CRIMINAL REVISION.

Edgley J.

HRISHI KESH DATTA

v.

HOWRAH MUNICIPALITY.*

1940

Mar. 14.

Municipality—*Masonry work—Application for sanction—Failure to grant or refuse permission within time specified in rules, if gives indefeasible right to build—Calcutta Municipal Act (Ben, III of 1923) as extended to the municipality of Howrah, s. 365, sub-s.* (1), *s. 488*; *Sch. xvii, rr. 56, 57, 58.*

If in respect of an application to the commissioners, for permission to erect a new masonry work, the commissioners neither grant nor refuse to grant permission within the time-limit of fifteen days provided by r. 57 of Sch. xvii of the Calcutta Municipal Act, as extended to the municipality of Howrah, then under r. 58 of the same schedule permission, in terms of the application, shall be deemed to have been granted to the applicant and the commissioners have thereafter no power under s. 365, sub-s. (*1*) of the Calcutta Municipal Act, as extended to the municipality of Howrah, to issue notice for stopping the masonry work. The violation of such notice, if issued, is no offence under s. 488 of the Calcutta Municipal Act, as extended to the municipality of Howrah, even though, after accrual of the applicant's right under r. 58, he files a petition agreeing to abide by the decision of the municipality in respect of the proposed work.

The procedure laid down in rr. 56 and 57 of Sch. xvii of the Calcutta Municipal Act, as extended to the municipality of Howrah, is mandatory and should be strictly followed.

Sub-rule (*1*) of r. 56 cannot be construed by itself, but must be read with the remaining sub-rules of r. 56. Sub-rule (*1*) of r. 56 contemplates one requisition by the commissioners stating the requirements and objections relating to an application to erect a new masonry work.

The period of "fifteen days" mentioned in r. 57 means fifteen working days in the same sense in which the expression has been used in r. 56.

On application for permission to erect a new masonry work in connection with an existing building when the commissioners order the applicant to expose the foundations of the building for inspection, the act of the commissioners amounts only to a requisition for information under r. 56, sub-rr. (*1*) and (*2*). From the mere fact that the commissioners hold a second inspection of the exposed foundations it cannot be inferred that the first inspection was

*Criminal Revision, No. 211 of 1940, against the order of Ahmad Husain, Police Magistrate of Howrah, dated Dec. 20, 1939.

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incomplete or defective within the meaning of r. 56, sub-r. (*3*), nor can it be presumed that between the first inspection and the second, the commissioners sent a requisition for further information under r. 56, sub-r. (*3*).

CRIMINAL REVISION case against a conviction for disobedience of a notice served by the Howrah Municipality on the petitioner to stop the construction of unauthorised masonry work.

The material facts of the case are set forth in the judgment.

Gour Mohan Dutt and *Satya Charan Pain* for the petitioner. The conviction is bad in law, because it is admitted that the petitioner applied for permission on February 15, 1938, and it was not until March 23, 1938, that the commissioners made up their minds to refuse permission. The refusal of the commissioners is clearly beyond fifteen days from the date of the application and, under r. 58, the permission to build should be deemed to have been granted. In other words, there was a permission to build by the operation of law. Hence the building work was carried on lawfully and the commissioners had no power to stop it. Section 365, sub-s. (*1*) uses the word "unlawfully" and has no application to the present case, where the building work was carried on lawfully. Hence the conviction under s. 365, sub-s. (*1*), read with s. 488 of the Calcutta Municipal Act, as extended to the municipality of Howrah, is bad in law and ought to be set aside.

Santosh Kumar Basu, Bholanath Roy, Bhudhari Mohan Chatterjee and *Tinkari Sarkar* for the opposite party. The period of fifteen days mentioned in r. 57 must mean fifteen working days, as in r. 56. The second inspection by the municipal authorities was held on March 12, 1938, and therefore the refusal on March 23, 1938, was within the required time limit of fifteen days as provided by r. 57. Hence r. 58 had no operation. Therefore, the conviction is right. I submit that, under r. 56, sub-r. (*1*), the Commissioners have a residuary power of making

requisitions at any time. Long after March 23, 1938, the petitioner made applications before the commissioners to abide by their decision. The petitioner cannot now turn round and invoke the presumption of r. 58, which was never sought to be availed of by the petitioner. On the above grounds the Rule ought to be discharged.

Dutt, in reply.

EDGLEY J. This Rule is directed against the order of the Police Magistrate of Howrah, dated December 20, 1939, under which he convicted the petitioner, Hrishi Kesh Datta, of an offence under s. 365 (*1*) of the Calcutta Municipal Act as extended to Howrah, read with s. 488 of the Act.

The case for the prosecution was to the effect that the petitioner had been directed by the municipal authorities, on February 19, 1939, to cease work in connection with the construction of a *verandâ* which he was building to the south of his premises situated at 65, Lakshman Das Lane, Howrah. The petitioner ignored this notice and continued the building operations, with the result that he was prosecuted. The petitioner's main contentions before the learned Magistrate seem to have been that he did not violate any of the building regulations of the municipality and that, in any event, inasmuch as the commissioners had passed no orders with reference to his application to erect the building, which was submitted to them on February 15, 1938, he was entitled to assume that the requisite written permission had been granted to him, having regard to the provisions of rules 57 and 58 of Sch. XVII annexed to the Act.

The learned Magistrate came to a finding of fact to the effect that it had not been established that the petitioner, Hrishi Kesh Datta, had violated any of the building rules under the Municipal Act. He held, however, that the petitioner had disobeyed the

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notice which was served on him under s. 365 (*1*) of the Act for the purpose of prohibiting him from proceeding with the building work and, in these circumstances, the learned Magistrate found him guilty under s. 365 read with s. 488 of the Act and sentenced him to pay a fine of Rs. 60 with costs amounting to Rs. 3-12, or, in default, to suffer simple imprisonment for one month.

On behalf of the petitioner it has been urged in this case that his conviction is illegal, as the order, which was issued against him on February 19, 1939, under s. 365 (*1*) of the Act, cannot be regarded as a valid order, because an order of this nature can only be issued in circumstances to which reference is made in s. 363 of the Act. With reference to this section, it is pointed out that, in view of the finding of fact at which the learned Magistrate arrived with regard to the alleged non-compliance with the building rules, the petitioner could only be convicted under s. 365 read with s. 488 of the Act, if he had proceeded with his building operations without having obtained the written permission of the municipality. In this connection, it is, however, argued that, as the municipality passed no orders with reference to the petitioner's application within fifteen days of the receipt thereof, he became entitled to the benefit of the presumption raised in rule 58 of Sch. XVII of the Act, under which it is provided that—

> if within the period prescribed by rule 57, the commissioners have neither granted nor refused to grant permission to execute any work, such permission shall be deemed to have been granted.

The main point for consideration, therefore, in connection with this matter is whether, having regard to the presumption raised by rule 58, the order in respect of which the petitioner has been prosecuted can be regarded as a valid order.

At this stage it will be convenient to mention certain admitted facts connected with the proceedings relating to this case. Prior to the submission to the

municipality of his application, dated February 15, 1938, some difficulties had occurred between the petitioner and the municipality in connection with the erection of the new premises at 65, Lakshman Das Lane, Howrah, more particularly in connection with the construction of a privy. It would appear that, thereafter, the petitioner, on February 15, 1938, applied to the municipality for formal permission to erect certain new buildings at the abovementioned address and with this application he submitted plans as required by rule 52 of Sch. XVII. The application had no connection with the privy with regard to which difficulties had occurred previously, but the plans included specifications for the erection of *verandâs* to the north and south of the new building. After receipt of the application in the municipal office, orders were passed on February 18, 1938, to the effect that the petitioner should be asked to expose the foundations of the building in order that they might be inspected. This requisition appears to have been duly issued and the municipal authorities were informed on February 22, 1938, that the foundations were ready for inspection. The inspection took place on February 24, 1938. A further inspection took place on March 12, and, on March 23, 1938, the petitioner was informed that his application, dated February 15, 1938, could not be granted on account of certain objections which were set forth in detail in the commissioners' letter. In the beginning of the following year, namely, on January 10, 1939, the petitioner's case came before the Building Committee of the Howrah Municipality, but it appears that, in spite of the refusal contained in the commissioners' letter, dated March 23, 1938, the petitioner continued building operations, with the result that a notice under s. 365 (*1*) of the Act was served on him on February 19, 1939, and, as stated above, it has been found by the learned Magistrate that he violated this order.

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The question whether or not the petitioner has been properly convicted depends to a very large extent upon the correct interpretation of rules 56 and 57 of Sch. XVII. Rule 56 is the main rule which indicates the procedure which should be adopted by the commissioners on the receipt of a building application under rule 52, and rule 57 lays down the conditions under which the commissioners may grant or refuse permission in connection with these applications. The general scheme of the rules relating to this matter, which are set forth in Sch. XVII to the Act, is to the effect that, as soon as an application under rule 52 is received by the commissioners, it should be carefully examined, in order that it may be ascertained at the earliest possible date whether: (a) any further information is required with reference to the application, or (b) it is necessary to formulate objections to the application, which may be taken thereto on account of any *prima facie* non-compliance with the building rules. In this connection, it is provided by rule 56 (*1*) that all information and documents which it may be found necessary to require and all objections which it may be found necessary to make before deciding whether permission to erect a new building should be given, shall be respectively required and made in one requisition and the applicant shall be apprised thereof at the earliest possible date.

It is argued by Mr. Basu that sub-rule 56 (*1*) should be read separately from the remaining sub-rules of rule 56 for the purpose of conferring upon the commissioners a general residuary power to issue requisitions at any time when they may require further information to enable them to reach a decision. The learned advocate, therefore, contends that recourse may be had to this sub-rule for the purpose of making these requisitions even after the procedure laid down in the remaining sub-rules of rule 56 has been exhausted. With this contention I am unable to agree. In my view, sub-rule (*1*) is clearly intended

to be read with the remaining sub-rules of rule 56, for the purpose of prescribing certain general conditions which must govern all requisitions and objections which it may be found necessary to make in connection with applications for the erection of new buildings. In order that the applicant may not be unduly harassed, the rule enjoins that only one initial requisition shall issue (of which the applicant shall be apprised at the earliest possible moment) and that this requisition shall mention all the points on which further information and documents are required and all objections which the commissioners may find it necessary to formulate. It is also provided that any such requisition, which it may be necessary to make, must be issued within fifteen working days after the receipt of the application under rule 52 for permission to execute the work.

Thereafter, the subsequent procedure in respect of requisitions for information and documents differs slightly from that which has been prescribed in the case of objections. It is only if the information or documents furnished in connection with a requisition are, in the opinion of the commissioners, incomplete or defective, that under sub-rule (*3*), within fifteen working days after the receipt of this defective information, they may require further information or documents to be furnished. If the party from whom information is sought fails to furnish it within three months, it is provided by sub-rule (*4*) that his application should be refused.

After the receipt of the information, it must of course be considered by the commissioners, but, in view of the provisions of rule 57 (*1*), the commissioners must make up their minds within fifteen days after the receipt of any information or documents or further information or documents, which may be requisitioned under rule 56, whether they are prepared to grant or refuse permission to erect the building in respect of which the application has been made. If

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they fail to issue a written order in the terms of the latter part of rule 57 (*1*) within the abovementioned period, it is provided by rule 58 that the requisite permission shall be deemed to have been granted.

As regards objections which the commissioners may wish to take with regard to an application under rule 52, the procedure to be followed is to some extent similar to that which has been prescribed in cases in which further information is required by the commissioners. For instance, it has been provided in rule 56 that such objections must be taken not later than a date within fifteen days of the receipt of the application. If such objections are taken, but there is no compliance on the part of the applicant with the requisition within three months, the commissioners are empowered to refuse the application. It would appear, however, that the applicant is at liberty, at any time within three months of the date of the requisition, to show cause against any objection which may have been put forward and it will then be the function of the commissioners to decide whether they have been satisfied or not with reference to the objection. No precise period has been prescribed by the rules within which the commissioners must come to a formal decision as to the validity of the objection after cause has been shown by the applicant, but it is clear from the provisions of rule 57 (*1*) that, if the commissioners wish to grant permission conditionally or unconditionally to execute the work or decide to refuse to grant the permission, they must issue a written order to this effect within fifteen days of the date of their decision. On failure to issue such order within the prescribed period the petitioner will be deemed under rule 58 to have obtained the requisite written permission to erect his building.

If it is not found necessary to call for any further information or documents or to formulate any objections, the written order to which reference is made in the latter part of rule 57 (*1*) must issue

within fifteen days after the receipt of the application under rule 52. In this connection, it is argued by Mr. Basu that the period of fifteen days which is prescribed by rule 57 must refer to working days. With this contention I agree. Under rule 56 the commissioners are allowed a period of fifteen working days after the receipt of the application, within which they may call for information or formulate objections, and it cannot, therefore, have been the intention of the legislature that the presumption raised by rule 58 should arise before the last day allowed to them for the purpose of issuing the necessary requisitions. It follows, therefore, that the period of fifteen days mentioned in rule 57 must be used as meaning "working days" in the same sense in which this expression has been used in rule 56.

Rule 57 contains no express provision on the point whether the order of the commissioners, in order to be valid, must be communicated to the petitioner, but having regard to the particular emphasis which is laid on the expression "grant permission" in rules 57 and 58 it would appear to have been the intention of the framers of the rules that, as soon as the commissioners have come to a decision on this point, their order must be communicated to the petitioner and the presumption raised under rule 58 will become operative if the order is not communicated to the applicant within fifteen working days of the date of the decision.

In connection with the matter which is now under discussion, it is a question of some importance whether the requisition to the petitioner to expose his foundations, which was dated February 18, 1938, can be regarded as a requisition for information or as an objection. Mr. Basu, on behalf of the municipality, strenuously contends that this requisition should be regarded as relating to an objection raised by the commissioners with reference to the building application and, in this view, he contends that the

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commissioners were not restricted by any time-limit as regards the date by which they should come to a decision with reference to the objection. Having regard to the nature of this particular requisition I do not think it can be said that it amounted to anything more than a requisition for information with regard to the nature of the building which it was proposed to erect and the foundations thereof. It certainly cannot be said that it formulated any objection which might be maintained with reference to the building rules contained in Sch. XVII and, on this point, therefore, I am not prepared to accept Mr. Basu's argument.

The learned advocate for the municipality then puts forward an alternative argument to the effect that, even if it be assumed that the requisition, dated February 18, was a requisition for information, the presumption which arises under rule 58 did not come into operation. In this connection, he contends that an inference should be drawn that a further requisition for information must have issued under rule 56 (*3*) some time between February 24 and March 12 when the second inspection took place. In this view, he argues that, as the calendar shows that the second inspection took place within fifteen working days of the first inspection, and, as the order of refusal, dated March 23, was issued well within a period of fifteen days from March 12, it would follow that the municipality took all the necessary steps within the periods required by rules 56 and 57 and, therefore, the order of refusal, dated March 23, must be regarded as effective. This argument is ingenious, but it cannot be accepted. There are no materials of any description on the record, which would justify an inference to the effect that the municipality regarded the information supplied to them at the time of the first inspection as incomplete or defective within the meaning of rule 56 (*3*) or that the commissioners issued any requisition for further information

under that sub-rule. Further, there is no evidence with regard to the nature of the further information (if any) which was supplied at the time of the second inspection on March 12.

The obvious intention of the legislature in enacting rules 56 and 57 was to ensure that all business connected with applications for the erection of new buildings should be transacted expeditiously and it is necessary that these rules should be strictly interpreted. In this view of the law, it could not have been intended, merely by holding an inspection before the expiry of the statutory period of fifteen working days without the issue of any requisition for further information, that the commissioners should acquire a right to an extension of the time within which they must issue the prescribed written order under the latter part of rule 57 (*1*). The intention of the legislature is that the municipality should follow strictly the mandatory procedure laid down in rules 56 and 57 and this they failed to do in the present case.

It follows, therefore, that the commissioners should have communicated their decision with regard to this matter to the petitioner not later than fifteen working days after February 24, 1938. As a matter of fact, they did not intimate their refusal of the petitioner's application until March 23, 1938, by which date the petitioner had already obtained the benefit of the presumption raised in rule 58, by reason of which it must be presumed that permission by written order to erect his proposed new building had already been granted to him.

In view of the above-mentioned considerations, it is clear that the commissioners had no authority to issue an order under s. 365 (*1*) of the Calcutta Municipal Act, in order to stop the progress of the petitioner's building work. An order to stop the progress of work under that section can only be

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issued in cases in which work is proceeding unlawfully in the manner indicated in s. 363 of the Act. In view of the terms of rule 58 of Sch. XVII, it must be deemed that an unconditional written permission had been granted to the petitioner to proceed with the work in connection with his proposed new building in accordance with the specifications submitted with his application under rule 52, provided he did not contravene any of the provisions of the Act or of any rules or bye-laws made thereunder. The learned Magistrate has expressly found that there had been no such contravention. No question arose of any illegality under sub-rules (2) or (3) of s. 363. It, therefore, follows that s. 363 had no application in this case and that the work in connection with the erection of the petitioner's building was not being carried on unlawfully within the meaning of s. 365.

It has been faintly urged on behalf of the opposite party by Mr. Basu that the petitioner cannot now claim the benefit of the presumption raised by rule 58, having regard to the fact that, after the order of refusal, dated March 23, 1938, was communicated to him, he submitted his application to the Building Committee of the municipality and thereby agreed to all intents and purposes to abide by their decision. Although it is admitted that the petitioner's application came before the Building Committee of the municipality on January 10, 1939, there is no evidence on the record, from which it can be inferred that it was at his instance that the matter came before the committee in this way. In any case, however, a right had certainly accrued to him to continue his building operations, having regard to the provisions of rules 57 and 58 and it follows that, if he continued those building operations after a belated refusal of his application by the municipality, he would commit no criminal offence if he disregarded any illegal stop order which the commissioners might issue against him. The learned advocate for the municipality in

effect wishes to contend that the petitioner is at liberty to waive his right to immunity in respect of a criminal prosecution in the circumstances of the present case, but this is an argument which I am not prepared to accept.

Having regard to the considerations set forth above, I am of opinion that the conviction of the petitioner under s. 365 read with s. 488 of the Calcutta Municipal Act is illegal. The conviction is, therefore, set aside and the Rule is, accordingly, made absolute.

The fine and the costs, if already paid, will be refunded.

Rule absolute.

N. C. C.