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 SECRETARY
 OF STATE
 FOR INDIA
 v.
 BREAKWELL
 & Co.

The appeal must therefore be decreed and the order of the Tribunal reversed with costs in both Courts.

CAMMIADE J. I agree.

Appeal allowed.

G. S.

CRIMINAL REVISION.

Before Rankin C. J. and Buckland J.

RAM GOPAL GOENKA

v.

CORPORATION OF CALCUTTA.*

1927
 Dec. 16.

Municipality—Procedure relating to contravention of the provisions of the Calcutta Municipal Act of 1859, since the passing of the Act of 1923—Effect of demolition order being set aside, the order being made without sanction—Bengal Act III of 1923—Bengal Act V of 1926.

Provision has been made by Act V, B. C., of 1926, whereby proceedings relating to a contravention of the provisions of the Calcutta Municipal Act, 1899, are to be taken in the manner prescribed by the Act of 1923.

The mere fact that previous proceedings to obtain a demolition order have been held to be nugatory, because they were not started after proper sanction, cannot prevent new proceedings, after sanction, from being started to obtain a demolition order.

RULE on behalf of the accused, in a proceeding under s. 363 of the Calcutta Municipal Act of 1923.

The petitioner, Ram Gopal Goenka, was the owner of the premises, No. 7, Bysack Street, in the town of

* Criminal Revision No. 1017 of 1927, against the order of the Municipal Magistrate of Calcutta, dated Aug. 3, 1927.

Calcutta. A complaint under s. 363 of the Calcutta Municipal Act of 1923 was started against him by the Corporation of Calcutta for the demolition of certain structures in the said premises, said to have been erected by the petitioner without sanction. The petitioner was convicted by the Municipal Magistrate on the 28th February, 1925. Against that order of the Magistrate, the petitioner moved the High Court, which by its order, dated the 20th May, 1925, held that the prosecution was illegal and set aside the conviction (1). Thereafter, in March, 1927, the petitioner received a notice from the Municipal Magistrate of Calcutta, to appear before him to show cause why an order should not be made under s. 363 of Act III, B.C., of 1923 for demolition of the additions and alterations, alleged to have been made in the said premises, No. 7, Bysack Street, Calcutta. The heading of the notice was under s. 449 of Act III, B. C., of 1899, read with Act V, B. C., of 1926. The petitioner entered appearance on the 8th March, 1927, and showed cause, stating *inter alia* that the alleged structures being the subject matter of prosecution in a previous case started by the Corporation and the order of the Municipal Magistrate passed therein having been set aside by the High Court, the present prosecution was *mala fide* and without jurisdiction and not maintainable according to law. On or about the 22nd July, 1927, a fresh notice under s. 363 of Act III, B. C., of 1923 was served on the petitioner to show cause on or before the 3rd August, 1927, why an order should not be passed under that section directing the demolition of additions and alterations made without sanction in premises No. 7, Bysack Street, Calcutta. The petitioner entered appearance and submitted *inter alia*

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that the Magistrate be pleased to consider and accept the written statement filed by him on the 8th March, 1927, and direct a dismissal of the case against him. The Magistrate, however, instead of dismissing the prosecution, treated the proceedings as one under s. 449 of Act III, B. C., of 1899, read with Act V, B. C., of 1926.

The petitioner moved the High Court and obtained this Rule.

Babu Suresh Chandra Talukdar (with him *Babu Mahendra Kumar Ghose*), for the petitioner. The previous judgment of this Court (1) is a bar to the present proceeding under s. 403 of the Criminal Procedure Code setting aside the previous order.

Act V, B. C., of 1926 does not legalise fresh proceedings under s. 449 of the old Act (III, B. C., of 1899), because the new Act (III, B. C., of 1923), s. 363 contemplates cases occurring after the passing of the new Act, which came into force on the 1st April. The alleged unauthorised structures were completed before that date.

Mr. Debendra Nath Bagchi (with him *Babu Baranashibasi Mukerjee* and *Babu Gopendra Krishna Banerjee*), for the opposite party. The previous judgment is no bar, as it never decided the case on the merits. It only set aside the previous order of the Municipal Magistrate, the previous proceeding not being initiated with the sanction of the General Committee, which ceased to exist after the passing of the new Act of 1923. *Vide* Russel on Crimes, pp. 1818-19; there is no *autre fois acquit*, if prosecution fails because of defect in the indictment and not on the merits. The proceeding for demolition of unauthorised structures is no criminal prosecution for an offence at all: *In*

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the matter of the Corporation of Calcutta v. Keshub Chunder Sen (1). The amending Act of 1926 was passed with the one object of laying down the procedure to be followed in cases occurring before the passing of the new Act (III, B.C., of 1923), the word "Corporation" standing for the expression "General Committee" and the procedure laid down in the latter part of s. 363 of the new Act and so on is to be followed in such cases. It would be making the amending Act of 1926 nugatory, if any other interpretation is to be put on it *Vide* s. 2 (2), and particularly s. 2 (3) of the amending Act of 1926, which leaves no doubt about it. The Rule must accordingly be discharged.

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Babu Suresh Chandra Talukdar, in reply. The amending Act of 1926 has no application here because of the High Court judgment, which makes all the difference about the present case.

RANKIN C. J. In this case it would appear that it is alleged by the Corporation of Calcutta that the present applicant, at his house No. 7, Bysack Street, had certain additions and alterations made without any necessary sanction being obtained from the Corporation in that behalf. It would seem that these additions and alterations were made at some time prior to 1923 and it would seem that, after the new Municipal Act of 1923 came into force, proceedings were taken to get a demolition order from a Magistrate in respect of the erections complained of. Those proceedings were apparently brought without taking the necessary preliminary steps prescribed by sections 363 and 364 of the Calcutta Municipal Act, 1923, and

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it was pointed out, at the time, that even if those proceedings were regarded as proceedings under the old Act of 1899 they again were incurably defective by reason that there had been no preliminary sanction given by the General Committee as required by the old Act. Accordingly those proceedings came to nothing and what has happened after that has been, first of all, that the Legislature has passed Bengal Act V of 1926. That having been passed, the present proceedings were really founded by a notice, dated the 22nd of July, 1927, calling upon the applicant to “show cause why an order should not be made under section 363 of the Act of 1923 directing that the work of all erections done at premises No. 7, Bysack Street, or so much of the same as has been unlawfully executed to be demolished at your expense on the following among other grounds: Additions and alterations without sanction.” That is a notice which was headed “Section 363 of Act III (B. C.) of 1923.”

Now, it appears to me that if this matter had stood upon the 363rd section of the Act of 1923 alone, it might very well be said that these erections having been completed before 1923 were not “alterations or additions” within the meaning of that particular section 363 of the Act of 1923. But it is drawn to our attention that by Act V of 1926 provision has been made whereby proceedings relating to a contravention of the provisions of the Calcutta Municipal Act, 1899, are to be taken in the manner prescribed by the Act of 1923; in other words, the new procedure is to be applied to contravention of the old Act as well as to contravention of the new Act. Accordingly this would be a perfectly good order to make under section 363 of the new Act, although the breach of the regulation was committed under the old Act.

It has been suggested in argument by Mr. Talukdar that the third clause of the new section 557 (a), inserted into the Act of 1923 by the amending Act of 1926, does not have this effect. If one looks at the three clauses of that new section, one finds therein that the first clause is to say that a proceeding, which has been instituted under the old Act or which might have been instituted under the old Act, may be continued or instituted by the Corporation as constituted under the new Act. That is the first clause. With reference to those provisions which require certain sanctions or preliminary procedure before legal proceedings can be validly started there is the second sub-section. The purpose of that is to say that the powers and duties of the General Committee and of the Chairman under the old scheme shall be deemed to have vested in the Corporation and the Chief Executive Officer respectively and that when any action has been taken in accordance with the old Act such action shall be deemed to have been taken by the corresponding authority under the new Act, and the corresponding provisions of the new Act shall be deemed to have been complied with. The third clause begins by saying "Save as provided in sub-section (2)". With that exception, namely, the exception of the particular provisions already made with regard to those matters, it says that "the procedure prescribed by this Act shall be followed in all proceedings relating to a contravention of the provisions of the Calcutta Municipal Act, 1899". In my judgment the effect of that is this: There is no doubt that necessary sanction had been taken before these proceedings were instituted before a Magistrate. That being clear enough, sub-section (2) of the new section having been complied with in that way, for the rest the new procedure is to be applied

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to a legal proceeding relating to a contravention of of the old Act That being so, I am of opinion that the application to the Municipal Magistrate is quite in order.

It has been suggested that because the previous proceedings to obtain a demolition order came to nothing by reason that there was no sanction in the proper way, no further application can be made by the Corporation to have these structures demolished. How the matter would have stood had the previous application been dealt with on the merits is another matter; but I am quite satisfied that the mere fact that proceedings have been held to be nugatory because they were not started after proper sanction cannot prevent new proceedings after sanction from being started to obtain a demolition order.

In this view the Rule must be discharged.

BUCKLAND J. I agree.

S. M.

Rule discharged.