

(1945) 03 CAL CK 0026
In the Calcutta High Court

Ashgar Ally

APPELLANT

Vs

Dr. Birendra Nath Dey

RESPONDENT

Date of Decision : 27-03-1945

Acts Referred:

Calcutta Municipal Act, 1923 — Section 51(1)

Citation : AIR 1945 Cal 249

Hon'ble Judges : Gentle, J

Bench : Division Bench

Judgement

Gentle, J.—These proceedings are brought by a relator, Ashgar Ali, who is a resident of Calcutta City and is an enrolled elector in Ward No. 9. The applicant's locus standi to institute these proceedings is not questioned. The respondent, Dr. Birendra Nath Dey, formerly held the appointment as Chief Engineer of the Calcutta Corporation from 1933, his appointment determined by effluxion of time on 14th October 1943. By Resolution No. 747, passed at a meeting of the Corporation on 4th October 1943, the respondent was appointed the Corporation's Special Officer in charge of the several departments specified in the resolution and to do the duties of Engineering Adviser to the Corporation. One other department was subsequently placed under the respondent's charge.

2. The applicant questions the legality of the respondent's appointment as Special Officer and alleges that he is usurping the office of the Corporation's Chief Engineer and of Engineer under certain statutes. The applicant prays that: (1) A writ of quo warranto or an information in the nature of quo warranto be issued against the respondent to shew cause as to by what authority he is functioning and acting as the Special Officer and Engineering Adviser to the Corporation and is exercising and performing the powers, duties and functions which may be performed or exercised by the Engineer under several statutes. (2) An injunction be granted restraining the respondent from functioning and acting as Special Officer and Engineering Adviser and exercising and performing the powers, duties and functions of Engineer.

3. On 30th January 1945, Das J. directed a rule nisi to issue; that the respondent show cause by what authority he is functioning and acting as the Special Officer and Engineering Adviser to the Corporation of Calcutta and is exercising or performing the powers, duties and functions which may be performed or exercised by the "Engineer" to the said Corporation under the statutory provisions relating to the Calcutta Tramways and why an information in the nature of quo warranto should not be issued or executed against him. The hearing of this petition commenced on, 14th March 1945. It is convenient first to set out the facts and circumstances which arise in respect of the application.

4. The respondent was appointed by the Corporation as the Chief Engineer for 10 years from 15th October 1933 to 14th October 1943. By Section 51 (1), Calcutta Municipal Act, 1923, (hereinafter called "the Act," the provisions of which are more fully set out below) this appointment is subject to the approval of the Provincial Government, and their approval was duly given to the appointment. In 1943 the monthly emoluments of the office were: (a) pay of Rs. 2000; (b) motor car allowance of: Rs. 100; (c) duty allowance of Rs. 500 and house allowance of Rs. 150 for carrying out the duties of the Special Officer and Engineering; Adviser.

5. According to the Corporation's Engineering: Manual, chap. I (1) (a) the Chief Engineer will exercise general administrative control over the working of the departments placed under him and will act as Adviser to the Corporation on all engineering matters. Chapter I (2) provides that the following sub-departments form the Chief Engineer's Department and are under his direct control:

- (a) Water Works Department.
- (b) Drainage & Outfall Departments.
- (c) Asphaltum (Bituminous Roads) Department.
- (d) Four District Engineers' Departments.
- (e) Municipal Railway.
- (f) Motor Vehicles Department.
- (g) Entally Workshops,
- (h) Electricity Department.

6. At a meeting of the Corporation held on 17th February 1943, (8 months prior to the termination of the respondent's appointment as Chief Engineer) Resolution No. 969 was passed. It is as follows:

That Dr. B. N. Dey be re-appointed Chief Engineer and Special Officer and Engineering Adviser to the Corporation for a further period of five years with effect from 15th October 1943, i. e., the date on which his present term of office expires, on his present terms and emoluments.

7. On 25th February 1943 the Corporation wrote to the Government of Bengal

asking for approval of the Government to the appointment, pursuant to Section 51(1) of the Act. By letter dated 25th September 1943, the Government informed the Corporation that they were unable to accord approval to the re-appointment of the respondent to a further term of service as Chief Engineer to the Corporation. On 27th September 1943, at a meeting of the Corporation, it was resolved, by Resolution No. 744, that: (1) the Government be requested to reconsider the decision and record approval to the resolution of 17th February 1943 appointing the respondent as Chief Engineer to the Corporation: (2) pending final approval to the appointment the respondent be allowed to continue as such and Government be also requested to accord their approval to such temporary appointment. On 28th September 1943 the Corporation wrote to the Government asking for the reconsideration of the re-appointment of the respondent as Chief Engineer and for their approval, u/s 51(1) of the Act, to such appointment and to the temporary appointment of Dr. Dey until the orders of the Government were received. By letter dated 28th September 1943 the Government informed the Corporation that the matter had already been given full and mature consideration with due regard to the wishes of the Corporation and the interests of the rate-payers and Government were not prepared to reconsider their decision. On 4th October 1943 a meeting of the Corporation was held at which Resolution No. 747 was passed. It is as follows:

I. That in view of the impasse created as the result of Government inaction for seven months in the matter of appointment of Chief Engineer and the subsequent hurried negative action taken by Government by persistently refusing to approve of the Corporation resolution of 17th February 1943, appointing Dr. B. N. Dey as Chief Engineer for a further term of 5 years, the Corporation cognisant of their own responsibilities in the matter of maintenance of the city's vital and essential services, particularly at the present state of acute emergency, do resolve:

1. That Government be finally asked to approve of the re-appointment of Dr. B. N. Dey as Chief Engineer etc., for a period of five years from the date of expiry of his present term.

2. That in case Government approval be not forthcoming on or before 14th October 1943, the following appointments be made:

(a) That Dr. B. N. Dey, D. Sc. (Engineering) etc. be appointed Special Officer in charge of the city's drainage, Water Works, Roads, Conservancy, Electricity, Workshops, Buildings and Street Lighting as well as to do the duties of Engineering Adviser to the Corporation on a monthly salary of Rs. 2500 plus the free use of a Corporation Motor Car for Corporation work for a period of 5 years from 15th October 1943, in modification of all Corporation's Resolutions to the contrary.

(b) That pending the appointment of a Chief Engineer, Mr. P. O. Bose, B. Sc., now working as Special Officer, Pulta and Tallah, be allowed to officiate as Chief

Engineer on his own pay.

3. That the question of appointing an outsider with minimum engineering qualifications and on a nominal salary to be designated as Chief Engineer, for the purpose of complying with the provisions of the Act and the proposal to abolish the Chief Engineer's sanctioned grade of Rs. 1500-2000 be referred to the Services Committee I."

8. The terms of Resolution No. 747 and a copy of the minutes of the Corporation's meeting held on 4th October were sent to the Government by letter dated 5th October 1943 and approval u/s 51 (1) of the Act was sought to the respondent's re-appointment. A request was made that, in case such approval was not accorded, the Government would accord approval, under the same section, to the appointment of Mr. P. C. Bose as Officiating Chief Engineer with effect from 15th October 1943 until the final appointment of the Chief Engineer to the Corporation. The Government's reply is dated 12th October 1943; it states that, with regard to Resolution No. 1, Government regretted their inability to reconsider the decision already communicated; the Government deplored the attitude of the Corporation in adopting Resolutions Nos. 2 (a) and 8 in view of the decision of Government: these resolutions were being examined and a further communication regarding them would be made, if necessary: and that Government had no objection to the appointment of Mr. P. C. Bose to officiate as Chief Engineer as proposed in Resolution No. 2 (b). Reference must now be made to Section 19 of the Act:

The Local Government may, after consideration of any representation which may be made by the Corporation, by written order, annul any proceeding of the Corporation which they consider not to be in conformity with law or with the rules or by laws in force thereunder, and may do all things necessary to secure such conformity.

9. On 16th October 1943, the Government wrote to the Corporation that they considered Resolutions Nos. 2 (a) and 3 passed at the meeting on 4th October 1943 to be not in conformity with law and they proposed to annul them u/s 19 of the Act; before passing final orders Government would be prepared to take into consideration any representation which the Corporation might like to make. The Corporation wrote to the Government on 18th October that, in order to enable a proper and adequate representation to be made, it would seem necessary that the Corporation be apprised of the ground or grounds on which Government proposed to annul the two resolutions and which were requested to be sent. On 20th October the Government wrote that the resolution appointing the respondent under a different name to discharge almost all the functions of the Chief Engineer was an obvious attempt on the part of the Corporation to evade the provisions of the Statute. The Corporation considered the communications from the Government dated 16th and 20th October 1943 at a meeting held on 8th November 1943 whereat Resolution No. 760 was passed. It is as follows:

1. That the Corporation records its protest against the Government's unjustified charge of evasion of statute against this Corporation, contained in Government's letter, dated 20th October 1943, and calls upon the Government to withdraw its unjust attack on this Corporation.

2. That the Corporation resents the uncalled-for interference by the Government with the appointment of Dr. B. N. Dey as Special Officer and Engineering Adviser in terms of its Resolution 2 (a), dated 4th October 1943, and regards such interference as a flagrant violation of the rights and privileges of this Corporation and an unwarranted invasion of local autonomy and the municipal self-government of this city.

3. That the Corporation maintains that the said Resolution No. 2 (a), dated 4th October 1943, is in conformity with the law and that such appointment u/s 51(2), Calcutta Municipal Act, does not require any approval on the part of the Government. The Corporation considers that the Government is not legally competent to take action u/s 19 of the said Act and the annulment of the said Resolution by the Government would be illegal and ultra vires.

4. That in case the Government is so ill-advised as to take steps u/s 19, Calcutta Municipal Act, the Corporation directs that Dr. Dey shall continue to act as the Special Officer and Engineering Adviser in terms of the said Resolution No. 2 (a) of 4th October 1943 and it shall have no other alternative but to refuse to submit to such illegal and unwarranted assumption of authority on the part of the Government.

10. The terms of Resolution No. 760 were sent to the Government in a letter written by the Corporation on 9th November 1943. By letter dated 18th/19th November 1943 the Government acknowledged the Corporation's letter of 9th November. The letter states that, after full consideration of the representation made by the Corporation, Government saw no reason to withdraw their proposal to annul He solutions Nos. 2 (a) and 3 passed on 4th October 1943; they considered these resolutions not to be in conformity with law and thereby, u/s 19 of the Act, annulled them. In his affidavit in opposition, affirmed on 12th February 1943, the respondent describes himself as "the Special Officer and Engineering Adviser to the Corporation" and reference is so made to him in several of the proceedings and letters of the Corporation and he is so described in He-solution NO. 760 passed on 8th November 1943. It is however to be noticed that, although in Resolution No. 969 passed by the Corporation on 17th February 1943, they re-appointed the respondent as "Chief Engineer and Special Officer and Engineering Adviser," by Resolution NO. 747 dated 4th October 1943, under Which the respondent is at present purporting to hold his appointment, he was appointed "Special Officer" inter alia, "to do the duties of Engineering Adviser to the Corporation." The Corporation's Engineering Manual, to which reference has been made previously, provides that the Chief Engineer will act as Adviser to the Corporation on all engineering matters. With these observations it is now convenient to examine the duties and functions assigned to the

respondent as the Corporation's Special Officer.

11. The Act does not expressly prescribe any duties to be carried out by the Chief Engineer. Rules 32 and 33 of Schedule 15 of the Act require every urinal to be provided with adequate flushing arrangements to the satisfaction of the Chief Engineer and every connected-privy and connected-urinal to be provided with a pan as may be approved by the Chief Engineer. These provisions would, impliedly, cast upon the Chief Engineer the duty to see that the provisions are carried out. Except the foregoing, the Act is silent regarding the duties of the Chief Engineer. Resolution No. 747 dated 4th October 1943, purporting to appoint the respondent as Special Officer states that he was to be in charge of the City's Drainage, Water-Works, Roads, Conservancy, Electricity, Workshops, Building and Street Lighting. By Section 12 of the Act the Corporation may, by a resolution passed at a special meeting, delegate to the Chief Executive Officer any of the Corporation's powers, duties or functions and the Chief Executive Officer may, by a general or special order in writing, re-delegate to any municipal officer any of the powers, duties or functions which have been delegated to him. On 15th October 1943, the date when the respondent's appointment as Special Officer commenced, the Corporation's Chief Executive Officer, issued circular NO. 71 of 1948-1944. It directs that:

(1). The respondent should be in charge of:

1. Drainage Department.
2. Water Works.
3. Roads (District Engineers and Ashphaltum) Departments.
4. Conservancy (District Engineer's Department).
5. Electricity Department.
6. Workshops.
7. Building Department.
8. Lighting Department.

(2). The powers already delegated and/or re-delegated to the Chief Engineer in respect of any of the above departments as officer in charge of such department were thereby withdrawn and were thereby delegated or re-delegated to the Special Officer u/s 12(2) and (3) of the Act.

(3). When the terms... in any corporation Manual already vest the Chief Engineer with powers in regard to any matter relating to the above departments, such powers shall, notwithstanding anything therein before mentioned continue to be exercised by the Chief Engineer. No payment in respect of the above departments should, however, be made unless the relevant bills were countersigned by the Special Officer and Engineering Adviser.

(4). The Chief Engineer would continue to be in charge of all the departments which had hitherto been in his charge with the exception of the departments specified in para. 1 above.

The list in para 1 follows the terms of the resolution regarding the matters placed in the respondent's charge. In June 1944 the Motor Vehicles Department was transferred to, and placed under the charge of, the respondent. In para 7 of his affidavit in opposition the respondent says he is not subordinate to the Chief Engineer. The departments set out in Resolution No. 747 and in Circular No. 71 and the Motor Vehicles Department include all those which, in chap. I, para. 2 of the Corporation's Manual, are stated to form the Chief Engineer's Department and are under his direct control except item (e) Municipal Railways; item (g) in the Manual is "Entally Workshop," but since Resolution No. 747 and the Circular include "workshops" the Entally Workshop must be included in "Workshops," items 7 and 8 in the resolution and circular, Buildings and Lighting Departments, are not included in the Manual. In substance and in the main, the departments which are now delegated to the respondent are those of which he was the head at the time he was the Chief Engineer, prior to 14th October 1943 and which the Engineering Manual provides form the department of the Chief Engineer. In para. 18 of his affidavit the respondent refers to the matters regarding privies in Rules 32 and 33 of schedule 15 of the Act and he says he has not usurped these two powers, functions and duties of Mr. P. C. Bose, the present Chief Engineer and, in para. 19, the respondent further says that, apart from these two functions, Mr. Bose was left in charge, as the Chief Engineer of (i) the Motor Vehicles Department (now given to the respondent); (ii) licenses regarding plumbing (water and drainage) and tube wells; and (iii) road openings by public utility companies. Since the respondent is in charge of the drainage, water works and roads departments there cannot be much to be done by Mr. Bose regarding (ii) and (iii) both of which must be small matters. These items and the duties, under Rules 32 and 33 of Schedule 15 cannot occupy the whole, or much, time of the man who is in the position of the Chief Engineer of the Corporation and which appear to be the sole functions which he has to perform as the holder of that office.

12. Since November 1948 the respondent has been in charge of the several departments of the corporation which were delegated to him and has been administering those departments. Mr. P. C. Bose has held the appointment of Chief Engineer but his activities are limited to the matters referred to above and which cannot be much more than nominal. The corporation has taken no step to fill the office of Chief Engineer by a permanent incumbent either with a man of minimum engineering experience, as envisaged by Resolution No. 747 (3) or by any one else.

13. The Calcutta Tramways (Electrical Traction) Act 1900 sanctioned an agreement dated 9th December 1899 made between the Corporation and the Calcutta Tramways Co. Ltd. and which is set out in the Schedule to the Act.

Under the agreement the corporation were empowered to purchase the tram, ways undertaking upon fulfilling the terms set out in the agreement. The agreement provides that, prior to the date of the expiration of a notice to be given by the corporation, the company would well and sufficiently repair the plant, machinery, rolling stock, etc. to the satisfaction of the Engineer to the corporation and upon failure to maintain the tramcars in efficient condition to the satisfaction of the Engineer to the corporation, notice could be given to the company to make good any default. The office of "Chief Engineer" first appears in the Bengal Municipal Act, 1923. The Act of 1899 refers to "The Engineer." The earlier Act was in force at the time of the passing of the Calcutta Tramways Act, 1900, and the expression "Engineer" and "Engineer to the Corporation" is thus explained and must be the same as "Chief Engineer" in the later Act.

14. In 1944 the corporation contemplated acquiring the tramways undertaking. On 4th November 1944 the respondent wrote to the tramway company that he, together with a Mr. Ganguli, had been instructed to examine and investigate, the company's assets in order to arrive at a valuation and he asked for an inventory of the assets to be sent to him and stated he would communicate further regarding the mode and time of the examination and investigation. The company replied to the effect that they would be willing for the respondent to inspect their assets provided it was an examination by the "Engineer" as contemplated in the agreement of 9th December 1899. On 22nd November 1944 the corporation resolved that inspection by the respondent be deemed to be the examination and requisition by the Engineer of the corporation as contemplated in the agreement. Pursuant to this resolution, the respondent carried out the inspection. The foregoing facts and circumstances are relied upon by the applicant to obtain the relief which is sought in his petition. It is contended, on his behalf, that (1) The appointment of the respondent as Special Officer and the delegation to him of the charge of the several departments were ultra vires the powers of the corporation. (2) The resolution dated 4th October 1943, purporting to make the appointment, was annulled by the Government on 18/19th November 1943 under the powers contained in Section 19 of the Act in consequence whereof the respondent's appointment, if any, terminated by the date of the annulment. (3) The occupancy of the appointment of Special Officer and the performance of the functions delegated to him were a usurpation by him of the office of Chief Engineer of the corporation.

15. The respondent contends, on the other hand, that (1) he was appointed the Special Officer by the corporation pursuant to Section 51(2) of the Act and his appointment is valid; (2) the corporation can delegate to him and/or to the Chief Executive Officer, who can re-delegate to the respondent, inter alia, the departments which have been delegated to him; (3) the annulment is invalid; and (4) he has not usurped any office.

16. In order to consider the powers of the corporation to make appointments, reference is now required to the material provisions of Section 51(1) and (2) of

the Act.

51 (1): "The corporation shall appoint proper persons for such periods respectively as they think fit to be Chief Executive Officer, Chief Engineer, Chief Accountant, Health Officer and Secretary, and shall fix the monthly salary and allowances to be paid to the persons so appointed.

The corporation may also appoint, for such periods as they think fit, not more than two Deputy Executive Officers and may fix their monthly salaries and allowances. Provided that the appointment, salary, allowances and conditions of service of the Chief Executive Officer, Chief Engineer, Health Officer and Deputy Executive Officer or Officers... shall be subject to the approval of the Provincial Government.

(2) The Corporation may appoint such other officers and servants for such periods respectively as they think fit and may fix their salaries and allowances."

17. The effect of these provisions can be shortly summarised. In Sub-section (1) the word "shall" being used, the provisions are mandatory and the Corporation are bound to appoint proper persons as Chief Executive Officer, Chief Engineer, Chief Accountant, Health Officer and Secretary. The appointees must be proper persons, *inter alia*, they must be qualified to hold the appointments. The Corporation is not bound to appoint Deputy Executive Officers but it is empowered to do so. Of these appointments, those of Chief Executive Officer, Chief Engineer, Health Officer and any Deputy Executive Officer are subject to the approval of the Provincial Government. If such approval is not accorded to an appointment it does not comply with the statutory requirement and is ineffective. But with regard to the Chief Accountant and Secretary, the approval of the Government is not required and when made by the Corporation they are complete. Under Sub-section (2) the Corporation is empowered, but is not obliged, to appoint other officers and servants; these appointments are entirely in the hands of the Corporation, the approval of the Government not being required. Whilst the power to appoint, given by this sub-section is in addition to the mandatory power in Sub-section (1), it is not an independent power. It is a power to appoint "other officers;" this must mean to appoint officers other than those whose appointments must be made pursuant to Sub-section (1) and which are specified in that sub-section. In my view the power to appoint officers in Sub-section (2) is a limited one and is confined to appointments of officers which are not mentioned in Sub-section (1).

18. The Act prescribes some duties to be performed by the officers whose appointments have to be made under Sub-section (1) of Section 51 of the Act. There are many such duties which the Chief Executive Officer is required to carry out but only a few by the Chief Engineer and which have already been indicated. It was contended, on behalf of the respondent, that while an officer specified in Sub-section (1) must be appointed, he is only required to carry out the duties which the Act prescribes he should perform but all the other duties, which

ordinarily appertain to his office can be performed by another officer appointed under Sub-section (2), This is to say that the Corporation must appoint, under Sub-section (1), a particular officer therein specified, but all the duties which ordinarily appertain to his office other than those which the Act prescribes, can be performed by another officer appointed under Sub-section (2). This is the position which has been created by the Corporation with respect to the office of the Chief Engineer.

19. If the action by the Corporation can be upheld, it must follow that the Legislature, at one and the same time, (a) mandatorily directed them to appoint the officers specified in Sub-section (1) and (b) permissively empowered them, at their will and pleasure, under Sub-section (2), to appoint other persons whom they could authorise to carry out all the duties appertaining to the offices set out in Sub-section (1), other than the duties which the Act requires to be performed by such officers. That is to say that, whilst the appointments under Sub-section (1) are controlled by the Government, since their approval to such appointments is required before they are effective, nevertheless, the Corporation can appoint any persons to perform the duties of those officers, other than the statutory duties, under the power given by Sub-section (2) and which appointments are not subject to the control, which is reserved in Sub-section (1), since the Government's approval is not necessary for any appointments under Sub-section (2). If this were the correct position then the following result could follow. The Corporation appoint proper persons at salaries, allowances and conditions of service as Chief Executive Officer, Chief Engineer and Health Officer to all of which the Government give approval; this having been done the Corporation then appoint, under Sub-section (2), other persons to whom some descriptions are given, other than the designations in Sub-section (1) and to whom are delegated the respective departments of the several officers whose duties they are to perform, except the statutory duties; these other persons would have to be paid salaries and allowances for their work and the persons holding the substantive appointments would have nothing to do beyond their statutory duties but nevertheless they would be entitled to draw the salaries and allowances of their offices. I do not think that this is either the intent or the purpose or the effect of the relevant provisions of the Act. In my view the meaning and construction of Section 51 Sub-sections (1) and (2) is the following.

20. The permissive power of appointment given by Sub-section (2) is distinct and separate from the mandatory power given by Sub-section (1). Under Sub-section (2) the power of appointment is limited to offices which were not mentioned in Sub-section (1). The mandatory power in Sub-section (1) to appoint to specified offices, connotes that the persons appointed shall be entrusted with the functions and duties which ordinarily appertain to those offices. By authorising an appointment to an office mentioned in it, Sub-section (1) contemplates that the duties of that office shall only be performed by a person appointed to the office pursuant to the sub-section, and not by a person appointed under Sub-section (2). In the case of the Chief Engineer, the person to be appointed must be a

"proper" person, that is to say, one who is qualified to hold the office; he must be appointed to carry out and discharge the duties of it and must be placed in a position to do so. The provisions of the Act are not carried into effect by appointing a person to the office and then delegating the departments, which, ordinarily, are administered by the Chief Engineer, to the charge of some other person appointed under Sub-section (2) thereby withdrawing from the Chief Engineer the authority to discharge the duties of his office and thus preventing him from performing them.

21. The corporation cannot under Sub-section (2) appoint a person to perform the duties which appertain to an office specified in Sub-section (1). The only person who can be authorised to perform such duties is a person appointed to the particular office under that sub-section. The corporation cannot assign or delegate to an officer appointed under Sub-section (2) the duties of any office specified in Sub-section (1). Now what has transpired in the present instance? The approval of the Government not having been given to the respondent's appointment (the resolution passed on 17th February 1943 states "re-appoint" but this is the same as "appoint" since he was occupying the office at the time of the resolution) of Chief Engineer for 5 years" the corporation resolved that:

1. The Government be finally asked to approve the respondent's re-appointment for 3 years;

2. in case approval was not accorded:

(a) the respondent be appointed the Special officer for 5 years to be in charge of substantially all the departments which had been under him as Chief Engineer and which form the department of that officer and to act as the Engineering Adviser, (which is a duty of the Chief Engineer), at the same emoluments as he received as Chief Engineer;

(b) pending the appointment of a Chief Engineer, Mr. P. C. Bose be allowed to officiate as Chief Engineer.

3. The question be referred to a Committee of the appointment of an outsider with a minimum engineering qualification and at a nominal salary to be designated as Chief Engineer for the purpose of complying with the statutory requirement necessitating the appointment of a Chief Engineer.

22. The terms of this resolution together with the subsequent delegation to him of substantially all departments which had been administered by him as Chief Engineer, reflect that the corporation intended whether or not the respondent's appointment as Chief Engineer was approved, that the respondent should have practically all the functions and perform practically all the duties of that office and he would be, de facto, the Chief Engineer. The appointment as Special Officer was made pursuant to Sub-section (2) which empowers the corporation to appoint officers, other than those specified in Sub-section (1) and he was invested with the duties of an office in respect of which an appointment under

the latter subjection must be made. The corporation clearly intended that the functions of the Chief Engineer should be vested in the respondent. Since the Act obliged them to appoint a Chief Engineer, the appointment of Mr. P. C. Bose was made to this office but none, or practically none, of its functions were to be performed by him. Incidentally the total emoluments, ignoring car and house allowances, payable in respect of these two appointments is Rs. 4000 instead of Rs. 2500 per month which was paid to the respondent when he was the Chief Engineer and performing all the duties of that office. The difference of Rs. 1500 is the salary paid to Mr. Bose. The last part of the resolution, referring to a Committee the question of appointing a person with a minimum engineering qualification at a nominal salary as Chief Engineer for the purpose of complying with the Act, shews an intention not to carry out the statutory obligation to appoint a proper person as Chief Engineer. A city of the size and importance of Calcutta with population, probably approaching 8 million people, necessitates a man with first class qualification holding the office of Chief Engineer, in the interests of the health and well being of the inhabitants. This conduct by the corporation indicates that the intention was not to carry out the statutory requirements but an intention to avoid doing so. If the Act permits the course which the corporation adopted then the provisions of Sub-section (1), in fact, have no force or effect and the safeguard, of requiring the Government's approval to the appointments of the officers specified in it, is of no avail; this safeguard is to ensure that proper persons are appointed to carry out the duties of the prescribed offices.

23. The corporation has acted without authority and beyond the powers given to him. The Act requires that the duties of the offices in Sub-section (1) are performed by the officers appointed under that sub-section. The permissive power in Sub-section (2), being limited to appointing officers to offices other than those prescribed in Sub-section (1), these other officers cannot be invested with the duties of the offices in the other sub-section. I do not accept the contention that the officers appointed under Sub-section (1) need only perform the duties which are prescribed for them in various parts of the Act; they should perform all duties ordinarily appertaining to their respective offices whether specified in the Act or not so specified. The expression "engineer of the corporation" in the agreement dated 9th December 1899 is clearly the same officer as the "Chief Engineer" in the Act of 1923. The resolution of the corporation, that inspection by the respondent should be deemed to be an examination by "the engineer of the corporation," in the above agreement, was an additional instance of assigning to the respondent the functions of the "Chief Engineer." The inspection by the respondent of the tramway company's rolling stock, etc., and his other conduct connected with the plant and assets of the company is a specific instance of his usurping the functions and office of the Chief Engineer. In *Mayor & Co. of Westminster v. L. & N. W. By. Co.* 1905 A. C. 426 Lord Macnaughten observed at p. 480:

"It is well settled that a public body invested with statutory powers, such as

those conferred upon the corporation, must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. The last proposition is involved in the second, if not in the first."

In *Marqueas of Clanricards v. The Congested Districts Board for Ireland* (1915) 31 T. L. E. 120 Lord Loreburn observed:

"When an administrative body was authorised by statute to take laud compulsory for specified purposes, the Court would interfere if it used those powers for different purposes."

24. Whilst the corporation has power, under Sub-section (2), to appoint "other officers," this does not empower them to appoint an officer to perform the functions of an office in Sub-section (1). In appointing the respondent, under Sub-section (2), by the designation of "special officer," to be in charge of the department of the Chief Engineer and delegating the several departments forming that department to him so that he could perform the functions of the Chief Engineer, the corporation used the power vested in them for a purpose for which it was not intended. In doing this the corporation acted beyond its powers and they did not legally vest the respondent with right or authority to perform those functions. By performing those functions, in the absence of right and authority, the respondent has usurped the office of the Chief Engineer. As Das J. observed at p. 805 in *In re Banwarilal Bay* ("44) 48 C. W. N. 766 : "After all what is in a name? If the function is usurped, the office is usurped." This having taken place the Court should interfere. The question can now be examined as to the correctness of the Government's action of purporting to Annul Resolutions (2) (a) and (3) which were passed by the corporation on 4th October 1943. This action by Government was alleged to be in pursuance of the provisions of Section 19 of the Act which have been previously set out. Before the power of annulment can be exercised an opportunity must be given to the corporation to make a representation, i. e. an explanation or a contention regarding the proceeding which it is proposed to annul. This opportunity was afforded by the Government's letter dated 16th October 1943. In reply to a letter from the corporation dated 18th October 1943 asking to be informed of the grounds for the proposed course in order that a proper and adequate representation could be made, the Government gave the grounds, by letter of 20th October 1943. On 9th November the corporation wrote to the Government; this letter invites reference to the Government's letter of 20th October regarding the appointment of the respondent as special officer and engineering adviser; and it then sets out the resolutions which were passed at a meeting of the Corporation on 8th November. I have previously given these resolutions in their entirety but summarised they are as follows:

(I) The Corporation recorded its protest against the Government's unjustified charge of evasion of the statute and called for the withdrawal of the unjust attack on the Corporation.

(II) The Corporation resented the uncalled-for interference by the Government with the respondent's appointment which was regarded as a flagrant violation of their rights and privileges.

(III) The Corporation maintained that resolution II (a) (by which the respondent was appointed Special Officer) was in conformity with law, the appointment u/s 51 (2) of the Act did not require approval of the Government and the Corporation considered the Government was not legally competent to take action u/s 19 and the annulment of the resolution would be illegal and ultra vires.

(IV) In case the Government was so ill-advised as to take steps u/s 19 the Corporation directed that the respondent should continue to act as Special Officer and Engineering Adviser in terms of resolution No. II (a).

25. In argument it was contended by Mr. B. C. Ghose, on behalf of the respondent, that the Corporation's letter of 9th November was not a "representation" u/s 19 but was solely complying with Section 78 of the Act. This latter section requires the Chief Executive Officer to forward to the Government a copy of the minutes of the proceedings of each meeting of the Corporation within 10 days from the date on which the minutes are signed as prescribed in Section 76. Section 76 requires the minutes of a meeting to be laid before the next ensuing meeting and signed by the Mayor or President. The Corporation's letter of 9th November was written the day after the meeting at which the resolutions were passed, the resolutions set out in the letter are not the minutes of the meeting; those minutes were not and could not have been signed since the ensuing meeting had not been held, and signed minutes were not sent with their letter which was signed by the Chief Executive Officer. There is no doubt that the contents of the letter of 9th November were representation of the Corporation u/s 19 of the Act.

26. A further contention was raised that the provisions of Section 19 can only be invoked by the Government when a request to do so is made by the Corporation. It was argued that there is no provision in the Act which allows the Corporation to rescind a resolution or to pass a resolution cancelling a previous resolution; if rescission or cancellation of a resolution is required, the Corporation's only course, it was argued, is to request the Government to annul it u/s 19. Section 19 permits annulment only when the Government considers a resolution to be not in conformity with law and, if the argument were correct, it follows that resolutions which conform, or are considered to conform, with law could not be rescinded, cancelled or annulled. There is nothing in the Act which prevents the Corporation rescinding or cancelling a resolution by a later resolution. I cannot find any provision, either express or implied, in Section 19 which requires the Corporation to request it to be invoked before the Government can exercise the powers given by it. The Government, can invoke the section, in proper cases, of their own initiative. The section enables the Government to annul proceedings, which includes a resolution, which it considers not to be in conformity with law. It does not provide that the proceedings to be annulled should not be in conformity

with law but that they can be annulled if Government considers them not to be in such conformity.

27. For the reasons which I have given I am of opinion that Resolution No. II (a) (appointing the respondent Special Officer) is not in conformity with law. I hold the same opinion with regard to Resolution No. III (appointing an outsider as Chief Engineer with a minimum engineering qualification at a nominal salary in order to conform with the Act) for the reason that Section 51(1) requires a proper person, i. e. a proper qualified person, to be appointed Chief Engineer; a person with minimum engineering experience who would be satisfied with a nominal salary is not a "proper person" within Sub-section (1). The resolution shows that it was the intention of the Corporation not to fulfil the statutory requirement regarding the status of the outsider they intended to appoint. It follows therefore that this resolution is not in conformity with law. By their letter dated 18/19th November 1943 the Government informed the Corporation that they considered the two resolutions not to be in conformity with law and thereby they were annulled. The resolutions are not in conformity and the Government rightly so considered. The provisions of Section 19 were complied with and the annulment being in accordance with the statutory requirement it was effective.

28. With respect to the annulment, a further contention was put forward. It was argued that, assuming the annulment of the two resolutions was effective, nevertheless the respondent is still the Special Officer since the resolution passed on 8th November 1943, was a re-appointment or a separate and fresh appointment and he is entitled to hold the office by virtue of this resolution. The material part of the resolution (NO. IV) upon which reliance is placed, provides that in case the Government were so ill-advised as to take steps u/s 19 of the Act the Corporation directed that the respondent should continue to act as the Special Officer and Engineering Adviser in terms of the resolution No. II (a) of 4th October. The resolution was direction that, if the Government annulled the resolution by which the respondent was appointed he should, nevertheless, continue to act in accordance with the terms of the resolution appointing him. In other words that the Corporation would and the respondent should ignore any annulment by the Government. The resolution of 8th November does not make an appointment on the terms of the engagement set out in the earlier resolution but directs that the terms of that resolution should be continued to be carried out; that is to say, it should be acted upon as remaining in full force and effect in spite of being annulled. The resolution of 8th November was not a re-appointment or a separate and fresh appointment of the respondent as Special Officer and he is not entitled to hold the appointment by virtue of that resolution.

29. The resolution dated 4th October 1943, by which the respondent was appointed Special Officer, was annulled by the Government pursuant to Section 19 of the Act, the annulment was in accordance with the requirements of the statute and was effective. Since that date there has been no right or authority, legal or otherwise, by which the respondent could hold the office of Special

Officer and Engineering Adviser and to perform duties which that office might entail. It was conceded on behalf of the respondent that, assuming the relator is entitled to the relief which is claimed, the procedure by way of quo warranto or an information in the nature of quo warranto is the correct method by which it can be obtained. It was held recently by a Special Bench that the Calcutta High Court has jurisdiction to issue the prerogative writ of quo warranto or an information in the nature of quo warranto, vide *In re Banwarilal Bay* ('44) 48 C. W. N. 766, and the correctness of this decision has not been assailed by u/s for the respondent. It was contended, however, that, in the present case, the relief sought should not be granted. The grounds for this contention were:

(1) The respondent is not a public officer, but holds his office at the will and pleasure of the Corporation and proceedings by way of quo warranto can only be invoked with respect to the holder of an office of a public nature.

(2) The Government and the Corporation are the most interested authorities with regard to the matters arising in these proceedings and as they are not parties, no relief should be given in their absence.

(3) The Court has a discretion to grant relief which should not be exercised in the applicant's favour on account of the delay in bringing proceedings.

30. It was argued that a public officer is a person who either is appointed by virtue of a mandatory statutory power or performs statutory duties; the respondent does not fulfil either of these categories. The contention was that the officers appointed pursuant to Section 51(1) of the Act are public officers since the enactment mandatorily directs they shall be appointed, but since the respondent was appointed pursuant to Sub-section (2) of the same section, which merely permissively empowers an appointment to be made, his appointment did not constitute him a public officer. It was further argued that the respondent was not, in the resolution appointing him, directed to perform any duty which is prescribed in the Act and he performs no such duty, and again, is not a public officer. In *Darley v. The Queen* (1846) 1201. & F. 520 the Judges were summoned to the House of Lords to give their opinion. Tindall C. J., at pp. 541 and 542, expressed the conclusion, which the house followed, that

"after the consideration of all the cases and dicta on this subject, the result appears to be that this proceeding by information in the nature of quo warranto will be for usurping any office whether created by charter alone or by the Crown with the consent of Parliament provided the office be of a public nature and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others; for with respect to such an employment, the Court certainly will not interfere and the information will not properly lie."

Reliance was placed upon this opinion inasmuch as it was contended, the respondent holds his office at the will and pleasure of the Corporation and a Special Officer appointed under Sub-section (2) is not the holder of an office created by statute. The respondent does not hold his office at will and pleasure;

he was appointed to it for five years; and, apart from the matters arising in these proceedings, the Corporation cannot determine it before the expiration of that period except for incapacity, misconduct or some such reason. The respondent's office is a substantive office. In *Beg. v. Guardians of St. Martin's* (1851) 17 Q. B. 149 it was held, that a clerk to a Board of Guardians was a public officer. At p. 160 Lord Campbell C. J., observed:

"Is the office of a public nature? We must look to the functions which were held to constitute such an office in *Darley v. The Queen* (1846) 12 O. & F. 520.... Whether the district for which it is exercised be a parish or a hundred or several parishes in a Union, appears to me to form no ground of distinction, if it be an office in which the public have an interest."

Patterson J., at p. 162 said:

"The question here is not whether the body for which the officer acts is public; it is whether his duties are of a public nature; and, as the exercise of them materially affects a great body of persons, I think they are so."

At page 163 Erle J., observed:

"if the executor of an office secures the proper distribution of a fund in which a body of the public (the contributors to a parish rate) have an interest, the office may be deemed public."

31. The respondent is in charge of many departments of the Corporation, e.g., drainage, waterworks, roads, workshops, street lighting, and the exercise of his functions arising out of his charge of these departments materially affects the inhabitants of Calcutta and the public have an interest in his office. The bills of all these and other departments have to be countersigned by the respondent before payment can be made out of the funds of the Corporation and in which the ratepayers (contributors to the fund) also have an interest. In all these respects the respondent's office fulfils the requirements laid down in *Beg. v. Guardians of St. Martin's* (1851) 17 Q. B. 149 which itself is sufficient to show it is a public office. If the functions which are now performed by the respondent were performed by the Chief Engineer, quite apart from the fact that, as such, he is a public officer, is there any doubt that such officer would be a public officer? Further, the respondent's appointment was made under Sub-section (2) of Section 51 of the Act, which empowers the Corporation to appoint officers and, apart from Sub-section (1) it is their sole authority to make appointments. Apart from the Act, there is no power in the Corporation to make an appointment and it must follow that the office is created by the Act. In addition to a Clerk to Guardians, the following have been held to be offices of a public nature: City Treasurer, *Darley v. The Queen* (1846) 12 O. & F. 520 and, Town Clerk *In re Harris* (1887) 6 Ad. & El. 475 and *Beg. v. Davies* (1828) 6 L. J. K. B. 170 but it would seem all these officers are prescribed in statutes.

32. In *Rex v. Speyer and Rex v. Cassel* (1916) 1 K. B. 595 Lord Beading C. J.,

pointed out at p. 609 that, subsequent to the Statute 9 Anne Cap. 20, informations in the nature of quo warranto were used for the more easy trial of the rights of offices and franchises in Corporations and boroughs. The respondent is a Corporation officer whose right to his office is the subject of trial. In my opinion the respondent is a public officer and his office is of a public nature and is embraced in the opinion expressed by Tindall C. J. in *Darley v. The Queen* (1846) 12 O. & F. 520 and is one which can be the subject of proceedings by quo warranto. With regard to the Government and the Corporation not being parties to these proceedings: In the course of argument it was stated that in November 1944 the Corporation resolved to institute a suit against the Government with respect to the annulment of the resolution appointing the respondent as Special Officer. Before such suit can be filed Section 80, Civil P. C., requires notice to be given to the Government two months before its institution. This notice was not served until the day before the hearing before me commenced on 14th March 1945. The decision to institute proceedings was made one year after the annulment and four months elapsed thereafter before the required statutory notice was given by the Corporation. The relator is an inhabitant of Calcutta and his right to bring the present proceedings is not questioned. The respondent is purporting to hold an office of a public nature and, in fact, is functioning in that office without any right or authority.

33. This position can properly be the subject, at the instance of the relator against the respondent, of an enquiry of the nature of these proceedings. In these circumstances the absence of the Government and of the Corporation cannot prevent relief being accorded. If otherwise it should be granted. The last matter for consideration is the question of delay by the relator in taking action, which, it was argued, should operate to prevent the exercise in his favour of the discretion, which undoubtedly the Court has, to grant or to refuse the relief which is sought. The resolution appointing the respondent as Special Officer was passed on 4th October 1943; he commenced to function on 15th October 1943, the resolution was annulled by 19th November 1943 and the rule nisi was granted on 80th January 1945. Throughout the intervening period and up to the present time the respondent has carried out the functions of an office which he has no right to hold and the functions of which he has no authority to perform. Further, in his affidavit in opposition, he asserts the correctness and legality of his position and, thus, shown an intention to pursue the same course which he has followed. Unless he is prevented by orders of this Court there is no doubt he will continue to hold the office and to exercise the same functions. Whilst proceedings could have been taken earlier I do not consider, in the circumstances, that the relator should be refused relief on the grounds that he has been guilty of unreasonable delay.

34. In my judgment the respondent's appointment as Special Officer and the delegation to him of the Corporation's departments which have been in his charge, were beyond the powers of the Corporation and are invalid; the annulment by the Government of the resolution of 4th October 1943, by which

the appointment was purported to be made, was valid and effective. Since the annulment there has been no appointment which the respondent could hold and the respondent has usurped the office of the Chief Engineer. The rule nisi against the respondent will be made absolute and he will be restrained by an injunction from functioning and acting as the Special Officer and from discharging the duty of Engineering Adviser to the Corporation. He will pay the relators cost--certified for two counsel. Upon application by u/s for the respondent for a stay of the above order, I refuse to grant a stay.