

CRIMINAL REVISION.

Before Suhrawardy and Cammiade JJ.

KRISHAN DOYAL JALAN

v.

THE CORPORATION OF CALCUTTA.*

Accused—Calcutta Municipal Act (Beng. III of 1923)—Proceeding before Municipal Magistrate for building without sanction—Administration of oath to owner of building as witness—Proceeding whether governed by the provisions of the Criminal Procedure Code (Act V of 1898).

In a proceeding before the Municipal Magistrate where the only question is whether or not certain structures are liable to be demolished the provisions of the Criminal Procedure Code do not apply. The owner of the unauthorised structure is not an accused person and as such is not exempted from administration of oath under section 342(4) of the Code. So long as there is no disobedience to the order of demolition passed by the Magistrate there is no offence.

Corporation of Calcutta v. Keshub Chandra Sen (1) approved.

Ram Gopal Goenka v. Corporation of Calcutta (2) distinguished.

THIS was a Rule obtained by one Krishan Doyal Jalan who was directed by the Municipal Magistrate of Calcutta by his order, dated 7th October 1926, to demolish certain structures made without sanction, the ground on which the Rule was issued was that the Magistrate followed a wrong procedure in administering oath to the petitioner and in examining him as a witness in the case.

*Criminal Revision No. 1181 of 1926, against the order of S. N. Basu, Municipal Magistrate, Calcutta, dated Oct. 7, 1926.

(1) (1902) 8 C. W. N. 142.

(2) (1925) I. L. R. 52 Calc. 962.

Babu Suresh Chundra Talukdar and *Babu Mahendra Kumar Ghosh*, for the petitioner. The Municipal Magistrate is a Presidency Magistrate, therefore to a prosecution before him, the procedure laid down in the Criminal Procedure Code is to be applied in all its details, an unauthorised construction is an offence, and the owner of the structure is an "accused" person, no oath should have been administered to him and he should not have been examined as a witness in the case. *Ram Gopal Goenka v. Corporation of Calcutta* (1) and other cases cited.

Mr. K. N. Chaudhuri, *Babu Baranashibasi Mukherjee* and *Babu Bhudar Haldar*, for the opposite party. The petitioner offered himself as a witness, it was not under the order of the Magistrate that he took oath and gave evidence, unauthorised construction is not an offence, and the petitioner is not an "accused" person, the Criminal Procedure Code does not apply to a case of this nature and there was nothing illegal in administering oath to the petitioner. *Narendra Chandra Rudra Pal v. Sabar Ali Bhuya* (2), *Corporation of Calcutta v. Keshub Chandra Sen* (3).

SUHRAWARDY AND CAMMIADÉ JJ. In this matter the petitioner has been ordered by the Municipal Magistrate to demolish certain sheds in a house abutting on Central Avenue. The present rule has been obtained by him on the ground that the Magistrate was wrong in administering oath to the petitioner, examining him as a witness and subjecting him to cross-examination. Before proceeding further with regard to the merits of the question raised by the ground on which the Rule was issued, it is necessary to observe that there is nothing in the

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(1) (1925) I. L. R. 52 Calc. 962. (2) (1925) I. L. R. 52 Calc. 721

(3) (1902) 8 C. W. N. 142.

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record to show that the Magistrate put the petitioner in the box and forced him to take oath and subjected him to cross-examination. From the judgment passed by the Magistrate in this case it may be presumed that the petitioner himself went to the box to support his case, namely, that the projections were of long standing. In one part of his judgment the Magistrate says "the defendaut gave evidence but did not say anything about this shed or the verandah though the defence witness Purna Mall spoke in his evidence that he has been seeing the verandah for the last 6 or 7 years." There is no sense in supposing that the Magistrate put the witness in the box, for obviously his evidence could not have helped the prosecution. In the petition before us it is not distinctly stated that it was under the order of the Magistrate that the petitioner took oath. The only allegation made therein is that the petitioner was examined on oath and was submitted to cross-examination by the opposite party. We have no doubt that the petitioner offered himself as a witness in the case to support his version of the story and having thus offered himself as a witness it is not fair for him to come to this Court and say that the Magistrate was wrong in administering oath to him.

We will now deal with the important question raised in this case, namely, that the administration of oath to the petitioner was such an illegal procedure as to vitiate the proceeding before the Municipal Magistrate. The bar to the administration of oath to an accused person is contained in section 342, Cr. P. C. This brings us to the consideration of the first question that arises, namely, whether the Criminal Procedure Code applies to the present proceedings before the Municipal Magistrate. In section 1 of the Code it is said that it shall not affect

any special or local law now in force or any special jurisdiction or power conferred by any other law for the time being in force. Section 5(2) provides "All offences under any other law shall be investigated and etc". This again brings us to the consideration of another question, namely, whether the act which the petitioner is said to have done namely, the erection of unauthorised sheds is an offence within the meaning of the Criminal Procedure Code. In several cases it has been held that the Criminal Procedure Code is applicable to prosecutions under the Calcutta Municipal Act. See the cases of *Sisir Kumar Mitter v. The Corporation of Calcutta* (1). *Umesh Chandra Mitter v. The Corporation of Calcutta* (2) and *Sew Prosad Poddar v. The Corporation of Calcutta* (3). The point was not argued in those cases; and moreover the Court was considering the proceeding in which the petitioners had been fined under the penal provisions of the Calcutta Municipal Act. We are not disposed to hold that the proceeding held by the Magistrate in which the question was whether the sheds in question are new and so liable to be demolished is governed by the provisions of the Criminal Procedure Code which would attract the application of several sections of the Code relating to procedure which on the face of them are inapplicable to proceedings such as the present.

The question that pertinently arises in this case is whether the petitioner can be said to have committed an offence, in other words whether the petitioner is an accused person within the meaning of the Criminal Procedure Code. Section 363 under which the present order is passed by the Municipal Magistrate provides that if the Corporation are satisfied

(1) (1926) 43 C. L. J. 369.

(2) (1925) 43 C. L. J. 231.

(3) (1904) 9 C. W. N. 18.

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that the erection of any building has been commenced without obtaining the written permission of the Corporation, they may after giving the owner of such building an opportunity of being heard apply to a Magistrate and such Magistrate may make an order directing that such erection be demolished by the owner thereof. If this order by the Magistrate is not carried out, under section 488 the person on whom it is passed renders himself liable to punishment for an offence, which word appears for the first time in the penal clause of section 488 and to a fine the amount of which is prescribed in the section. Under section 536 of the Act the Magistrate may order him to pay a fine as well as require him to demolish the work, thus making a distinction between a punishable offence and an executive order. In our opinion so long as there is no disobedience by a party to the order of demolition passed by the Magistrate no offence is committed; *i.e.*, when a person disobeys that order he then can be said to have committed an offence and renders himself liable to punishment under section 488 of the Act. It is further to be observed that proceedings under section 363 are started not upon complaint but upon an application made to the Magistrate, whereas in proceedings to be taken for rendering a person liable to punishment for an offence under the Act complaint has to be made before a Magistrate within the period prescribed by the Act. It has now been held in the Full Bench case of *Narendra Chandra Rudra Pal v. Sabarali Bhuiya* (1) that a party to a proceeding under section 145 Cr. P. C. is not an accused person. In the same sense a party to a proceeding under section 133, Cr. P. C., is also not an accused person though under the section the Magistrate has power to order the demolition or

(1) (1925) I. L. R. 52 Cal. 721.

removal of the obstruction. *Hirananda Ojha v. The Emperor* (1). Section 340, Cr. P. C., also lends countenance to the view that parties to *quasi-criminal* proceedings are not accused persons for in such proceedings a party thereto may offer himself as a witness. If he is taken to be an accused person the Magistrate has no right under section 342(4) to administer oath to him. The position is so anomalous that it cannot possibly be maintained. If a party to a proceeding under Chapter XII of the Criminal Procedure Code is not an accused person, it is hardly conceivable that a party to a proceeding under the Municipal Act relating to demolition of an unauthorised structure is an accused person and as such exempted from administration of oath. It has however been argued on the authority of the case of *Ram Gopal Goenka v. The Corporation of Calcutta* (2) that a Municipal Magistrate in Calcutta is a Presidency Magistrate and so the Criminal Procedure Code will apply to proceedings before him in all its details. The case referred to does not lay down any such proposition. The learned Chief Justice has made some observation which is clearly an *obiter* and not necessary for the decision of that case, namely, that the Municipal Magistrate being a Presidency Magistrate the High Court has jurisdiction under section 439, Cr. P. C., to revise his orders. The learned Chief Justice has further observed that whether the proceedings before the Municipal Magistrate is civil or criminal the High Court has under both the Codes, viz., the Civil Procedure Code and the Criminal Procedure Code, power to interfere with the orders of the Municipal Magistrate. That case therefore is no authority for the broad proposition that because the Municipal Magistrate happens to be a Presidency

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(1) (1905) 9 C. W. N. 983.

(2) (1925) I. L. R. 52 Calc. 962.

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Magistrate the Code of Criminal Procedure will apply to all proceedings before him. Under section 531 of the Calcutta Municipal Act, 1923, Municipal Magistrates are appointed by the local Government for the trial of offences against the Act or rules made thereunder. The Act has also invested such Magistrates with power to deal with certain proceedings under the Act which are not criminal proceedings. One of such powers is to order demolition of unauthorised structures. The case of *In the matter of Corporation of Calcutta v. Keshub Chandra Sen* (1) is an authority for the view that the order of demolition passed under the Calcutta Municipal Act is not an offence. Offence has been defined in section 4, clause (o), Criminal Procedure Code as any act or omission made punishable by any law for the time being in force. The word "punishable" has not been defined in the Code but in section 53, I. P. C., every kind of punishment has been mentioned of which demolition of structure is not one. We agree with the observation made in the case of *Corporation of Calcutta v. Keshub Chandra Sen* (1) that the demolition of unlawfully erected work is not a punishment within the meaning of section 631, sub-section 1 of the Calcutta Municipal Act (B. C. III of 1899) corresponding to section 363 of the present Act. There is great force in the observation of the Municipal Magistrate in his explanation that an order under section 363 or 364 of the Calcutta Municipal Act is in the nature of a mandatory injunction passed by a civil court. On these grounds we are of opinion that the proceedings before the Municipal Magistrate was not vitiated by any illegality or irregularity and this Rule must be discharged.

Rule discharged.

A. S. M. A.

(1) (1962) 8 C. W. N. 142.