through their Chairman, offered to Ramkumar Saha to re-transfer to him his portion of the land on payment of Rs. 538-5-6, the amount assessed as compensation therefor, and Rs. 13-9-6, the proportionate amount

of expenses of acquisition. A few months later, the Land Acquisition Collector, on behalf of the District Board, offered to re-transfer the land to Ramkumar Saha, his landlords and his tenants, if Rs. 990-12-0 was paid. What took place on these offers, does not transpire from the record; but two years later, Ram-kumar Saha petitioned for refund of his deposit; this was of no avail, and a renewed application three years later was equally fruitless. On a third application by him, some months later, the Chairman of the District Board directed a refund, but his order was neither communicated nor carried out. More than a year afterwards, notwithstanding protest by Ramkumar Saha, the District Board put up the land to auction, when it was purchased by Ramsundar Saha, who had, 11 years earlier, set the machinery of the Land Acquisition Act in motion to deprive his rival of the land in suit. The purchaser, however, was not able to obtain actual possession, and was obliged to sue for recovery of possession, with the result that a cross-suit was instituted by Ramkumar Saha with a view to perfect his own title or to recover damages from the District Board. The outstanding features of the case, then, are, that Ramkumar Saha has never been paid any compensation for his land, and has, on the other hand, paid to the District Board authorities, with a view to obtain a re-transfer thereof, a sum of Rs. 992-11-1, of which the Board had enjoyed the benefit for 9 years at the date of the institution of the suit. The only question is, what are the legal rights of the parties; for there is not much room for doubt as to where the justice of the case lies. It is convenient to examine, at the outset, the position of Ramsundar Saha, who was the first to come into Court and to launch these litigations.

3. There is no controversy that under Section 16 of Act I of 1894, the title vested absolutely in the District Board when possession of the land acquired was taken by the Collector on the 11th and 21st February 1898. The question arises, whether that title has been subsequently transferred to Ramsundar Saha. The District Judge has held that the answer must be in the negative. The purchaser relied upon the sale certificate granted to him on the 14th May 1909 and the release executed in his favour on the 12th July 1909; the Court of Appeal below has held that neither is of any avail. Section 54 of the Transfer of Property Act, provides that a sale of tangible immoveable property of the value of Rs. 100 and upwards can be made only by a registered instrument. The sale certificate was not registered and cannot consequently operate as a valid conveyance. The release was registered, but it does not purport to be a conveyance, and was stamped, not as a conveyance but as a release; as stated on the face of it, it was granted, because the property covered by the sale-certificate was not described with sufficient precision in that document. A release of this character cannot operate to transfer title, because, as has been repeatedly ruled in this Court, title to land cannot pass by a mere admission when the' Statute requires a deed: Jadu Nath Poddar v. Rup Lal Poddar 4 C.L.J. 22 : 33 C. 937 : 10 C.W.N. 650 : Dharam Chand Boid v. Mouji Shahu 16 Ind. Cas. 440 : 16 C.L.J. 436; Narak Lal v. Thagoo Lal 13 Ind. Cas. 455 : 22 C.L.J. 380. The decision in Hemendra Nath Mukerji v. Kumar Nath Roy 12 0. W.N. 478 [which at an earlier stage is reported as Hemendra Nath Mukerjee v. Kumar Nath Roy 32 C. 169 : 9 C.W.N. 96 is distinguishable; there this Court held upon a construction of all the terms of the particular instrument that though called a deed of disclaimer it operated as a deed of transfer; the Court did not formulate any general proposition of universal application that a deed of release has always the same operation as a conveyance. But, even if the release in this case could, by any stretch of language, be construed as a conveyance, there would be a fatal objection to its validity. Neither the release nor the sale certificate fulfils the requirements of Rule 98 of the Statutory Rules made by the Lieutenant-Governor on the 15th December 1885 under Section 138(d) of Act III

of 1885 B.C. (Bengal Local Self-government Act). Rule 98 is in these terms: ''Every transfer of immoveable property, vested in a Board, shall be made by an instrument under the common seal, signed by the Chairman and by two members of the Board, and,, where these rules require the previous approval of the Commissioner of the Division, the fact that the transfer is signed with such approval shall be distinctly expressed.' This rule must be read along with Rule 93, which, so far as relevant to the present matter, provides that no immoveable property vested in a District Board shall, except with the previous approval of the Local Government and in such manner and on such terms and conditions as that Government may approve, be transferred by the Board by way of sale.' The effect of these two rules, consequently, is that no immoveable property vested in a District Board can be sold, except with the previous approval of the Local Government and except by an instrument under the common seal signed by the Chairman and by two members of the Board. Neither the sale certificate nor the release fulfils this condition, as both the documents, though sealed and signed by the Chairman, were not signed by two members of the Board. The appellants have sought to escape from this difficulty by a twofold argument, namely, first, that Rules 93 and 98 are ultra vires, and, secondly, that Rule 98, if intra vires, is directory and not mandatory.

4. In support of the first contention, reference has been made to Sections 20 and 138 (d) of Act III of 1835 B.C. The former section defines a District Board as a body corporate with power to acquire and hold property, both moveable and immoveable, and, subject to any rules made by the Lieutenant-Governor under the Act, to transfer any such property held by it and to contract and do all other things necessary for the purposes of the Act. A District Board has, consequently, power to transfer property held by it, subject to any rules made by the Lieutenant Governor under the Act. Section 133(d) authorises the Lieutenant-Governor to make rules consistent with the Act for the purpose of regulating the powers of District Boards to transfer property. The appellants have argued that this authorises the Lieutenant-Governor to frame rules which impose restrictions on alienations, but not to frame rules which prescribe the formalities to be observed when alienations are made. After careful consideration of the argument addressed to us, we are unable to accept this contention. The expression regulate the powers', when applied to a rule, appears to us to be comprehensive enough to include, not only rules which restrict the power of alienation to property of specified value and kind, but also rules which regulate the mode in which the alienation is to be effected. It is conceivable, for instance, that the rules may prescribe that a District Board may sell land for one purpose and not for another, or that the sale can be made only with the assent of the Local Government when the value of the land exceeds a prescribed limit, or that the conveyance is, in certain cases, to be executed by the Chairman alone, while, in other cases, it is to be signed by the Chairman and a member of the Board, Rules framed in this behalf may, without undue stretch of language, be deemed to be rules regulating the powers of the District Board. The term regulate' is defined as follows in the Oxford Dictionary, Vol. VIII, page 379: 'to control, govern cr direct by rules or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings.' Consequently, a rule to regulate a power may be a rule to restrict the exercise of the power as also a rule to guide the exercise of the power; though, as Lord Davey said in Municipal Corporation of Toronto v. Virgo (1896) App. Cas. 88 : 65 L.J.P.C. 4 : 73 L.T. 449 authority to regulate does not include a power to prevent - or prohibit, because, in the language of Lord Watson in . Attorney-General (Ontario) v. Attorney-General (Dominion of Canada) (1893) App. Cas. 318 : 65 L.J.P.C. 26 : 74 L.T. 533 a power to regulate assumes the conservation of the thing which is to be made the subject of

regulation. Subject to this qualification, a rule framed for the purpose of regulating the power to transfer property may deal with the extent as also the mode of exercise of that power. In our opinion, Rules 93 and 98 are not ultra vires. In the interpretation of the scope of Section 133 (d), some stress may also be laid upon the circumstance that immediately after the enactment of the section by the Legislature, the construction now accepted by us was placed thereon by the authority charged with the duty of framing the rules. As was explained in Baleshwar Bagarti v. Bhagirathi Dass 7 C.L.J. 563 : 35 C. 701 at p. 713 : 12 C.W.N. it is a well-settled principle of interpretation that Courts in construing a Statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation has not by any means a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons. We may add that if the contention of the appellants were to prevail, the object of the Legislature would obviously be defeated; instead of a simple and definite rule as to the mode in which transfers are to be effected, we would have here all the uncertainty which prevails in other systems of law as to the manner in which transfers may be validly effected by a corporate body.

5. In support of the second contention, namely, that Rule 98, if not ultra vires, is merely directory and not mandatory, it has been argued that the rule does not, by the use of negative words, expressly provide that a valid transfer can be effected in no other way, and reference has in this connection been made to the decisions in Liverpool Borough Bank v. Turner (1860) 1 Johns. & Hem. 159 : 29 L.J. Ch. 827 affirmed in (1860) 2 De G.F.& J. 502 at p. 507 : 13 L.T. 494 :9 W.R. 292 : 30 L.J. Ch. 379 : 7 Jur. (N.S) 150 : 70 E.R. 703 : 128 R.R. 315 and Cole v. Green (1843) 6 M. & G. 872 at p. 890 : 7 Scott (N.R.) 682 : 13 L.J.C.P. 30 : 134 E.R. 1145. In the first of these cases, it was ruled that although the Merchant Shipping Act, 1851, contains no provision negativing the validity of a mortgage made otherwise than according to the terms of the Act, the whole scope of the Act is to that effect, and an equitable mortgage is consequently invalid. In the second case, it was ruled that a contract within the scope of Section 151 of Statute 3 & 4, Will. IV, Ch. 68, is not void, though not signed 'by the Commissioners, or by any three of them, or by their clerk', as prescribed by that section. In our opinion, the contention of the appellants is not well founded. Rule 98 must be read along with Rule 93, and the latter rule does use appropriate words to indicate that no immoveable property vested in a District Board can be transferred by way of sale, except in such manner as the Local Government may approve. The intention is clearly manifest that a transfer shall not be made except in the manner prescribed by Rule 98. The whole aim and object of the law would plainly be defeated, if here the command to do the thing in a particular manner did not imply a prohibition to do it in any other; indeed, the language used in Rule 93 leaves no room for doubt as to the intention: Jolly v. Hancock (1852) 7 Ex, 820 : 22 L.J. Ex. 38 : 16 Jur. 550; In re Dickinson, Ex parte Rosenthal (1882) 20 Ch. D. 315 : 51 L.J. Ch. 736 : 47 L.T. 266 : 30 W.R. 667. The decisions relied upon by the appellants are clearly of no avail. The observations of Lord Campbell, L. C in Liverpool Borough Bank v. Turner (1860) 1 Johns. & Hem. 159 : 29 L.J. Ch. 827 affirmed in (1860) 2 De G.F.& J. 502 at p. 507 : 13 L.T. 494 :9 W.R. 292 : 30 L.J. Ch. 379 : 7 Jur. (N.S) 150 : 70 E.R. 703 : 128 R.R. 315 show that a transfer in a mode other than that prescribed may be null and void, even though there are no negative words in the Statute declaring that all transfers in any other form shall be null and void. No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience; it is the duty of Courts of Justice to try to get at the real

intention of the Legislature by carefully attending to the whole scope of the Statute to be construed; Howard v. Bodinghon (1877) 2 P.D. 203 at p. 211. The decision in Cole v. Green (1843) 6 M. & G. 872 at p. 890 : 7 Scott (N.R.) 682 : 13 L.J.C.P. 30 : 134 E.R. 1145 seems at first sight to assist the contention, of the appellants, but, on closer examination, turns out to be clearly distinguishable, as there the clause in question, according to strict grammatical construction, was held not to form part of the proviso; the judgment of Tindal, C.J., shows that if the latter part of the section could be treated as part of the proviso, it would have been deemed imperative and not directory only. Here, however, Rule 98, when read with Rule 93, shows that the requirement as to signature by two members of the Board is mandatory and not directory. This is shown also by an application of a useful test, namely, do the statutory prescriptions affect the performance of a duty or do they relate to a privilege or power. It is well settled that where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it is neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred: Caldow v. Pixell (1877) 2 C.P.D. 562 : 43 L.J.C.P. 54; 36 L.T. 469 : 25 W.R. 773. On the other hand, where a public duty is imposed and the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others, who have no control over those exercising the duty, would result, if such requirements were deemed essential and imperative. The distinction between the two classes of cases is illustrated by the decisions in Ward v. Beck (1863) 13 C.B. (N.S.) 668 : 134 R.R. 691 : 32 L.J.C.P. 113 : 9 Jur. (N.S.) 912 : 143 E.R. 265; Stapleton v. Haymen (1861) 2 H. & C. 918 : 133 R.R. 858 : 33 L.J. Ex. 170 : 10 Jur. (N.S) 497 : 9 L.T. 655 : 12 W.R. 317; The Andalusian (1878) 3 P.D. 182 : 47 L.J. Adm. 65 : 39 L.T. 204 : 27 W.R. 172 : 4 Asp. M.C. 22; Le Feuvre v. Miller (1857) 8 El. & Bl. 321 : 112 R.R. 582 : 26 L.J.M.C. 175 : 3 Jur. (N.S.) 1255 : 120 E.R. 120 Cope v. Thamas Haven Dock Railway Company (1849) 3 Exch. 841 : 77 R.R. 859 : 6 Railw, Cas. 83 : 18 L.J. Ex. 345; Biggie v. London and Blackwall Railway Company (1850) 6 Exch. 412 : 19 L.J. Ex. 303 : 6 Railw. Cas. 590 : 14 Jur. 937; Frend v. Dennett (1858) 4 C.B. (N.S.) 576 : 114 R.R. 859 : 5 L.T. 73 : 27 L.J.C.P. 314 : 4 Jur. (N.S.) 897 : 140 E.R. 1217; Cornwal Mining Company v. Bennett (1869) 5 H.& N. 423 : 120 R.R. 670 : 29 L.J. Ex. 157 : 6 Jur. (N.S.) 539; Irish Peat Company v. Phillips (1861) 1 B. & S. 598 : 124 R.R. 680 : 30 L.J.Q.B. 363 : 7 Jur. (N.S.) 1189 : 4 L.T. 806 : 9 W.R. 873 : 121 E.R. 837; Alma Spinning Company, In re. Bottomley's case (1880) 16 Ch. D. 681 : 50 L.J. Ch. 167 : 43 L.T. 620 L 26 W.R. 133; Gifford & Bury Town Council, In re (1888) 20 Q.B.D. 368 : 57 L.J.Q.B. 181 : 58 L.T. 522 : 36 W.R. 438 : 52 J.P. 119. These cases show that when a public body or a Company is established by Statute or incorporated for special purposes only, and is altogether the creature of Statute Law, the prescriptions for its acts and contracts are imp rative and essential to their validity. The case of Frend v. Bennett (1858) 4 C.B. (N.S.) 576 : 114 R.R. 859 : 5 L.T. 73 : 27 L.J.C.P. 314 : 4 Jur. (N.S.) 897 : 140 E.R. 1217 is specially instructive. The Public Health Act, 1818, enacted that contracts exceeding 10 in value should be sealed with the seal of the Board; that they should contain certain particulars; and that every contract so entered into shall be binding ; provided always that before contracting for the execution of any work, the Board shall obtain from the surveyor a written estimate of the probable expense of executing it and keeping it in repair. The first of these requisites was decided to be imperative, and a contract unsealed was consequently held inoperative against the Board and the rates. But the provision which required an estimate, was held to be merely a direction or instruction for the guidance of the Board and not a condition precedent essential to the validity of the contract: Hunt v. Wimbledon Local Board

(1878) 4 C.P.D. 48 : 48 L.J.C.P. 207 : 40 L.T. 115 : 27 W.R. 123; Eaton v. Basker (1881) 7 Q.B.D. 529 : 50 L.J.Q.B. 444, 44 L.T. 703, 29 W.B. 597 : 45 J.P. 616; Brooks v. Torquay Corporation (1902) 1 K.B. 601 : 71 L.J.K.B. 109 : 85 L.T. 785 : 66 J.P. 293 : 18 T.L.R. 139; British Insulated Wire Company v. Prescot Urban District Council (1895) 2 Q.B. 463 : 64 L.J. Q.B. 811 : 15 R. 633 : 73 L.T. 383 : 44 W.R. 224 : 59 J.P. 552; Nowell v. Mayor of Worcester (1854) 9 Exch. 457 : 96 R.R. 793 : 2 C.L.R. 981 : 23. L.J. Ex. 139 : 18 Jur. 64 : 22 L.T. (O.S.) 244; Bonar v. Mitchell (1850) 5 Exch. 415 : 19 L.J. Ex. 302. This meets completely the argument of the appellants that if any of the provisions of Rule 98 be deemed mandatory, the same character must be imputed to all its provisions. The view we take is supported by the principles deducible from the decisions in Ashbury Railway Carriage & Iron Company v. Riche (1875) 7 H.L. 653 : 44 L.J. Ex. 185 : 33 L.T. 451 : 24 W.R. 794; Chasteauneuf v. Capeyron (1882) 7 App. Cas. 127 : 51 L.J.P.C. 87 : 46 L.T. 65 : 4 Asp. M.C. 489 and Young v. Mayor of Leamington Corporation (1883) 8 App. Cas. 517 at p 522 : 52 L.J.Q.B. 713 : 49 L.T. 1 : 31 W.R. 925 : 47 J.P. 660. In the case last mentioned, the House of Lords ruled that Section 174 of the Public Health Act, 1875, which enacts that every contract made by an urban authority whereof the value or amount exceeds 50, shall be in writing and sealed with the common seal of such authority, is obligatory and not merely directory. Lord Bramwell observed: The Legislature has made provisions for the protection of ratepayers, shareholders and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities, which involve deliberation and reflection. That is the importance of the seal. It is idle to say, there is no magic in a wafer. It continually happens that carelessness and indifference on the one side and the greed of gain on the other cause a disregard of these safeguards, and improvident engagements are entered into.... The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement.' A similar view has been taken in a long line of cases in the Courts of the United States, where the principle has been repeatedly affirmed that if the charter or constituent act of a Corporation prescribes a particular mode in which the property of the Corporation shall be disposed of, that mode must be pursued: Platter v. Elkhatt County (1885) 103 Iml. 360 : 2 N.E. 544; Crow v. Warren County (1888) 118 Ind. 51 : 20 N.E. 642; Shimen v. Phillipsbery (1896) 58 N.J.L, 506 : 33 Atl. 852. The point was discussed with characteristic clearness and striking logical force in able and interesting opinions by Field, C.J., in what are known as the City Slip cases in California, where it was ruled that sales of real estate belonging to the city by its officers, under the authority of an ordinance not adopted in accordance with statutory requirements, were void and did not pass title to the purchasers: Mc-Craken v. Ran Francisco (1860) 16 Calf. 591;. Crogan v. San Francisco (1861) 18 Calf. 590; Pimemtal v. San Francisco (1863) 21 Calf. 351. There is thus no escape from the position that neither the sale certificate nor the release has operated to transfer title to the appellants.

6. It is further clear that they do not constitute even a valid contract for sale, because Rule 103 requires that every contract or agreement entered into by any District Board in respect of a sum or involving a value above Rs. 500 shall be sanctioned at a meeting, be in writing, be signed by the Chairman and two other members of the District Board and shall be sealed with, the common seal of such District Board. The rule adds that unless so sanctioned and executed, such contract shall not be binding on the District Board. It has been finally argued that the objection to the title of the appellants should not have been allowed to prevail, as the sale was admitted Satyesh Chunder Sircar v. Dhunpul Singh 24 C. 20 and that, at any rate, the trial should have

been postponed to enable the appellants to complete their title by securing a duly executed instrument from the District Board Ganpat Pandurang v. Adarji Dadabhai 3 B. 312. There is no force in either of these contentions. The appellants came into Court as plaintiffs and must succeed on proof of a valid title. Their title was challenged by the defendants, and though the factum of the sale by auction was admitted, it was asserted that the title had not been transferred thereby. The appellants had ample opportunity to produce a property executed conveyance from the District Board, if they could, but they have not done so. The case before us clearly does not fall within the class of decisions where it has been ruled that a suit need not be dismissed merely because the authority for its institution, such as a certificate under the Pensions Act, 1861, or Section 78 of the Land Registration Act, or Section 60 of the Bengal Tenancy Act, or Section 4 of the Succession Certificate Act, is not produced with . the plaint. The cases on this subject will be found reviewed in the judgment of this Court in Sarat Chandra Banerjee v. Apurba Krishna Roy 11 Ind. Cas. 187 : 14 C.L.J. 55 : 15 C.W.N. 925 and need not be reexamined here. They are distinguishable, as the plaintiffs here had no title at all at the date of the institution of the suit. We hold accordingly that the District Judge has correctly found that Ramsundar Saha had no enforceable title at the date of the commencement of his suits, which must be deemed to have been rightly dismissed. The inference follows that the title to the land in dispute is still vested in the District Board, and, we must, consequently, examine the rights of Ramkumar Saha against that body, which form the subject of enquiry in his suit.

7. There is no controversy upon one fundamental point, namely, that after the land in dispute had become vested in the District Board, they abandoned the project to excavate a tank and obtained the sanction of the Local Government to re-transfer the land to the original owner. The question is, whether there is a valid contract for such transfer enforceable at the instance of Ramkumar Saha against the District Board. It cannot be disputed that there was an offer by the District Board to Ramkumar Saha on the 31st August 1898 to re-convey the land to him upon payment of Rs. 25 as actual expenses of acquisition, and that the offer was accepted by him when he made the requisite deposit on the 6th September 1898. This plainly constituted an enforceable contract. Rule 102 of the Statutory Rules provides that every contract made by or on behalf of a Board in respect of a sum or involving a value exceeding Rs. 50 shall be in writing and shall be signed by the Chairman or Vice-Chairman of the Board. As the contract in this case was for re-transfer of the land for Rs. 25, neither Rule 102 nor Rule 103, which apply respectively to contracts in excess of sums of Rs. 50 and Rs. 500, has consequently any application; but we know that the offer of the 31st August 1898 was, as a matter of fact, signed by the Vice-Chairman. It has not been proved that the Vice-Chairman had no authority to make this particular offer; no copy of the rules, if any, framed by the District Board under Section 32(e) of the Bengal Local Self-Government Act as to the power to be exercised by the Chairman or Vice-Chairman, has been produced. We must assume that the Vice-Chairman was competent to make the offer, specially as his act has never been specifically repudiated in these proceedings. The document whereby the original offer was made, is apparently not in existence, and the draft copy kept in the office has been produced; it is consequently impossible to say, whether the original bore the seal of the District Board; but, if a seal is necessary, it is to be presumed, as Lord Denman says in Doe d. Pennington v. Taniere (1848) 12 Q.B. 998 at p. 1013 : 18 L.J.Q.B. 49 : 13 Jur. 119 : 116 E.R. 1144 : 76 R.R. 450 against the Corporation that everything has been done that was necessary to make it a binding contract upon both parties. The Statutory Rules, however, do not expressly require that a contract of this

description should be sealed. The omission to affix the seal would not, therefore, affect the validity of the contract. The strict rule of the ancient Common Law, no doubt, was that a Corporation could only act under its seal and was not bound by written contracts not under seal. This rule, however, was relaxed in many cases at an early date and where a Corporation is acting within the scope of the legitimate purposes of its institution, even parol contracts made by its authorised agents raise implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the Corporation : 6 Vin. Abr. 267 : 1 Wms. Saund. 615, 616; I Blackstone Com. 475; Lawford v. Billericay Rural Council (1903) 1 K.B. 772 at pp. 780 786 : 72 L.J.K.B. 554 : 88 L.T. 317 : 51 W.R. 630 : 67 J.P. 245 :1 L.G.R. 535 : 19 T.L.R. 322; Douglass v. Rhyl Urban Council (1913) 2 Ch. 407 : 82 L.J. Ch. 537 : 109 L.T. 30 : 77 J.P. 373 : 11 L.G. R. 1162 : 57 S.J. 627 : 29 T.L.R. 605; Melbourne Banking Corporation v. Brougham (1878) 4 App. Cas. 156 : 48 L.J.P.C. 12 : 48 L.T. 1; Bank of Columbia v. Patteson (1813) 7 Cranch 399. This is borne out by the statement of Pry in his classical treatise on Specific Performance of Contracts, 1911, Section 648: 'it appears to be clear that such part performance as will prevent an ordinary defendant from setting up the defence of the Statute of Frauds, will prevent the defendant Company from setting up either that defence or a defence grounded on the absence of the corporate seal or of the statutory formalities in accordance with which the Company may be enabled to contract. This was clearly laid down in the case of Wilson v. West Hartlepool Harbour He Railway Company (1864) 34 Beav. 187 : 2 De G.J. & S. 475 : 34 L.J. Ch. 241 : 11 Jar. (N.S.) 124 : 11 L.T. 692 : 13 W.R. 361 : 55 E.R. 600 : 145 R.R. 476 and there are other authorities leading to the same conclusion.' Reference is then made to Marshall v. Queen-borough Corporation (1823) 1 Sim. & St. 520 : 24 R.R. 220 : 57 E.R. 206; Maxwell v. Dulwich College (1783) 4 L.J. Ch. 138 mentioned in Carter v. Ely (Dean) (1853) 7 Sim. 211 at p. 222 : 40 R.R. 113 at p. 121 : 4 L.J. Ch. 132 : 58 E.R. 817; London & Birmingham Eailway Company v. Winter (1840) Cr. & Ph. 57 at p. 63 : 41 E.R. 410 : 54 R.R. 201; Earl of Lindsey v. Great Northern Railway Company (1853) 10 Hare. 664 : 22 L.J. Ch. 995 : 17 Jur. 522 : 1 W.R. 257 : 68 E.R. 1094 : 90 R.R. 515; Crook v. Corporation of Seaford (1870) 10 Eq. 678; Mayor of Drogheda v. Holmes (1855) 5 H.L.C. 460 : 101 R.R. 251 : 10 E.R. 979. Amongst more recent decisions, reference may usefully be made to the judgment of Neville, J. in Hoare v. Kingsbury Urban Council (1912) 2 Ch. 452 : 81 L.J. Ch. 666 : 107 L.T. .492 : 76 J.P. 401 : 10 L.G.R. 829 : 56 S.J. 704, which shows that the exception based upon the doctrine of part performance cannot be applied where, as in Frend v. Dennett (1858) 4 C.B. (N.S.) 576 : 114 R.R. 859 : 5 L.T. 73 : 27 L.J.C.P. 314 : 4 Jur. (N.S.) 897 : 140 E.R. 1217 and in Young v. Mayor of Leamington Corporation (1883) 8 App. Cas. 517 at p 522 : 52 L.J.Q.B. 713 : 49 L.T. 1 : 31 W.R. 925 : 47 J.P. 660, the contract is, by Statute, positively required to be under seal: to hold otherwise would in effect be, as Lindley, L.J., said in Young v. Corporation of Leamington (1882) 8 Q.B.D. 579 at p 585 : 51 L.J. Q.B. 292 : 46 L.T, 555 : 30 W.R. 500 : 46 J.P. 516 to repeal the Act of Parliament and to deprive the ratepayers of that protection which Parliament intended to secure for them. In the case before us, however, the statutory rules do not render a seal necessary for the validity of this class of contracts, and the doctrine of part performance may well be applied; the District Board have had the benefit of the money paid by Ramkumar Saha and have allowed him to remain in occupation of the land and to incur expenditure thereon for many years on the basis of the contract. It is worthy of note that the contract in this case is not ultra vires in the sense that it is beyond the scope of the authority of the District Board as a corporate body under any circumstances; such contract is not affected by the class of decisions, whereof Ashbury Railway Carriage and Iron Company v. Riche (32) may be

taken as the type. We hold accordingly that there was an enforceable contract on the 6th September 1898.

8. Two questions next require consideration, namely, first, has there been an implied rescission of this contract by a substituted agreement, and, secondly, has there been an implied rescission of the contract by abandonment. As regards the first point, we have to bear in mind that, subsequent to the agreement of the 6th September 1898, an offer was made to Ramkumar Saha by the Collector on behalf of the District Board on the 27th November 1900 to re-transfer the entire land to him (inclusive of the land acquired from him as also from others), if he would make the required deposit. He may be deemed to have accepted this offer on the 4th December 1900, when he paid into the Treasury the amount demanded. What, then, was the legal effect of this transaction; did it amount to an implied rescission of the original agreement by a substituted agreement? The answer must be in the negative, first, because the second agreement was only more comprehensive than, but in no way inconsistent with, the first agreement, and, secondly because, the second agreement was inoperative in law.

9. As regards the first point, it is well settled that a contract need not be rescinded by an express agreement to that effect; if the parties make a new and independent agreement concerning the same matter, the latter may be construed to discharge the former, when the terms of the latter are so inconsistent with those of the former that they cannot stand together: Gilbert v. Hall (1831) 1 L.J. Ch. 15. The true principle is that one contract is rescinded by another between the same parties, when the latter is inconsistent with, and renders impossible the performance of, the former; but if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless or until it is performed: Hunt v. South Eastern Railway Company (1875) 45 L.J.C.P. 87; Dodd v. Churton (1897) 1 Q.B. 562 : 66 L.J.Q.B. 477 : 76 L.L.T. 438 : 45 W.R. 490; Patmore v. Colburn (1834) 1 Cr. M. & R. 65 : 4 Tyr. 810 : 3 L.J. Ex. 314 : 149 E.R. 996; Thornhill v. Neats (1860) 18 C.B. (N.S.) 831 : 125 R.R. 902 : 2 L.T. 539 : 141 E.R. 1392. The same view has been adopted in the Courts of the United States: Drown v. Forrest (1891) 63 Vermont 557 : 14 L.R. A. 80; Rhoades v. Chesapeake Railway Company (1901) 49 W. Va. 494 : 87 Am. St. Rep. 826 : 55 L.R.A. 170; Mc Daniels v. Robinson (1854) 26 Vermont 316 : 62 Am. Dec. 574. It is further well settled that where parties enter into a contract, which, if valid, would have the effect, by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction. As observed by Willes, J. in Noble v. Ward (1867) 4 H.& C. 149 : L.B. 1 Exch. 117 : 143 R.R. 534, 35 L.J. Ex. 81, 15 L.T. 672 : 15 W.R. 520, this is in accordance with a series of cases which will be found referred to in the second of the Egreemont cases, Doe d Biddulph v. Poole (1848) 11 Q.B. 713 : 75 R.R. 607 : 17 L.J.Q.B. 143 : 12 Jur. 450 : 116 E.R. 641. A similar view was taken in Britt v. Ayllet (1850) 11 Arkansas 475 : 52 Am. Dec. 282. In the case before us, the second agreement was inoperative in law, as it contravened the provisions of Rule 103 of the Statutory Rules previously mentioned. We cannot consequently hold that the original agreement of the 31st August 1898 was, by implication, rescinded by the subsequent agreement of the 4th December 1900.

10. As regards the second point, we have to consider whether the agreement of the 6th September 1898 was impliedly rescinded by abandonment, when Ram-kumar Saha applied to the District Board, on the 24th April 1904, 9th June 1907 and 12th

August 1907, for return of the sum previously paid by him; for there is no dispute that where one party, by acts and conduct, evinces an intention no longer to be bound by the contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract. The rule on this subject was formulated by Lord Coleridge, C.J. in Freeth v. Burr (1874) 9 C.P. 208 : 43 L.J.C.P. 91 : 29 L.T. 773 : 22 W.R. 370: 'Where the question is, whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which, I think, the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, namely, that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract.' This exposition has been twice affirmed by the House of Lords. In Mersey Steel & Iron Company v. Naylor Benzon & Company (1884) 9 App. Cas. 434 at pp. 438 412 : 53 L.J.Q.B. 497 : 51 L.T. 637 : 32 W.R. 989 Selborne, L.C., said: 'You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.' In the same case, Lord Blackburn added: ''Where there is a contract which is to be per- formed in future, if one of the parties has said to the other in effect, 'if you go on and perform your side of the contract, I will not perform mine,' that in effect amounts to saying, I will not perform the contract.' ' To the same effect is the observation of Lord Collins in General Bill Posting Company v. Atkinso (1909) App. Cas. 118 at p. 122 : 78 L.J. Ch. 77 : 99 L.T. 943 : 25 T.L.R. 178 'the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract.' As renunciation is thus based on an absolute abandonment of the contract, it follows, as Bowen, L.J., said in Boston Deep Sea Fishing Company v. Ansell (1881) 39 Ch. D. 339 at p. 365 : 59 L.T. 345 that a rescission of the contract implies that you relegate the parties to the original position they were in before the contract was made; that cannot be where half the contract has been performed. It is also well settled that the Court insists upon clear and precise evidence of a mutual intention to determine and abandon the contract: Robinson v. Page (1826) 3 Russell 114 : 27 R.R. 26 : 38 E.R. 519 and Buchhouse v. Crossby (1737) 2 Eq Cases Abr. 32 : 22 E.R. 28. Sugden, L.C. said in Carolan v. Brabazon (1846) 3 J. & L. 200 at p. 209 : 9 Ir. Eq. Rep. 224: The Court requires as clear evidence of the. waiver as of the existence of the contract itself; and will not act upon less.' To the same effect is his observation in Moore v. Crofton (1846) 3 J. &. L. 438 at. p. 445 : 7 Ir. Eq. Rep. 344. Smith, M.R., in Clifford v. Kelly (1858) 7 Ir. Ch. Rep. 333 and in Gartan v. Bury (1860) 10 Ir. Ch. Rep 387 at p. 400 quotes with approval the statement of Lord St. Leonards in his celebrated work on Vendors and Purchasers (1862), Chapter 4, Section 9, paragraph 3, page 168: 'An abandonment of the whole agreement clearly made out (for the Court will look at the evidence with great jealousy), is a good defence in equity:' Brophy v. Connolly (1857) 7 Ir. Ch. Rep 173; Chambers v. Betty (1815) Beatty 488; Homan v. Skelton (1860) 11 Ir. Ch. Rep. 75 at p 97; Chubb v. Fuller (1858) 4 Jur. (N.S.) 153; Lloyd v. Collett (1793) 4 Brown. C.C. 469 : 29 E.R. 992; Reynolds v. Nelson (1821) 6 Madd. 290 : 22 R.R. 225 : 56 E.R; Garrett v. Besborough (1839) 2 Dr. & Wal. 441 : 2 Ir. Eq Rep. 180; Cubitt v. Blake (1854) 19 Beav. 454 : 105 R.R. 209 : 52 E.R. 426 : 2 W.R. 604 and Earl of Rosse v. Sterling (1816) 4 Dow. 442 : 3 E.R. 1221. Now let us examine the relative situation of

the parties in the light of these principles. The applications by the plaintiff for return of his money do not state explicitly that he wished to rescind the contract. His conduct, indeed, was inconsistent with any such possible implication; he did not offer to quit possession of the land on receipt of the money. In fact, if he rescinded the contract and gave up the land, he would be entitled not only to a return of his money, but also to compensation assessed under the Land Acquisition Act. The Chairman, when he recorded the order for return of the money, no doubt, noted that if the plaintiff took back the money, he might find himself estopped in his attempt to enforce the contract, not, indeed, the earlier contract, but the later agreement, which formed the basis of the unexecuted draft conveyance; in any event, his remarks show that he, at any rate, thought that there was a subsisting contract between Ramkumar Saha and the District Board. But whatever the result might have been if the plaintiff had actually received back his money, the incontestable fact remains that the amount has not yet been paid to him. The order of the Chairman was never communicated to him; the money has never been tendered, much less actually paid, to him. The District Board have never sought to obtain possession of the land from him, as they would unquestionably be entitled to do on a rescission of the contract. The plain truth is that whatever may have been recorded on paper, both parties have conducted themselves as if there had been no rescission; they have not been relegated to the original position they occupied before the contract was made. Their conduct has been inconsistent with the theory of rescission, and when, for the first time, more than a year after the order for refund had been recorded by the Chairman, the District Board attempted to sell the land as if they were emancipated from continued liability under the contract, the plaintiff forthwith protested and relied upon the contract, and there is no room for doubt that whatever might have been said, nothing had been done, up to that stage, on either side, on the hypothesis that the contract had been abandoned. The demand of a return of the deposit is not by itself conclusive evidence of an intention to abandon the contract; but where, as in Whalen v. Stuart (1909) 194 N.Y. 495 : 87 N.E. 819 such demand is accompanied by other conduct consistent only with an intention to rescind, the vendee who has so acted cannot later seek specific performance, for, as has been said, a non-existent contract cannot be specifically enforced. We hold accordingly that the conduct of the parties does not show that the contract was rescinded, and it has not been urged that, apart from this, the conduct of the plaintiff has been such that, though it does not amount to rescission, it still disentitles him from insistence on specific performance, as was held in Price v. Assheton (1834) 1 Y. & C. Exch. 82 : 41 R.R. 222 : 4 L.J. Ex. 3 and Price v. Dyer (1810) 17 Ves. 366 : 11 R.R. 102 : 34 E.R. 137. The conclusion follows that, at the date of the institution of this suit, there was a valid contract specifically enforceable by the plaintiff against the District Board.

11. No question of limitation obviously arises under Article 113 of the Schedule to the Indian Limitation Act, as the plaintiff had notice, for the first time, on the 22nd February 1909, that the performance was refused, and the suit was instituted within three years from that date.

12. The question next arises, whether the plaintiff is entitled to the assistance of the Court in any other manner. The District Judge has made in his favour a conditional decree for recovery of Rs. 992-11-1 from the District Board. In the view we take of the right of the plaintiff to enforce specific performance of the contract of the 6th September 1898, it is plain that this decree must be modified. The plaintiff is not entitled to a return of the sum of Rs. 25 paid on the 6th September, 1898 but he is entitled to a return of the sum of Rs. 957-11-1 paid on the 4th December 1900, when

he accepted the second offer. The second agreement, as we have already seen, is not enforceable and never superseded the original contract. Consequently, the District Board is not entitled to retain the money paid by the plaintiff thereunder. It cannot be disputed that where a Corporation receives money or property under an agreement, which turns out to be ultra vires or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation: Rankin v. Emigh (1910) 218 U.S. 27. This is good sens6 and based on sound principle. The relief is granted, not upon the illegal contract, nor according to its terms, but on an implied contract of the Corporation to return, or failing to do that, to make compensation for property or money which it has no right to retain; to maintain such an action is not to affirm but to disaffirm the illegal contract: Central Transport Company v. Pullman Palace Car Company (1890) 139 U.S. 24. As Baggally, L.J. said in Chapleo v. Brunswick Building Society (1881) 6 Q.B.D. 696 at p. 711 : 50 L.J.Q.B. 372 : 44 L.T. 449 : 29 W.R. 529, if the Company has received the benefit of the payment, if, for instance, that amount has found its way to the credit of its banking account, the plaintiff might have been enabled to establish a claim against the Company to the extent of the benefit derived by it from the transaction: Lawford v. Billericay Rural Council 1 K.B. 772 at pp. 780 786 : 72 L.J.K.B. 554 : 88 L.T. 317 : 51 W.R. 630 : 67 J.P. 245 :1 L.G.R. 535 : 19 T.L.R. 322 and Douglass v. Rhyl Urban District Council (1913) 2 Ch. 407 : 82 L.J. Ch. 537 : 109 L.T. 30 : 77 J.P. 373 : 11 L.G. R. 1162 : 57 S.J. 627 : 29 T.L.R. 605. In the case before us, the plaintiff is clearly entitled to a return of Rs. 957-11-1 together with interest thereon from the date of deposit to the date of realisation.

13. One other question requires consideration, namely, whether the plaintiff is entitled to relief against the District Board by way of cross-objection to the decree in an appeal preferred by the other defendants. It need not be disputed that, as an ordinary rule, a respondent in an appeal is not entitled to urge cross-objections except as against the appellant : Bishun Chum Roy Chowdhry v. Jogendra Nath Roy 20 C. 114; Shabiuddin v. Debmoorat Koer 30 C. 655; Kallu v. Manni 23 A. 93 : A.W.N. (1900) 212; Jadunandan Prosad Singha v. Koer Kallyan Singh 13 Ind. Cas. 653 : 15 C.L.J. 61 : 16 C.W.N. 612; Nvrsey Virji v. Alfred H. Harrison 21 Ind. Cas. 7 : 37 B. 511 : 15 Bom. L.R. 781 and Abdul Ghani v. Muhammad Fasih 28 A. 95 : A.W.N. (1905) 200 : 2 A.L.J. 667. But Rule 22(3) of Order XLI of the Code of 1908 has materially altered the pre-existing law by substitution of the words party who may be affected by such objection' for the word appellant' contained in Section 561(3) of the Code of 1882. It may further be observed that Rule 33 of Order XLI has conferred wide discretionary powers on the Court of Appeal to alter the decree of the Court below as the case may require. In the case before us, the Saha defendants, who are appellants in this Court, have attacked even the conditional decree made by the District Judge in favour of the plaintiff; the appeal, in fact, re-opens the whole matter in controversy and calls upon the Court to re-examine the questions in dispute from all possible points of view. That appeal has been supported by the District Board respondent. The plaintiff-respondent has been constrained, with a view to ensure his safety, to take cross-objections, which, if successful, would make his title unassailable. These cross-objections, no doubt, primarily touch the co-respondent, but that co-respondent has throughout supported the defendants-appellants against the plaintiff-respondent. No question of surprise arises, as every party has been given full notice and opportunity to place his own case before the Court in its true bearing. The circumstances are thus obviously of a very special character; the District Board has decided to part with the land acquired for a purpose which has fallen through. The substantial question is, whether

relief should be granted in respect of that land to the original owner or to the subsequent purchaser. If we allow the cross-appeal, though relief is granted in form against the District Board, the ultimate result is that the title of the original owner is secured as against the subsequent purchaser. In these peculiar circumstances, it is in no sense unjust that effect should be given to the cross-objections. There is no answer to the cross-objections on the merits, while the appeal itself is, as we have seen, groundless. The cross-objections must, consequently, succeed, while the appeal cannot be sustained.

14. We may add that even if we had declined to entertain the cross-objections, and had merely dismissed the appeal, the practical result would have been identical with what will be the consequence of our decree. The plaintiff Ramkumar Saha has been in undisturbed possession of the land all along, notwithstanding the acquisition. His possession became adverse to the Board on the 21st February 1898; consequently, he acquired an indefeasible title on the 21st February 1910. If the conditional decree, made by the District Judge, be maintained, the plaintiff need never take back the deposit, but he will be entitled to receive from the Collector the compensation awarded under the Lard Acquisition Act. The plaintiff thus achieves the end he has in view, namely retention of possession of the land; that possession can no longer be disturbed by the District Board. The Counsel for the District Board fully appreciated the difficulties of the situation; he complained that the decree of the District Judge is ineffectual for his purposes, as it does not entitle the District Board to recover possession of the land by execution and on payment of the decretal amount to the plaintiff. The obvious answer is that the decree cannot be modified, in the way suggested, in favour of the District Board; the Board are not the plaintiffs in suit, and have never chosen to appeal against the decree made by either Court.

15. We have finally to consider the question of costs. In three appeals, in which the decree of the District Judge is affirmed, the appellants will pay the costs of the respondent in this Court. In the other appeal, in which the appeal is dismissed and the cross-objections allowed, the appellants will also pay the costs of the plaintiff-respondent. But the costs of the plaintiff, both in the primary Court and in the Court of the District Judge, should, in our opinion, be paid by the District Board: Thornhill v. Weeks (1915) 1 Ch. 106 : 4 L.J. Ch. 282. The history of this protracted litigation proves conclusively that the whole difficulty has been created by the utterly unbusinesslike manner in which the transactions reviewed by us have been carried on ever since 1898 by the District Board of Chittagong. There is no exaggeration whatever in the quaint observation, embodied in one of the office notes in the record, that this matter remained to be decided from a long time owing to different opinions of different officers.' One can only hope that the long delay and uncertainty, which have characterised the proceedings of the Board in this particular matter, furnish but a solitary instance of the way in which business is transacted by a Corporation created for purposes of public utility. The net result to the plaintiff has been that though his land was acquired under very doubtful circumstances in 1898, he has had to wait for more than 18 years to get back his property, notwithstanding that he has, in the interval, responded promptly to every demand of the District Board.

16. The result of our decision may now be summarised. Appeals Nos. 1979, 1980 and 1981 of 1912 are dismissed with costs. Appeal No. 1243 is dismissed, but the cross-objections therein are allowed and the decree of the District Judge discharged. In lieu thereof, we direct that the suit (No. 435 of 1909), out of which that appeal arises, do stand decreed in the manner following. The plaintiff Ram-kumar Saha is awarded a

decree for specific performance of the contract of sale of the land mentioned in the schedule to the plaint, as against the District Board of Chittagong; the Board is directed to execute a conveyance in his favour in accordance with law. On failure of the Board to execute the conveyance, the plaintiff will be at liberty to proceed in accordance with Order XXI, Rles 32 and 34, of the Code. The possession of the plaintiff will be confirmed, and should it trapspire that he has been dispossessed, he will be restorod to possession in execution of the decree of this Court, as explained in Madam Mohan Singh v. Gaja Prosai Singh 11 Ind. Cas. 228 : 14 C.L.J. 159; Fateh Cand v. Narsingh Das 16 Ind. Cas. 988 : 22 C.L.J. 383. The plaintiff will, in addition, have a decree, against the District Board, for Rs. 957-11-1 together with interest thereon at 6 per cent. per annum from 4th December 1900 to the date of realisation. The plaintiff will have his costs in the Courts of the Subordinate Judge and the District Judge from the Distric. Board, and his costs in this Court from the other defendants. A self-contained decree, which will set out the various sums in detail, will be drawn up in this Court.

17. It has been brought to our notice that the District Board have not been correctly described in these proceedings in accordance with Section 20 of Act III of 1885 B.C. The cause title of the plaint will accordingly be amended and the expression District Board of Chittagong' will be substituted for 'The Chairman of the District Board, Chittagong.'