APPELLATE CRIMINAL.

Before Mitter J.

S. R. VARMA

v.

CORPORATION OF CALCUTTA.*

1932

Nov. 24; *Dec.* 20.

Municipality—License for places of public resort, recreation or amusement, if can be withheld or refused by the Corporation—Calcutta Municipal Act (Beng. III of 1923), ss. 175, 391.

Section 391 of the Calcutta Municipal Act (Beng. III of 1923) gives by implication a discretion to the Calcutta Corporation to refuse a license regarding theatre, circus or other similar places of public resort, recreation or amusement, when the Corporation thinks that the applicant would not be a fit and proper person to hold a license, and in the interest of public order and morality it is necessary to do so. But this discretion must be exercised in a judicial spirit and a reasonable manner.

Municipal Corporation of City of Toronto v. *Virgo* (1) distinguished.

London County Council v. *Bermondsey Bioscope Co.* (2) and *Rex* v. *London County Council* (3) followed.

Section 175 of the Calcutta Municipal Act deals with a very different class of license from that contemplated by section 391 and the existence or otherwise of one under the former section does not affect a prosecution under the latter.

Bipin Behari Ghose v. *Corporation of Calcutta* (4) and *S. N. Banerjee* v. *Manager, W. Lewis & Co.* (5) referred to.

APPEAL by the accused.

The facts and arguments are set out in the judgment.

Debendranarayan Bhattacharya and *Parimal Mukherji* for the appellant.

Narendrakumar Basu and *Pashupati Ghosh* for the Corporation of Calcutta.

Cur. adv. vult.

*Criminal Appeal, No. 674 of 1932, against the order of Abdul Majid, Municipal Magistrate of Calcutta, dated June 6, 1932.

(1) [1896] A. C. 88.
(2) (1910) 80 L. J. K. B. 141.
(3) [1915] 2 K. B. 466.
(4) (1907) I. L. R. 34 Calc. 913.
(5) (1920) I. L. R. 47 Calc. 809.

1932

S. R. Varma v. Corporation of Calcutta.

MITTER J. The question raised by this appeal is one of considerable importance and relates to the power of the Corporation of Calcutta to refuse a license to keep open a carnival, when in the public interest it thinks it necessary to do so.

The case for the prosecution is that the appellant, S. R. Varma, was the proprietor of a carnival, in respect of which license had been obtained from the Corporation, and that that license remained in force up to the 1st March, 1932; that there had been complaints against the holding of carnivals, of late, both in the newspapers, as well as by some public bodies like the Mârwâri Trades Association of Calcutta and the appellant was informed that no further license would be granted after the expiry of the period; that the appellant, thereafter, changed the site and name of the show and obtained a police license for the show under the name of Hollywood Park Carnival on plots Nos. 21 to 29 of the Calcutta Improvement Trust scheme and intimated to the Corporation that he was going to open the projected carnival from the 1st April and was prepared to pay the taxes, that the carnival was opened from the 1st April, but no license from the municipality having been obtained, the appellant had offended against the provisions of section 391 of the Calcutta Municipal Act. The Corporation of Calcutta started the prosecution under section 391 of the Calcutta Municipal Act.

It is admitted by the accused that the carnival was started without obtaining the license and, in such circumstances, one would have thought that the provisions of section 391 had been contravened, but it is contended by the defence that the Corporation cannot refuse a license altogether, although it can impose conditions for the taking out of the license. The magistrate thought that it was not necessary to go into the question whether the Corporation had the right of refusing license altogether and that it was sufficient for the purposes of the conviction in this case that the carnival had been started and continued

without a license. In this view, the Municipal Magistrate convicted the appellant under section 391 of the Calcutta Municipal Act and has sentenced him to pay a fine of Rs. 500.

The conviction and sentence have been challenged on appeal on several grounds:—(1) The Corporation had no power under the statute to refuse a license altogether and in refusing to grant license "the "Corporation ceased to function" and the conviction under section 391 cannot be maintained, (2) the Act contemplates two licenses, one license for the place and another for the calling and, so far as the license for calling is concerned, license could be taken after the 1st of July as section 391 must be read with section 175 and the prosecution was bad as it was started before 1st July; and (3) that the sentence is too severe.

It will be easy to dispose of the second ground first. Mr. N. K. Basu who appears for the Corporation of Calcutta replies to the argument founded on this ground by pointing out that section 175 or Schedule VI has got nothing to do with section 391. He argues that the breach under section 175 is punishable under section 492, whereas the breach under section 391 is punishable under section 488. He points out that section 175 occurs in Chapter XII, which concerns "Tax on professions," whereas section 391 occurs in Chapter XXVI, which deals with "Regulation and inspection of places of public resort." Mr. Basu further cites two cases in support of this view: *Bipin Behari Ghose* v. *Corporation of Calcutta* (1), *S. N. Banerjee* v. *Manager, W. Lewis & Co.* (2). Both these cases, which were under the old Calcutta Municipal Act (Beng. III of 1899), support the argument of Mr. Basu and I am of opinion that section 175 deals with a very different class of license from that contemplated by section 391. The object of the two sections and the nature of the licenses required by them are different. Section 175 occurs in Chapter XII, which deals with tax on profession, whereas

(1) (1907) I. L. R. 34 Calc. 913. (2) (1920) I. L. R. 47 Calc. 809.

1932

S. R. Varma
v.
Corporation of Calcutta.

Mitter J.

section 391 occurs in Chapter XXVI dealing with regulation and inspection of places of public resort. These observations are sufficient to dispose of the second ground taken.

The first ground taken seems to be one of some difficulty. Section 391 of the Act of 1923 runs as follows :—

> No person shall, without or otherwise than in conformity with the terms of a license granted by the Corporation in this behalf, keep open any theatre, circus or other similar place of public resort, recreation or amusement :
>
> Provided that this section shall not apply to private performances in any such place.

It is argued that when a municipal authority is given the power under the law to regulate the opening of certain places of amusement that implies the continued existence of that which is to be regulated and governed and, on this authority, it is argued that the Corporation has got no power to withhold a license. It is said it can impose conditions, but it cannot refuse altogether the granting of licenses. In support of this contention, reliance has been placed on a decision of their Lordships of the Judicial Committee in the case of *Municipal Corporation of City of Toronto* v. *Virgo* (1). In that case, the question arose as to whether a statutory power conferred upon a municipal council to make bye-laws for regulating and governing a trade does or does not, in the absence of an express power of prohibition, authorise the making it unlawful to carry on a lawful trade in a lawful manner. It was held that it did not so authorise the municipal council. In that case, a municipal bye-law was passed prohibiting hawkers from plying their trade in an important part of the municipality. And Lord Davey said that through all the cases a general principle may be traced that municipal power of regulation or of making bye-laws for good government without express words of prohibition does not authorise the making it unlawful to carry on a lawful trade in a lawful manner.

(1) [1896] A. C. 88.

In that case, before their Lordships, what was being dealt with was a bye-law, power to make which is given by the statute, and not the statute itself, as in the present case, and it was held that the bye-law was really *ultra vires* of the statute, in the absence of express prohibition. But there is also a well-recognised principle that, where there is competent authority to which an Act of Parliament entrusts the power of making regulations, it is for the authority to decide what regulations are necessary; and any regulations which they may decide to make should be supported unless they are manifestly unreasonable or unfair. See the observations of Lord Alverstone C.J. in *London County Council* v. *Bermondsey Bioscope Co.* (1).

It is familiar knowledge that public performances have a strong influence on public mind and public opinion and for that reason the Corporation have been given the discretion to grant or refuse licenses regarding theatre, circus or other similar places of public resort, recreation or amusement. The terms of section 91 would impliedly suggest such a discretion. As has been pointed out by Lord Justice Buckley in *Rex* v. *London County Council* (2), which was the case of cinematograph license, "the only "question we have to determine is whether the body "with whom exclusively the determination of that "matter lies has acted fairly and according to law." In the case in which these observations were made, license was refused to the cinematograph company, whose share-holders were in a large proportion alien enemies, and it was held that London County Council could refuse license in the exercise of their discretion.

Further, in the case of *Toronto Corporation* (3) there was no question of apprehended nuisance, for, as Lord Davey pointed out, "there was no evidence "and it is scarcely conceivable that the trade could not "be carried on without occasioning a nuisance."

(1) (1910) 80 L. J. K. B. 141, 144. (2) [1915] 2 K. B. 466, 488.
(3) [1896] A. C. 88, 94.

1932

S. R. Varma
v.
Corporation of Calcutta.

Mitter J.

If such nuisance could be apprehended, the licensing authority would have been within their rights to refuse license.

Section 391 says that certain places of amusement cannot be kept open without or otherwise than in conformity with a license granted by the Corporation of Calcutta. Can it be said that where a question of public order is involved or where question is involved that betting and gambling which are illegal might go on in this carnival, the Corporation has no power to refuse a license? In the present case, there was the representation by a public body as to the harmful effect of these carnivals and there is evidence of the Theatre Inspector that betting and gambling was going on in the Great Eastern Carnival of which the appellant was the proprietor. It was open to the Corporation to anticipate, having regard to the way this carnival was being carried on, that the applicant would not be a fit and proper person to hold the license for another carnival. I am of opinion it was within the competence of the Corporation to refuse a license, where, in the interest of public order and morality, it was necessary to do so. This act, on the part of the Corporation, does not, in my opinion, infringe on the liberty of the subject to carry on lawful trade in a lawful manner. The element of public order comes in and I should think that section 391 impliedly gives the Corporation power to refuse licenses, if, in the interest of public order, it thinks it should do so. The representation by the public bodies and in the newspapers led to a resolution to be passed by the E. G. P. Committee to the effect that no licenses should issue for carinvals except with the permission of the District Committee. This seems to be a salutary resolution and if, in pursuance of the resolution, the Corporation refused to grant licenses, it was quite within its power to do so. It cannot be said that the discretion was exercised arbitrarily or in an unreasonable manner.

A point has been raised by Mr. Basu on the second day of hearing of the case that authorities show that

one cannot raise the contention that the refusal to license is in exces of the authority of the Corporation in a criminal court, but must be determined before a civil court, wherefrom the accused must obtain a declaration that the action of the Corporation is *ultra vires*. I am of opinion that it may be raised by way of defence in the trial before the magistrate, although it may be more appropriate to do so by a civil declaratory action or by a writ of *mandamus*.

My conclusions may be summarised as follows:— Under the implications of section 391 of the Act, it is open to the Corporation to refuse a license if in their discretion they think fit to do so; but this discretion must be exercised in a judicial spirit and in a reasonable manner. In the present case, it cannot be said that the discretion has not been exercised in an impartial and judicial spirit seeing that on the representation of a public body the question was debated before the E. G. P. Committee and the said committee came to the conclusion that license of carnivals should ordinarily be refused and may be granted with the permission of the District Committee and, seeing further that there is evidence in this case that the previous carnivals, of which the appellant is the proprietor, allowed gambling and betting to go on. The conviction must, therefore, be maintained.

With regard to the ground of severity of sentence, after considering all the circumstances and giving due weight to the argument of Mr. Basu that the accused was liable in addition to a daily fine, I am of opinion that the ends of justice would be met by reducing the fine to Rs. 250 only (Rupees two hundred and fifty). The appeal is to this extent allowed. The conviction is affirmed but the sentence is reduced. The portion of the fine remitted must be refunded to the appellant.

Appeal allowed in part.

A. A.