

## CRIMINAL REVISION.

*Before Mr. Justice Heaton and Mr. Justice Shah.*

1919.

*In re* DINBAI JIJIBHAI KHAMBATTA.\*

April 7.

*Criminal Procedure Code (Act V of 1898), section 435—High Court—Revisional Jurisdiction—Magistrate's order as to compensation—District Municipalities Act (Bombay Act III of 1901), section 161 (2). †*

An order passed by a Magistrate under section 161 (2) of the Bombay District Municipalities Act, 1901, can be revised by the High Court.

THIS was an application to revise an order passed by V. H. Thakur, Resident Magistrate First Class at Bandra.

The applicant owned a house at Andheri.

On the 1st September 1917, the Notified Area Committee appointed under section 188 of the District Municipalities Act, 1901, issued a notice calling upon the applicant to construct a drain and intimating that on her failure to do so, the Committee would construct it and recover the cost from her. The Chairman of the Committee inspected the premises on the 13th October 1917, when, it was alleged, he excused the applicant from constructing the drain but suggested certain minor works to be done. These were duly performed.

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\* Criminal Application for Revision No. 51 of 1919.

† The section runs as follows :—

161 (2). Any prosecution under this Act or under any bye-laws thereunder may, save as therein otherwise provided, be instituted before any Magistrate and every fine or penalty imposed under or by virtue of this Act or any bye-law thereunder, and also all claims to compensation or other expenses for the recovery of which no special provision is otherwise made in this Act, may be recovered on application to such Magistrate, by the distress and sale of any moveable property within the limits of his jurisdiction belonging to the person from whom the money is claimable.

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In April 1918, the Committee proceeded to construct the drain as required by their notice, and demanded the cost (Rs. 146) from the applicant.

The applicant having failed to pay, the Committee applied to the Magistrate for recovery of the amount under section 161 (2) of the Bombay District Municipalities Act, 1901.

The Magistrate passed the order.

The applicant applied to the High Court.

*Coyajee with Khambata & Co.*, for the applicant.

*S. S. Patkar*, Government Pleader, for the Crown.

SHAH, J. :—In this case the Notified Area Committee for Andheri gave notice to the owner of a certain house to construct certain drainage work specified in the notice under the rules framed by the Governor in Council under the Bombay District Municipalities Act. It is said that the owner failed to carry out the work, and that it was completed by the Notified Area Committee. An application to the Resident Magistrate of Bandra was made under section 161 (2) of the Bombay District Municipalities Act, for the recovery of the expenses incurred by the Committee as provided by rule 62, clause (6) of the rules applicable to the Committee. The owner of the house pleaded in effect that the Chairman of the Committee had substantially modified the terms of the notice, and that, the work as suggested by him having been carried out, she was not liable for the expenses incurred by the Committee. The Magistrate directed the expenses to be recovered by distress. It is this order for distress that is now sought to be revised.

The first question is whether this order is liable to revision by this Court. I think it is. The first part of sub-section (2) of section 161 relates to prosecutions to be instituted before any Magistrate; and it is unquestionable that the power which the Magistrate exercises

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in respect of any prosecution is a judicial power and any order made by him would be the order of an inferior criminal Court liable to revision by this Court. The power, which he has to exercise under the latter part of the sub-section, is ordinarily of a ministerial nature. But this part of the sub-section refers to such Magistrate as has been referred to in the first part of the sub-section ; and I do not see any good reason to hold that 'such Magistrate' is not an inferior criminal Court, and that his orders are not liable to revision. It may be that having regard to the nature of the inquiry that a Magistrate has to make when an application is made to him for the recovery of fines or penalties or sums for compensation or for expenses, there would not be any scope for revising his orders ordinarily. For instance, where the fine or penalty or compensation is otherwise duly determined, he would not be concerned with the question of determining the amount. But there may be occasions when he may have to determine the amount of compensation or expenses, where it is disputed : and the scope of the inquiry will necessarily depend upon the nature of the defence put forward by the owner on an application under the latter part of sub-section (2). But it is clear that the Magistrate will have to make some inquiry in proper cases ; and I see no reason to treat such an inquiry as purely ministerial, when the inquiry contemplated by the Magistrate in the former part of the same sub-section is purely judicial. This view is in consonance with the decisions of this Court under section 84 of the old District Municipal Act (Bombay Act VI of 1873), which corresponded in part to the present sub-section (2) of section 161 : see *Municipality of Ahmedabad v. Jumna Punja*<sup>(1)</sup> and *Queen-Empress v. Nathu*<sup>(2)</sup>. No doubt the wording of that section was different. But I do not think that the

(1) (1891) 17 Boml. 731.

(2) (1891) Ratanlal's Cri. Cas. 559.

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Legislature meant to effect any change in this respect ; and I gather that meaning from the circumstance that both these powers are referred to in one sub-section, and that one of them is purely judicial. Unless the contrary meaning is clearly indicated, I think that it is reasonable to hold that no differential treatment is intended in respect of orders made by Magistrates under sub-section (2). The decision in *In re Dalsukhram Hurgovandas*<sup>(1)</sup> relating to section 86 of the Bombay District Municipalities Act is an instance in point, and is in no way inconsistent with the construction which I put upon sub-section (2) of section 161.

The next question is whether there is any ground to revise the order. If it were clear that the learned Magistrate made his order after making proper inquiry as to the merits of the contention put forward by the owner of the house, I would not interfere. But it is alleged in the petition that the order was made without making any inquiry as to the merits of the contention raised by the owner, and, as it is not denied before us, I think under the circumstances it would be proper to direct the Magistrate to make a proper inquiry and to determine whether the notice of the Notified Area Committee was in fact modified by the Chairman as alleged by the petitioner, and whether he was competent so to modify it according to the rules. The learned Magistrate purports to find that the notice was neither modified nor cancelled. But it is not clear that it was the result of a proper inquiry on the merits.

I would make the rule absolute, set aside the order for distress, and direct the Magistrate to dispose of the application for the recovery of expenses according to law.

<sup>(1)</sup> (1907) 9 Bom. L. R. 1347.

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HEATON, J. :—I agree to the proposed order.

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We have to find out the meaning of clause (2) of section 161 of the Bombay District Municipalities Act and it is a difficult task. If the words "and also all claims ...in this Act" were omitted there would not be any great difficulty. The section would then provide for the trial of certain matters by a Magistrate and for the method of enforcing the fines and penalties inflicted by the Magistrate. The former would be a judicial, the latter a ministerial, act: the former could be revised by this Court; and, as I think, not the latter.

The introduction of the words "and also all claims, &c.," makes the real difficulty. The section in general, however, provides for (1) the arriving at a judicial decision; and (2) the carrying out ministerially of that decision. Taking the general meaning you cannot have the second without having the first. That meaning must also, I think, apply to the case of "claims to compensation or other expenses," unless some cogent reason to the contrary is forthcoming, and I cannot find such reason. That being so it follows that there must be a decision on the claim before the amount can be recovered and that decision must be a judicial decision.

This may or may not be what was intended when the section was enacted. I decide that it is what was intended. If it is not, the Legislature should make the matter clear.

*Rule made absolute.*

R. R.