

regarded as a condition the satisfaction of which is a necessary preliminary to the Court's obtaining jurisdiction. In any case, it seems to me that the second part of O. XXXIII, r. 15, is not primarily concerned with the question of jurisdiction and that the proviso thereto must be regarded as laying down a procedure, the objection as to the non-observance of which can be waived and that in this case the fact that no such objection was raised at the trial must be held to mean that such objection was waived.

Decree reversed.

J. G. R.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.

R. K. NAIK, PETITIONER (ORIGINAL ACCUSED) v. EMPEROR.*

Indian Penal Code (Act XLV of 1860), s. 420—Bombay Local Boards Act (Bom. Act VI of 1923), s. 136—Government of India Act, 1935 (26 Geo. V. Ch. 2), s. 270—Accused, an administrative officer of District Local Board—Travelling allowance—False bill made by accused in claiming travelling allowance—Whether accused acting or purporting to act in pursuance of the Act—Accused not entitled to claim advantage of protection clause.

Where an accused, who was an administrative officer of a District Local Board, was charged under s. 420 of the Indian Penal Code, 1860, for having, by a false representation and with dishonest intention, claimed and drawn travelling allowance in respect of touring done by him at a higher rate than that to which he was entitled under the Bombay Civil Service Regulations, he would not be entitled to the protection afforded by s. 136 of the Bombay Local Boards Act, 1923, or by s. 270 of the Government of India Act, 1935, as the accused in delivering the false bill was not acting or purporting to act in pursuance of either of these Acts.

Ranchhoddas Morarji v. The Municipal Commissioner for the City of Bombay,⁽¹⁾ referred to.

Hori Ram Singh v. Emperor,⁽²⁾ distinguished.

*Criminal Revision Application No. 190 of 1939.

⁽¹⁾ (1901) 25 Bom. 387.

⁽²⁾ [1939] A. I. R. F. C. 43.

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CRIMINAL REVISION APPLICATION against the order passed by G. H. Guggali, Sessions Judge, Dharwar.

The accused was appointed Administrative Officer of the District Local Board of Dharwar. As Administrative Officer, it was part of accused's duty to inspect schools under the Local Board and for this he was entitled to draw travelling allowance under the Bombay Civil Service Regulations at the rate of four annas a mile if he travelled in a hired motor car and at three annas a mile if he used his own car.

The accused was charged with an offence under s. 420 of the Indian Penal Code, in that he falsely represented in the travelling allowance bills drawn as administrative officer that he hired a car when in fact he had travelled in his own car and thereby induced the District Local Board to pay a mileage at the higher rate of four annas instead of three annas per mile.

The case against the accused was being proceeded with in the Court of the Sub-Divisional and First Class Magistrate III Division, Dharwar. Before the charge could be framed, the accused by his application dated July 8, 1938, prayed that the proceedings against him be quashed on the ground that the said proceedings were barred under s. 136 of the Bombay Local Boards Act, 1923, as no notice of the intended prosecution had been given to him and also because the prosecution had been initiated against him more than three months after the acts complained of. The application was rejected.

Thereafter the accused again applied that the proceedings be quashed as no previous consent of the Governor of Bombay had been obtained as required by s. 270 of the Government of India Act, 1935. This application was also rejected.

The accused then preferred an application to the Sessions Judge at Dharwar praying that the case be referred to the

High Court with a recommendation that the proceedings against the accused be quashed under s. 270 of the Government of India Act, 1935, and s. 136 of the Bombay Local Boards Act, 1923. The application was rejected.

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The accused applied in revision to the High Court.

Dewan Bahadur P. B. Shingne with *S. R. Parulekar*, for the applicant (accused).

R. A. Jahagirdar, Government Pleader, for the Crown.

BEAUMONT C. J. This is a revision application from an order of the District Judge of Dharwar. The applicant was appointed Administrative Officer of the District Local Board of Dharwar, and it was part of his duty to inspect schools under the Local Board. He was entitled to draw travelling allowance under the Bombay Civil Service Regulations, and if in his travels he hired a motor car he was entitled to draw travelling allowance at the rate of four annas a mile, but if on the other hand he used his own car the rate was only three annas a mile.

The charge against him is that he delivered travelling bills claiming allowance at the rate of four annas a mile, that is in effect representing that he had travelled in a hired car, whereas in fact he had travelled in his own car. He is charged under s. 420 of the Indian Penal Code with cheating by delivering a bill representing that he travelled in a hired car suppressing the fact that he had travelled in his own car.

He claims that the charge against him must be dismissed under s. 136 of the Bombay Local Boards Act, 1923, which provides so far as material that "No prosecution shall be commenced against any local board, or any officer of a local board, for anything done, or purporting to have been done, in pursuance of this Act, or any other law for

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the time being in force which entitles or requires a local board, or officer, or other person so acting to exercise any powers or perform any duties" without giving the notice therein specified, which admittedly has not been given. For the purpose of this application we must assume that the charge is well founded, though naturally we express no opinion upon that point.

Looking at the matter apart from authority, I must confess that I should have thought that it was impossible to say that an officer of the Board delivering a false bill deliberately was acting or purporting to act in pursuance of the Act. His duty under the Act would be at the highest to deliver a true bill, and when he proceeded to deliver a false bill, he was not acting under the Act, nor, I should have thought, purporting to act under the Act. In my view these protection clauses, which are so commonly inserted in Acts conferring powers on public authorities or their officers, were never intended to protect a dishonest rascal from the consequences of his rascality. They are only intended to protect people who from excess of zeal, or negligence, or other cause exceed their powers. I think that view of sections of this nature has prevailed in England, see particularly the law as stated in the 26th Volume of the 2nd Edition of Halsbury's Laws of England, page 296, and the cases cited by Sir Lawrence Jenkins in *Ranchhoddas Morarji v. The Municipal Commissioner for the City of Bombay*,⁽¹⁾ in which case the learned Chief Justice followed the English view. It is, however, true that every case of this nature must ultimately turn upon the construction of the particular Act by which the protection is given.

Dewan Bahadur Shingne on behalf of the applicant has referred us to a recent decision of the Federal Court in *Hori Ram Singh v. Emperor*⁽²⁾ in which the protection afforded by s. 270 of the Government of India Act, 1935, was considered.

⁽¹⁾ (1901) 25 Bom. 387.

⁽²⁾ [1939] A. I. R. F. C. 43.

There were two charges in that case to which it was alleged that the protection applied, one under s. 409 of the Indian Penal Code for criminal breach of trust, and the other under s. 477A, for falsification of a register. The Court held that in respect of the charge under s. 409 the protection did not apply because the whole of the Act of criminal breach of trust was not necessarily performed by the accused in his official capacity, but that as the whole of the act complained of under s. 477A was performed by the accused in his official capacity, the protection applied to the charge under that section. So that the Federal Court, differing from the High Court of Lahore from which the appeal was preferred, considered that a deliberate falsification of accounts was an act done in purported execution of a statutory duty. The decision of the Federal Court does not govern the present case, because the Court there was dealing with s. 270 of the Government of India Act, whereas this case arises under s. 136 of the Bombay Local Boards Act, 1923, and the charges in that case were not under s. 420, Indian Penal Code. Assuming, however, that the reasoning in respect of the charge under s. 477A of the Federal Court is correct, it does not apply to the present case for two reasons. In the first place the accused was not bound to claim any travelling allowance at all. If he did claim a travelling allowance he was bound to put in a bill, but any public servant who chooses to do so can use his own car for official work without claiming to be paid for so doing. On this point the applicant relies on r. 31 (2) of the Bombay Primary Education Rules, 1924, which provides :—

“ At the first meeting of the School Board in each month, there shall be placed before the meeting for its approval statements of the movements on duty of the Chairman and of members who have performed journeys on duty under the orders of the School Board and the official diary of the Administrative Officer with their travelling allowance bills . . . ”

It is argued that the rule makes it compulsory upon the Administrative Officer to deliver a travelling allowance bill.

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But, in my opinion, the rule only means that the travelling allowance bill must be delivered if travelling allowance is being claimed. There is nothing in the rules which compels the Administrative Officer to claim travelling allowance if he does not desire to do so. Therefore the delivery of his travelling allowance bill was not a duty imposed upon him by the Act. In the second place it seems to me clear that the charge of cheating by suppression of the fact that the accused owned a motor car involves an act outside the accused's official duties. He was not under any statutory duty to refrain from stating to the board that he possessed and used his own car. The charge is more analogous to a charge under s. 409, than to a charge under s. 477A, because a part of the ingredients of the charge is not in any way concerned with the official duties of the officer.

In our opinion the judgment of the learned Sessions Judge refusing to stop the prosecution was right, and the application must be dismissed.

SEN J. I agree.

Rule discharged.

J. C. R.

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice.

RAYMOND THORNTON, PETITIONER *v.* MARGUERITE ELAINE
THORNTON, RESPONDENT.*

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Divorce—Indian and Colonial Divorce Jurisdiction Act, 1926 (16 & 17 Geo. V, ch. 40)
—Matrimonial Causes Act, 1937 (1 Edw. VIII & 1 Geo. VI, ch. 57)—Desertion
—Refusal of wife to join husband in India—Refusal to resume marital relations
—Whether desertion at an end if parties live under the same roof.

Where a wife refuses for no adequate reason to live in the country in which his business compels her husband to live and refuses to have any sexual intercourse with him during the periods in which they may be in the same country she ceases to be his

* O. C. J. Matrimonial Suit No. 616 of 1939.