APPELLATE CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

1937
February, 3

EMPEROR *v.* KALKHOWAN*

Municipalities Act (Local Act II of 1916), sections 298, heads H(m) and F(d); 299—Bye-law No. 3—Permission for holding circus and variety show—Grounds for refusal—Unjustifiable refusal—Prosecution for holding show without permission—Defence that refusal of permission was unjustifiable—Jurisdiction—Legality or propriety of refusal can not be questioned in the criminal court.

The manager of a variety show applied to a Municipal Board for permission to exhibit the show at a particular place in the city. Bye-law No. 1, framed by the Municipal Board under section 298, head H(*m*), of the Municipalities Act, required the permission of the Executive Officer to be taken by a person wishing to use any place within municipal limits as circus, exhibition, show, etc., and bye-law No. 3 provided that the Executive Officer should satisfy himself as to the safety and suitability of the place for the performance intended, and that he might in his discretion refuse or grant sanction or impose any reasonable conditions in respect of the use of the place. The Executive Officer refused the application for permission; but the order of refusal did not proceed on any consideration of the safety and suitability of the place, but on the ground that the majority of the Board were averse to such shows and liked to discourage them. In spite of the refusal of permission the show was exhibited, and the manager was thereupon prosecuted under section 299 of the Municipalities Act:

Held, that under the provisions of bye-law No. 3 the safety and suitability of the site proposed is not the sole criterion for granting or refusing permission; the Executive Officer can also use his judgment and discretion. In the present case, however, he did not use his own judgment and discretion but merely deferred to what he considered to be the sentiment of a majority of the Board. The order of refusal was, therefore, at least improper as it was not based on proper grounds. But the impropriety, or illegality, of the grounds of refusal

*Criminal Appeal No. 836 of 1936, by the Local Government, from an order of L. H. Niblett, City Magistrate of Bareilly, dated the 25th of July, 1936.

can not be a good defence in a prosecution under section 299. If an order of refusal is passed on frivolous, improper or illegal grounds, the injured party may have a remedy by suit or otherwise; but if the bye-law has been legally passed, the criminal court is concerned only with the question whether there has been a breach of it by holding the show without the requisite permission.

The bye-laws in question, passed under head H (*m*) of section 298, were legally passed. The "places of public entertainment or resort" mentioned in head F(*d*) of that section, in respect of which there is no provision requiring permission to be obtained, refer to places of that description which have a permanent character, such as parks, recreation grounds, and the like; but even assuming that the Board was competent to pass bye-laws relating to the exhibition of variety shows etc. under head F(*d*), there was nothing to prevent such bye-laws being legally passed under head H(*m*).

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Mr. *Waheed Ahmad Khan*, for the respondent.

COLLISTER and BAJPAI, JJ.:—This is an appeal by the Local Government against a judgment of acquittal. The respondent is a gentleman named Mr. F. G. Kalkhowan who is, or was, the general manager of a concern known as the Amusement Variety Company. On the 8th of June, 1936, he applied to the Chairman of the Municipal Board at Bareilly for permission to exhibit his show and in his application he stated that it would consist of theatrical performances, circus, acrobatics and some games of skill. The Chairman on that same date wrote the following order: "To the Executive Officer, for disposal. I have no authority to give or revoke license. If he gives licenses, I cannot say anything. Personally I have no objection if it is not objectionable."

That same day the Executive Officer refused permission, but his order was so worded as practically to disclaim personal responsibility for the refusal. After referring to the applicant's testimonials and the Chair-

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man's endorsement on the application, the Executive Officer wrote as follows:

"There is no doubt that the majority of the Board likes me, as licensing officer subordinate to the Board, to discourage these shows and to do all in my power to give effect to their wishes. I have been lately issuing short period licenses to shows which I know are much inferior to the one under reference now, and there is a general outcry amongst the public and in the press against my permitting them and I know that I will not be spared on the plea of the present applicants being a far higher class people. In view of the facts mentioned above and also that there have been such shows going on for some time in the small city of Bareilly, which is not a very prosperous town, I think that permission at present will be prejudicial to public interest. I, therefore, refuse permission. Inform the applicant."

In spite of that order of refusal the applicant proceeded to exhibit his show in the city at Bareilly. He was accordingly prosecuted by the Municipal Board under section 299 of the Municipalities Act for infringing certain bye-laws; but the Magistrate who tried the case has acquitted the respondent on the ground that his application was illegally refused.

Section 298 of the Municipalities Act empowers a Municipal Board to pass bye-laws, and clause (*m*) of head H of List I provides for the passing of bye-laws "prohibiting or regulating, with a view to promoting the public safety or convenience, any act which occasions or is likely to occasion a public nuisance and for the prohibition or regulation of which no provision is made under this heading". Bye-laws of the Municipal Board of Bareilly under section 298, heads H(*m*) and J(*d*), were published in the U. P. Gazette dated March 22, 1919. Bye-law No. 1 reads as follows: "Except with the permission of the Executive Officer and in accordance with such conditions as are imposed under these bye-laws a person shall not use any place within municipal limits as circus, exhibition, theatre

or cinema, or for the display of fireworks or for any other such purpose."

Bye-law No. 3 is in the following terms: "The Executive Officer, on receiving the application, shall satisfy himself either by personal inspection or by the report of a subordinate official or otherwise as to the safety and suitability of the place for the performance specified, and may, in his discretion, refuse or grant sanction, and, in granting sanction, may impose any reasonable conditions in respect of the use of the place for the performance in question."

The learned Magistrate in the course of his judgment says: "It has been argued with considerable force that according to bye-law No. 3 of the same bye-laws (the) only grounds on which the Executive Officer could base his refusal are (1) the safety and (2) the suitability of the place for the performance specified." He then quotes from the order of the Executive Officer and observes: "In other words, it is not the safety of the place, but the unsafety of his own difficult position, not the suitability of the place, but the unsuitability of the whims and fancies of the majority of the Board, whose subordinate he says he is, which makes him refuse." Further on, after quoting the Executive Officer's remark that he "will not be spared on the plea of the present applicants being a far higher class people", the Magistrate remarks: "This clearly indicates not only that the Executive Officer did not base his refusal on the safety and suitability of the place, nor even on his discretion as allowed by the law, but on a nervous fear of the majority of the Board who have no concern at all with such a sanction, as the bye-laws clearly show." The Magistrate was, therefore, of the opinion that the application of the respondent, who had deposited the fee in advance, had been illegally refused and he accordingly acquitted him.

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We do not think that under the provisions of bye-law No. 3 the safety and suitability of the site proposed is the sole criterion for granting or refusing permission. It is certainly the duty of the Executive Officer to satisfy himself on these points, and if he finds that the place is not safe and suitable, permission must be refused; but it does not follow that if the place is found to be safe and suitable, permission will automatically be granted. It will be the duty of the Executive Officer thereafter to use his judgment and discretion and then decide whether permission should be granted or refused. In his order of refusal the Executive Officer in question has said nothing about the safety or suitability of the place on which it was proposed to exhibit the show; nor did he use his own judgment or discretion in the matter at all, but merely deferred to what he considered to be the sentiment of a majority of the Board. It is true that he also referred to a "general outcry amongst the public and in the press", but this was not the main ground for his refusal. It may thus be said that his order of refusal was at least improper, for the obvious reason that it was not based on proper grounds.

The question remains whether the impropriety—or, as found by the Magistrate, the illegality—of the grounds of refusal can be a good defence in a prosecution under section 299 of the Municipalities Act. The first thing to observe is that bye-law No. 7 provides a right of appeal from an order of the Executive Officer to the Chairman of the Board. The respondent did not avail himself of that right, but proceeded to defy the order of the Executive Officer. Bye-law No. 1 makes it perfectly clear that no circus, carnival, etc., can be exhibited except with the permission of the Executive Officer. The legality of these bye-laws was not challenged in the court below. It has been challenged before us, however, on the ground that, although they purport to have been passed under heading H of section 298, the appropriate heading under which they

ought to have been passed was heading F, clause (*d*). This clause empowers the Municipal Board to pass bye-laws providing, among other things, for the establishment, regulation and inspection of places of public entertainment or resort; and learned counsel argues that no permission is required under heading F and therefore there was no ground for prosecution. We think that the "places of public entertainment or resort" mentioned in clause (*d*) of heading F refer to places of that description which have a permanent character, such as parks, recreation grounds, etc. But even assuming for the sake of argument that the Board was competent to pass bye-laws relating to the exhibition of variety shows, carnivals, etc., under heading F, there is nothing to prevent such bye-laws being passed under heading H, clause (*m*), and it is obvious that the bye-laws in question were in fact passed under this clause and heading and not under heading F at all. It is thus clear that the bye-laws in question were legally passed; and when a bye-law whose legality is established provides that a certain act shall not be done without permission, it follows that if that act is done without such permission there is a breach of the bye-law. If an order of refusal is passed on frivolous, improper or illegal grounds, the injured party may have a remedy by suit; but that is a matter with which we are not concerned. In the present case the plain, incriminating fact stands out that the respondent performed without permission an act which under a legal bye-law he had no power to perform unless permission were granted to him by the Executive Officer. It is thus manifest that a breach of the bye-laws has been committed and the respondent is liable to conviction.

We have been referred by learned counsel for the respondent to the case of *Mannua* v. *Emperor* (1), decided by PIGGOTT, J. In that case a woman and her

(1) (1919) 17 A.L.J., 976.

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son had been storing wood at a certain place within the limits of the Municipal Board of Cawnpore. For some years there had been a dispute between them and the Board as to their right to use that plot of land. The Board claimed that it was *nazul* land, while the applicants denied this claim and pleaded that it had been in their exclusive occupation for the purpose of a timber yard for more than 50 years. Ultimately the Board passed a resolution to the effect that no license should be given to the applicants for storing wood at that place and that a lease alleged by the Board to be subsisting should be cancelled. No license for storing wood had been applied for. The applicants continued to store their wood at the place in dispute and thereafter they were prosecuted for infringing the bye-laws of the Board inasmuch as they had no license. Since the applicants in that case had admittedly made no formal application for the grant of a license, they were convicted by the trial court and sentenced to pay a fine of Rs.50 each. The learned Judge of this Court at page 980, in considering what the position would be in the event of a formal application for a license being presented, observed that "a Municipal Board will be straining its authority if it refuses a license, properly applied for, under any of these bye-laws, not on any grounds of public safety, health or convenience, but merely in order to secure an advantage to itself in a dispute about a question of title with another person". In the result this Court found that although an offence had been committed, it was of a technical nature and the fines were reduced to Rs.5. This authority is against the respondent, and supports the view which has been pressed before us by learned counsel for the Crown.

In our opinion this appeal must be allowed. We accordingly allow it and we set aside the order of acquittal and convict the respondent under section 299

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of the Municipalities Act. In view, however, of the fact that the Executive Officer in refusing permission did not use his own judgment or discretion and that his order was not passed on proper grounds, we are of opinion that a small fine will meet the ends of justice. We accordingly sentence the respondent to pay a fine of Rs.20 or in default to undergo 7 days' simple imprisonment.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Harries

JAMIL-UN-NISSA AND ANOTHER (DEFENDANTS) *v.* MUHAMMAD ZIA (PLAINTIFF)*

1937 *February*, 17

Muhammadan law—Gift—Delivery of possession—Open piece of waste land—Character of possession requisite—Declaration in deed of gift that possession has been delivered—Revocation—Co-sharers of joint land—Exclusive possession of one co-sharer—Such co-sharer raising permanent construction—Ouster—Mandatory injunction.

Under the Muhammadan law, although delivery of possession is necessary to make a gift complete, actual possession is not necessary; all that is required is that steps should be taken to place the donee in a position to take possession effectively and to invest him with authority for that purpose. Actual possession is not necessary where the property gifted is not capable of being possessed physically. So, where the donor was one of the co-sharers in the village and as such owned only a fractional share in an open piece of waste land, although he was in exclusive possession of it, and he executed a gift of that land to another co-sharer in the village, who also had a fractional share in that land, and declared in the deed that he had delivered possession to the donee, it was *held* that there was sufficient delivery of possession to complete the gift.

The declaration made by the donor in the registered deed that possession had been delivered was binding on him, and even if it did not amount to an estoppel it certainly threw

*Second Appeal No. 1267 of 1933, from a decree of C. I. David, Additional Civil Judge of Allahabad, dated the 22nd of July, 1933, reversing a decree of Hardeo Singh, Munsif of East Allahabad, dated the 30th of June, 1930.