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Rs. 375 within three months from this date, subject to the condition that the defendant will be entitled to remove the trees planted by him within three months from the date of the payment of the mortgage money. The plaintiff will get his costs in all courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh.

EMPEROR *v.* KASHMIRI LAL.*

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May, 12.

Act (Local) No II of 1916 (United Provinces Municipalities Act), sections 267 (b), 318, 321—Notice to construct a cesspool—Appeal—Prosecution for failure to comply—Power of trying court to question reasonableness of Board's order on the merits—Procedure in case of continuing breach indicated.

No appeal will lie from a notice legally issued under section 267 *(b)* of the United Provinces Municipalities Act, 1916, requiring the owner of premises to construct a cesspool.

The effect of section 321, read with section 318 of the United Provinces Municipalities Act, 1916, is that certain orders, directions or requirements of a Municipal Board or of the Committee of a notified area only can be called in question as regards their reasonableness or practicability, but the legality of any such orders, directions or requirements can be questioned in any court in which penal proceedings are brought in respect of any alleged breach for non-compliance therewith.

Emperor v. *Ram Dayal (1)*, *Municipal Board of Etawah* v. *Debi Prasad (2)*, *Ram Pratab Marwari* v. *Emperor (3)* and *Emperor* v. *Mannu (4)* referred to.

An order imposing a daily fine in respect of future breaches is *ultra vires*. If the offender persists in continuing the the breach after the first conviction, the fact has to be proved in a second and substantive proceeding brought against him in respect of the subsequent breaches.

In such cases of continued breach of an order passed by the Municipality in respect of an urgent matter affecting public health or sanitation it is desirable for the Municipality to exercise its power of having the necessary work done at the expense of the person who was ordered to do it.

THIS was reference made by the District Magistrate of Meerut in a prosecution arising out of notice issued under section 267 (*b*) of the United Provinces Municipalities Act, 1916. The facts of the case are fully stated in the judgment of the Court.

* Criminal Reference No 262 of 1921.

(1) (1910) I. L. R., 33 All., 147. (3) (1920) 18 A. L. J., 229.

(2) (1920) I. L. R., 42 All., 435. (4) (1920) I. L. R., 42 All., 295.

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The parties were not represented.

WALSH, J. :—This case has been referred to the High Court by the District Magistrate of Meerut. One Lala Kashmiri Lal, Agarwal Jaini, who has premises in the notified area of Baraut, was fined Rs. 15 by a Magistrate of the first class for failing to comply with a notice issued by the Committee of the notified area as the sanitary authority, requiring him to construct a cesspool ; and also Rs. 2 a day from a certain date in respect of future breaches. The latter part of the order, as has often been pointed out, is clearly illegal and must be set aside. Future breaches must be dealt with somewhat differently, as I will point out presently. Magistrates who have to administer this rather troublesome and important Act would do well to study the provisions more closely than they seem to do. However, this part of the case raises no question of importance.

The main point on which the case has been referred to this Court is a question of importance to the general public and to sanitary authorities. It is unfortunate that in a matter of this kind they have not thought it necessary to be represented and I have to deal with it without any assistance; but I have come to a clear conclusion as to the law upon the subject.

The premises of the owner, Kashmiri Lal, seem to adjoin a Jain temple which is visited by a large number of women from time to time, and the Committee of the notified area, no doubt for good reasons, formed the opinion that the existing method of dealing with the rain water and dirty water from his premises was unsatisfactory and insanitary. That is a question entirely within their competence. In the month of June they passed a resolution requiring him under section 267 (*b*) of the Municipalities Act of 1916 to construct a cesspool in a certain manner, namely, partly under his wall and partly on or into a *kharanja*. The object of this requirement seems to have been to collect the water in some form of storage which would facilitate its removal and prevent its distribution on the public road in the neighbourhood of the temple. Notices were issued to the owner giving him, in accordance with the scheme provided by the Act, 15 days to construct a cesspool. The notices were for some reason addressed to his peon, presumably because it was known that

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this was the most certain way of reaching him. Nothing turns on this, as Kashmiri Lal has acknowledged the receipt of the notices. The first notice was issued on the 2nd of July, the second on the 1st of August, upon which Kashmiri Lal filed an objection and asked the Committee to allow him to construct a drain. On the report of a member of the committee this request was refused and a fresh notice was issued to him on the 15th of October. Various technical questions have been raised about the service and the form of the notice. There is nothing in these. The form of the notice was correct and adequate, referring to the section under which the requirement had been made by the Committee, and also to the number and date of the Committee's resolution. Kashmiri Lal did not comply with the notice, and proceedings were taken against him under section 307 (*b*) which makes a person liable to a fine for failing to comply with a notice given under the provisions of the Act. There is no question that Kashmiri Lal has failed to comply with the notice. The only real question is whether it was given under the provisions of the Act. It seems to me quite clear that it was.

Kashmiri Lal's explanation at the original hearing for not having complied with the notice was that he had appealed to the District Magistrate. So far as I can discover from the Act, without anyone present to argue the point, it appears to me that there is no appeal under the Act against a notice issued by the sanitary authority under section 267. An appeal is given to any person aggrieved by any order or direction made by the Board or Committee of various kinds under a number of sections enumerated in section 318 of the Act, but section 267 is not amongst the sections so enumerated. The reason for this probably is that matters of sanitation and health in connection with private drains are matters at the same time so urgent, and also so entirely for the local authority, that it was thought better to constitute them the sole arbiters of such matters.

The Magistrate who tried the case went into the merits of the requirements of the sanitary authority, examined the plan and discussed various alternatives and criticized somewhat unfavourably the conclusion at which the sanitary authority had arrived, but he held that it was not for him to question the

reasonableness of the notice and he fined Kashmiri Lal. I think having regard to the general scheme of the Act and the policy of the law in these matters, the Magistrate was clearly right unless there is some statutory provision to the contrary. It would be obviously difficult and embarrassing and would cause a vast amount of discussion if every order of this kind, not merely sanitary but other orders of a public nature, made by a public authority in the administration of the general comfort and health of the community were to be canvassed and debated in a Magistrate's court in every small matter, before a tribunal which is not necessarily qualified to form an opinion and certainly not so well qualified as a municipal body, which, if it does its work properly, ought to act upon the advice of trained and experience employés.

On the matter, however, coming up before the District Magistrate, the District Magistrate took the view, basing himself partly upon a decision of this Court, that the Magistrate who has to deal with a question of breach is entitled to consider the reasonableness of the order. This question is constantly causing difficulty, if one may judge by the cases which come before this Court, and it is clear that the District Magistrate has allowed himself to be misled by failure to realize a distinction which, although it may seem somewhat subtle, is really quite clear and intelligible. Section 321 provides that no order or direction referred to in section 318 shall be questioned in any other manner or by any other authority than is provided therein. This, at first sight, would seem to suggest that orders and directions not mentioned in that section may be questioned by other authorities. But, according to my view, sub-section (1) of section 321 was rendered necessary by the power of appeal which was given and was enacted to make it clear that the reasonableness of the order could only be questioned by the appellate authority provided in such cases by the Act. "Question" to my mind clearly means "called in question as regards its reasonableness or practicability." It cannot mean in the context in which it is used, "challenging its legality." The scheme of the Act is clear that, except as provided in the case of specified orders which may be appealed to the District Magistrate, no order or direction or

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requirement made by a municipality, or a committee of this kind, can be questioned on the merits, provided that it is a requirement or an order or a direction made within the powers conferred upon the authority, but its legality can undoubtedly be questioned in any court in which penal proceedings are brought for breach of the order, if it can be shown that it is an order, requirement or direction which the Board could not make, or to use an expression familiar in judicial proceedings, an order made outside its jurisdiction. All that was laid down in the authority referred to by the District Magistrate, *Emperor* v. *Ram Dayal* (1) is contained in one sentence in the judgment:—"If the Board have no power whatever to issue the notice, it cannot be considered to be a notice under that section and the provisions of section 152 do not apply." The same reasoning would apply to a piece of paper issued from the office of the Board having all the appearance of an order, but which had not been authorized by any resolution or competent authority of the Board, but was a mere sham and pretended order issued by some subordinate official without the authority of the Board. I think these principles are clearly established by the recent authorities of this Court. There is the case of *Municipal Board of Etawah* v. *Debi Prasad* (2), where it is held that a notice calling upon a private person to alter his drain, not on sanitary grounds but on some grounds of danger to passers-by at night was not a good notice under section 267 and no offence had been committed in ignoring it. Similarly it was held in the case of *Ram Pratab Marwari* v. *Emperor* (3) that a notice issued under the signature of the Secretary without the authority of the Board and not served upon the owner, was not a good notice and might be disobeyed. On the other side of the line is the case of *Emperor* v. *Mannu* (4) where it was held that an order refusing to allow the applicant a licence to store firewood in Cawnpore, which he had not appealed against, but which had been made within the powers of the municipality, could not be questioned in these proceedings. In the result, upon the main and important question I disagree with the District Magistrate and agree with the

(1) (1910) I. L. R., 33 All., 147. (3) (1920) 18 A. L. J., 229.

(2) (1920) I. L. R., 42 All., 485. (4) (1920) I. L. R., 42 All., 295.

Magistrate who convicted Kasmiri Lal and I uphold the fine of Rs. 15.

The fine of Rs. 2 per day for future breaches is clearly beyond the power of the Magistrate. The section provides that in the case of a continuing breach a further fine up to Rs. 5 per day, after the date of the first conviction, may be imposed where the offender is proved to have persisted in the offence. It is a condition precedent to prove that the offender has persisted after the first conviction. That can only be done by a second and substantive proceeding after the date when he has continued to commit the breach. I would merely point out to this municipality and municipalities in general that, although these proceedings to impose fines are no doubt necessary in some cases and it may be even desirable sometimes to pursue an objecting owner in further proceedings for fines in respect of continuing breaches, the Act really provides a far more efficient alternative. In addition to proceedings against the owner and having fined him for original disobedience to the notice, the sanitary authority is also given the power to do the work itself or cause the work to be done and to charge the expenses upon the owner. If it is a matter of health requiring notice upon the owner of criminal proceedings for breach, it must be a matter sufficiently urgent to call upon the local authority to remedy the evil in the interests of the health of the community with as little delay as possible. The erection in this case was clearly needed, but was an erection, so far as time and money were concerned, of no difficulty. The owner was required to do it in 15 days. That probably means that either he or the municipality could have done it in two or three days. In such circumstances, instead of wrangling in a Magistrate's court and going up in revision and coming to the High Court, it is clearly in the public interest that a municipality, if it has issued a reasonable notice and has the courage of its opinion, should do the work in the interests of the community (in this case the visitors to the Jain temple) and charge and recover from the owner the few rupees which it would cost. Presumably the matter is somewhat small, but the important point is that we are in the month of May, 1921, when nothing has been

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done in a matter which the municipality thought ought to be done in June, 1920.

I accept the reference to the extent of quashing the fine for future breaches and the order of the Magistrate directing the applicant to do the work. A court of law cannot compel a man to execute work and this part of the order must be quashed. As I have pointed out, the authorities should do it and charge the owner with the costs. The fine for the original breach must be upheld.

Order modified.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal

MUHAMMAD MUIN-UD-DIN AND ANOTHER (DEFENDANTS) *v.* JAMAL FATIMA (PLAINTIFF).*

1921
May, 13.

Act No. IX of 1872 *(Indian Contract Act), section* 23—"*Public policy*"—*Ante-nuptial agreement to provide for wife's maintenance in case of dissensions between the parties.*

Held that an ante-nuptial agreement entered into between the prospective wife on the one side and the prospective husband and his father on the other (the parties being Muhammadans) with the object of securing the wife against ill-treatment and of ensuring her a suitable amount of maintenance in case such treatment was meted out to her, was not void as being against public policy. *Bai Fatma* v. *Alimahomed Aiyab* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *S. Abu Ali*, for the appellants.

Maulvi *Iqbal Ahmad*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ.:—The question for consideration in this case is whether an ante-nuptial agreement made between a lady and her prospective husband and her prospective father-in-law, providing for the payment of a certain maintenance in the event of future dissensions between her and

* Second Appeal No 819 of 1919 from a decree of Abdul Ali Khwaja, Subordinate Judge of Budaun, dated the 9th of December, 1918, confirming a decree of Muhammad Junaid, Munsif of East Budaun, dated the 9th of May, 1918.

(1) (1912) I L. R., 37 Bom., 280.