

independently of the Act whether the bequest is a good or a bad one. I do not think, however, that this was the intention of an Act enacted to deal with the whole subject. There may be matters with which it has not dealt; but this is, in my opinion, not one of them. The language of section 101 is clear and no exception is stated.

The argument that we are here to deal with only one bequest, is not in accordance with the facts.

I agree, therefore, with the judgment of the learned Chief Justice.

O. M.

*Appeal allowed.*

Attorneys for the Appellants: *Orr, Dignam & Co.*

Attorneys for the Respondents: *Leslie & Hinds, Rutter & Co., J. Arnowitz, Watkins & Co. and C. W. Foley.*

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## CRIMINAL REFERENCE.

*Before Richardson and Shams-ul-Hula JJ.*

BIBHUTI BHUSAN BISWAS

v.

BHUBAN RAM\*.

1918  
 July 29.

*Public Nuisance—Liability of absent proprietors for such nuisance committed by their servants—Applicability of the English Common Law in the construction of the Penal Code—Penal Code (Act XLV of 1860), ss. 268, 290.*

Where the use of premises gives rise to a public nuisance it is, generally, the occupier for the time being who is liable for it, and not the absent proprietor.

The English cases under the Common Law are no authority upon the construction of the Penal Code in this respect.

*Rex v. Medley* (1) and *Queen v. Stephens* (2) not followed.

\* Criminal Reference, No. 86 of 1918, by R. R. Garlick, Sessions Judge of Dinajpore, dated June 12, 1918.

(1) (1834) 6 C. & P. 292.

(2) (1866) L. R. 1 Q. B. 702.

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IN 1912 the accused, Bhuban Ram, Ramananda Ram and Deo Chand Ram, two of whom were resident in the United Provinces and the third in Darjeeling, started a steam paddy-husking machine in Maldapatty, within the Dinajpore Municipality, and with its consent. Up to December 1917, it was worked only during the day and there was no complaint. But in that month the machine commenced working night and day. On the 11th January 1918, Mahendra Lal Biswas, Bibhuti Bhusan Biswas, and eight other residents of the immediate vicinity of the rice mill, filed a complaint under s. 290 of the Penal Code, before the District Magistrate of Dinajpore, complaining of the noise, smoke, coal dust and smell from the mill. The District Magistrate, after examining Mahendra, issued summonses against the three above named proprietors and the manager of the mill, Lachiram, under s. 290 of the Penal Code, and further passed an order under s. 144 of the Criminal Procedure Code prohibiting the working of the machine at night. The case was made over to, and tried by, the Subdivisional officer of Dinajpur. Ten residents of the locality were examined for the prosecution, and 19 witnesses, who lived a little further away, for the defence. The latter deposed that the machine did not cause any nuisance. The Magistrate convicted and sentenced the four accused, under the above section, to fines of Rs. 50 each, by his order dated the 5th April.

The accused, thereupon, moved the Sessions Judge of Dinajpore, on the 1st May, on the grounds (i) that the offence was not established, as only a few of the neighbours were affected by the alleged nuisance and not the public generally; and (ii) that the proprietors were not criminally liable. The Judge referred the case of the proprietors only to the High Court under s. 438 of the Criminal Procedure Code (*Crim.*

*Reference No. 86 of 1918*). Lachiram then moved the High Court and his application (*Crim. Revision No. 635 of 1918*) was heard with the above Reference.

*Babu Dasarathi Sanyal and Babu Debendra Nath Bhattacharjee*, for the petitioner.

*The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown.

RICHARDSON AND SHAMS-UL-HUDA JJ. This is a reference by the Sessions Judge of Dinajpur under section 438 of the Criminal Procedure Code. The learned Sessions Judge states the facts as follows: "A steam paddy-husking machine was set up in Dinajpore Municipality in 1912 with the permission of the Municipality. Up to December 1917, it appears to have worked only by day and there was no complaint. But in that month it began working both by day and by night, and a complaint was filed, on the 11th January 1918, by ten persons living near it that the dust, smoke, smell and noise of the machine were a public nuisance both by day and by night. The District Magistrate, thereupon, prohibited the working of the mill by night and summoned the proprietors and the manager under section 290 of the Penal Code. At the trial ten persons, living close to the mill, said that they were annoyed by the mill in various ways, but chiefly because it disturbed their sleep at night—the man who signed the petition, however, said that it did not inconvenience him at all—and 19 defence witnesses, who live in the same neighbourhood but rather further away, deposed that the mill caused them no annoyance. The trying Magistrate held that the working of the mill at night in a residential portion of the town was objectionable, and that the noise of it amounted to a public nuisance, and he fined the

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manager and the three proprietors Rs. 50 each under section 290 of the Penal Code.”

The learned Sessions Judge was of opinion that the conviction of the proprietors was bad in law, and he recommended that their conviction should be set aside. He was of opinion, however, that there was nothing wrong in the conviction of the manager.

We have heard the matter argued, on behalf of the persons convicted, by Mr. Sanyal, and on behalf of the Crown by the Deputy Legal Remembrancer. In the result we agree with the Sessions Judge that the conviction of the proprietors of the mill should be set aside. The general rule is that a principal is not criminally answerable for the acts of his agent. In the present case the proprietors of the mill were not living on the premises; two of the three proprietors live in the United Provinces and the third lives in Darjeeling. Speaking generally, the person liable, where the user of premises gives rise to a nuisance, is the occupier for the time being whoever he may be. The occupier in the present case is the servant of the proprietors. No doubt the proprietors might be liable for abetment. But in the present case abetment is neither proved nor charged. In this view, we must set aside the conviction of the three proprietors, Bhuban Ram, Ramananda Ram and Deo Chand Ram.

As to the conviction of the manager, Mr. Sanyal has argued that the facts do not bring the present case within the definition of a public nuisance to be found in section 268 of the Penal Code. That section, so far as it is necessary to quote it, lays down that “a person is guilty of a public nuisance who does any act, or is guilty of an illegal omission which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity.”

As to this question, though there may be some conflict in the evidence, we are of opinion that there were materials before the Magistrate on which he was at liberty to find that the working of the mill at night amounted to a public nuisance within the words we have read. In this view we are not disposed to interfere with the conviction of the manager or to interfere with the sentence passed upon him. The application made on behalf of the manager must, therefore, be refused.

As regards the proprietors, we were referred to certain cases decided in England: *Rex v. Medley* (1) and *Queen v. Stephens* (2). These cases were decided under the Common Law. In India the question is merely how the Statute should be construed, and the English cases cited are, in our opinion, no authority on the construction of the Penal Code.

The fines imposed on the proprietors must, if paid, be refunded.

E. H. M.

(1) (1834) 6 C. & P. 292.

(2) (1866) L. R. 1. Q. B. 702.

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