

when he received the money from Ramzan Khan, that he was doing something wrong but that he realized it then and therefore expressed his regret. Up till now his attitude has been that what he did was not wrong and that he was justified in what he did.

In these circumstances I agree with the order of my Lord suspending the Mukhtear for a period of three months.

AGARWALA, J.—For the reasons already given by my learned brothers, I agree that the agreement between the Mukhtear and Ramzan Khan was one which it was highly improper for a legal practitioner or any bailor to enter into, and that the conduct of the Mukhtear in concealing the agreement during the early stages of the present proceedings must be viewed as a serious aggravation of the original offence that he committed; I therefore agree with the order of suspension proposed in his case.

Reference accepted.

CRIMINAL REFERENCE.

Before Macpherson and James, JJ.

BALKISHUN DAS MARWARI

v.

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Bihar and Orissa Highways Act, 1926 (B. & O. Act III of 1926), sections 4 and 5—Rules 2 (2) (a) and 36 of the Rules framed by local Government—tin roofing projecting over side-drain of "Government road", whether is an encroachment—Act, whether retrospective—rules contemplated by section 4, scope of—fine for continuing breach, when can be imposed—magistrate, whether competent to impose anticipatory fine.

* Criminal Reference no. 64 of 1934, made by W. W. Dalziel, Esq., I.C.S., Sessions Judge of Manbhum-Sambalpur, in his letter no. 185-C., dated the 8th December, 1934.

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A tin roofing projecting over the side-drain of a " Government road " is an encroachment within the meaning of rule 2 (2) (a) of the Rules framed by the local Government under section 4 of the Bihar and Orissa Highways Act, 1926.

The Act, however, is not retrospective, its provisions not being applicable to obstructions or encroachments made before the Act came into operation.

Ram Ratan Sao v. King-Emperor(1), followed.

The rules contemplated by section 4 of the Act may include, besides rules for the prevention of obstruction, both rules for the prevention of any encroachment and the preservation of the road, for instance, by removal of the encroachment (made since the Act came into force) whether by continuing fine or otherwise.

Prabhu Charan Ram v. King-Emperor(2), not followed.

Rule 36 (2) makes a continuing breach of rule 2 and the other rules mentioned in rule 36 (1) punishable with a further fine for every day during which the *breach is continued after* the offender has been convicted for such breach. Rules 36 (2) must, however, be read with section 5 of the Act which limits the power to impose such a fine to every day after the date of the first conviction during which the offender *is proved to have persisted in the offence*.

Held, therefore, that the magistrate is not competent to impose an anticipatory fine on and from the day of conviction.

Reference under section 438, Code of Criminal Procedure, 1898.

The case was heard in the first instance by Varma, J. who referred it to the Division Bench.

The facts of the case material to this report are stated in the Judgment of Macpherson, J.

B. C. De and *K. K. Banarji*, in support of the reference.

(1) (1935) Cr. Ref. 68 of 1934 (Unreported).

(2) (1935) Cr. Ref. 60 of 1934 (Unreported).

No one against the reference.

MACPHERSON, J.—Under the provisions of section 438 of the Code of Criminal Procedure the Sessions Judge of Singhbhum on the 8th of December last submitted the record of 'The King-Emperor *versus* Balkishun Das Marwari' in which the accused was convicted by a magistrate of Chaibassa under rule 2(2) (a) of the rules framed by the local Government under the provisions of section 4 of the Bihar and Orissa Highways Act III of 1926 and sentenced to a fine of four rupees and also ordered under rule 36 (2) to remove the encroachment within a month, "failing which a further fine of eight annas only will be imposed for each day during which the encroachment continues". The learned Judge recommended that the conviction and the sentence be set aside and the case be returned to the Lower Court with a direction to take further evidence on the question of the age of the encroachment and the responsibility of the petitioner. A single judge of this Court has directed that the case be placed before a Division Bench.

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The learned Sessions Judge made a local inspection and recorded the following memorandum:—

"The petitioner has a shop in a crowded portion of the Chaibassa bazar. The shop-front is on the edge of a pakka drain, and projecting from the wall at a height of seven or eight feet, there is a piece of tin roofing, sloping towards the road. It projects as far as the further side of the drain, and I think an inch or two more, although I did not actually measure. It does not look many years old."

The proceedings were started by the Subdivisional Officer of the Public Works Department, who complained that one Nankaram Marwari had made an encroachment over the "Government road", that is to say, over the road-side drain of the Chaibassa-Chakradharpur road, by placing a tin shed over it. Nankaram being dead, summons was issued on Balkishun Das who keeps shop in the house, and he was convicted and sentenced as already stated.

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Before the learned Sessions Judge it was contended that he was only a partner and not the person really responsible for the alleged encroachment, but the learned Judge pointed out that that was purely a question of fact. It was next contended that the extension of the tin shed over the drain was not an encroachment within the meaning of the term. This point will be discussed later. The third plea was that the projection was an ancient one existing long before the Act came into force on the 13th October, 1926. The magistrate had considered it unnecessary to determine whether the encroachment had been made before or after the Act came into operation, or before the time when the accused himself came into possession. That view is in the opinion of the learned Judge erroneous. His recommendation is due to the fact that the prosecution had not adduced any evidence on the point and his inspection made him think that the tin roofing was not many years old. Finally he would uphold the plea that the order as to continuing fine is illegal.

Mr. B. C. De supports the reference so far as it is in his favour, but he contends further that the case ought not to be remanded for further hearing on the two points mentioned, since section 428 of the Code of Criminal Procedure does not properly apply to it, since there is no encroachment within the meaning of the Act and since the only evidence on record goes to show that if there is an encroachment, it was made before the Act came into operation. He would rely upon the decisions of a learned Judge of this Court in *Ram Ratan Sao v. King-Emperor*⁽¹⁾ and *Prabhu Charan Ram v. King-Emperor*⁽²⁾.

The plea as regards section 428 is not wellfounded. Even assuming that the learned Sessions Judge may not have been entitled to direct additional evidence

(1) (1935) Cr. Ref. 68 of 1934 (Unreported).

(2) (1935) Cr. Ref. 69 of 1934 (Unreported).

to be taken, the provision authorizes this Court to make such an order "if it thinks additional evidence to be necessary". But in view of the order which is to be passed in this case, the point does not really arise.

On the question whether there has been an encroachment punishable under rule 2 (2) (a), it is necessary to consider what rule-making powers the Act confers. The preamble of the Act shows that it was intended to provide, inter alia, for the prevention of obstruction and encroachments and of nuisances on or near Government roads and for the preservation of such roads. A "Government road" is defined as a road vested in, or under the control and administration of, the Public Works Department, and includes (among many other things) the side-drains on any such road. Obviously the side-drain on the road in question is a 'Government road' within the meaning of the Act. Under section 4 the local Government is empowered to make rules inter alia for prevention of encroachment on the side-drain and for the preservation of the side-drain as being a "Government road". The rules framed are designed to carry out these purposes by imposition of penalties for a breach or a continuing breach of the rules. Rule 2 (2) (a) prohibits any person from making or causing any encroachment without written permission of the Executive Engineer, on any such road by means of any building and rule 36 fixes a maximum penalty for infraction of the rule. As the learned Judge has pointed out, the tin roofing projecting from the petitioner's shop front wall over the road-side drain is an encroachment over the 'Government road' as above defined. From its nature this building is also necessarily an obstruction.

As to the third plea of the accused, I agree with the view of the learned Sessions Judge that the Act is not retrospective. Its terms indicate that it is intended to prevent obstruction and encroachment or nuisance

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on or near the roads and to preserve the roads, that is to say, that it contemplates the future. The magistrate has not held on the defence evidence that the encroachment was prior to the operation of the Act, and in fact he failed to direct his attention to the question.

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The two decisions which have been referred to do not avail the accused. The Deputy Commissioner made the reference on the 20th December, 1934, that is, after the present reference has been made by the Sessions Judge. He recommended that the convictions be set aside since the Act, having no retrospective effect, did not apply because the encroachment had in one case been in existence for forty or fifty years and in the other for many years prior to 1926. The learned Judge of this Court pointed out in the first case that there was no provision in the Act applying to constructions in existence for so long a period before the passing of the Act and in the second case that the rule contemplated by section 4 is a rule for the prevention of obstruction and that a rule under that section cannot be construed as a rule providing for the punishment in respect of existing constructions. I would accept the view expressed in the first case, but consider that the observation in the second case is not exhaustive since the rules contemplated by section 4 may include, besides rules for the prevention of obstruction, both rules for the prevention of any encroachment and for the preservation of the road, for instance, by removal of the encroachment whether by continuing fine or otherwise.

With regard to the continuing fine, section 5 provides that when the breach is a continuing one, the local Government may direct that a continuing breach of a rule made by it under this Act shall be punishable with further fine not exceeding one rupee for every day after the date of the first conviction during which the offender is proved to have persisted in the offence. Rule 36(2) makes a continuing breach

of rule 2 and the other rules mentioned in rule 36 (1) punishable with a further fine for every day during which the *breach is continued after the offender has been convicted for such breach.* Rule 36 (2) must, however, be read with section 5 of the Act which limits the power to impose such a fine to every day after the date of the first conviction during which the offender *is proved to have persisted in the offence.* Obviously the magistrate could not legally impose an anticipatory fine on and from the day when he convicted of the offence. The second part of his order, therefore, cannot stand. It is also proper that the fine should be imposed when the Court has proof before it of the continuing breach and the length of it.

I would accept this reference in part, set aside the conviction and sentence and direct a fresh trial of the case by the same magistrate, or if he is not available, by such other magistrate as the Deputy Commissioner may direct.

JAMES, J.—I agree.

Reference accepted.

FULL BENCH.

Before Wort, Khaja Mohamad Noor and Agarwala, JJ.

SONEY LAL JHA

v.

DARABDEO NARAIN SINGH.*

Evidence Act, 1872 (Act I of 1872) sections 32 and 167—statement of boundaries in documents of title between third persons who are dead, whether admissible in evidence—section 32(2) and (3)—judgment of lower appellate court based partially on inadmissible evidence—High Court, when should reverse the judgment or make a remand—section 167.

* Appeal from Appellate Decree no. 992 of 1930, from a decision of A. N. Banarji, Esq., District Judge of Darbhanga, dated the 16th of April, 1930, confirming a decision of Babu Charu Chandra Coari, Munsif of Darbhanga, dated the 23rd of August, 1928.

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