

VASUDEVA
 AIYAR
 v.
 THE
 NAGAPATAN
 DEVASTHA-
 NAM
 COMMITTEE.
 ———
 WHITE, C.J.

It occurred to us that, if we were satisfied that the remaining members of the committee would appoint Balakrishna Odayar if they were given an opportunity of doing so, it might not be necessary for us to interfere with the order of the District Court. The case was adjourned in order that the views of the remaining members might be ascertained. It would seem that they are not prepared to intimate what action they would take.

The order of the District Court must be set aside and the case sent back in order that the Court may deal with it by the light of this judgment.

We make no order as to the costs of the petitions to the District Court or of the revision petition to this Court. We direct that the costs of the remaining members of the committee be paid personally.

OLDFIELD, J. OLDFIELD, J.—I agree.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar.

Re NAGAPPA THEVAN AND ANOTHER (ACCUSED).*

1913.
 September
 8 and 25
 and
 October 3.

Indian Penal Code (Act XLV of 1860), ss. 188 and 269—Epidemic Diseases Act (III of 1897), ss. 2 and 3—Local Government, delegation of powers to—Regulations under the Act—Rule 104 of the Regulations ultra vires of the Local Government.

A delegation under rule 104 by the Collector to a Divisional Officer of the power to call upon people to evacuate houses is illegal and an omission to comply with the order of such officer acting under such delegated authority is not an illegal omission.

CASE taken up for revision from the file of P. SARANGAPANI, the Stationary Second class Magistrate of Udumalpet, in Calendar Case No. 44 of 1913.

The second accused (Mohideen Khan Sahib) is renter of, and the first accused (Nagappa Thevan) seller in, a toddy shop situated in the eastern portion of Udumalpet.

* Criminal Revision Case No. 284 of 1913. (Taken up Case No. 14 of 1913.)

Udumalpet, a town on the Palni road, was infected with plague in 1912, and about the end of December the block of the town in which this toddy shop was situated became badly infected and there were several deaths. The Sub-Collector acting under authority from the Collector of the district issued an order about the 27th December directing the immediate evacuation of the block and almost all the houses were accordingly evacuated; on the afternoon of the 5th January 1913, the Sub-Collector who was camping in Udumalpet went round the block inspecting it. He saw the second accused's toddy shop kept open. There were several persons in front of the shop apparently waiting to be served with toddy, but they all ran away on seeing the approach of the Sub-Collector to the shop. The Sub-Collector went in and found three pots of toddy and also an old woman grinding some curry stuff in the enclosed space in front of the shop. The first accused was inside the shop, but the second one was not in the premises at all. The Sub-Collector told the first accused to remove the things at once, but the latter objected to do it and finally a police constable was sent for and then the first accused removed the things from the shop and vacated it. The Sub-Collector thereupon lodged a complaint in the Stationary Second Class Magistrate's Court of Udumalpet under section 195, Criminal Procedure Code, charging both the accused with the offence of disobeying a duly promulgated order of a public servant under section 188 (2), Indian Penal Code, and also of doing an act likely to spread a disease dangerous to life by selling toddy in the infected area; and both the accused were convicted.

C. Sidney Smith for the *Government Pleader* for the Crown.

M. Govindarajulu Nayudu for the accused.

ORDER.—The accused (two in number) have been convicted under sections 188 and 269 of the Indian Penal Code. The question is whether they disobeyed any lawful order promulgated by a public servant so as to cause danger to public health, etc., by their disobedience. The Epidemic Diseases Act (III of 1897) section 3 says that any person disobeying any regulation or order made under that Act shall be deemed to have committed an offence punishable under section 188 of the Indian Penal Code. Owing to this statutory provision, it is unnecessary for

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the prosecution to prove, in case of disobedience to an order made under Act III of 1887, that the accused's disobedience was likely to cause danger, etc. The contention of the accused's counsel in this case that in the absence of such proof, the conviction under section 188 could not be supported, is therefore untenable.

The really important question is whether the disobeyed order was a lawful order made under Act III of 1897. The Act is a very short one of 4 sections, of which the second section is the longest and most important. Clause (1) of that section provides (I quote only the portion relevant for this case) that the Governor-General in Council "may . . . empower any person to take such measures" and that the Governor-General in Council may himself "prescribe such temporary regulations to be observed by the public or by any person or class of persons as he shall deem necessary to prevent the outbreak of" any dangerous epidemic disease "or the spread thereof."

By clause (3) of section 2, the Governor-General in Council may direct that all his powers may be exercised by a Local Government, with respect to the Local Government's territories. The Madras Government has been invested with such powers, that is, the Madras Government can "take measures," can "empower any person to take measures" and can "prescribe regulations to be observed by the public or by any person or class of persons" to put down plague, etc.

In the present case, the order disobeyed was the order of the Sub-Collector of Pollachi division to the public of Udumalpet to vacate their houses, etc. The order was not filed as an exhibit in the case and the duty of the prosecution to prove all the facts necessary to bring home the offence to the accused was not discharged in this case. Of course, if the accused pleaded guilty the Court could act upon it without evidence. But where the accused pleaded "not guilty" the fact that he did not deny the passing of the order or did not contest its legal validity cannot absolve the prosecution from its duty of proving the order and its legal validity. On this simple ground, the convictions are liable to be set aside.

I had the order of the Sub-Collector produced before me during the arguments in this petition case. I find that the

Sub-Collector does not say that the Local Government empowered him to take any measures, but it says that he made the evacuation order "under the powers conferred by the Collector." The Collector can be empowered by the Local Government under the Act to "take measures," but the Collector cannot be empowered under the Act to himself give "powers" to others. The Regulations made under the Act by Government prescribe what acts should be observed by the public or by any person or class of persons and give powers to any person to take measures but such powers cannot be delegated by that person in his turn to others, *unless such delegation* ought to be necessarily implied from the nature of the measures to be taken under the granted powers. The Regulations made by the Local Government under the Act do not confine themselves to the Regulations "to be observed by the public, etc." but also contain provisions empowering certain persons to take certain measures and even contain penal clauses which do not properly fall under Regulations to be observed by the public, etc. The Act (section 2, clause 1) keeps these two powers of the Government distinct, namely (1) the power "to empower any person to take measures" and (2) the power "to make Regulations for the conduct of the public," etc.

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Rule 71 of the Local Government's Regulations, clause (5), seems to empower a Plague Officer (the Sub-Collector in this case comes within the meaning of that term "Plague Officer,") to direct the evacuation of a town *when authorized* by the Collector. The power "to take measures" may include the power to ask others to evacuate their houses. A direction to the public to comply with that requisition falls, in my opinion, to be exercised under the power to make Regulations to be observed by the public, etc., that is, that direction should be made by the Regulations passed by the Government.

In this case, the Sub-Collector did not get the authority of the Collector under rule 71 (5) to require the public of Udamalpet to evacuate their houses but seems to have acted under the powers delegated to him in 1904 by a general order of the then Coimbatore Collector passed under rule 104 of the Regulations. Rule 104 is as follows: "The Collector may, *from time to time*, assign to Plague Officers and Assistant Plague

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Officers jurisdiction over such local areas and confer on the latter officers such powers as he may deem fit."

This rule seems to be *ultra vires* of the Local Government. The Government itself can give powers under the Act to an Officer or to Officers to take measures, but it cannot give powers under the Act to any person so as to enable the latter to himself give the said powers to others unless such powers by their very nature can be exercised only through agents. The Collector went even further in his order of 1904, in which he says that he "is pleased to *delegate* the powers detailed in the annexed schedule" (including the power to order evacuation) "to all Plague Officers and Assistant Plague Officers" and not merely to appoint them as his sub-agents. (The order does not say expressly that the Officers to whom the Collector's powers are delegated should exercise them only within their jurisdiction as Revenue Officers or as public servants to any other department.)

The Collector had no power to delegate his own powers and the Local Government had no right to empower the Collector to delegate the powers which the Local Government gave to the Collector except in respect of performance of acts which by their nature are or can be usually done only through agents and sub-agents. The Government can, by Regulations empower any person "to take measures" for the suppression of plague and can prescribe *temporary* Regulations directing the public or any person or class of persons to *observe* such Regulations, that is, the Local Government can itself order the public or any person or class of persons to evacuate their houses, etc. Curiously enough, the Regulations do not directly require the public on the Collector's request to evacuate but this may be implied from the tenor of several rules. The phrase "to take measures" seems to mean the doing of disinfection work, the destruction of rats and other similar measures (see section 231 of the District Municipalities Act) and may include requisitions to be given to other persons to do certain acts such as evacuation, but the directions to those other persons to obey the requisitions should be made by the Local Government under temporary Regulations. The Regulations to be observed by the public or a class of persons are to be *temporary* Regulations made by the Local Government.

The Madras Regulations are not called "Temporary." I think that they ought to show in the beginning or the end up to what time (say, till Government declares the Madras Presidency to be free from plague) they are to be in force. In my opinion, the power "to take measures," which power may be granted to any person by the Local Government is a different thing (though closely connected with the effective carrying out of the measures taken under that power) from the Regulations or orders which have to be observed or obeyed by the public or a person or class of persons in respect of those measures. These latter orders to be obeyed by the public or a person or class of persons cannot without great danger to the liberty of the subject be left to be promulgated by any authority except the Local Government and hence the Act gave almost autocratic power to the Local Government alone to issue temporary Regulations or orders to be observed (that is, obeyed) by the public or a person or class of persons (orders to evacuate dwelling houses, etc.) interfering very seriously with the rights of the public. The Collector in this case has delegated his right to take measures, *i.e.*, calling upon people to evacuate houses, to his Divisional Officer, whoever the latter officer may happen to be from and after 1904. This seems to me to be illegal. The Divisional Officer as a Plague Officer can under rule 71 (5) apply for authority to the Collector to ask people to evacuate and when so authorized, the power given by the Local Government to the Plague Officer by section 71 to take measures will come into operation and give him the right to require evacuation of houses. But as I said already, the Sub-Collector did not get or apply for authority under rule 71 (5) in this case before he passed the order to the public to evacuate houses and he acted under the delegation under rule 104 by a former Collector of the Collector's own powers. That rule is *ultra vires*, and the delegation under that rule is of no legal effect to confer any powers on the Sub-Divisional Officer. It cannot surely be said that the power to order evacuation of houses is a power of such a character that from its nature it could be conveniently exercised only through appointing agents to exercise that power by delegation as each occasion arises without any further reference to the principal on any particular occasion (see the analogy of section 190 of the Indian Contract Act).

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As regards the conviction under section 269, Indian Penal Code there was no proof let in by the prosecution that the accused were guilty of any unlawful or negligent act likely to spread the infection of any disease, etc. Taking it that "act" includes illegal omission (section 32, Indian Penal Code) if the order of the Divisional Officer was illegal, the omission to comply with it is not an illegal omission.

I therefore, set aside the convictions and sentences and direct the fine, if levied, to be refunded to the second accused.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1913.
September
17, 23 and 24
and
October 9.

A. SURYANARAYANA (PLAINTIFFS NOS. 2 AND 3), APPELLANTS

IN ALL,

v.

A. PATANNA AND EIGHT OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 8 (except.), 3, cl. 2 (d)—Inamdar—Right to kudivaram—No presumption in favour of Inamdar—No distinction between zamindar and inamdar as to presumption—Surrender or abandonment of holding, not an acquisition by landholder of right to kudivaram—Suit in ejectment—Jurisdiction of Civil or Revenue Court.

The presumption is that an inamdar like a zamindar, is not the owner of the kudivaram right.

Per SADASIVA AYYAR, J.—Surrender or abandonment of the holding by the tenant, is not a case of acquisition of the kudivaram right by the landholder within the terms of the exception to section 8 of the Estates Land Act and such land does not therefore cease to be part of the estate; consequently the Civil Courts have no jurisdiction to entertain suits in ejectment brought by inamdars against the defendants who were tenants in possession, but the plaints should be returned for presentation to the Revenue Courts.

Per SPENCER, J.—A narrow interpretation should not be placed on the word 'acquired' in the exception to section 8, so as to exclude acquisition by an inamdar by surrender or abandonment of the kudivaram right by a tenant.

SECOND APPEALS against the decrees of F. A. COLERIDGE, the Acting District Judge at Masulipatam, in Appeals Nos. 472, 473

* Second Appeals Nos. 1205, 1207 and 1208 of 1912.