REVISIONAL CRIMINAL

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

1935 *September*, 23

EMPEROR *v.* BAIJNATH RAM*

Municipalities Act (Local Act II of 1916), sections 184(2), 186, 209—Separate sanction necessary for constructions projecting over street or drain—General sanction to the building not sufficient—Private ownership of drain immaterial—Municipalities Act, sections 307, 318, 321—Notice to remove or stop constructions—No appeal made to District Magistrate, challenging lawfulness of notice—Notice can not be questioned in criminal court.

Under section 180 of the Municipalities Act the Chairman of a Board can only accord a general sanction for the erection or re-erection of a building, but where such erection or re-erection involves the making of any constructions contemplated by section 209, the provision of section 184(2) comes into operation and makes it incumbent to obtain a separate sanction in respect of them under section 209, and such sanction can be given only by the Executive Officer.

The operation of clause (*b*) to section 209(1) of the Municipalities Act is not confined to public drains alone, and any person wishing to make a structure or projection over a private drain is also bound to obtain permission under that section, if the drain lies in a street as defined in the Act. The question of his title to the drain is quite immaterial in this respect.

The words "notice given under the provisions of this Act" in section 307 of the Municipalities Act mean that the notice in question should not merely profess to be under the Act but should have been given in compliance with the provisions of the Act. As a rule, therefore, a criminal court trying a charge under section 307 would be entitled to satisfy itself that the notice satisfies this condition. Section 318, however, lays down a special provision in the case of certain notices specified therein and in this respect controls the provisions of section 307. It follows, therefore, that where the notice which is the subject of a charge under section 307 happens to fall within one of the classes of notice provided for in section 318, the criminal court is prevented from entering into the question of its legality

*Criminal Revision No. 181 of 1935, from an order of Vishnu Ram Mehta, Additional Sessions Judge of Ghazipur, dated the 5th of November, 1934.

by virtue of the special provisions of the latter section. According to these provisions the only method by which a person aggrieved by a notice falling within the purview of section 318 can challenge the validity of that notice is by way of an appeal to the District Magistrate or other special officer appointed by the Local Government, and, if he fails to avail himself of that remedy, no other authority such as a criminal court trying a case under section 307 can question the validity of the notice. The legislature having provided a complete remedy by sections 318 and 319 against illegally issued notices of the classes enumerated in section 318, it deliberately ousted the jurisdiction of any other court or tribunal in that matter. *Emperor* v. *Har Prasad* (1), followed.

Mr. *A. P. Pandey*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

SULAIMAN, C.J., and MULLA, J.:—This is an application in revision by one Baijnath Ram, a resident of Ghazipur, against his conviction by a Magistrate of two separate offences under sections 210 and 307 of the Municipalities Act (Act II of 1916), which has been upheld by the Additional Sessions Judge of Ghazipur. He has been fined Rs.10 for each offence.

The prosecution of the appellant in this case was launched in rather peculiar circumstances, from which it would appear that the municipal authorities at Ghazipur did not fully realise their responsibilities in dealing with these civic affairs. The applicant owned a double storeyed house abutting on a public road running through a market with a drain on each side. The house having been considerably damaged by the earthquake in January, 1934, the applicant decided to pull it down and to re-erect a new one instead. Accordingly, on the 15th of February, 1934, he gave a notice to the Municipal Board under section 178 of the Municipalities Act, attaching thereto a plan of the proposed building, as required by the rules. It is admitted that the plan showed a balcony or projection on the upper storey

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and a structure over the drain in the lower storey. The Chairman of the Board, who received the notice, called for a report in the ordinary course from the Municipal Health Officer, who inspected the locality and objected to the structure over the drain on sanitary grounds. In spite of that objection the Chairman proceeded to pass an order on the 25th of May, 1934, sanctioning the proposed building in accordance with the plan submitted by the applicant, with the direction that the structure over the drain should be so constructed as not to obstruct the cleaning and flushing of the drain. This sanction was endorsed on the back of the plan submitted by the applicant and was conveyed to him on the 28th of May, 1934. A very important point to be noted about this endorsement is that it was signed not only by the Chairman but also by the Executive Officer. Armed with this sanction, the applicant forthwith started the construction of the building in accordance with the approved plan. On the 5th of July, 1934, some employee of the Municipal Board made a report to the Executive Officer drawing his attention to the fact that in building the new house the applicant had constructed a balcony or projection on the upper storey and had also made some structure over the drain on the margin of the road. On this report the Executive Officer, who, as noted above, had put his signature on the sanction accorded to the applicant by the Chairman, proceeded to pass an order on the 18th of July, 1934, directing that a notice be issued to the applicant asking him to remove the balcony or projection. A notice was accordingly issued on the 23rd of July, 1934, but it was not served on the applicant until the 2nd of August, 1934. This notice was confined to the balcony or projection in the upper storey, and the applicant was directed to remove it. Another notice was, however, issued on the 2nd of August, and was served on the applicant on the same date, referring both to the balcony or projection and the structure over the drain and directing him to stop the construction of

the front portion of his building. The fact that these notices were duly served on the applicant but he did not comply with them is not denied, though with reference to the latter notice directing him to stop further construction of the front portion of the building it is contended—and not without some force—that by the time it was served on him the construction of that portion had already been completed. On the 11th of August, 1934, a third notice was issued to the applicant asking him to show cause why he should not be prosecuted for failing to comply with the notice already served on him and why the balcony and the structure over the drain, which he had constructed without obtaining a proper sanction, should not be demolished. In answer to that notice, which was served on him on the 13th of August, the applicant protested that the construction in question had been made in accordance with the plan sanctioned by the Board and had been completed long before. The Executive Officer then proceeded to file a complaint against the applicant under sections 210 and 307 of the Municipalities Act, which ultimately resulted in his conviction as mentioned above.

The applicant's defence, which has been rejected by both the courts below, is, firstly, that the construction in question having been made in accordance with the sanction of the Board duly obtained by him he cannot be held guilty of an offence under section 210 of the Act; and, secondly, that the Board being bound by its own sanction had no power to get those constructions demolished, and hence the notices issued by the Board were not valid notices under the Act. With reference to one of those constructions, viz. the structure over the drain, it is further pleaded that the Board had no right of action, inasmuch as the drain was the private property of the applicant.

The trial court found (1) that having regard to the nature of the construction in dispute, the sanction obtained by the applicant was not a proper one, inas-

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much as it was his duty, under section 184(2) of the Act, to make a separate application for sanction in respect of those constructions which fell within the purview of section 209, and his failure to do so made him liable to the penalty provided for in section 210; and (2) that in view of the definition of "street" as contained in section 2(23), it must be presumed that the drain in question was part of the public road on which the applicant's house abuts, and that presumption had not been rebutted by the oral and documentary evidence produced by the applicant to support his alleged title.

The learned Additional Sessions Judge endorsed these findings and further pointed out by reference to the case of *Emperor v. Har Prasad* (1) that so far as the applicant's conviction under section 307 was concerned, he was not entitled to question the legality of the notices served on him in the present proceeding, because he failed to avail himself of the remedy specifically provided for that purpose by section 318 of the Act.

The contentions raised by the applicant in the courts below have also been pressed before us, but having fully examined them in the light of the relevant sections of the Act, we find that they have no force and have been rightly rejected. So far as the applicant's conviction under section 210 is concerned, the position appears to be quite plain. It cannot be denied that both the constructions in dispute are such as are contemplated by section 209. The sanction obtained by the applicant from the Chairman of the Board was obviously one under section 180, and could not validly cover those constructions. Under section 180, the Chairman of a Board can only accord a general sanction for the erection or re-erection of a building, but where such erection or re-erection involves the making of any constructions contemplated by section 209, the provision of clause (2)

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of section 184 comes into operation and makes it incumbent on the person desiring to make such constructions to obtain a separate sanction in respect of them under section 209; and in view of section 60 read with schedule II, such sanction can be given only by the Executive Officer. It is admitted that the applicant did not obtain any separate sanction for the constructions in dispute, as required by section 184(2) read with section 209; and hence it is clear that he made those constructions without the permission required by section 209, and thereby committed an offence under section 210. It has, however, been strenuously contended on behalf of the applicant that in the circumstances of the present case we ought to hold that the sanction obtained by the applicant from the Chairman amounted also to a sanction by the Executive Officer, who endorsed it by his signature, and hence it was not necessary for the applicant to obtain a separate sanction under section 209. We have given due weight to this contention, but we cannot allow it to prevail, even though we feel that the conduct of the Executive Officer was likely to mislead the applicant; firstly, because the language in which the sanction was couched clearly indicated that it was a sanction given by the Chairman alone, and secondly, because it was incumbent on the applicant to discharge the statutory obligation laid on him to obtain a separate sanction under section 209, and his failure to do so cannot be condoned merely on the ground that he was misled by the fact that the sanction obtained by him, which on the face of it had been given by the Chairman alone, also bore the signature of the Executive Officer. It has to be borne in mind that the applicant's liability under section 210 arises in respect of two separate constructions, one being a balcony or projection on the upper storey, and the other a structure over the drain in the lower storey. So far as the former construction is concerned, it is clear that the applicant did not obtain any separate sanction for it, as required by clause (*a*) to

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section 209, and hence there can be no doubt that in erecting it he committed an offence under section 210. With reference to the latter construction it is, however, urged on behalf of the applicant that the Board had no right of action, because the drain, over which that construction was made, was his private property. Having regard to the clear language of clause (*b*) to section 209, which obviously covers that construction, we find that the applicant's contention is entirely beside the point. The question of the applicant's title to the drain is quite immaterial, because there is absolutely no justification for supposing that the operation of clause (*b*) to section 209 is confined to public drains. All that is needed to attract the operation of that clause is that the drain, over which it is sought to make some structure or projection, should be situated in a street, which, according to section 2(23), "means any road, bridge, footway, lane, square, court, alley or passage which the public or any portion of the public has a right to pass along, and includes, on either side, the drains or gutters and the land up to the defined boundary of any abutting property, notwithstanding the projection over such land of any verandah or other superstructure." It clearly follows, therefore, that any person wishing to make a structure or projection over a private drain is bound to obtain permission therefor under section 209(*b*), provided the drain lies in a street. The policy behind this provision is quite obvious. The filthy condition of a drain lying in a street may be a source of great danger to public health, and the municipal authorities being charged with the duty of maintaining public health have consequently been armed by the legislature with the power of controlling the construction of any structure or projection which might be calculated to prevent the proper cleaning of such a drain. It cannot be denied in the present case that the drain, over which the construction in question has been made, lies in a street

within the definition of that term as contained in section 2(23). It follows, therefore, that even on the assumption that the drain was the applicant's property, it was his duty to obtain the permission necessary under section 209(*b*) in respect of the structure which he proposed to erect over it. We are, therefore, satisfied that the applicant has rightly been found guilty of an offence under section 210 in respect of both the constructions in dispute.

Turning now to the applicant's conviction under section 307 we find that it can rest on his non-compliance with any one of the two notices issued to him, one on the 23rd of July, 1934, directing him to demolish the balcony or projection in the upper storey, and the other on the 2nd of August, asking him to stop further construction of his building. Both the courts below appear to have laboured under a misapprehension in dealing with the applicant's liability under section 307. The trial court seems to have been under the impression that all the notices issued to the applicant directed him to stop the construction of the building, and it was his failure to do so which made him liable to the penalty prescribed by section 307. The appellate court on the other hand proceeded on the assumption that all the notices had been issued under section 211 directing the applicant to demolish the construction over the drain. None of these two positions is, however, correct, for on a careful examination of the record we find that there were in fact only two notices on which the prosecution could have based the charge under section 307. One of them, dated the 23rd of July, was confined to the balcony or projection in the upper storey and directed the applicant to remove it within a week; while the other, dated the 2nd of August, though it referred both to the balcony and the structure over the drain, only asked the applicant to stop the construction of the front portion of the house. The fact, however, remains that the applicant's conviction under section 307 cannot be

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interfered with if it is found that it rests validly on his non-compliance with either of these two notices. The contention on behalf of the applicant is that these notices were not issued under the provisions of the Act in the sense that the conditions necessary under the Act to justify the issuing of such notices had not been fulfilled, and hence the applicant could not be validly convicted under section 307.

Now we find that so far as the first notice is concerned the position is quite clear and the applicant's contention has no force. That notice was undoubtedly issued under section 211 of the Act and directed the applicant to remove the balcony or projection in the upper storey which he had constructed without obtaining a separate sanction for it as required by section 209(*a*) read with section 184(2) of the Act. In these circumstances we fail to see how it is possible for the applicant to challenge the legality of that notice and to contend that it was not issued under the provisions of the Act as required by section 307. The applicant's failure to comply with that notice was clearly an offence under section 307, and it is not, therefore, possible to interfere with his conviction under that section in respect of the said notice. In view of this finding it is not really necessary for us to enter any further into the question of the propriety or otherwise of the applicant's contention under section 307, but, as his contention in respect of the other notice is calculated to raise a doubt as to the correctness of the decision of this Court in the case of *Emperor* v. *Har Prasad* (1), which has also found expression in some other cases of this Court decided by single Judges, we consider it advisable to analyse that contention in order to set the conflict at rest.

The other notice, which directed the applicant to stop further construction of the building, could not possibly have been issued under section 211 of the Act, for that

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section contains no such provision. The only other section under which such a notice could have been issued is section 186 which runs as follows: "The Board may at any time by written notice direct the owner or occupier of any land to stop the erection, re-erection or alteration of a building or part of a building * * * in any case where the Board considers that such erection, re-erection, alteration, construction or enlargement is an offence under section 185." Now an offence under section 185 is committed only where a person "begins, continues or completes the erection or re-erection of, or any material alteration in, a building or part of a building . . . without giving the notice required by section 178 or in contravention of the provisions of section 180, sub-section (5), or of an order of the Board refusing sanction, or any written directions made by the Board under section 180 or any bye-law." In the present case it is admitted that the applicant not only gave the notice required by section 178 but also obtained a sanction under section 180, sub-section (5) to erect the building in accordance with the plan submitted by him. It is, therefore, clear that he had not committed any offence under section 185 and no notice asking him to stop further construction of the building could validly be issued to him under section 186. The question now arises as to whether the applicant was entitled to challenge the validity of that notice in the trial court in order to avoid the penalty for non-compliance prescribed by section 307. That question has been answered in the negative in the case of *Emperor* v. *Har Prasad* (1), which rests on an interpretation of sections 318 and 321 of the Act. Section 318 provides that any person aggrieved by a notice or direction given under certain sections of the Act including section 186 may appeal to the District Magistrate or to such officer as the Local Government may appoint for the purpose of hearing such appeals. Section 321 definitely lays

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down 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." The learned Judges of this Court who decided the case of *Emperor* v. *Har Prasad* (1) have interpreted these sections to mean that the only method by which any person aggrieved by a notice under section 186 can challenge the validity of that notice is by appealing to the authority provided in section 318, and if he fails to do so, no other authority such as a criminal court can question the validity of the notice. The learned Judges have further held that there is nothing in the language of section 307 to indicate that it is the duty of the criminal court trying a case under section 307 to satisfy itself that the notice has been lawfully issued, and in support of that conclusion have pointed out that the language of section 307 is quite different from that of the corresponding section 147 of the old Municipalities Act which made it incumbent on the trial court to satisfy itself that the notice relied upon by the prosecution had been lawfully issued. The contention on behalf of the applicant is that this view does not take into account the full effect of the words "under the provisions of this Act" at the very beginning of section 307 which ought to be interpreted to mean that the notice in question should not merely profess to be under the Act but should have been given in compliance with the provisions of the Act. We have no hesitation in holding that this interpretation is correct, but we find that it does not necessarily lead to the conclusion that the view taken by the learned Judges in the case of *Emperor* v. *Har Prasad* (1) is open to any doubt. It must be noted that section 307 embodies a general provision in respect of any notice given under the provisions of the Act or under a rule or bye-law to a person, requiring him to execute a work in respect of any property movable or immovable, public or private, or to provide or

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do or refrain from doing anything within a prescribed time. As a rule, therefore, a criminal court trying a charge under section 307 would be entitled to satisfy itself that the notice in question has been given in compliance with the provisions of the Act or some rule or bye-law. Section 318, however, lays down a special provision in the case of certain notices specified therein and has the effect of withdrawing them from the ambit of section 307. It provides certain exceptions to the general rule laid down in section 307 and must, consequently, control the provisions of that section. It would follow, therefore, that where a notice, which is the subject of the charge under section 307, happens to fall within one of the exceptions provided in section 318, the criminal court is prevented from entering into the question of its legality by virtue of the special provisions of the latter section. Now section 318 clearly provides that the legality of a notice falling within its purview can be challenged by way of an appeal to the District Magistrate or to some officer specially appointed by the Local Government for that purpose. The fact that the legality of a notice falling within the purview of section 318 can be challenged in appeal is quite evident from section 319 which runs as follows: "If on the hearing of an appeal under section 318 any question as to the legality of the prohibition, direction, notice or order arises on which the officer hearing the appeal entertains reasonable doubt, he may, either of his own motion or on the application of any person interested, draw up a statement of facts of the case and the point on which the doubt is entertained, and refer the statement, with his own opinion on the point, for the decision of the High Court." The section further provides that where a reference is made to the High Court, the subsequent proceedings in the case shall be governed by the provisions of order XLVI of the Civil Procedure Code or such other rules as are made by the High Court under section 122 of that Code. It is clear from the above

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that a person aggrieved by a notice covered by section 318 has been provided by the law with a complete opportunity of challenging the legality of that notice, first in appeal before the District Magistrate or other special officer appointed by the Local Government and again by way of reference to the highest court. There is consequently nothing anomalous or shocking to the sense of justice in the provision made by section 321 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." The only possible interpretation of this section is that the legislature, having provided a complete remedy to the aggrieved person under sections 318 and 319, deliberately ousted the jurisdiction of any other court or tribunal. We may also note here that section 321 gives a further chance to the aggrieved person to apply for a review of the order passed by the appellate authority if it happens to be adverse to him. Having regard to all these provisions, we have arrived at the same conclusion as the learned Judges who decided the case of *Emperor* v. *Har Prasad* (1), that the only method by which a person aggrieved by a notice falling within the purview of section 318 can challenge the validity of that notice is by way of an appeal to the District Magistrate or other special officer appointed by the Local Government, and, if he fails to avail himself of that remedy, no other authority such as a criminal court trying a case under section 307 can question the validity of the notice. The result, therefore, is that the applicant's conviction under section 307 can validly rest on his non-compliance with both the notices referred to above, for though one of them falling under section 186 was illegal in the sense that it was not given in compliance with the provisions of the Act, yet its illegality could not be questioned by the criminal court in the present proceeding.

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The case of *Kashi Prasad Verma* v. *Municipal Board, Benares* (1) is clearly distinguishable. No doubt section 164 is somewhat similar in language and provides that the liability to be assessed or taxed cannot be questioned "in any other manner or by any other authority than is provided in this Act". But a criminal court is one of the authorities referred to in the Municipalities Act itself for hearing complaints under section 155 of the Act, which section begins with the supposition that the goods are "liable to the payment of octroi", a fact which has to be established by the prosecution. On the other hand, section 321 lays down 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", and the civil court is nowhere mentioned in the Municipalities Act as a court of competent jurisdiction which can entertain an original suit, as distinct from a mere reference to the High Court.

We, therefore, uphold the applicant's conviction under sections 210 and 307 of the Municipalities Act, but in proceeding to consider the appropriate sentence in this case we feel constrained to notice the irresponsible conduct of the municipal authorities in dealing with him. The Chairman, who dealt with the applicant's notice under section 178, must have known that he was empowered only to grant a general sanction for the construction of a building under section 180 but had no authority to permit any construction falling within the purview of section 209. The plan attached by the applicant to the notice under section 178 clearly showed a balcony on the upper storey and a structure over the drain in the lower storey, both of which were clearly governed by section 209. It was, therefore, the duty of the Chairman to make it clear that the sanction which he had accorded had no reference to those constructions. We find on the other hand that he sanc-

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tioned the construction of the building in accordance with the plan submitted by the applicant and further made a reference to the structure over the drain which he had no power to sanction and directed that it should be so made as not to obstruct the cleaning of the drain. Again, the Executive Officer had no business to put his signature on the sanction given by the Chairman in the terms mentioned above, which he must have known was not valid under the Act. The whole proceeding was obviously calculated to mislead the applicant, and we cannot help feeling that he was actually misled by it. We find further that the applicant was allowed to proceed with the construction of the building for nearly two months before it was discovered by the Executive Officer, who had made himself a party to the invalid sanction, that the construction was being made without a proper permission. Taken as a whole the conduct of the municipal authorities in this case is in our opinion open to serious objection, and it is no excuse to say that the applicant must be presumed to know the law, for it is nonetheless reprehensible that they should first have misled him by their own act and should then have brought him to book for non-compliance with the law. The prosecution of the applicant in these circumstances may be technically correct but it has no moral justification behind it. We must, therefore, express our disapprobation of the conduct of the municipal authorities, and we propose to do so by reducing the sentence imposed on the applicant from Rs.10 to one anna for each offence.

The result, therefore, is that we uphold the applicant's conviction under sections 210 and 307 of the Municipalities Act and dismiss his application in revision but reduce the sentence imposed on him to one anna for each offence.