1902

SRI GOPAL v. PIRTHI SINGH.

in this appeal. Among others section 43 of the Civil Procedure Code was held to be a bar to his suit in the two first Courts. The Court of appeal expressed some doubt whether that was correct. There might have been a nice question to be argued; but the appellant's Counsel did not open it, and did not even read the section to the Committee.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the respondents Bechai Lal and Musammat Janki, who alone defended this appeal.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Pyke* and *Parrott*.

Solicitors for the respondents (5) and (6)—Messrs. *Thomson & Co.*

J. V. W.

REVISIONAL CRIMINAL.

1902
April 29.

Before Mr. Justice Knox.

EMPEROR *v.* BAL KISHAN.*

Act (Local) No. 1 *of* 1900 *(N.-W. P. and Oudh Municipalities Act) sections* 128*(c)*, 132—*Municipal Board, powers of—Bye-law—Bye-law held to be unreasonable and its enforcement refused.*

The English law as to the necessity of bye-laws being reasonable is applicable to bye-laws framed in the exercise of their statutory powers by Municipal Boards in India.

The Municipal Board of Naini Tal passed a bye-law under the powers conferred upon it by section 128, clause *(c)* of Local Act No. I of 1900 to the following effect, namely:—"No coolie, whether bearing loads or not, no servant except in attendance on his master, and no prostitute shall use the upper North Mall "(one of two parallel roads running along the north side of the Naini Tal lake) " at any time."

Held that, as regards the words "no servant, except in attendance on his master", this was under the circumstances an unreasonable bye-law; and the Court declined to give effect to it.

WITHIN the limits of the Naini Tal Municipality were two roads running along the north side of the lake parallel with each other, but at slightly different levels. The upper road was a fairly broad metalled road, on the north side of which were shops and houses; the lower was more of the nature of a foot-path

*Criminal Revision No. 186 of 1902.

1902

EMPEROR v. BAL KISHAN.

close down by the margin of the lake. The upper road was in fact used chiefly by the better classes of the inhabitants of the station; the lower road mostly by coolies. The two roads were known by the names, respectively, of the Upper and Lower North Mall. The Municipal Board of Naini Tal, purporting to act under the power conferred upon it by section 128, clause *(c)*, of the N.-W. P. and Oudh Municipalities Act, 1900, * passed, with the view of regulating traffic on the two roads above referred to, a bye-law, the material portion of which was as follows :—"No coolie, whether bearing loads or not, no servant, except when in attendance on his master, and no prostitute shall use the Upper North Mall at any time."

After the passing of this bye-law one Bal Kishan, a servant of one of the residents of Naini Tal, was found on the Upper Mall, not in attendance on his master, but apparently going on a message by his master's order. Bal Kishan was prosecuted under section 132 of the Municipalities Act and fined Rs. 15. His appeal was dismissed by the Sessions Judge, and he accordingly preferred an application in revision to the High Court.

Pandit *Sundar Lal*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

KNOX, J.—One Bal Kishan, a servant, has been convicted of an offence falling under Rule No. 10 of Rules under section 128, clause *(c)* of the N.-W. P. and Oudh Municipalities Act, 1900, and been sentenced to pay a fine of Rs. 15. I am asked to revise this order, upon the ground that the Municipal Board had no authority in law under section 128, clause *(c)*, to frame a rule of this kind; further, because the rule was not necessary for the prevention of danger or grave inconvenience to the public; and thirdly, because the bye-law is unreasonable in itself. The bye-law in question runs as follows :—"No coolie, whether bearing loads or not, no servant, except in attendance on his master, and no prostitute shall use the Upper North Mall at any time." The

* This section (so far as is material to the present case) runs as follows :—

128. Any Board may, by rules—

(c) Provide for the regulation or prohibition of any description of traffic in the streets, where such regulation or prohibition appears to the Board to be necessary for the prevention of danger or grave inconvenience to the public.

facts of the case are not questioned. They are very briefly that the petitioner, a servant, and not in attendance on his master, was found at 2 P. M., on the 13th August, 1901, walking with a letter towards Talli Tal along the Upper North Mall.

Now the power given to Municipalities under section 128, clause *(c)* of the N.-W. P. and Oudh Municipalities Act, 1900, is undoubtedly a very large and wide power, and therefore one to be exercised with great discretion. The Board is under it authorized to make rules for prohibiting any description of traffic in the streets of Naini Tal, where such prohibition appears to the Board to be necessary for the prevention of danger or grave inconvenience to the public. It is contended on behalf of the Board that as the law has made them sole arbiters of what is necessary for the prevention of danger or grave inconvenience to the public, and that as they consider the use of the Upper North Mall by a servant, except when in attendance on his master, and at any hour of the day and night, a matter of grave inconvenience to the public, there is nothing further to be said. If the matter be one of grave inconvenience, the proof of it must be an easy matter. It does not appear from the judgment, nor from any arguments addressed to me, wherein consists the grave inconvenience to the public of servants using the Upper North Mall. No inconvenience, grave or otherwise, was shown even in argument, nor is it apparent at first sight wherein the grave inconvenience lies. It is intelligible that strings of coolies bearing loads may be inconveniences, and might be, under certain circumstances, grave inconveniences to the public. But it is difficult to distinguish between the case of a servant carrying a letter, as in the present instance, and a person of similar position in life, say a carpenter or a blacksmith passing along the Upper North Mall. The servant would be under the bye-law, if it be a good bye-law, committing an offence; the independent carpenter or blacksmith would be committing none. Both are or are not doing acts of a precisely similar nature. All bye-laws and rules of the same nature have to be very carefully construed, and the invariable rule of law is that they are to be construed in favour of the subject. The rule of law prevailing in England that a bye-law may be examined in order to discover whether it is reasonable in

1902

EMPEROR v. BAL KISHAN.

itself is a very sound rule, and no authority has been shown to me confining such a construction to bye-laws in England. This is indeed conceded by the argument of the counsel for the Municipality, in that he contended, that the present bye-law is not an unreasonable one. After fully considering all the arguments that have been addressed to me, it appears to me that the bye-law is not a reasonable one. The distinction made between a person who is a servant and a person of similar degree who is not a servant is both invidious and unreasonable. It would also appear that the bye-law, if strictly construed, would lead up to impossibilities. There are shops and places which abut immediately on the Upper North Mall. How is a servant at point *A*, abutting upon the Mall, to proceed to point *B*, similarly abutting on the Upper North Mall, without using the Upper North Mall for the purpose? The only answer given was, that the spirit of the bye-law must be looked to, not the strict letter. This Court has held on previous occasions that where such grave power as this is entrusted to Municipalities, it behoves them to be extremely careful in framing their bye-laws so as to leave no room for doubt as to what is meant by them.

There are certain remarks in the judgment which I cannot pass over as unimportant. The learned Magistrate who tried the case speaks of the case as being a trivial one, and adds, "but where it is well-known that defiance has been and is being offered to these rules, some fine must be imposed which would be held by the accused to be a real punishment." These remarks are distinctly out of place in a case where the evidence discloses no intention to act in defiance of the law. The act of the servant is in itself a harmless act; there is no evidence that he or any one else acted contumaciously. There is no presumption in law in favour of the existence of contumacy or wilful defiance. The learned Magistrate was wrong in making any such presumption. It was suggested that the case was a test case. If it be so, there is no defiance of law in instituting a test case.

I hold that the present rule is one which, as it stands, the Board had no authority to pass. It seems to me doubtful whether the passing of a servant along a road falls within the term

1902

EMPEROR v. BAL KISHAN.

"traffic." This point was, however, not argued, and my judgment proceeds upon the ground that grave inconvenience to the public has not been shown, and the rule, as it stands, is an unreasonable one. I confine my judgment to the immediate matter before me, *viz.*, the using the Upper North Mall by a servant not in attendance on his master. No other point in the bye-law arises for decision. I accordingly set aside the conviction and the fine, and direct the latter to be refunded.

1902
April 29.

Before Mr. Justice Blair.

IN THE MATTER OF THE PETITION OF BEHARI LAL.*

Criminal Procedure Code, section 145—No decision come to by Magistrate as to party in possession—Application for revision at instance of party who could not in his own right be entitled to immediate possession—Practice.

Held that where a Magistrate, after entertaining proceedings under section 145 of the Code of Criminal Procedure, had declined to make any order declaring one or other of the contending parties in possession, the High Court would not interfere in revision at the instance of a person who, though apparently the next reversioner to the estate, could for the time being have no possible right on his own behalf to present possession. *Laldhari Singh* v. *Sukhdeo Narain Singh* (1) and *Anesh Mollah* v. *Ejaharuddi Mollah* (2), distinguished.

THIS was an application in revision arising out of certain proceedings under section 145 of the Code of Criminal Procedure held before the Joint Magistrate of Moradabad. The facts as found by the Magistrate were as follows:—One Har Sahai Patak died, leaving a widow, but apparently no direct male heir. After his death a dispute arose about mutation of names. This ended in a compromise, whereby it was settled that the widow Musammat Chunno should be entered in the khewat as owner for her life-time, and that Behari Lal the grandson of the deceased should be entered as her manager. It was also clearly laid down that Musammat Chunno had not reserved the right to remove Behari Lal from his possession. Musammat Chunno granted leases of certain villages belonging to the estate to Ram Sarup and others, and this action of hers led to the

* Criminal Revision No. 229 of 1902.

(1) (1900) I. L. R., 27 Calc., 892. (2) (1901) I. L. R., 28 Calc., 446.