Nani Gopal Biswas vs The Municipality Of Howrah on 29 October, 1957

Equivalent citations: 1958 AIR 141, 1958 SCR 774, AIR 1958 SUPREME COURT 141, 1958 MADLJ(CRI) 276, 1958 SCJ 297

Author: Bhuvneshwar P. Sinha

Bench: Bhuvneshwar P. Sinha

PETITIONER:
NANI GOPAL BISWAS

Vs.

RESPONDENT:
THE MUNICIPALITY OF HOWRAH

DATE OF JUDGMENT:
29/10/1957

BENCH:
SINHA, BHUVNESHWAR P.
BENCH:
SINHA, BHUVNESHWAR P.
BOSE, VIVIAN

CITATION:
1958 AIR 141 1958 SCR 774

ACT:
Municipal Law--Encroachment caused by compound wall--Structure not part of main building-Notice to remove encroachment headed by wrong Provision of the Municipal Act-Conviction under different section-Legality-Calcutta Municipal Act, 1923 (Bengal III Of 1923), SS. 299,,300, 488(1)(c).

HEADNOTE:
The appellant was convicted by the Municipal Magistrate under s. 488, read with s. 299, of the Calcutta Municipal Act, 1923, and sentenced to pay a fine of Rs. 75, for failure to carry out within the specified time the terms of a notice served on him under S. 299 of the Act to remove the encroachment caused by a compound wall upon the road-side land of the Municipality. Since the offending structure was

a compound wall and not something which was part and parcel of the main building, the offence comes under s. 300 and not s. 299, read with s. 488 Of the Act. The High Court, in revision, found that the accused was fully aware of the nature of the accusation against him and that there was no prejudice caused to him by the wrong mention of s. 299 in the notice in place Of S. 300. It accordingly altered the conviction into one under s. 488, read with S. 300, and reduced the amount of fine to Rs. 5o as required by the section. On appeal to the Supreme Court it was contended for the appellant that the conviction was bad because (1) the notice having been headed as under s. 299 of the Act, the conviction under S. 300 was illegal, (2) the requisition had not been lawfully made within the meaning Of s. 488(1)(c), and (3) there was substantial prejudice to the appellant inasmuch as if the conviction were under s. 299 and

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not S. 300, read with s. 488, he might have been entitled to claim compensation :

Held, that the effective part of the notice made it clear that the requisition, which was to remove the encroachment caused by the compound wall, was lawfully made, that the alteration of the conviction under S. 299 to one under s. 300 would not make it illegal and that, on the facts, there was no prejudice.

Begu v. The King-Emperor, L.R. 52 I.A. 191, relied on.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 60 of 1955.

Appeal from the judgment and order dated the 2nd February, 1955, of the Calcutta High Court in Criminal Revision No. 1113 of 1954, against the judgment and order dated the 14th November, 1953, of the Court of the Sessions Judge, Howrah in Criminal Appeal No. 185 of 1953, arising out of the judgment and order dated the 8th September, 1953, of the Municipal Magistrate, Second Class, Howrah, in Case No. 1407C/1952.

Sukumar Ghose, for the appellant.

B. Sen and P. K. Ghosh (for P. K. Bose), for the respondent 1957. October 29. The following Judgment of the Court was delivered by SINHA J.-This appeal on a certificate of fitness granted by the Calcutta High Court under Art. 134 (1) (c) of the Constitution, is directed against the judgment and order of a Single Judge of that Court in its criminal revisional jurisdiction, convicting the appellant under s. 488/300 of the Calcutta Municipal Act, 1923 (which will hereinafter be referred to as the Act), and sentencing him to a fine of Rs. 50, in substitution of the order of conviction under s. 488/299 of the Act, of a fine of Rs. 75, passed by the lower courts.

The facts found by the courts below which are necessary to be stated for the purpose of this appeal, are as follows:

> The appellant who is the owner of the premises No. 10/3, Swarnamoyee Road, Howrah, encroached upon an area of 57' x 3' of the road-side land of the Howrah Municipality to which the provisions of the Act have been extended. A notice, the terms of which we shall set out hereinafter, was served on the appellant to remove the encroachment aforesaid, and as he failed to carry out the terms of the notice within the specified time, the prosecution leading up to this appeal, was instituted before the magistrate who, under s. 531, is called 'Municipal Magistrate'. The Municipal Magistrate who tried the appellant in the first instance, convicted him, but on appeal, the learned Sessions Judge acquitted him on the ground that the prosecution had been launched beyond three months which was the prescribed period of limitation under s. 534 of the Act. The Municipality moved the High Court of Calcutta in its revisional jurisdiction and a Division Bench of that Court (J. P. Mitter and S. K. Sen JJ.), set aside the order of acquittal and directed the appeal to be re-heard, after giving the Municipality an opportunity of formally bringing on record certain official documents showing the date of the institution of the complaint. The relevant documents were proved and exhibited on behalf of the prosecution in the Sessions Court and the learned Additional Sessions Judge confirmed the conviction and the sentence, and dismissed the appeal. Thereupon, the appellant moved the High Court in its revisional jurisdiction. His application in revision was heard and disposed of by P.N. Mukherjee J. by his order dated February 2, 1955, which is the subject-matter of this appeal. Before him, the appellant as petitioner, urged at the forefront of the arguments, the question of limitation, and the learned Judge took the view that the matter was now concluded in view of what had taken place in the High Court and in the court of Session in pursuance of the order of remand passed by the High Court. The learned Judge agreed with the appellate court that the complaint was not barred. The High Court also agreed with the lower courts on their findings on the merits, that is to say, it affirmed the finding that the appellant had encroached upon the road-side land of the Municipality. The High Court accepted the argument raised on behalf of the appellant that on the facts found, namely, that the offending structure was a compound wall and not something which was a part and parcel of the main building, the offence if any, would come under s. 300, and not s. 299, read with s. 488 of the Act. The High Court further took the view that as the accused was fully aware of the nature of the accusation against him, it would not cause any prejudice to him if the conviction and the sentence were altered into those under s. 300, read with s. 488 of the Act, the sentence being reduced to the statutory limit of 50 rupees. The appellant moved the High Court and obtained the necessary certificate from the Bench presided over by the learned Chief Justice who observed, while granting the certificate: "It seems to me to be arguable and arguable with some force that such alteration of the conviction could not possibly be correct in law..... It would therefore be arguable that a notice under section 299 to remove a compound wall unattached to any building could not be a notice 'lawfully given' or a requisition

'lawfully made' within the meaning of section 488(1)(c) of the Calcutta Municipal Act, 1923. It appears to me that the alteration of the conviction by this Court does raise a question of law which makes the case a fit case for further appeal to the Supreme Court."

In this Court, the learned counsel for the appellant has placed at the forefront of his arugments the points suggested in the portion of the learned Chief Justice's order quoted above, but in our opinion, there is absolutely no substance in those contentions. The alteration of the conviction from s. 299 to s. 300, read with s. 488 of the Act, was no alteration in the substance of the accusation but only in the section more properly applicable to the facts found. A similar question was raised before their Lordships of the Judicial Committee of the Privy Council in the case of Begu v. The King-Emperor (1). It was argued before their Lordships that the conviction of the appellants before the Judicial Committee under s. 201, Indian Penal Code, without a charge under that section, was a serious departure from the procedure laid down in the Code of Criminal Procedure. In that case the initial conviction was for murder under s. 302 of the Indian Penal Code, but the High Court had set aside that conviction and substituted a conviction under the lesser s.

201. After discussing the provisions of ss. 236 and 237 of the Code of Criminal Procedure, their Lordships made the following observations which fully cover the present controversy " A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made."

It will be noticed that in the case before the Privy Council, the alteration was not only in respect of the section but also of the substance of the accusation, but as the lesser offence under s. 201, had been made out by the evidence led on behalf of the prosecution which was primarily for an offence of murder, their Lordships ruled that ss. 236 and 237 of the Code of Criminal Procedure authorize the Court to alter the conviction and the sentence to be passed in respect of the offence made out in the evidence. In the case in hand, it is manifest that the facts sought to be proved and found by the courts below remained the same even after the alteration of the conviction from s. 299 to s. 300, read with s. 488 of the Act. There was, therefore, no illegality in the alteration of the conviction under one section to the other. It was next argued that the notice served upon the appellant was not lawful within the meaning of s. 488(1)(c) of the Act, which runs as follows:

488(1) Whoever commits any offence by

(a).....

(b).....

(c) failing to comply with any direction lawfully given to him or any requisition lawfully made upon him under any of the said sections, sub-sections, clauses,

provisos or rules, shall be punished....."

The substantive portion of the notice is in these terms:

> "Take notice that you are hereby required by the Municipal Commissioners of Howrah, within thirty days from the date of service of this notice to remove the encroachment caused by a compound wall measuring 57'-0" x 3'-0" upon Swarnamoyee Road attached to premises No. 10/3 and that in default, the provisions of the above Act will be enforced."

This notice is headed as under s. 299 of the Act. It is no

-more in controversy, as found by the courts below, that the offending part of the structure comes under s. 300 which refers to a wall, etc., not being a portion of a building or fixture, as contemplated in s. 299. The contention now has narrowed down to this that the notice having been headed as under s. 299 of the Act, the conviction under s. 300 is illegal, because, it is further argued, the requisition had not been 'lawfully made'. According to this argument, the requisition would have been 'lawfully made', if the notice had been headed as under s. 300. Hence, the label given to the notice makes all the difference between a requisition 'lawfully made' and a requisition not so made. In our opinion, this argument has only to be stated to be rejected. It is the substance and not the form of the notice that has to be regarded. The effective part of the notice quoted above, leaves no doubt in the mind of the parties concerned that the requisition is to remove the encroachment caused by the compound wall. As it has not been contended that the appellant had not received the notice, and it is common ground that the appellant had not carried out the terms of the notice, there cannot be the least doubt that the appellant has incurred the penalty under s. 488(1)(c), read with s. 300. It must, therefore, be held that notwithstanding the label given to the notice, the requisition bad been lawfully made in the sense that the appellant had made the encroachment complained of, and that the Municipality was entitled to call upon him to remove the encroachment. The appellant was bound to carry out the terms of the requisition, and as he admittedly failed therein, he had incurred the penalty of the law. It was next sought to be contended that there was substantial prejudice to the appellant inasmuch as if the conviction were under s. 299 and not s. 300, read with s. 488, he may have been entitled to claim compensation. There are several answers to this contention. In the first instance, he himself invited the High Court to interfere with the order of conviction passed by the lower courts. If the High Court has set right the technical defect, as it was bound to do when the matter had been brought to its notice, the appellant has no just grievance, keeping in view the fact that the amount of fine has been reduced as a result of the alteration in the section. Secondly, if he has any rights to claim compensation in a civil court the judgment and order of the criminal court is wholly irrelevant; and thirdly, the prejudice must have reference to any irregularity in the trial of the case. It has not been shown that the appellant had, in any way, been prejudiced in the trial of the case as a result of the alteration in the section, that is to say, that he was deprived of some opportunity to make a proper defence to the prosecution if the right section had been named in the notice or in the charge, if any. Nor has he been able to show that he was misled as a result of any such technical error. Lastly, it was sought to be made out that the prosecution itself was beyond time. This contention was attempted to be made good with reference to the additional

evidence adduced at the appellate stage as a result of the direction of the High Court when the case came before it on the first occasion, as mentioned above. In our opinion, there is no substance in this contention because as pointed out by the learned Additional Sessions Judge, the additional evidence placed before the Court puts the matter beyond all reasonable doubt that the complaint had been lodged in time before the relevant authority.

In view of these considerations, it must be held that there is no merit in this appeal. It is, accordingly, dismissed. Appeal dismissed.