

prepared should be given." The application, then, to the Delhi Court was not an application to execute the decree under section 230 of the Civil Procedure Code, but an application by the decree-holder under section 223 to send it for execution to the Ahmedabad Court. The Delhi Court simply granted the application and sent the decree to the Ahmedabad Court. It passed no order for execution—and that for the simple reason that no application was made to it under section 230 for such order. When the decree came to the Ahmedabad Court, the decree-holder made an application to the latter Court under section 230 for execution (see Exhibit 1). The Ahmedabad Court was, therefore, the Court entrusted with the duty of executing the decree and empowered to exercise all the powers incidental thereto. Under section 244 it has jurisdiction to determine all questions between the parties. As it was the Court which received the application for execution, it had power, under section 245, to determine whether the application fulfilled the requirements of sections 235 to 238 and then to proceed according to the law prescribed in the Code for "the mode of executing decrees." Execution of the decree against the surety being one of the modes prescribed by section 253, the Ahmedabad Court had power to decide whether the requirements of that section were fulfilled.

We, therefore, reverse the orders of the Courts below and remand the *darkhást* to the Subordinate Judge for disposal according to law. Costs to be costs in the *darkhást*.

Orders reversed. Darkhást remanded.

CRIMINAL REVISION.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR v. NADIRSHA H. E. SUKHIA.*

City of Bombay Municipal Act (Bom. Act III of 1888), sections 231 and 471—Municipal Commissioner—Notice to construct drains—Effect of Negotiations—Limitation.

Accused was convicted and fined Rs. 25 for not complying with a notice issued by the Municipal Commissioner of Bombay under section 231 of Bombay Act

* Criminal application for Revision, No. 96 of 1904.

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III of 1888. The notice required him to make an open drain in the gully on the west of his premises, this drain to be so constructed as to adjoin the west wall of his building.

Held (reversing the conviction and sentence), that the notice was *ultra vires* inasmuch as it required the accused to construct a drain, adjoining a particular part of his premises.

Held, that on a notice being served by the Municipal Commissioner of Bombay, under section 231 of Bombay Act III of 1888, if negotiations ensue, which are tantamount to a request by the party, served with the notice, and a consent by the Commissioner, to reconsider the matter, such negotiations will have the effect of waiving the notice, and it is competent to the Commissioner to issue a fresh notice after the negotiations have closed. Limitation, in this event, under section 514 of the Municipal Act, will not run from the original notice.

APPLICATION under section 435 of the Code of Criminal Procedure (Act V of 1898).

On the 27th May, 1903, the Municipal Commissioner of Bombay issued a notice to the accused under section 231 of the Bombay Municipal Act, III of 1888.

The notice required him to construct a drain or drains from such parts of his premises as required to be drained, and to execute certain other works.

On the 29th May, 1903, the accused wrote to the Municipal Commissioner a letter, which contained, *inter alia*, the following passages :—

“ With reference to your notice No. D.-435 of the 27th instant, served on me after my letters of complaint, dated the 30th April and 22nd May and the 24th February and the 20th and 21st March, 1903, I have the honour to inform you that it is not only incorrect but actually wrong to allege that my premises are ‘without sufficient means of effectual drainage.’

“ I am quite ready to defend again, up to the highest tribunal, to show how capricious and frivolous are the alleged objections of the department, but without prejudice, and before I finally reply to your requisition, I request you to let me know—

“(a) Whether the department wants me to do only that work in the house gully, which is shown in the block plan, that accompanied your notice, *i.e.*, in accordance with the detailed directions Nos. 2 to 5 only, or whether it wants me to overhaul all present existing drainage arrangements, as per detailed directions Nos. 6 and others ?

“(b) Whether the department wants to insist upon two separate channels, as shown in the block plan, or only a central one for the combined purpose, as is allowed at various places in the city, *i.e.*, whether the department wants to

exercise the option, given to it under detailed direction No. 2, in the present case of my premises ?

“(c) Whether the department instead of a 4” half round stoneware channel, can allow a more costly and better one of 6” ?”

On the 30th May, 1903, the Municipal Commissioner informed the accused that enquiries would be made in the matter.

Correspondence thereupon ensued between the Municipal Commissioner and the Engineering Department of the Municipality on the subject.

On the 3rd October, 1903, the Municipal Commissioner of Bombay again issued a notice to the accused under section 231 of the Bombay Municipal Act, III of 1888.

This notice required him, *inter alia*, within one month from the receipt thereof, “to make an open drain in the gully on the west of your premises, this drain to be so constructed that it shall adjoin the west wall of your building.”

On the 23rd February, 1904, the accused was convicted by Karsondas Chhabildas, Third Presidency Magistrate of Bombay, under section 471 of the Bombay Municipal Act, III of 1888, with having failed to comply with the abovenamed requisitions, and sentenced to pay a fine of Rs. 25.

Robertson for the applicant:—The complaint is time-barred under section 514 of the Bombay Municipal Act, 1888. Section 231 does not apply. The Magistrate wrongly presumed that the drains of the accused were injurious to health. This should have been proved, in order to satisfy the requirements of clause (c) of section 231 of the Act. On the other hand, the evidence tendered by the accused, that the provisions of section 234 had been complied with, was wrongly rejected. Further, the requisitions contained in the notice of the Municipal Commissioner of October 3rd, 1903, were *ultra vires*: *In re Khimji Jairam*.⁽¹⁾

Strangman for the Municipality.

[CHANDAVARKAR, J.:—We only wish to hear you on two points: (1) as to limitation, (2) as to the validity of the notice.]

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Strangman :—The offence consists in non-compliance with the notice. There is nothing in the Act to prevent repeated notices being issued by the Municipal Commissioner, and the non-compliance with each of such notices would be a separate offence.

The requisitions contained in the notice of October 3rd, 1903, differed from those contained in the previous notice.

Then as to *ultra vires*, section 239, read with section 231 of the Act, implies the power of the Municipal Commissioner to specify the position of the drain.

PER CURIAM.—This is an application made by Dr. Nadirsha Hormusji Edulji Sukhia for a revision of the judgment of the Third Presidency Magistrate, convicting the petitioner of the offence, punishable under section 471 of the Bombay Municipal Act, of failure to comply with a lawful requisition made by the Municipal Commissioner under section 231 of the Act. The requisition was contained in a written notice given to Dr. Sukhia by the Commissioner on the 3rd of October, 1903; and one of the points made before us by Mr. Robertson, the petitioner's Counsel, is that this complaint based on the said requisition is beyond the period prescribed in section 514 of the Municipal Act, because though it was laid before the Magistrate within the period of three months computed from the date of the requisition, that requisition was no more than a repetition of a previous requisition made by the Commissioner on the 27th of May, 1903. It is contended that the petitioner having failed to comply with the latter requisition, the offence charged in the complaint was virtually a failure to comply with it, and the prosecution ought to have been instituted within three months from the 27th of May, 1903.

It is necessary for the disposal of this point to state certain facts which are not in dispute and which appear upon the record. A written notice was served on Dr. Sukhia by the Municipal Commissioner on the 27th of May, 1903, under section 231 of the Act. By that written notice Dr. Sukhia was required to construct a drain or drains from such parts of his premises as required to be drained and to execute certain other works. The notice fixed a fortnight as the period within which the works were to be completed. Upon service of the notice

Dr. Sukhia addressed a letter to the Commissioner, dated the 29th of May, 1903, complaining that it was "not only incorrect but actually wrong to allege" that his premises were "without sufficient means of effectual drainage." And he further requested the Commissioner to enlighten him on certain points on which he said he required information with regard to the works he was directed to execute. In reply to this letter the Commissioner informed Dr. Sukhia on the 30th of May, 1903, that enquiries would be made in the matter of his complaint. There seems to have been, after that, correspondence on the subject between the Municipal Commissioner and the Engineering Department of the Municipality with reference to the works which Dr. Sukhia was called upon to carry out and it resulted in the requisition of the 3rd of October, 1903, which forms the basis of the complaint laid before the Magistrate.

This statement of the facts leaves no doubt that as far as the requisition of the 27th of May, 1903, is concerned, it was at the instance of Dr. Sukhia himself that the Commissioner was led to make enquiries with reference to it. It was Dr. Sukhia who invited the Commissioner to look into the matter, again and more carefully. The Commissioner acquiesced in that and seems to have made enquiries. After that neither Dr. Sukhia nor the Commissioner could treat the requisition as in force. When Dr. Sukhia complained that the requisition had been made unjustly, he virtually asked the Commissioner not to enforce the notice but to reconsider the matter; and the Commissioner must be regarded as having consented when in reply he wrote that he would enquire. The parties were after that in a state of negotiation, as it were, and neither could say as against the other that the notice of the 27th of May, 1903, was operative. These facts of the case clearly bring it within what Earl Cairns in *Hughes v. Metropolitan Railway Company*⁽¹⁾ describes as "the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties

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to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." This principle is, we think, applicable in a criminal case when the complaint is as to an offence of non-compliance with a requisition that can be kept in abeyance or cancelled by the authority making the requisition. Here the Legislature gave authority to the Commissioner to require Dr. Sukhia to do certain acts within a certain period. Failure on Dr. Sukhia's part to do them within that period involved the result of subjecting him to certain penalties in a criminal prosecution. But both Dr. Sukhia and the Commissioner entered upon a course of negotiation which had the effect of keeping the notice in abeyance, leading Dr. Sukhia to believe that the Municipal Commissioner would not enforce the strict rights arising under it. Both the parties must be regarded after that as having waived the notice and treated it as non-existent and unenforceable. It was, therefore, competent to the Commissioner to issue a fresh notice after the negotiations had closed, as the result of the enquiry he had made on Dr. Sukhia's invitation. The requisition, therefore, of the 3rd of October, 1903, was so far valid and legal and the complaint was not time-barred.

But the more important question remains whether the requisition in question is lawful in the sense that the works which Dr. Sukhia has been called upon to execute are such works as are contemplated by and within the purview of section 231, under which the requisition purports to be made. The object of that section, as its language shows, is to provide "sufficient means of effectual drainage" for undrained premises by making a drain which will connect them with "a Municipal drain or some place legally set apart for the discharge of drainage." The essential part of a requisition under the section consists in the making of such a drain. But in the notice given to Dr. Sukhia the Commissioner has not only required him to make a drain of the kind described in clause (a) of the section but he has also directed him to make the drain "in the gully on the west of" his "premises, this drain to be so constructed that it shall adjoin the west wall

of the building." Dr. Sukhia complains that the Commissioner has no power to tie him down to any particular portion of his premises for the making of the drain and we think he is right. Clause (a) merely gives the Commissioner power to require that a drain should be made "of such material, size and description and laid at such level and with such fall and outlet as may appear to the Commissioner necessary, emptying into such Municipal drain or place aforesaid." There is nothing in the language of the section authorising the Commissioner to direct that the drain shall be made so as to adjoin any particular part or wall of the premises. In *In re Khimji Jairam*⁽¹⁾ there was a notice given by the Municipal Commissioner under section 249 of the Act requiring the accused to construct a urinal of six compartments in the open space inside the entrance gateway to the cloth market from Champawady and a water-closet in the corner of the entrance from 1st Ganeshwady near the fire-engine station. This Court held the notice to be bad, because section 249 did not give power to the Commissioner to direct that the urinals should be constructed in a particular place in the accused's premises. The principle of that ruling applies to section 231 of the Act. The notice served on Dr. Sukhia contains no doubt other requisitions under clauses (b) and (c) of section 231 and under section 239 and these may be lawful; but all these requisitions are more or less ancillary to the principal requisition which is the making of the open drain. The former requisitions follow as subsidiary to the latter which is the paramount object of the notice under section 231. The making of the drain being then the essential part of the whole notice, leading to the other requisitions, and the requisition in respect of that part being *ultra vires* of the Commissioner, we must treat the notice as illegal and reverse the conviction and sentence and direct the fine, if paid, to be refunded. It will be open to the Commissioner to give a fresh notice according to law.

Conviction and sentence reversed.

(1) (1899; 24 Bom. 75.