

1935.

DWARAKA  
MAHTON  
v.  
PATNA  
CITY  
MUNICIPALITY.

DHAVLE  
AND  
ROWLAND,  
JJ.

the technical defect that the objection was a day late—a matter which appears to have escaped notice at the time.

Though the Municipality has prosecuted the petitioner, it has not chosen to oppose the petition in revision. It seems to us that in the circumstances we should not be straining the law unduly in favour of the petitioner if we were to hold that the procedure followed was not in accordance with law and that such a prosecution was not maintainable.

The rule is accordingly made absolute, the conviction set aside and the petitioner acquitted. The fine if paid is to be refunded.

*Conviction set aside.*

1935.

July 15.

### CRIMINAL REFERENCE.

*Before Agarwala and Luby, JJ.*

KING-EMPEROR

v.

ETWARU DOME.\*

*Whipping Act, 1909 (Act IV of 1909), section 3—sentence of whipping passed under section 3—sentence of imprisonment in respect of the same offence, whether legal—Criminal Procedure, 1898 (Act V of 1898), section 565—under that section, in the absence of a sentence of imprisonment, whether legal.*

a sentence of whipping is passed under section 3 of the Whipping Act, 1909, a sentence of imprisonment in respect of the same offence is illegal.

under section 565 of the Code of Criminal Procedure, 1898, in the absence of sentence of imprisonment,

\* Reference no. 19 of 1935 made by N. Baksi, Esq., r.c.s., District Judge of Palamau, in his letter no. 3899, dated the 15th July 1935.

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

The facts of the case material to this report are set out in the judgment of the Court.

No one in support of or against the reference.

AGARWALA AND LUBY, JJ.—This is a reference by the Deputy Commissioner of Palamau in a case in which three persons Etwaru Dome, Phaguni Dome and Sahdeo Dome were tried on a charge of stealing two pigs. Against the first two accused previous convictions were also proved. The learned magistrate who tried the case found the accused guilty and sentenced Etwaru and Phaguni to twenty stripes each under the Whipping Act and Sahdeo to ten stripes under the same Act. He also passed an order under section 565 of the Code of Criminal Procedure directing Etwaru and Phaguni to report their whereabouts for three years. The learned Deputy Commissioner points out that the order under section 565, in the absence of a sentence of imprisonment, is illegal, being contrary to section 565 of the Act. He therefore recommends either that this order should be set aside or that a substantive sentence of imprisonment should be passed against all the accused persons.

Section 3 of the Whipping Act authorise passing of a sentence of whipping in lieu of punishment' to which the accused charged with offences enumerated in the section has been and it is under this section, which includes of the Indian Penal Code, that the sentence present case was passed. It must therefore that the sentence of whipping was, in the section, passed in lieu of the sentence which might have been passed under. There is ample authority that when whipping is passed under section 3 of Act, a sentence of imprisonment in respect of offence is illegal. In this respect see from section 4 which authorises the

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sentence of whipping " in lieu of, or in addition to any other, punishment " to which the accused is liable.

The reference, in so far as it recommends that the order under section 565 of the Code of Criminal Procedure be set aside is accepted and that order is accordingly set aside. In so far as the reference recommends the passing of a sentence of imprisonment it is rejected.

*Reference accepted in part.*

1935.

August  
5, 16.

## APPELLATE CIVIL.

*Before Fazl Ali and Luby, JJ.*

AMARENDRA KRISHNA GHOSH

v.

LAHABAT MAHTON.\*

*Service Tenure—Grant in perpetuity subject to the burden of service—performance of service rendered impossible by grantor—land, whether liable to be resumed or assessed with rent.*

A distinction exists between the grant of an estate burdened with certain services and that of an office, the performance of whose duties is remunerated by the use of lands.

If the lands had been granted in perpetuity, but was subject to the burden of a service, namely, the performance of a certain bundh, and the grantor had made the performance of the service impossible by converting the agricultural lands.

If the tenant was entitled to hold the land free of the burden of the service, the landlord could not put an end to the tenancy and resume the land.

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\* Appellate Decree no. 747 of 1931, from a decision of the District Judge, Main, Additional District Judge of Manbhum, dated 1931, reversing a decision of Babu Ram Bilas Singh, District Judge, Purulia, dated the 31st January, 1930.