

(1959) 02 CAL CK 0003
In the Calcutta High Court
Case No : Appeal No. 151 of 1958

Benoy Kumar Sen

APPELLANT

Vs

Satyananda Bhattacharya and Others

RESPONDENT

Date of Decision : 05-02-1959

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : 63 CWN 590

Hon'ble Judges : Bachawat, J

Bench : Single Bench

Advocate : Ranadeb Chaudhuri and Bikas Sen, for the Appellant; S. Roy and T. Bose for the Relator Respondent, E.R. Meyer and S. Ghosh for the Corporation and Anil Mitter and S.A. Masood for the State of West Bengal, for the Respondent

Final Decision : Allowed

Judgement

Das Gupta, C.J.—This appeal is against a judgment of P. B Mukharji, J., by which he ordered the issue of a writ of quo warranto against the appellant Benoy Kumar Sen, who had been holding the office of the Commissioner of the Corporation of Calcutta under the Calcutta Municipal Act and also a writ of mandamus directing the State of West Bengal to remove this appellant from his office as Commissioner. These writs were issued on the application of the respondent, Satyananda Bhattacharjee, a rate-payer of the Calcutta Corporation. It may be mentioned that the application under Article 226 of the Constitution, as originally framed, asked for only a writ of quo warrant against the appellant, Benoy Kumar Sen, and at that stage the State of West Bengal and the Corporation of Calcutta were not made parties to the application. The original application was, however, amended on the 15th May, 1958 and the State of West Bengal and the Corporation of Calcutta were brought on the record as parties and on the basis of certain new averments made as regards a resolution for the removal of the appellant from his office as Commissioner alleged to have been taken by the Corporation under the provisions of Section 19/3 of the Calcutta

Municipal Act, 1951, a prayer WAS added for the issue of a writ of mandamus, calling upon the State of West Bengal to remove the appellant from his office as Commissioner. The application was opposed by this appellant as well as the State of West Bengal and the Corporation of Calcutta. The present appeal is by Benoy Kumar Sen alone. The State of West Bengal has, however, supported the appellant before us and has continued before us its opposition to the issue of the above writs. The Corporation of Calcutta which opposed the application for the issue of writs in the Court below and indeed denied the averment of the respondent, Satyananda Bhattacharjee, as regards the invalidity of the renewal of "the appellant's appointment, has changed position and has, in this court, tried to support the respondent, Satyananda Bhattacharjee. The questions on which the appeal has to be decided are, however, pure questions of law, so that the rather inexplicable change of attitude by the Corporation of Calcutta does not really concern us. The facts which are material to the consideration of the question whether the judge has acted rightly in issuing the writ of quo warranto, are not in dispute. The appellant, Benoy Kumar Sen, was appointed as the first Commissioner under the provisions of section 19 of the Calcutta Municipal Act. This appointment was for a term of five years with effect from the first day of May, 1952. Thus without renewal the appellant would have ceased to be entitled to hold the office from the 1st of May, 1957. The Legislature, however, when legislating that every commissioner shall be appointed for a term of five years, thought fit to add a proviso, the exact words of which it is necessary to set out, as much will depend on the proper interpretation and application of the prescriptions in this proviso. The proviso is in "these words:-

Provided that the Corporation may, with the approval of the State Government, renew for once only the appointment of a Commissioner for a further term of five years, on the recommendation of the State Public Service Commission.

The Government of West Bengal in its anxiety that there should not be any vacancy in the office of the Commissioner who, it has to be remembered, is one of the authorities of the municipality and has to discharge certain functions which cannot be discharged by any other authority, wrote as early as the 27th June, 1956, enquiring of the Corporation if the Corporation wished for renewal of the commissioner's term and asked for a reply by the 30th November, 1956. On the 30th November, 1956 (the Corporation postponed consideration of the matter and thereafter wrote to the Government asking for extension of the time to communicate its decision in the matter. The Government replied on the 3rd December, 1956, extending the time for reply till the 18th December. On the 14th of December, 1956, the Corporation took up this question of renewal of the applicant's appointment for a further period of five years and passed a resolution in the following words:-

Resolved that the Corporation recommends to the State Government the renewal of the appointment of the present Commissioner Shri B. K. Sen for a further period of five years.

2. This resolution was communicated to the State Government by a letter dated the 15th December, 1956. The State Government communicated its approval on the 6th March, 1957 in the following words:-

I am directed to say that the Governor is pleased to approve, under the proviso to sub-section (2) of Section 19 of the Calcutta Municipal Act, 1951, the proposal of the Corporation of Calcutta for renewal of the appointment of Shri B. K. Sen, as the Commissioner of the Corporation of Calcutta for a further term of five years with effect from the 1st May, 1957, on the existing terms as regards his emoluments and other conditions of service.

3. The letter of the Government containing this approval came up before a meeting of the Corporation on the 15th March, 1957 and the Corporation passed a resolution saying "recorded." Before this, it appears, the Mayor of the Corporation of Calcutta wrote to the State Public Service Commission on this question of renewal of appointment of the appellant for another term of five years. The Public Service Commission sent a reply to the Government of West Bengal stating that "the Commission agrees to the renewal of appointment of Shri B. K. Sen, Commissioner, Corporation of Calcutta, for another term of 5 years, as proposed by the Corporation of Calcutta." A copy of this letter was also forwarded on the same day, the 16th January, 1957, by the Public Service Commission to the Mayor of Calcutta Corporation. Admittedly, this letter was never placed by the Corporation or considered by the Corporation at a meeting. Nothing else appears to have been done as regards the act of renewal of the appointment; but it is important to remember that the Corporation continued to pay the appellant pay and allowances on the basis that there had been a renewal of his appointment for another term of five years. It is also important to remember that the appellant continued to exercise various functions under the Calcutta Municipal Act 1951, at least upto the time of the issue of the writ of quo warranto by P. B. Mukharji J. The question that has been raised by the respondent, Satyananda Bhattacharjee, is whether there was an effective and valid renewal of the appointment of this appellant as Commissioner under the provisions of sub-section (2) of Section 19 of the Calcutta Municipal Act. The learned Judge held that there had been no valid renewal and in that view ordered the issue of a writ of quo warranto, as I have already stated.

4. The first question for consideration is what does the provision of the statute actually require in order that there may be an effective renewal? There is no dispute that (i) it requires an order of renewal by the Corporation, (2) that it further requires that Government should approve such renewal and (3) that the State Public Service Commission should recommend such renewal. It is not easy, however, to be so very certain about the manner in which the Corporation should proceed in this matter. It may be mentioned that this is the first case of renewal or attempted renewal under the present Act and one can well understand the difficulties of the Mayor and other Councilors in clearly understanding the exact manner in which they should proceed.

5. The first difficulty is on the question whether the approval of Government should precede the order of renewal. An attractive proposition is that the Corporation should first come to a decision whether it proposes to renew and that after it has come to a decision to renew, it should ask Government for approval of such decision and after Government approves, it should make a formal order of renewal by an appropriately worded resolution. I have no doubt that such a procedure is possible and permitted. To say that is, however, not to agree that that is the only procedure that the law permits. An alternative procedure would be that as soon as the Corporation decides to renew, it makes its order for renewal by an appropriately worded resolution and then asks Government for approval of this order of renewal. The order would be ineffective in law until and unless Government approves, but if the Government approves, the order of renewal becomes effective in law- apart of course from the question of the other requirement of the recommendation of the Public Service Commission. I can see no reason why this alternative procedure should not be held to be permitted by the Statute. Indeed, for myself I am inclined to the view that this procedure of making the order of renewal and then sending it to the Government for approval is more sensible and much more convenient. It is, in my opinion, reasonable to regard the Corporation as consisting of a body of men steady and careful in coming to a conclusion of such an important matter as the renewal of the appointment of the Commissioner for a further term of five years. It is reasonable to expect that once it has come to such a conclusion, the Corporation would not waver in its views thereupon. Once it decides to renew the appointment and Government approves that decision, it is unreasonable to think that it would go back on further deliberation on that decision. If it be reasonable to take this view of the Corporation's competence, further consideration of the matter by the Corporation appears to me to be wholly uncalled for, a waste of valuable time and public money. I am, therefore, of opinion that, while the statute does certainly permit the more elaborate procedure mentioned earlier, that first the Corporation decides whether to renew or not and then without recording a resolution for renewal asks the Government for approval of its decision and again on receipt of Government's approval meets to consider the matter afresh and records a formal resolution of renewal, the statute also permits the more business-like procedure that as soon as the Corporation reaches its decision in favour of renewal, it should make the order of renewal and ask the Government straight off for approval of the order made.

6. It is necessary next to consider as to what procedure should be followed in regard to the recommendation of the State Public Service Commission. On behalf of the appellant, Dr. Gupta contended that the Corporation itself has no concern with this recommendation and that it is the Government who should obtain recommendation of the Public Service Commission and this it should do for the purpose of deciding whether it should approve the renewal of the appointment. In my judgment, such a procedure is not contemplated by the Statute. It is quite clear that at the time of the first appointment u/s 19(1) which provides that the

Commissioner shall be appointed by the State Government on the recommendation of the State Public Service Commission, the Government has to obtain the recommendation, and the Corporation is not concerned with that recommendation. When however, the statute provides that not the Government but the Corporation is the renewing authority, though renewal is not effective in law without Government's approval, it would stand to reason that the recommendation should be made by the State Public Service Commission to the Corporation. But we are not left to guess the intention of the legislature on this point as a matter of reasonable action. The language used by the Legislature, namely, The Corporation may. renew on the recommendation is, in my judgment incapable of the interpretation that the recommendation should be made to the State Government and not to the Corporation. If it had been the intention of the Legislature that the recommendation should be made to the State Government so that the State Government may take that into consideration in deciding whether it should approve the renewal or not, the language of the proviso would have been "*** with the approval of the State Government on the recommendation of the State Public Service Commission." On the language actually used, it is, in my opinion, quite clear that what the Legislature prescribes is that the recommendation of the State Public Service Commission should be made to the Corporation and that also before the renewal is made.

7. On the admitted facts, the position in the present case is that the Corporation decided to renew the appointment, that the Government has approved this decision and the Public Service Commission has recommended the renewal. To this extent the prescriptions of the Legislature as laid down in the proviso have been fulfilled. It appears, however, that in two respects, there was departure from the prescriptions for when the decision to renew was reached by the Corporation, the resolution was in the form, "Resolved that the Corporation recommends" instead of being in the form, "Resolved that the Corporation renews the appointment." Another departure was that though the Public Service Commission did recommend the renewal, the Corporation never considered the recommendation.

8. The question is what is the consequence of these departures? As regards the fact that the Corporation did not word its resolution so as to make it clear that it renewed the appointment, but worded it in the form of a recommendation to Government, the contention on behalf of the respondent, Satyananda Bhattacharjee, which has been accepted by P. B. Mukharji, J. is that the position was that there was no renewal at all. If one is to go strictly by the words used, there might be some justification for the view that what the Corporation was doing was only to recommend renewal and that it was not making an order of renewal. This approach, in my opinion, would be entirely wrong and unjustified by law for what the Courts always strive to do is not to sacrifice the substance for the form of the matter. One has to remember that words are used with a view to express an intention and if the intention can be clearly gathered from the words that have been used, a Court of law is not entitled to say that as the

words are not appropriate, effect should not be given to the intention. The Courts have always tried to ascertain the real meaning of words that are used whether they are in statutes or documents. It is, in my opinion, proper therefore to look behind the words that have been used to ascertain whether the Corporation was in fact making an order of renewal, though using the words that it was recommending the renewal. In this connection, it is in my opinion permissible and proper to look at the conduct of the parties. When the Government communicated its approval stating therein that it was approving the proposal of the Corporation, all that the Corporation did in its meeting on the 15th of March was to make a resolution that the letter be recorded. In other words, the Corporation thought that all action that was necessary to take in the matter was to put the Government's letter of approval on its record. Then after the 30th of April, 1957, the salary and allowances were admittedly paid to the appellant Commissioner on the basis that the Corporation had renewed the appointment. It is equally undisputed that numerous duties were performed by the appellant Commissioner on the basis thereof. I am quite conscious of the fact that if there has not been a valid renewal, the mere fact that the Corporation authority might have thought so, would not make an invalid act valid. When, however, we have to ascertain the meaning of the words used, it is proper to look at the contemporaneous conduct of the party who used the words. In my view, the reasonable interpretation of the words used by the Corporation in its resolution of the 14th December is that though in form it was resolving that the "Corporation recommends the renewal", what it was actually intending to do was not a mere recommendation, but the actual act of renewal, which it was understood, required an approval. It was this knowledge that approval would be necessary that was really at the basis of the use of the word "recommends".

9. I have, therefore, reached the conclusion that the resolution that was taken by the Corporation at its meeting of the 14th December, 1956, amounted, in substance, to a resolution renewing the appointment. Assuming, however, that the resolution cannot be read as renewing the appointment, the position, in my opinion, still is, in view of the clear intention of the Corporation to renew the appointment, that there was a mere defect of language. Is it the intention of the Legislature that such defect of language, would entail the invalidity of the act itself? I have no hesitation in stating my view that it will be unreasonable to impute to the Legislature an intention that such a defect in form due to deficiency of language should be allowed to invalidate an act when the intention is absolutely clear and specially when the Corporation itself, which used this defective language, appears to have been of opinion that that language was sufficient in law to effect a renewal. That would be my conclusion on the accepted principles of law as regards the imputation of intention to Legislature, but in this case there is the further support for this conclusion in section 106 of the very statute we have to consider in the Calcutta Municipal Act, 1951. The relevant portion of sub-section (1) of section 106 is that "no act done or proceeding taken under this Act shall be questioned on the ground merely of any

defect or irregularity not effecting the merits of the case."

Where, as in the present case, the Corporation has already reached a decision in favour of renewal, the defect, that in expressing its conclusion it used words "Resolved that the Corporation recommends" instead of using the words "Resolved that the Corporation renews the appointment", is, in my judgment, a defect clearly within the meaning of section 106. It is equally clear that this defect does not affect the merit of the case, for the decision had already been taken and, as I have stated earlier, it would be unreasonable to think that the Corporation might go back on that decision on further deliberation.

10. My conclusion, therefore, is that the departure from the strict requirement of the section that the Corporation should make a formal resolution making the renewal-if there is any departure at all-does not make the renewal invalid.

11. The other departure from the strict prescriptions of the proviso consists, as I have already stated, in the fact that the recommendation of the Public Service Commission was not considered by the Corporation before it came to a decision in favour of renewal. In this case the State Public Service Commission did recommend the renewal. So it is not necessary to consider the extreme proposition that even the absence of a recommendation of the State Public Service Commission would not invalidate renewal by the Corporation. I think it fair to state, however, that in my opinion it is *prima facie* arguable that the requirement of recommendation of the State Public Service Commission is not imperative but is merely directory being really in the nature of instruction to the Corporation, non-compliance with which would not entail the consequence of invalidity. It is, however, not necessary in the present case to consider that extreme proposition, specially as there has in the present case been recommendation. But while the strict requirement of the law is that this recommendation of the Public Service Commission should be before the Corporation before it decides on renewal, the recommendation was not, in this case, before the Corporation at all. The question again is whether it is the intention of the Legislature that even though the requirement of recommendation is satisfied, the failure of the Corporation to consider the recommendation before deciding on renewal should make an act of renewal invalid. Almost a hundred years ago it was laid down by Lord Campbell in (1) *Liverpool Borough Bank v. Turner* (1861) 30 L.J. Ch. 379, that "no universal rule can be laid down as to whether mandatory enactment shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the 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." Considering the same question about ten years later, Lord Penzance in (2) *Howard v. Edington* (1877) 2 P.D. 203, observed as follows:-

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be

secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory....I have been very carefully through all the principal cases, but upon reading them all the conclusion at which I am constrained to arrive is this that you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them is to come to the conclusion which was expressed by Lord Campbell in the case of *Liverpool Bank v. Turner*." (1) (supra).

12. Many eminent Judges have spoken on this matter in numerous cases during these hundred years, but the position still is as was laid down by Lord Campbell and Lord Penzance that the subject-matter of the law has to be examined and the importance of the provision and the relation of that provision to the general object intended to be secured have to be examined to find out whether the Legislature intended the provision to be imperative or directory.

13. It is quite clear that the purpose of the Legislature in adding the proviso about the renewal of the appointment of a Commissioner is that the services of a man who has already gained valuable experience should be available to the Corporation, but at the same time, the risk of an unfit man being continued for a further term should be avoided. It was with a view to achieve this object that the Legislature while leaving the renewal to the Corporation which has had experience of the work of the Commissioner for the previous period required that the State Government should approve such renewal to further safeguard the position that an unfit man should not be appointed. On extraneous consideration the Legislature added the prescription that the State Public Service Commission should also recommend the renewal. The position is that only if these three bodies namely, the Corporation, the State Government and the State Public Service Commission, agree as regards the fitness of the person for renewal that the renewal should take place. Is it necessary for the fulfillment of this purpose that the recommendation of the State Public Service Commission should be before the Corporation before it takes decision on renewal? I am unable to see that that is necessary.

14. It is well to remember in this connection the rule that has been laid down in several cases that "where the prescription of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only: See Maxwell on the Interpretation of Statutes, 10 Ed. page 331. Clearly in deciding on the renewal of the Commissioner, the Corporation is performing a public duty. the invalidation of the act of renewal because of the neglect of the prescription that the recommendation of the State Public Service Commission should be considered by

it first, before coming to a decision, would undoubtedly work serious general inconvenience and injustice to numerous persons in respect of whom the Commissioner has taken action. The result of the invalidation of the renewal would certainly invalidate numerous orders made by the Commissioner in the exercise of the functions exclusively assigned to him. These include in many cases decisions as regards consolidated rates, orders as regards demolition and many other matters which vitally concern private individuals and also the public generally- persons who have no control over the Corporation in the matter of strict observance of the prescriptions. At the same time, it appears to me that an insistence on the prescription that the recommendation of the Public Service Commission should be taken into consideration by the Corporation before coming to a decision as regards the renewal, does not promote the essential aim of the Legislature which is that the renewal should be made by the Corporation without two further checks, namely, that the Public Service Commission recommends it and the State Government approves it.

15. On these considerations I have come to the conclusion that the prescription, which, I think, the proviso reasonably interpreted contains, that the recommendation of the State Public Service Commission should be before the Corporation before it decides on the renewal is merely directory-being in the nature of an instruction to the Corporation to follow a particular procedure-and non-compliance with this direction does not make the renewal invalid.

16. The result of the decision that this prescription is directory, necessarily is that non-compliance with it is a mere defect within the meaning of S. 106(1) (c) of the Act. As the Public Service Commission did actually recommend the renewal, the omission by the Corporation to consider it, has not affected the merits of the case. From that aspect also, I find that the renewal cannot be questioned on this ground.

17. My conclusion, therefore, is that the respondent has failed to establish that there has not been a valid renewal of the appointment of the appellant as Commissioner for a further term of five years with effect from the 1st of May, 1957.

18. The writ of quo warranto issued by P. B. Mukherjee, J., should therefore, in my opinion, be set aside.

19. The facts which are material to the question of the issue of the writ of mandamus have now to be stated. About these facts also there is really no dispute. The dispute is only as to the legal consequence. The prayer for an issue of mandamus calling upon the State Government to remove the appellant from his office is based on the provisions of the third sub-section of section 19 of the Calcutta Municipal Act, 1951. They are in these words:

"Notwithstanding anything contained in sub-section (2) the State Government may at any time remove the Commissioner from office and shall do so if at a special meeting of the Corporation called for the purpose, a resolution for the

removal, if the total number of members of the Corporation give their vote, is carried."

20. A special meeting of the Corporation was in fact called for the purpose of removal of the Commissioner from office. This special meeting was held on the 29th March, 1958. A motion was moved and was put to the vote. What happened as regards the voting can best be narrated in the words which we find in the minutes of the meeting, a copy of which is on the record.

"The Mayor: Now I will put this motion to vote. Those who are in favour of the motion will you please raise your hands?"

Sri N. L. Banerjee: Sir, you cannot remove the Commissioner when there is bare majority. 24. Sri K. L. Dhandhanian: The question of legality does not arise at this stage. 38 members are voting and we are not voting We cannot be compelled to vote.

21. The Mayor: It is a peculiar position. Any way, I have shouted those who are for and the Secretary has counted 38. Now I shout those who are against-No voice, that means not voting.

22. Sri A. Moitra: That means by not voting they are not opposing the motion.

23. The Mayor: Then I can declare that the motion is carried. It is my last meeting. I request you to allow me to conduct it till the end. I have never been put to such a situation. The resolution was moved and seconded. It was discussed and then put to vote. Certain number of members voted for. But when I shouted those against, nobody voted. I know that according to this Act if 44 members vote for the resolution, then the Government shall take action on it. But I have to say that for the resolution there were 38 and none voted against, the motion is carried.

24. Sri N. D. Banerjee: This is a specific resolution for the removal of the Commissioner and-

25. The Mayor: Please listen. I am in the chair. I have to declare that the motion is carried. But according to the Act we know that unless there are 44, Government is not bound to take any action.

26. Sri G. Sur: Out of 86 Aldermen and Councillors only 38 have voted in favour of the resolution which has been tabled u/s 19(3) of the Act.

27. The Mayor: It has been recorded that so many numbers voted for it and I shouted "Against" none responded. The other members did not cast their votes. The motion has secured 38 votes, though not 44. Let law take its course, if necessary, I will talk to Mr. P. B. Chakravarti."

28. The real dispute is whether a resolution for the removal of the Commissioner, in favour of which more than one-half of the total number of members of the Corporation give their votes, has been carried. It is not disputed that on the

relevant date the total number of members of the Corporation was 86. Consequently, the Mayor was right in his view that 44 votes were really necessary for the purpose of an effective resolution under sub-section (3) of section 19. Clearly, unless some of the persons who did not vote for the resolution are considered by some sort of legal fiction to have voted for it, the position is that the requisite number of 44 persons did not give their votes in favour of the resolution. P. B. Mukharjee, J., thinks that the law permits such a fiction to be resorted to. Relying on the view that an act means an act of commission or an act of omission, he has given his view that just as showing of hands is a way of voting, the omission to show hands also amounts to voting. In my opinion, this is an improper and unjustifiable extension of the theory that an act includes an act of omission and an act of commission. I am unable to persuade myself that law is so absurd as to produce the consequence that a person who does not show his hands will be deemed to have shown his hands. Perhaps if a statute had laid down that a person who did not show his hands would be considered to have voted in a particular manner, we would have been bound by that. So long, however, as the statute does not say any such thing, the Court is not, in my opinion, entitled to say that by not showing his hand when the Mayor called for a vote against the resolution a Councillor should be held in law to have voted in favour of the resolution. Nor am I able to agree with the learned Judge that the fact that the Mayor shouted for "votes against", after the "votes for" the resolution have been counted without challenge to be 38, makes any change in the position. In my opinion, when the legal requirement was that at least 44 persons should vote for the resolution before it could be effectively carried, it was unnecessary for the Mayor to ask again for a "vote against" the resolution. In ordinary cases when a resolution is carried by a simple majority or even by a particular proportion of the votes, it is necessary for the Chairman to count the votes for as well as the votes against. Where, however, as in the present case, a definite number of votes is required in favour of the resolution and the number of votes against does not matter, the Mayor, in my opinion, need not have shouted for "votes against". It is on this fact that when he shouted for votes against nobody showed his hands, that the learned Judge has reached the conclusion that those who did not show hands then-that means the entire body of persons present-should be deemed in law to have voted for the resolution. I have already said that I can see no principle behind this theory of holding a refusal to show hands as amounting to the act of showing hands. In my view, the legal position is that only 38 persons voted in favour of the resolution and, consequently, the requisite number of more than one-half of the total number of members of the Corporation had not given their votes.

29. In support of his view the learned Judge has referred to certain English decisions. In the view I take of the matter, I would not feel pressed by these English decisions, even if they were consistent and unshaken. I would presently show that the English Courts have not consistently taken the view which was taken in the cases on which P. B. Mukharji, J., has relied. Of two cases on which

P. B. Mukharji, J., appears to have mainly relied, one is a decision of Lord Mansfield in (3) *Rex v. Foxcroft*, 97 E.R. 683- which it would be noted is also referred to as (4) *Oldknow v. Wainright*- that whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do. But the decision which appears to have greatly impressed the learned Judge was the decision in (5) *Gosling v. Valley*, 16 Law J. Rep. (M.S.) 201. In that case Lord Denman, C. J., quoted with approval Lord Mansfield's observation in (3) *Rex v. Foxcroft* and made certain observations which has been quoted by P. B. Mukharji, J. Lord Denman said: "If he dissents from the choice of A, who is qualified, he must say so by Voting for some other also qualified; he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend. And this is a wise and just rule in the law; it is necessary that the election should duly be made and at the lawful time: the electoral meeting is held for that purpose only, and but for this rule the interest of the public and the purpose of the meeting might both be defeated by the perverseness or the corruption of electors who may seek some unfair advantage by postponement. If, then, the elector will not oppose the election of A in the only legal way, he throws away his vote by directing it where it has no legal force, and in so doing he voluntarily leaves unopposed, i.e. assents to, the voices of the other electors." Following the observations, P. B. Mukharji, J., said that "it was the duty of the Councillors at that meeting of the 29th March, 1958 to vote either to pass or to defeat the Resolution for removal and none of the councillors was entitled to remain neutral.

30. Reliance was also placed by the learned Judge on an observation in Crew's authoritative text-book on Public Company and Local Government Meetings, 15th ed., at page 215 on which the following sentence appears :-

Those who do not choose to vote on the question before the meeting are considered to vote with the majority of the voters and so all those who are absent.

31. It is unfortunate that the learned Judge's attention was not drawn to the fact that in later editions of Crew on Public Company and Local Government Meetings this sentence is conspicuous by its absence. Whatever this observation does mean, it is clear that the view expressed therein is no longer in favour.

32. It is still more unfortunate that the learned Judge's attention was not drawn to the fact that *Gosling v. Volley* (5) went to the House of Lords, and there the view taken by the learned Chief Justice was emphatically dissented from. It is reported in Vol. IV House of Lords Cases, 679. The question in this case was as regards the validity of a church rate which the law required should be made by a majority of the vestry. Reliance was placed, among other cases, on Lord Mansfield's decision in (3) *Rex v. Foxcroft* and (4) *Oldknow v. Wainright*. After an exhaustive discussion of the cases, the House of Lords held that the fact that a majority of the voters had refused to take part in the voting would not make the resolution in favour of the rate, a resolution of the majority. Lord Truro in his

speech observed: "I am of opinion, that neither principle nor authority has been produced for the doctrine that, by the refusal by the majority of the vestry to make a church-rate when it is their duty, and they are lawfully required to do so, the power of making the rate devolves upon the minority of the vestry." In another portion of his speech Lord Truro observed: "I am not aware of any authority for the proposition that, where the law gives a power to a definite number or a definite portion of an indefinite number, the refusal of the majority to concur in the proposed exercise of the power is of the less legal effect as a negative, because such refusal may be illegal and may even subject the party making it to punishment."

33. It will thus appear that there is very little authority of the English Courts in support of the proposition that the Councillors who did not vote, when the vote against the resolution was called, should be deemed to have voted for it.

34. As the learned Judge has himself recognised, the English Courts have in at least two other cases taken a view opposed to what has found favour with him. In (6) *In re. the Rate-Payers of Eynsham Parish*, (1949), 18 Law J. Rep. (D.B.) 210, the question arose whether a majority of two-thirds of the votes of persons present at a meeting had been cast in favour of an act. Thirty-seven persons duly qualified to vote were present, but there were only twenty votes in favour of adopting the act. Reliance was placed on Lord Mansfield's observation in (4) *Oldknow v. Wainright* that those who took no part in the proceedings must be considered as absenting themselves; and then there will be the whole of the persons voting in favour of the proposition. That submission was rejected. It was held that as only twenty out of thirty-seven had affirmed it, the requisite majority had not been obtained. In (7) *Labouchere v. Earl of Wharnccliffe* 13 Ch. D. 34G, where the plaintiff Labouchere challenged the validity of the resolution for his expulsion, the question was whether two-thirds of those present at a general meeting had voted in favour of his expulsion. The position was that 117 persons were present but did not vote and that the number who voted for this expulsion was 77. Jessel, M. R. held that it was clear that if there were 117 persons present, seventy-seven were not two-thirds of the number, so that the expulsion was irregularly carried. In that case the learned Master of the Rolls made certain other observations in this connection which may usefully be remembered. He said: "When a resolution is put to a meeting, the persons present may take one of three courses. They may vote for or against it, or not wishing to express a positive opinion on the question refrain from voting at all." This observation is clearly opposed to the view which found favour with P. B. Mukharji, J., that by not voting when a vote against is called, a person should be deemed to have voted for the resolution.

35. In my judgment, there is neither principle nor authority in favour of the view that though thirty-eight voted for the resolution, the fact that no person showed his hands when the Mayor called for votes against, produces the consequence that all the persons present gave their votes in favour of the resolution. The legal

position, therefore, in my opinion, is that the requisite number of more than one-half of the total number of members of the Corporation did not give their votes in favour of the resolution for the removal of the Commissioner.

36. It is necessary to consider, however, the fact of the entry in the minutes of the proceedings that the resolution has been carried. Section 91(3) of the Calcutta Municipal Act provides thus-

At any meeting, unless a poll be demanded by at least five members, a declaration by the presiding officer of such meeting that a resolution has been carried " or lost, and an-entry to that effect in the minutes of the proceedings shall, for the purposes of this Act, be conclusive evidence of the fact without proof of the number of proportion of the votes recorded in favour of or against such resolution.

37. I shall assume for the purpose of this case if there was an unequivocal entry of a declaration by the Mayor that a resolution had been carried and there was nothing else, the Court will not be entitled to go behind that entry and to examine for itself whether the resolution had been carried with votes of more than one half of the total number of members present in favour of the resolution of removal. The relevant portion of the minutes of the meeting has already been set out. This shows clearly that the declaration by the Mayor was not clear and unequivocal. It further shows that he himself was in considerable doubt about the matter and that the position was that the motion had secured 38 votes and not 44; and after saying, "let law take its course", he also expressed his intention to take legal advice in the matter. The question is whether in the facts and circumstances of the present case and the manner in which the declaration has been entered in the minutes, the Court is prevented from investigating the question whether the requisite number of persons have given their votes. It is, in my opinion, unnecessary to go to English cases for the decision of this question in view of the clear decision of our own Court in (8) *The Dhakeswar Cotton Mills Ltd. v. Nilmal Chakravarty*, 41 C.W.N. 1137. The law as laid down in that case is that where the Chairman by his declaration finds the figures and erroneously in point of law holds that the resolution has been duly passed, the resolution cannot be said to have been passed according to law. In that case also the effect of the provision in the Companies Act that such a declaration would be conclusive evidence of the fact that it was carried by the necessary majority fell to be considered. Apart from the fact that this decision is binding on us, I may point out that in coming to this conclusion, the learned Judges of this Court relied largely on the view taken in several decisions of English Courts, including a decision by that very eminent Judge Buckley. J., in (9) *In re. Cartial (New) Mines, Limited*, (1902) 2 Ch. 498, Buckley, J., had to consider the effect of the provision that "unless a poll is demanded by at least five members, a declaration of the Chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same" practically the same as Section 91(3)

of the Calcutta Municipal Act. After considering the cases in which apparently a different view had been taken, namely, (10) *In re. Hadleigh Castle Gold Mines, Limited*, (1900) 2 Ch. 419 and (11) *Arnot v. United African Lands, Limited*, (1901) 1 Ch. 518, the learned Judge observed:

In the latter case there was confusion at the meeting but the court came to the conclusion that the Chairman had put the resolutions to the meeting properly and had declared them carried, and therefore declined to enter on an investigation as to what numbers voted for and against the resolutions. In the former case the meeting was a stormy one, and there was a considerable conflict of evidence as to what took place, and the Court refused to entertain the question whether the resolution was carried by the requisite majority.

38. Then he proceeded to observe

"But those decisions do not apply to a case where the Chairman by his declaration finds the figures and erroneously in point; of law holds that the resolution has been duly passed."

39. In the facts of that case the learned Judge held that on the fact of the declaration it was shown that the resolution had not been passed by the majority required by the statute. In my opinion, the facts are exactly the same here. The declaration on its very face shows that 38 persons voted in favour of the resolution of removal, though before it could be effectively carried, at least 44 votes were required to be given in favour thereof. Whatever, therefore, the Mayor had in mind in using the word "carried", the entry in the minutes that the resolution was carried cannot be considered conclusive, because it is obviously erroneous in law.

40. On these considerations I have come to the conclusion that the learned Judge has erred in thinking that the resolution for removal of the Commissioner was an effective resolution in accordance with the provisions of section 19(3) of the Calcutta Municipal Act, 1951.

41. The order for issue of a writ of mandamus was also, therefore, unjustified.

42. I would, therefore, allow the appeal, set aside the judgment and order of P. B. Mukharji, J., and order that the application for the respondent, Satyananda Bhattacharjee, be rejected.

There will be no order as to costs.

Bachawat, J.

43. I am satisfied that there was sufficient renewal of the appointment of the appellant Sri Benoy K. Sen as Commissioner u/s 19(2) of the C. M. Act, 1951. The resolution dated 14th December, 1956. is expressed in the form of a recommendation to the State Government. The language of the resolution is somewhat defective in form, but I should read that as a decision by the Corporation to renew the appointment in terms of Sec. 19(2) subject to the

approval of the State Government. The resolution ought to be read agreeably to the intention of the Corporation that there should be no interregnum in the office of the Commissioner. That resolution was confirmed by the Corporation at a meeting held on the 15th February, 1957. The letter of the State Government approving the renewal was recorded at another meeting of the Corporation on the 15th March, 1957 without any demur. The Corporation always acted upon the footing that there was an effective renewal of the appointment and payments of salary were all along made to the appellant on the basis of the renewal. Presumably, all this was done regularly. Presumably these payments were made in accordance with yearly budgets which have to be sanctioned every year by the Corporation in accordance with Section 127 of the Calcutta Municipal Act. The corporate will to renew the appointment is sufficiently shown by the positive acts and resolutions of the Corporation on the record.

44. It is said that at the time of the renewal the Corporation should have laid down the terms and conditions of service. But it seems to me that having regard to the provisions of sections 19 and 20 of the Calcutta Municipal Act the salary and other terms and conditions of service are to be determined by the State Government. The Corporation could extend the term of appointment but could not otherwise interfere with those terms and conditions.

45. I am also satisfied that the renewal was validly made in substantial compliance with the provision 19 of the Calcutta Municipal Act. I think that the words with the approval do not necessarily mean that the approval should be given *pari pasu* with the renewal. The renewal is made with the approval of the State Government, if the approval is given after resolution for renewal and before the renewal takes effect.

46. In the nature of things, the recommendation of the State Public Service Commission should have been obtained before the renewal of the appointment by the Corporation and should have been placed at the meeting of the Corporation before the Corporation renewed the appointment. This was not done. The essential requirements of Sec. 19(2) were, however, complied with. There was (1) an act of renewal by the Corporation and (2) an approval by the State Government. As a matter of fact there was also a recommendation by the State Public Service Commission. The regular procedure was not observed that the recommendation of the State Public Service Commission was not obtained before the Corporation decided to renew and in that such recommendation was not placed at a meeting of the Corporation. Failure to observe this procedure is an irregularity not affecting the merits of the renewal. The renewal is an act done under the Calcutta Municipal Act 1951 and by section 106 it cannot be questioned on the ground of such irregularity. It is not shown that the Corporation would not have renewed the appointment of the appellant as Commissioner if the recommendation of the State Public Service Commission had been placed before the Corporation. There is no wilful non-compliance with the provisions of the Statute by the Corporation. Whatever was done was done in the

bona fide belief that the provisions of the Statute were being complied with.

47. It is important to bear in mind that the Commissioner is a high Municipal authority and is vested with large powers and duties in connection with the assessment of rates and taxes, and with regard to public health, public safety and public convenience of this City. His acts and orders touch and affect countless citizens. The legislature could not have intended that an irregularity in the appointment of the Commissioner will render the appointment invalid and will nullify and render void all his official acts to the prejudice of citizens who have no control over the authorities charged with the duty of complying with the procedure and the machinery of Section 19(3).

48. On a careful consideration of the matter and having regard to the principles enunciated in (12) *Montreal Street Railway Co. v. Noramandin* 1919 A.C. 170, (13) *Biswanath Khemka v. The King Emperor* 1945 F.C.R. 99 and (14) *State of Uttar Pradesh v. Srirastava* 1957 S.C.A. 1022, I am satisfied that the requirement of the Statute as to the placing of the recommendation of the State Public Service Commission before the relevant meeting of the Corporation is directory and a failure to comply with the requirement does not render the renewal invalid. The main object of the Statute is in no way promoted by holding that this requirement is mandatory. The essential safeguards imposed by the Statute to ensure the renewal of appointment of a fit and proper person have not been violated.

49. A writ in the nature of quo warranto is not issued as a matter of course. The Court has a discretion to grant or to refuse the writ. It is well settled that the Court will not allow an information in the nature of a quo warranto to be filed to try the title to an office, merely because there has been an irregularity in the election to the office in the absence of bad faith, and where the result of the election has not been affected: (see (15) *the Queen v. Ward* L.R. 8 Q.B. 210, (16) *The Queen v. Cousins* L.R. 8 Q.B. 216). In this case no bad faith is alleged or proved. It is not shown that the result of the election has, in any way, been affected. In my opinion the writ of quo warranto ought not to issue in this case.

50. I am also satisfied that the Corporation did not pass any resolution for the removal of the Commissioner in favour of which more than one-half of the total number of the members of the Corporation gave their votes. Accordingly there is no duty incumbent upon the State Government to remove the Commissioner in terms of Section 19(3) of the Calcutta Municipal Act and a writ of Mandamus upon the State Government to remove the Commissioner ought not to issue.

51. On the 29th March, 1958, a meeting of the Corporation was held to consider a resolution for removal of the appellant from his office as Commissioner. At that meeting the Chairman put the motion to the vote and counted the votes. He said "I will put this motion to vote. Those who are in favour of the motion would you please raise your hands?-38. * * * Now I shout those who are against-no voice, that means not voting." Therefore 38 members only voted in favour of the

resolution though the total number of the members of the Corporation was 86. It follows that more than one-half of the total number of the members did not give their votes in favour of the resolution. As such no resolution as required by Section 19(3) was carried.

52. His Lordship P. B. Mukharji, J. has observed:-

As I read the proceedings of that Corporation meeting there is no doubt that there were two votings at that meeting In this application we are only concerned with voting by show of hands. Show of hands" is an act. An "act" means an act of commission or an act of omission. The normal meaning or interpretation is that those who show their hands vote for and those who do not show their hands vote against. "Voting" therefore must necessarily include in Section 91(2) of the Act voting by the act of showing hands and also voting by the act of omission to show hands. Applying that test and interpretation, I read the result of first voting to be 38 members voting for the removal of the Commissioner and 42 members voting against removal * * * But then the Mayor did not allow the result to rest with the first voting. * * * In fact, he called for a second voting and called for votes against the removal, that is against the Resolution. This time not a single member out of the 80 members present voted against the removal. In other words, 1 must interpret the second voting as, and find as a fact, that 80 members gave their votes in favour of the Resolution of removal by no one not raising their hands against the removal.

53. With respect I am unable to agree with this reasoning or conclusion. The Chairman of a meeting usually puts the motion to the vote thus: "Those who are in favour of the motion, please hold up one hand; those against-" Those who vote "against" follow those who vote "in favour of" the motion. All those who hold up their hands vote. The Chairman counts the votes in favour of the motion as also the votes against the motion. The entire show of hands and counting takes place in course of one voting.

54. It is usual for the Chairman to ascertain the total number of votes both for and against the motion. In ordinary cases by Section 91(1) of the Calcutta Municipal Act, any matter required to be decided by the Corporation is determined by a majority of the members voting at the meeting before which the matter is brought. Where the matter is decided by a majority of the members present and voting it is essential to find out the total number of votes for and against the motion. At the meeting held on the 29th March, 1958 the Chairman followed the usual practice and counted the total numbers of votes for and against the resolution though for

55. the purposes of that meeting and having regard to the provisions of Section 19(2) the Chairman was required to give only the total number of votes in favour of the motion and it was not necessary for him to ascertain the number of votes against it. It is clear however that there was and could be only one voting by show of hands at that meeting and that in fact the Chairman did not direct two

successive votings.

56. Voting is an affirmative act. In a voting by show of hands, those who vote hold up their hands. Those who do not show their hands do not vote. There is no voting by omission to show hands. When those who vote in favour of the motion hold up their hands, those who do not then hold up their hands do not vote in favour of the motion. Similarly when those who vote against the motion hold up their hands, those who do not then hold up their hands do not vote against the motion.

57. Voting by show of hands signifies "counting the persons present who are entitled to vote and who choose to vote by holding up their hands"; see the observations of Lindley, L. J. in (17) *Earnest v. Loma Gold Mines Limited* (1897) 1 Ch. 1 at page 6.

58. In (18) *Queen v. Overseers of Christ-Church, Middlesex*, (1857) Vill. & B. 409, a meeting of the vestry was convened to consider a charge against a collector of the poor rate. The vestry then consisted of eighty persons; thirty-five attended the meeting. A motion being made to dismiss the collector, sixteen voted for and eleven voted against it. The motion was declared to be carried.

59. The Court of Exchequer Chamber unanimously held that though the motion was carried by a majority of those voting, ye; not, being carried by a majority of those present, it was not carried by a majority of those assembled, and, consequently, the dismissal, was not effectual. Wightman, J., observed: " The removing of the Collector is an affirmative act to be done by a majority of the vestrymen present at a meeting. In the present case, a majority certainly did not concur in that affirmative act; for, of those present, a majority either directly voted against it, or did not vote at all, in either case not concurring in the affirmative act of removal." In my opinion when the Chairman asked for the votes of those against the motion the members present who did not then hold up their hands did not vote in favour of the removal.

60. His Lordship, P. B. Mukharji, has further observed:

It was the statutory duty of the Corporation to attend such meeting and vote u/s 19 of the Act. * * * In a situation such as this the Councillor's statutory duty is either to vote the Commissioner to continue in office or to vote for his removal from the office. There is no middle course.

On the facts in this present case and on the law here as I interpret it, I do not think there was any room for the third course of not voting at all. * * * In fact, the Mayor's call for a second voting, in my view, left no option for the councillors but to vote against the removal if they wanted the Commissioner to continue in his office. But by not doing so, I read the effect of their not showing hands as assent to his removal and as giving their votes in favour of the removal of the Commissioner within the meaning of section 19(3) of the Calcutta Municipal Act.

61. With respect again, I am unable to agree with this reasoning and conclusion,

Supposing the Councillors were under a statutory duty to attend the meeting and to vote, they may be punished for failure to do so but by not attending the meetings and by not voting they do not constructively vote in favour of the motion for removal. But it seems to me that there is no statutory obligation on the part of a councillor to attend and vote at a meeting of the Corporation. Certain consequences follow as provided for in section 68(d) of the Calcutta Municipal Act if a member fails to attend the meeting for a period of six consecutive months.

62. A member may of course vote affirmatively either in favour of or against a resolution. But if he so chooses he need not vote at all. By not voting, he indicates that he is neither in favour of nor against the resolution. The members who do not choose to vote, defeat the resolution which has to be carried by the majority of the total number of members, as effectively as those who positively vote against the resolution.

63. In (7) *Labouchere v. Earl of Wharnccliffe*, 13 Ch. D. 346, it was competent for the votes of two-thirds of the members of a club present at a meeting to expel a member of the club.

A general meeting of the club was called to consider the question of expulsion of Labouchere, a member of the club. The Chairman put the question to the vote thus: "Those members who vote for the committee will vote 'Aye', and those voting for Mr. Labouchere will vote 'Nay'". 115 members voted, of whom 77 votes for the committee and 38 for Labouchere. Two members though present at the meeting did not vote. The Chairman declared the resolution carried by one vote. The Court held that the resolution was not carried by a sufficient majority. Jessel, M. R., observed at page 354: "When a resolution is put to a meeting, the persons present may take one of three courses. They may vote for or against it, or not wishing to express a positive opinion on the question, refrain from voting at all. This being so, those who do not vote may, by not doing so, turn the scale in favour of the accused member of the club."

64. His Lordship P. B. Mukharji, J. relied upon the following observations of Lord Mansfield in (3) *Rex v. Foxcroft* or (4) *Oldknow v. Wainwright*, 2 Burr. 1017: "Whenever electors are present, and do not vote at all, they virtually acquiesce in the election made by those who do." He also relied upon the decision of the Court of Queen's Bench in (5) *Gosling v. Volley*, 115 E.R. 542 and upon the following observations of Lord Denman, C. J., at page 554: "If he dissents for the choice of A, who is qualified, he must say so by voting for some other also qualified; he has no right to employ his franchise merely in preventing an election and so defeating the object for which he is empowered and bound to attend. * * *

If then the elector will not oppose the election of A, in the only legal way, he throws away his vote by directing it where it has no legal force; and in so doing, he voluntarily leaves unopposed, i.e. assents to, the voices of the other electors."

The decision of the Court to Queen's Bench was affirmed by a sharply divided Court of Exchequer Chamber whose decision is reported in (1849) 12 Q.B. 328. The decisions of the Courts of Queen's Bench and the Exchequer Chamber were reversed by the House of Lords whose decision is reported in (19) Vol. 4 House of Lords Cases, 679 : 10 E.R. 627. The facts of that case were that at a vestry meeting assembled to consider and make a rate for the repairs of the parish church, an estimate was produced by the church wardens and rate of 2s. in the pound proposed by them. No objection was made to the estimate, but an amendment was passed by the majority that church-rates were bad in principle and ought to be refused. Thereupon the vicar, church wardens, and certain other of the vestry, without- taking any further vote on, the question, signed a rate of 2s. in the pound. The House of Lords, while holding that it was the duty of the parish to repair the fabric of the parish church, and that the neglect or refusal to perform this duty would subject those who so neglected or refused, to punishment in the Ecclesiastical Court, decided that the rate was not validly imposed. The House of Lords ruled that a valid church rate could only be made by an actual or constructive majority of the parishioners in the vestry assembled and if the majority should refuse to make a rate for the purpose of discharging this duty, such refusal would not entitle the minority to make a rate. Delivering the judgment of the House of Lords, Lord Truro said, "I am not aware of any authority for the proposition that, where the law gives a power to a definite number or a definite portion of an indefinite number, the refusal of the majority to concur in the proposed exercise of the power is of the less legal effect as a negative, because such refusal may be illegal and may even subject the party making it to punishment. * * * And further, I am of opinion, that neither principle nor authority has been produced for the doctrine that, by the refusal by the majority of the vestry to make a church-rate when it is their duty, and they are lawfully required to do so, the power of making the rate devolves upon the minority of the vestry." Referring to the case of (4) Oldknow v. Wainwright, 2 Burr. 1017 and other cases, Lord Truro observed: "In the cases cited, the elections took place by virtue of the Charters, no vote of any kind being necessary to sanction them, and it was no condition in the election of the candidates that they should obtain a majority of the corporators assembled, but only a greater number of votes than any rival candidates; except in (4) Oldknow v. Wainwright. Lord Mansfield stated that, in corporate elections, negative votes might be given against a candidate and he observed that those who objected to an election taking place had not voted against Seagrave; whereas in Parliamentary elections there was no mode of opposing the election of the candidate other than by voting for a rival candidate. * * * In Parliamentary elections the question is not, Do you approve of a particular candidate, aye or no, but Do you prefer any other qualified candidate: If there is no other qualified candidate there is no mode of opposing the qualified candidate put in nomination, and by your voting for a disqualified candidate after notice. Lord Mansfield says, in (4) Oldknow v. Wainwright, it is the same as if you did not vote at all". In this case we are not concerned with Parliamentary elections and with

special rules of law applicable to those elections. We are not here dealing with the case of election of a candidate where it is sufficient for the candidate to obtain greater number of votes than a rival candidate. We have to consider the provision of a special Statute, viz. section 19(3) of the Calcutta Municipal Act. That sub-section requires that "a resolution for the removal of the Commissioner, in favour of which more than one-half of the total number of members of the Corporation give their votes" should be carried. The Statute requires affirmative votes of a majority in favour of the resolution. Refusal of the majority to vote on the question effectively defeats the resolution. The majority by not voting on the question do not give power to the minority to pass a valid resolution for removal of the Commissioner.

65. I am also satisfied that the declaration of the Chairman that the motion was carried is not conclusive. "I know", the Chairman said, "that according to this Act if 44 member vote for the resolution, then the Government shall take action on it. But I have to say that for the resolution there were 38 and none voted against, the motion is carried. * * * It has been recorded that so many members voted for it and when I shouted "Against" none responded. The other members did not cast their votes. The motion has secured votes, though not 44. Let Law take its course." The statement that the motion has secured 38 votes only is as much part of the declaration as the statement that the motion has been carried. On the face of the declaration, there is no statement that the resolution has been carried by the requisite statutory majority. If the declaration is read as a declaration that it is carried by statutory majority, such declaration is on the face of it erroneous. If the Chairman finds the figures and then erroneously in point of law holds that the resolution is duly carried, such declaration is not conclusive: See (8) *The Dhakeswari Cotton Mills Ltd. v. Nil Kamal Chakravarty*, 41 C.W.N. 1137; (9) *In re. Caratal (New) Mines, Ltd.* (1902) 2 Ch. 498 and (20) *Allison v. Johnson*. (1902) 46 Sol. Jo. 686. I am, therefore, of the opinion that the appeal should be allowed. I concur in the order made by my Lord.