

REVISIONAL CRIMINAL.

Before Mr. Justice Pullan.

LALMAN v. BISHAMBHAR NATH.*

1931
November, 5.

Criminal Procedure Code, sections 1 and 133—Public nuisance—Lime kiln licensed by Municipality—Municipalities Act (Local Act II of 1916), sections 298 (G), 318, 321—Jurisdiction of Magistrate not ousted by powers given by Municipalities Act, or by other remedy available under that Act—Right of complaint by person choosing to reside near an existing nuisance.

A lime kiln within municipal limits had been working for 45 years, upon a license obtained from the municipality from year to year. There were very few houses in the locality and no objection had been raised by the public to the working of the kiln. Recently some houses were built by the owner of the kiln in the neighbourhood and the tenant of one of these houses made a complaint to a Magistrate under section 133 of the Criminal Procedure Code alleging that the working of the kiln was noxious to the health of residents in the vicinity and was a public nuisance. The Magistrate ordered the kiln to be stopped and removed.

Held that although the Municipalities Act, 1916, had given to the Municipal Boards control of all matters relating to public health within municipal limits, and the municipality concerned had passed bye-laws dealing with the management of noxious trades including the burning of lime and the license was issued subject to such bye-laws, and although under section 318 of the Municipalities Act any person who was adversely affected by an order of the Board on a question of this nature had a right of appeal to the District Magistrate, and section 321 laid down that such an order of the Board was not to be questioned in any other manner, yet these facts did not oust the jurisdiction of the Magistrate to deal with a complaint under section 133 of the Criminal Procedure Code and to regulate the manner of actual working of the licensed lime kiln so as not to be obnoxious to the health or comfort of the community. At the same time it is generally inexpedient that a Magistrate should take action in such cases, for these matters are left by the legislature to the control of the Municipal Boards

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who have a Health Officer to instruct them on matters of hygiene.

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As the present complaint did not directly challenge any order passed by the Municipal Board, but merely the manner in which the license given by the Board was worked, section 321 of the Municipalities Act did not stand in its way.

Section 1 of the Criminal Procedure Code had no application to the case, as the Municipalities Act, 1916, was not in force when that Code was passed.

As it appeared on the evidence that the lime kiln in question was not a danger to the health or comfort of the community and that if it caused discomfort to any one it was only to the complainant and his immediate neighbours who had deliberately chosen to reside in a position where they knew they might be inconvenienced by the working of the kiln, the order of the Magistrate was set aside.

Messrs. *K. O. Carleton* and *Kumuda Prasad*, for the applicant.

Messrs. *Saila Nath Mukerji* and *M. L. Chaturvedi*, for the opposite party.

PULLAN, J. :—This matter comes before this Court in the form of a reference by the Sessions Judge of Farrukhabad. There is also an application in revision of that order on behalf of one Lalman. This Lalman, who owns property on both sides of the Fatehgarh-Farrukhabad road, within the limits of the Fatehgarh Municipality, has been working a lime kiln on his land on the north-east side of the road for the last forty five years. According to the Municipal bye-laws, which were published in the Gazette of the 15th of September, 1928, no person is allowed to burn lime within Municipal limits without a license from the Municipal Board. Lalman has obtained a license from year to year, and so far as the Municipal Board is concerned he is still authorised to conduct the business of burning lime on this site. One Bishambhar Nath, who occupies a house on the opposite side of the road, made a complaint to a Magistrate of the first class under section 133 of the Code of Criminal Procedure in which

he said that the working of this kiln is "noxious to the health of the residents of the vicinity, and is a public nuisance". The Magistrate took proceedings on this complaint and passed an order directing Lalman to remove the lime kilns within twenty days and not to start them again on the present site. The Sessions Judge at first was of opinion that the Magistrate's order should be set aside, mainly on the ground that it was an application by an individual on account of a private grievance. He subsequently modified that order and came to the conclusion that the Magistrate was entitled to order removal of the kiln; but he was of opinion that as the Health Officer of the Municipal Board had himself suggested the raising of a wall in front of the kiln and was of opinion that if the wall were raised nobody would be discomforted, this court should set aside the order of the Magistrate, but order Lalman to raise a wall seven feet high on the southern side of the kiln, and further "order the Magistrate after that to see whether the kiln is still a nuisance to the public". It is open to this Court on a reference of this nature to consider both the legality and the propriety of the order of the Magistrate. I have been asked on behalf of Lalman to consider in the first place that the order was passed without jurisdiction. I was referred to the first section of the Criminal Procedure Code by which it was enacted that the Code of 1898 would not affect any special or local law then in force, and it was argued that this restriction on the scope of the Code should be held to cover the Municipalities Act, although that Act was passed after the Code. This view is based on a previous enactment, the N.-W. P. Municipalities Act of 1883, but I am of opinion that there is nothing in that Act which could affect the Criminal Procedure Code in its relation to the present Municipalities Act of the year 1916. But the Municipalities Act itself has given to the Municipal Boards control of all matters relating to

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public health within the Municipal limits; and the Municipal Board of Fatehgarh has passed bye-laws dealing with the management of what are known as noxious trades, and which include the burning of lime. Under section 318 of the Municipalities Act any person aggrieved by an order of the Board on a question of this nature has a right of appeal to the District Magistrate; and under section 321 of the Act it is laid down that no order or direction referred to in section 318 shall be questioned in any other manner, or by any other party, than is provided therein. It was held by a Bench of this Court in an unreported case, F. A. F. O. No. 79 of 1928, by Sir SHAH MUHAMMAD SULAĪMAN and myself that an aggrieved person under section 318 does not mean only an aggrieved party, but includes any person who is really affected adversely by the order which may have been passed behind his back; and in that view of the law the present applicant would be a person aggrieved, if it can be considered that he is now objecting to an order passed by the Municipal Board under a bye-law framed under clause (G) of section 298. But it does not appear that the present complaint challenges directly any order passed by the Municipal Board; on the contrary it is a complaint under section 133 of the Code of Criminal Procedure, and merely sets out that the working of the kiln is noxious to the health of the residents. That is to say, the complaint challenges not the order of the Board allowing Lalman to burn lime on a certain plot, but the manner in which Lalman carries out the permission given to him by the Board. In a parallel case decided by a Bench of the Calcutta High Court in *Krishna Mohan Banerjee v. A. K. Guha* (1) it was decided that a Magistrate was empowered to pass an order curtailing the rights of a certain person under a license. The licensee had an iron yard, but in the course of his business he made an intolerable noise which amounted to a

(1) (1920) 57 Indian Cases, 829.

nuisance to the public in the neighbourhood. The Judges laid down there that though the Magistrate would have acted more wisely in advising the complainant to set in motion the machinery of the Local Act applicable to the case, the existence of an alternative remedy "does not deprive the Magistrate of jurisdiction"; and it appears that a similar view has been taken by this Court in the case of *Emperor v. Raghunandan Prasad* (1). Although it is not expressly stated in that case that the factory, the noise of which was held to be injurious to the physical comfort of the community, was within Municipal limits, it must be concluded that this was the case, as it was situated in a congested part of the town of Bareilly. In my own opinion the Magistrate had jurisdiction to pass an order under section 133 of the Code of Criminal Procedure to regulate the manner in which Lalman conducted his business, if he found that in so doing Lalman was acting in a manner injurious to the health or physical comfort of the community. It is generally inexpedient that a Magistrate should take action in such cases, for these matters are left by the legislature to the control of the Municipal Boards who have a Health Officer to instruct them on matters of hygiene; and in this case I must consider whether the Magistrate's order was a proper order and necessary, even in a modified form, in the interests of the health of the public. As the order stands, it is a direction to remove the kiln in spite of the license given by the Municipal Board; and this Court would be loath to uphold such an order *in toto* as it would afford a disastrous precedent by allowing Magistrates to interfere in matters which have been made over by the legislature to the Municipal Boards and the committees of public health appointed under them. But such an objection would not apply to the modification of the order proposed by the Judge and which had already

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(1) (1931) I.L.R., 53 All., 706.

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been recommended by the Health Officer of the Board, if I were able to hold that such a modification was justified in the interests of the public health.

I have stated above that the learned Sessions Judge at first questioned the right of the complainant coming forward with such a complaint on the ground that it was merely a personal matter and not a *bona fide* complaint in the interests of the public. There is abundant evidence to show that this kiln and a few temples are the only buildings on the north-east side of the road for a considerable distance, and on the other side of the road there are a few houses. It is clear from the evidence that people who use the road have no objection whatever to the kiln; and it comes to this that the only persons who object are those living in three or four houses, more or less opposite to the kiln. I cannot help noticing that the kiln is to the north-east of these houses, and this is not the prevailing direction of the wind in the United Provinces. A lime kiln as such causes at times a rather unpleasant smell and a very little smoke. I very much question whether the majority of the Indian public have any objection whatever to the near neighbourhood of a lime kiln. At any rate, the public of Fatehgarh appear to have put up with this lime kiln for the last forty five years without making any objection, and there is, in my opinion, no adequate evidence that apart from slight discomfort there are any evil effects on the public health from the mere neighbourhood of the lime kiln. I do not dispute the statement of two medical witnesses who say that certain noxious gases are formed in burning lime, but there are also two medical witnesses, who saw the kiln when it was in action, who are of opinion that no gases are formed which could be injurious to any one. A further objection can be taken to the complaint in this case, in that the complainant himself has only recently chosen to occupy the house opposite the kiln, which was built by the owner of the kiln, and when he did so he was well aware of

any discomfort that might be caused by the burning of the lime. The complainant was a free agent, and I cannot see that he had any right to set himself down in front of somebody else's lime kiln and then say that he objects to the conduct by that person of a lawful trade for which he holds a license from the local health authority, and which he has been conducting for the last forty five years. I cannot consider any good purpose will be served by making Lalman build a wall seven feet high in front of the kiln. In the first place, I do not consider that the kiln at present is in any way dangerous to the health of the public, and in the second, I am not prepared to find that any inconvenience that is being caused by it will be diminished by the erection of a wall such as that proposed by the Sessions Judge.

Thus, though I am of opinion that the Magistrate would not have been acting without jurisdiction in ordering a licensed burner of lime to take precautions so as to prevent his trade from being a nuisance to the community, I am of opinion that in any case such an order by a Magistrate is open to general objection in so far as it must inevitably reflect on the orders of the Municipal Board, and in this case in particular, that it has no justification because the lime kiln in question is not a danger to the community, and if it causes discomfort to any one it is only to the complainant and his immediate neighbours who have deliberately chosen to reside in a position where they are liable to be inconvenienced by the smoke and smell from the kilns.

I accordingly allow the application in revision and accept the reference in the form in which it was originally submitted, and set aside the order of the Magistrate *in toto*.

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