

(1949) 05 CAL CK 0011
In the Calcutta High Court
Case No : Criminal Revision No. 679 of 1948

Abdoola Haroon and Co.

APPELLANT

Vs

Corporation of Calcutta

RESPONDENT

Date of Decision : 13-05-1949

Acts Referred:

Calcutta Municipal Act, 1923 — Section 363, 364, 420, 421, 421(2)
Criminal Procedure Code, 1898 (CrPC) — Section 435, 6

Citation : AIR 1950 Cal 36 : (1950) 2 ILR (Cal) 301

Hon'ble Judges : R.P. Mookerjee, J; Das Gupta, J

Bench : Division Bench

Advocate : N.K. Basu and Pasupati Ghose, S.M. Bose, -General and J.M. Banerjee, for the Appellant; Debabrata Mukerjee and Sunil Kumar Basu, for the Respondent

Judgement

R.P. Mookerjee, J.—This is an application in revision against an order u/s 421, Calcutta Municipal Act passed by the Municipal Magistrate directing the destruction of certain tinned jam, marmalade etc., belonging to the petitioners defendants and at their cost, on the finding that the seized stock was unfit for human consumption.

2. Proceedings out of which the present rule arises were initiated on a complaint, u/s 421, Calcutta Municipal Act, hereafter referred to as the Act, filed by a Food Inspector of the Calcutta Corporation. The allegation was that the entire lot of jam, marmalade etc., packed in tins, which were stored at 30 Park Lane, Calcutta, had been found on examination to be unwholesome, unsound and unfit for human consumption. Some of the tins had been seized by the Corporation Officer while the remaining quantity of the stock was kept under seal. As required under said Section 421 the seized articles were produced before the Magistrate for inspection, enquiry and necessary orders.

3. After the filing of the complaint notice was given to the petitioners defendants. The defence as set out was that the defendant company had purchased the stock

in question from the Government of India, as being the surplus stock of tinned food which had been brought out by the U. S. A. Military Authorities. The stock as purchased consisted of 8 lbs. tins and the defendants subsequently found out that such tins were too big for ordinary customers. Steps were accordingly taken to have the jam repacked in smaller 20 oz. tins. The contents were reprocessed before being recanned. Such recanning and subsequent sale in the open market continued from February to November 1947. At the request of the Department of Agriculture and the Central Government, the Director of Public Health, West Bengal, had some of the same tins examined in the Public Health Laboratory for ascertaining whether the contents were fit for human consumption. Before the submission of the final report of analysis the Health Officer of the Corporation visited the godown at 30, Park Lane and had the stock seized and sealed as stated already. The seizure report was sent to the Municipal Magistrate by the Food Inspector who had accompanied the Health Officer. The final report submitted by the Director of Public Health Laboratory bears the date 6th December 1947--a 4 days after the filing of the complaint before the Municipal Magistrate. The report indicated that there were no signs of deterioration of the contents and that after culture no organisms of three named varieties could be isolated.

4. In course of the hearing before the Municipal Magistrate the Health Officer of the Calcutta Corporation as also some of the officers including the Food Inspector and a representative of the Corporation Laboratory were examined on behalf of the prosecution. The defence examined a number of witnesses. On the conclusion of the enquiry the stock seized was declared by the Magistrate u/s 421 (2) of the Act to be unfit for human consumption and was directed to be destroyed at the cost of the petitioners defendants. This rule has been obtained by the petitioner against the orders for destruction passed by the Magistrate.

5. A preliminary objection has been raised before us by the Advocate-General on behalf of the Government of West Bengal. It is urged that orders passed, by a Magistrate u/s 421 (2) of the Act are in an executive capacity being merely ministerial and administrative directions and in any view the Magistrate did not act as a Court subordinate to the High Court. Accordingly, this Court has no jurisdiction to exercise revisionary powers u/s 485, Criminal P. C.

6. The order complained of has been passed by a Municipal Magistrate appointed u/s 531 of the Act and the relevant portion of that section is in the following terms :

"The Local Government may appoint one or more Magistrates for the trial of offence against (a) this Act, and (b) the Rules or Bye-laws made thereunder."

7. A Magistrate appointed under the provisions of this section is a criminal Court within the meaning section 6 Criminal P. C.: Ram Gopal Goenka Vs. Corporation of Calcutta, . It should also be stated that the Magistrate who passed the order in this particular case was acting not only as a Municipal Magistrate but as the

Additional Chief Presidency Magistrate, Calcutta, and he has signed the order as such.

8. The fact, however, that the order is passed by a criminal Court, does not finally determine the question whether an order passed by that Court is revisable by the High Court. It is well known that a Magistrate has to discharge duties which are at times judicial and at other ministerial or administrative. On certain occasions and under special statutory provisions, a Magistrate or a Judge may be vested with jurisdiction not as Court but as *persona designata*. It is, therefore, necessary to determine whether the order passed by the Magistrate u/s 421 of the Act is one in a judicial capacity and as a Court subordinate to the High Court.

9. There is no doubt that the Municipal Magistrate, Calcutta, if he is acting in a judicial capacity, is a Court subordinate to the High Court. The only question is whether the order complained of is a judicial order or merely a ministerial or administrative one. This question has to be decided principally on reference to the provisions of Section 421 of the Act. Reliance, however, has been placed, on behalf of the Government, not only on other provisions of the Calcutta Municipal Act but on different other Acts as well, of India and England. It may be stated at once that decisions on the interpretation of other statutes generally give very little help to the Court. In the words of Lord Esher M. B. in *R. v. Commissioner of Income Tax* (1888) 22 QBD 296 "we cannot use the interpretation of one statute in construing another not made with the same intent." Decisions as to whether the High Court has jurisdiction to interfere with the order by a Magistrate under particular statutes, dependent as they must be on the special provisions of those statutes in question, will generally be of little assistance unless it is possible to deduce that any principle had been laid down by them. Neither the particular provisions in those other statutes nor the context in which they appear are exactly in the same terms as the one now before us.

10. This is why that in *Municipality of Ahmedabad v. Jumna Punja*, 17 Bom. 781 or in *Abdul Samad v. Corporation of Calcutta* 33 Cal 287: 3 CrILJ 211 or in *Chunilal Dutt v. Corporation of Calcutta* 34 Cal 341: 4 CrILJ 408 or in *re Dalsukhram Hurgovindas* ILR 9 Bom 1347: 6 CriLJ 425 or in *Rajani Khemtawalli v. Pramatha Nath* 37 Cal 287 : 11 CriLJ 112 or In *Re: Dinbai Jijibhoy Khambata*, , it was either held specifically that the Magistrates were under the respective statutes acting as Courts subordinate to the High Court or that the Court might insist that where in the exercise of the authority vested in the Magistrate discretion is to be used that discretion must be judicial discretion. While in the matter of *Rahaman Sarkar*, 10 Beng. LR App 4 : 18 WBCr 67, or In *Re: The Corporation of Calcutta or Sarat Chandra v. Corporation of Calcutta* 31 Cal 384: 11 CriLJ 183 or *Vijiaraghavalu Pillai v. Theagaroya Chetti* 38 Mad 581 : AIR 1915 Mad 360: 15 CriLJ 693 and *Husan Ali v. Emperor* 47 Cal 843 :AIR 1920 Cal 635, the Courts held that the Magistrates were not acting judicially as a Court but in an administrative capacity. In *Osman Munshi and Others Vs. Kader Pramanick and Others*, , *Suhrawardy J.* held that an order passed by a Sub-Divisional

Magistrate under the Bengal Alluvial Act (B. C. V. 1920) directing certain huts erected on a disputed char to be sold and for crediting the amount received was an executive and not a judicial order. Graham J. on the other hand held that the order being one passed by the Collector in his capacity as such the High Court had no jurisdiction to deal with it in the exercise of its criminal jurisdiction. In (Rao) Masoon Ali Khan Vs. (Rao) Ali Ahmad Khan and Jagmohan Surajmal Marwadi Vs. Venkatesh Gopal Ranade, , the Magistrate was held to be acting as persona designata.

11. It is no use multiplying instances. Reference to the decisions above mentioned and many others show that the decisions had varied according to the particular provisions contained in the statutes in question.

12. There is no direct decision on Section 421, Calcutta Municipal Act. For determining whether the Magistrate in passing an order under this section acts in a judicial capacity or merely as an executive officer we shall, in the first instance, proceed to consider the provisions of this section and the setting in which this section is placed.

13. In part 5, Calcutta Municipal Act, dealing with Public Health, Safety and Convenience, occurs Chap. 28 which deals with "Food and Drugs" and there are four subdivisions in this Chapter. Sections 405 to 416 are under the sub-head "Sale of Food and Drugs," Sections 417 to 421 appear under the sub-head "Inspection, Seizure and Destruction of Food and Drugs," Sections 422 to 426 are under the sub-head "Analysis of Food and Drugs." The last Section 426 is under another sub-head dealing with the vesting of condemned food or drug in the Corporation.

14. The sections which have been particularly referred to in course of the arguments before us are Sections 420, 421 and 426. They are in the following terms:

Section 420. "(1) When any animal, food, drug, utensil or vessel is seized u/s 419, it may, with the consent of the owner or the person, in whose possession it was found, be forthwith destroyed; or

if such consent be not obtained, then, if any food or drug so seized is of a perishable nature and is, in the opinion of the Executive Officer, the Health Officer or any Councillor or Alderman, unsound, unwholesome or unfit for human food or medicine, it may likewise be destroyed.

(2) The expenses incurred in taking any action under Sub-section (1), shall be paid by the person in whose possession such animal, food, drug, utensil or vessel was at the time of its seizure."

Section 421. (1) Any animal, food, drug, utensil, or vessel seized u/s 419, which is not destroyed in pursuance of Section 420 shall, subject to the provisions of Section 419, Sub-section (3) be taken before a Magistrate as soon as may be after such seizure.

(2) If it appears to the Magistrate that any such animal is diseased, or that any such food or drug is unsound, unwholesome, or unfit for human food, or for medicine, as the case may be or is adulterated, or that any such utensil or vessel is of such kind or in such state as is mentioned in Section 419, Sub-section (2) or is used for preparing manufacturing or containing such food or drug he shall cause the same to be destroyed, at the expense of the person in whose possession it was at the time of its seizure or to be otherwise disposed of by the Corporation so as not to be capable of being used as human food or medicine.

(3) If it appears to the Magistrate that any such animal is not diseased or that any such food or drug is not unsound, unwholesome or unfit for human food, or for medicine, as the case may be, or is not adulterated, or that any such utensil or vessel is not used for preparing, manufacturing, or containing the same, the person from whose shop, or place the animal, food, drug, utensil or vessel was taken shall be entitled to have it restored to him, and it shall be in the discretion of the Magistrate to award him such compensation not exceeding the actual loss --which he has sustained, as the Magistrate may think proper."

"Section 426. When any authority directs, in exercise of any powers conferred by this chapter, the destruction of any food or any drug or the disposal of the same so as to prevent its being used as food or medicine, the same shall thereupon be deemed to be the property of the Corporation."

15. We must be careful to remember that the orders in the present case have been passed u/s 421 and not u/s 420 as the articles in question were not of a perishable nature. Reference to sections other than Section 421, is relevant primarily for the purpose of appreciating the difference, if any, between the provisions contained in Section 421 and the other sections, particularly between those of Rs. 420 and 421 of the Act.

16. Section 420 authorises immediate destruction of animal, food or drug if the same is in the opinion of certain officers of the Corporation or of any Councillor or Alderman, to be unwholesome or unfit for human consumption, If the persons named be of opinion that the article is unfit for human consumption and only if that article be of a perishable nature, destruction may be directed by the Officer immediately. There is no provision giving the owner of the article any right or opportunity to stop such destruction by those persons. The conditions precedent for attracting Section 420 are (1) that the article, whether perishable or not, is allowed or consented to by the owner to be immediately destroyed, or, (2) if the article be of a perishable nature the person named and authorized by the section may destroy the article even without the consent of the owner; (3) in either case the person taking action must be of opinion that immediate destruction is necessary in the interest of public health.

17. If the destruction of the article be not consented to by the owner and if the article be not of a perishable nature the persons named in Section 420, have no jurisdiction to destroy it in the exercise of the plenary powers given under that

section. In that event the condemned article has to be taken to a Magistrate presumably because there is no such pressing necessity for an immediate order for destruction. The powers of the Magistrate are detailed in Sub-sections (2) and (8) of Section 421. If the Magistrate is of opinion that the article is unfit for human consumption he shall cause the same to be destroyed.

18. Great reliance is placed upon the provisions of Section 420 of the Act and it is argued by way of analogy that if an order for destruction passed u/s 420, so far as perishable articles are concerned, is shown to be an administrative or executive order by the different persons mentioned in that section, orders passed u/s 421, in respect of non-perishable articles also, must be of a similar nature. But at the very outset it is to be noticed that there is a fundamental difference between the provisions of the two sections, as regards extreme urgency in one and its absence in the other, the person authorised to direct destruction, the procedure to be followed, the nature of property affected, and the provision for release order, if any, after seizure. It is not necessary for our present purpose to examine in detail the question whether orders passed u/s 420 and the steps taken thereunder are merely administrative or executive in character. u/s 420, if the destruction is with the consent of the party concerned, no question as to the character of the orders passed or action taken arises. If the article is of a perishable nature, authority is given to the persons named to destroy the same provided in their opinion it is unfit for human consumption, and whether after such destruction the party has any cause of action or not, is also not necessary for us to determine now. If, on the other hand, the article is not of a perishable nature, the persons named have only the authority to seize it and send it to the Magistrate for a decision whether it is deleterious and unfit for human consumption ; and if so, to direct its destruction but if not, to direct its return and to assess the amount of compensation. It is thus patent that the Legislature makes a clear distinction between perishable and non-perishable articles. It will be improper to interpret Section 421 on an analogy of Section 420 upon the mere fact that as the persons named in the latter section are authorised to destroy the articles on the spot it must be presumed that orders passed u/s 421 must be of a similar nature. The emergency which exists and the extreme expedition with which action has to be taken in the case of perishable articles in a case u/s 420 are not present when the article is not of a perishable nature. The Legislature takes due note of the difference and provisions, fundamentally different, are promulgated. If the article is not destroyed u/s 420 the seizing officer is enjoined to take the articles to a Magistrate immediately after such seizure. All that can be said is that the enquiry to be made by the Magistrate is of a summary nature and a detailed and long drawn-out trial is not envisaged ; but that is not by itself sufficient to make the order passed merely an executive one. Even if we held that the procedure laid down and the orders to be passed u/s 420 were ministerial or executive in character that will be no ground for holding that the procedure before the Magistrate u/s 421 was of a similar nature.

19. It is next argued that one of the sure tests for determining whether a

particular order is a judicial order or not, is to enquire whether the statute provides for the issue of a notice to the party affected or for giving him a hearing before such an order is passed. If there is no such clear provision in the statute, as in the case now before us, we are asked to conclude simpliciter, that the Magistrate could have passed the order without even affording the party aggrieved an opportunity to be heard and, therefore, this order must be deemed to be a ministerial or administrative order. Reference is in this connection made by way of comparison to some of the other provisions in the Calcutta Municipal Act, as appearing in other chapters, particularly to the provisions affecting construction and demolition of buildings within the Municipal limits (vide Sections 363 and 381).

20. This in my view is not the correct approach to the question. If an act is otherwise found to be a judicial act the absence of specific provisions either for the issue of notice to the party affected or for being heard in recognition of the fundamental right, will not be sufficient to convert the judicial act into an executive one. On the other hand, the party must always be deemed to be entitled to get an opportunity of being heard even if the statute does not specifically provide for the same. The only exception will be when there is a clear direction that no notice need be given or that the ex parte order is made revisable at the instance of the party affected. Similarly, if an order is otherwise found to be an executive one, the mere fact, that there is a provision for allowing a hearing to the party concerned, will not by itself make it a judicial one.

"It is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party, must not be finally made unless he has been afforded an opportunity to be heard." *Tikait Ajant Singh Vs. F.T. Christian and Others* . See also *In re Hammersmith's Rent Charge* (1849) 4 Ex 87 : 19 LJEx 66, *Mena Juddi Biswas v. Toam Mandal* 39 Cal 881 : 15 IC 176 and *R. v. Saddler's Co* (1863) 10 HLC 404 : 32 LQB 337).

21. The Judicial Committee had occasion to consider the question as to the test to be applied for determining whether an order by the Commissioners under the Crown Lands Alienation Act, 1868, was purely ministerial or not.

"If an exercise of judgment is required to determine whether or not a man is entitled to lands by reason of compliance with the provisions of the Act, it is difficult to see why less judgment should be required in determining, what concerns him quite as much, whether or not he has forfeited them by non-compliance." Their Lordships

"do not desire to be understood as lying it down that the Commissioner, in conducting such an enquiry, is bound by technical rules relating to the admission of evidence, or by any form or procedure, provided the enquiry is conducted according to the requirements of substantial justice. These requirements are well-known to our law, and have been enunciated in many cases bearing some

resemblance to, though not identical with, the present." James Dunbar Smith v. Queen (1878) 3 AC 614 .

Sir Robert Collier refers with approval (at page 624) to the observation by Bailey J., in Capel v. Child (1832) CriLJ 658 : 111 LJ NS Ex 205.

"Is it not a common principle in every case, which is in itself the character of judicial proceeding, that the party against whom the judgment is to operate shall have an opportunity of being heard?" See also R. v. Archbishop of Canterbury (1859) 1 EE 545 : 28 LJQB 154.

22. In Cooper v. Board of Works for the Wandsworth District (1868) 14 CBNS 180: 32 LJCP 185, although the Metropolis Local Management Act empowered the District Board to alter and demolish a house, where the builder had neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation, the Board were, nevertheless, unable to execute that power without first giving the person guilty of the omission an opportunity of being heard. Earle C. J. definitely lays down that the principle is applicable even in proceedings not strictly judicial:

"I fully agree that the Legislature intended to give the District Board very large powers indeed, on the qualification I speak of has been recognised to the full extent. It has been said that the principle that no man will be deprived of his property without an opportunity of being heard is limited to a judicial proceeding. I do not quite agree to that. The law I think has been applied to many exercises of power, which in common understanding would be not at all more judicial proceedings than would be the act of the District Board in ordering the house to be pulled down."

23. The principles enunciated have been made applicable not only when a person is performing a judicial function but even if the function is not of a judicial nature. The party concerned must be given a hearing in the sense required by the elementary principles of natural justice.

24. Even where there are specific provisions permitting ex parte orders of a judicial nature, it is also another fundamental principle of natural justice that such orders may be revoked at the instance of any party prejudiced thereby and the Court has inherent power to give such directions as the justice of the case may require. Tasliman v. Harihar 32 Cal 253 : 9 CWN 81 FB; Tikait Ajant Singh Vs. F.T. Christian and Others .

25. It is further incontrovertible that even the absence of specific provisions in the statute does not authorise the Magistrate to proceed ex parte and without offering an opportunity to the party concerned to be heard in his defence. Such an absence of provision cannot also be taken by itself to be sufficient to make the order a ministerial one.

26. On the other hand, one of the infallible tests applied by Courts to determine whether an act is merely ministerial or judicial is to ascertain whether the public

officer or body had to exercise a judicial discretion. Of the various authorities, I need only refer to the clear enunciation of the principle by Lord Esher M. R. in *Partridge v. General Council of Medical Education* (1890) 25 QBD 90 : 59 LJQB 475 :

"Is giving a special direction to the registrar under that section merely a ministerial act, to be done without the exercise of any discretion at all? I do not think so. I think it is clearly discretionary. Now it appears to me that it is a true proposition to say that, when a public duty is Imposed by Act of Parliament upon a body of persons, which duty consists in the exercise of a discretion, it cannot be said that the exercise of that discretion is a merely ministerial act. If what the defendants did cannot be considered to have been merely ministerial, then I think for the purpose of the question, whether they are protected from an action, it must be considered as judicial."

27. In the case now before us there can be no question that, even if the argument advanced on behalf of the Government about the duty cast on the Magistrate u/s 421 (2) be accepted there is no doubt that the Magistrate has to pass the final order only after using his discretion, which cannot but be a judicial discretion. From this point of view also the order passed by the Magistrate u/s 421 (2) must be considered to be a judicial order.

28. Special emphasis is laid by the Advocate General on the opening words of Sub-section (2) of Section 421:

"If it appears to the Magistrate ... he shall cause the same to be destroyed at the expense of the person in whose possession it was at the time of seizure."

29. It is contended that the expression "if it appears" indicates that the Magistrate is neither to give any notice to the party concerned nor to hold any enquiry but may proceed to pass an order basing the same on his personal opinion after a visual examination only. Apart from the question whether it is either practicable or feasible for the Magistrate to arrive at a decision without any assistance from either of the parties, viz., the corporation and the person from whose custody the articles are seized, it may be stated at once that the question whether the orders passed by the Magistrate are judicial or ministerial ones must rest not on one clause only but on an interpretation of Section 421 taken as a whole.

30. In one sense the word "appear" may refer to that which is seen by the eye, but it is also used in its broader sense as signifying that which is made clear by evidence or is clear to the comprehension when applied to matters of reasoning or opinion.

31. The expression "if it appears" is used at various places in the Calcutta Municipal Act as among others in Sections 259 (i), 272, 338 and 344, and from the context in each case it is clear that the expression is used in the broader sense as indicated above. This clause is used at least at three places in chap. 28,

in Sections 419 (2), 421 (2) and 421 (3). That which "appears" in Section 419 (2) to the Health Officer and others as unwholesome or unfit for human food is described in the next Section 420 (1) as being so "in the opinion" of those officers. It is manifest that the Legislature was using the expressions "if it appears" and "if in the opinion of" as mutually interchangeable. According to the accepted rules of interpretation, if an ordinary expression like "if it appears" is used in the wider sense in other parts of the same Act and is also used as an alternative to "in the opinion" there is no escape from the conclusion that in Section 421 it has also been used in that wider sense. The more so, as there is no doubt so far as Section 421 (3) is concerned.

32. The word "appear" or "appearing" is one of frequent use in judicial proceedings and is sometimes used in statutes referring to them as meaning

"clear to the comprehension, when applied to matters of opinion or reasoning and satisfactory or legally known or made known when used in reference to facts or evidence."

Various expressions of a similar import are used in the statutes and if reference be made to the Code of Criminal Procedure only we may notice the use of expression "if it appears" in Sections 169, 170, 173(3), 209(1), "sees reason to believe" in Section 186(1), "if he finds" in Section 209(1), "if" or "unless the Magistrate is satisfied" in Sections 210(1) and 218(1) or "if he thinks fit" in Sections 219(1) and 260(1)(c). In each one of these cases the conclusion to be arrived at by the Magistrate, etc., is after the exercise of judicial discretion and on a proper appreciation of the materials placed before him. I do not overlook the opinion expressed by the English Court in *Robinson v. Corporation of Sunderland* (No. 2) (1899) 1 QB 751 : 68 LJQB 330 where in considering a statute (Section 36 of the Public Health Act, 1875) that:

"if a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet,"

the Court observed :

"The words "appear to such authority" are obviously put in for the purpose of making the local authority the judges on the question whether the house is without a sufficient water-closet."

It is sufficient to observe that it was not merely on the expression "appear to such authority" that the decision in this case and in similar other ones was arrived at. Reference was made to the opportunity--which the party had, at the earlier stage, as held in *Attorney-General v. Hooper* (1893) 3 Ch 483 : 63 LJCh 18, to raise objection and to lead evidence but had neglected to avail of it and more particularly to the provisions for an appeal as u/s 268 of that Act against this summary decision. Not only the section itself as a whole but the setting in which it appears in the particular statute, will determine the particular

interpretation to be put on this phrase. What the intention of the Legislature is has to be ascertained from the case taken as a whole and also with an eye to reasonableness.

33. It has already been pointed out that the test to be applied as under Sections 420 and 421, Calcutta Municipal Act in the case of a perishable article is altogether different from the one necessary when the article is non-perishable. It is only after a proper enquiry is held, the Corporation and the other party are heard, that it may "appear to the Magistrate" as to whether the particular non-perishable article is fit to be condemned or not. The emergency and plenary powers as contained in Section 420 are attracted, even when the owner is not a consenting party, but it is limited to the destruction of articles of a perishable nature only. The reason is that in the case of a perishable article orders have to be passed on the spot and a decision can be made in a very large majority of cases by a mere look, touch or smell of the thing. But it may not very often be possible for a person to declare off-hand, if the article is not of a perishable nature, that it is liable to be condemned. The facts of this case now before us show unmistakeably that it was impracticable and impossible for the Magistrate to record an opinion, without material assistance from the Corporation and the party, as to whether the food contained in a large stock of closed tins was either fit for human consumption or not. The extreme urgency which exists in the case of a perishable article is also not present here. The persons named in Section 420 are not, on these grounds, given the authority to destroy such articles on the spot. They are required to bring them before an independent person, the Magistrate, so that he may examine the opinion held by the Corporation Officer and others on the merits and how can he do so without holding an enquiry before arriving at the proper decision? Even if it may be said that the enquiry to be made by the Magistrate is to be of a summary nature and a detailed and long investigation is not contemplated that cannot alter the character of the enquiry or the nature of the orders passed. The expression "if it appears to the Magistrate" as the opening words of Section 421 (2) cannot be taken to vest such Magistrate with unlimited powers with a discretion not to hold a proper enquiry or to make the order passed an administrative or ministerial order only. It is worthy of note that the Calcutta Municipal Act contains no provisions for the party affected by an order, even though improper and unsustainable, to apply for any relief elsewhere. There are no provisions similar to those as found in Sections 268 or 308, Public Health Act, 1875 (38 and 39 Vict. C. 65).

34. A further provision, as is to be found in Sub-section (8) of Section 421, places the matter beyond any doubt. The Magistrate acting u/s 421, sits in judgment over the opinion and decision of the Corporation Officer or Councillor and acts as an appellate or a revising authority. It is open to the Magistrate not to accept the case as made by the Corporation and in that event provision is made for the restoration of the articles to the party from whose custody they had been taken. Further, the Magistrate is to exercise his discretion, which no doubt must always be a judicial discretion, to award, to the party under certain

circumstances, such compensation for the loss as he might have sustained. Now, is it possible for the Magistrate to arrive at a correct decision without giving both the Corporation and the party concerned an opportunity of being heard ? Moreover, how is the Magistrate to ascertain the amount payable without having heard the party aggrieved? Further, if a decision is arrived at about the quantum of compensation it cannot be suggested that that part of the order is binding on the party as an executive order. It had been conceded before us that the order, if any, allowing compensation is a judicial order. The decision by the Magistrate u/s 421 (3) has to be made, whether for return or for compensation, immediately after he comes to the conclusion under Sub-section (2) of that section that the opinion of the Corporation cannot be accepted. How is the party to be heard at this stage if he had not been intimated from before and is ready with the evidence if required ?

35. Under ordinary canons of interpretation a section is to be taken as a whole. The intention of the Legislature, as to the nature of the authority exercised by the Magistrate, or the character of the order passed, is to be determined with reference to the section as a whole. It is not only impracticable but also unwarranted if the provisions are so interpreted so as to have laid down that the functions of the Magistrate so far as condemning the article is concerned are to be deemed to be executive in nature but the order for compensation, if allowed, will be a judicial one.

36. u/s 420 there is no necessity for any provision for the return of the articles to the party from whose custody they might have been taken and no question further arises either for assessing compensation for damages incurred by the party or for awarding the same.

37. A distinction was attempted to be made between preventive and penal steps as provided in the Act. It was suggested that a penal order may be a judicial order but a preventive order may not be. Further, the preventive portion of the order is to be passed very expeditiously and introduction of judicial procedure will defeat the very purpose of the provisions.

38. In the first place a preventive step may, in its very nature, be a penal one. To prevent the owner of the article from exposing it for sale and thus to protect public health, the article may be seized or destroyed. Seizing it, pending further decision as to its disposal, is merely preventive but a direction for destruction, by whichever authority it may be, is penal. The order for destruction is a penal one and is in the nature of confiscation of the goods and it is actually so. The decision by the competent authority that an article is unfit for human consumption has the effect u/s 426, Calcutta Municipal Act to transfer the ownership to the Corporation. The order for destruction when passed is really when ownership of the article has vested in the Corporation.

39. The argument based upon urgency and expedition so far as applicable u/s 420 loses force to some extent at least when the order is one u/s 421 the reason

again being that in one case the article is perishable and in the other non-perishable. Unless there be specific provisions abrogating the necessity of service of notice in giving a hearing to the party affected, it cannot be presumed when a penal order is to be passed that no hearing need be given or that the penal order itself is merely a ministerial order by a Magistrate.

40. From the interest of public health also the Corporation should not be compelled to take the decision by the Magistrate as final and conclusive, as it must be, if the same be deemed to be a ministerial order. If the opinion by the Corporation Officers is not accepted by the Magistrate illegally or without any inquiry it is only proper that the Corporation should have an opportunity of having the matter treated as an order by a Court subordinate to the High Court.

41. Section 488 of the Act provides for the penalties which may be imposed for certain offences under the Act. Section 407, with Section 421 in chap. XXVIII of the Act, indicates the nature of the offence by sale, storing etc., of any of the articles mentioned therein. For goods or drugs destroyed u/s 421 a person may be convicted u/s 488 of the Act. There is no doubt that if a person is fined u/s 407 read with Section 488 of the Act the order passed by him is in his judicial capacity and as a Court acting under the High Court. But it is argued that the order for destruction u/s 421 is not a judicial order but is a ministerial direction given by the self-same Magistrate which cannot be revised by the Court. It is permissible for the Corporation to proceed, for the destruction of a particular article, u/s 421 (2) only or along with the same u/s 407 read with Section 488 of the Act. The penalty which may be imposed on a person for the sale, storing, etc., of food and drugs, etc., is of a two-fold nature--one by a direction for destruction u/s 421 (2) and the other by an imposition of a fine u/s 488. The undoubted position is that the order u/s 488 is revisable by the High Court and this Court may, in that connection, come to the conclusion that the procedure followed for condemning the article was illegal or that it had not been proved that the article was unfit for human consumption which could be condemned. It seems to be rather strange that a proceeding in which two different orders are passed will, for certain purposes be considered to be in course of judicial proceedings and for other purposes executive. The anomaly which will arise on such interpretation if accepted, is that the person aggrieved, even if he succeeds, against an order passed u/s 407 read with Section 488, the only relief that he would be entitled to will be that the fine cannot be imposed. But when the Court comes to the conclusion that the articles could not have been condemned an order passed under Sub-section (2) of Section 421 would become wholly untenable. The party would in equity, and legally also, be entitled to an order in terms of Sub-section (3) of Section 421. If we are to accept the interpretation as put on behalf of the Government and the Corporation that orders passed u/s 421 (2) are merely executive orders manifest injustice and incongruities will follow in certain cases.

42. There is no doubt that no Court is entitled to depart from the intention of the

Legislature as may be ascertained from the language of the Act only because it is thought either unreasonable or inconvenient. But where two constructions are open the Court may adopt the more reasonable of the two. *Countess of Bathes v. Kirkcaldy and Dysart Watermark Commissioners* (1882) 7 AC 694 ; *Cooke v. Charles A. Vogeler Co.* (1901) AC 102 : 70 LJKB 181 ; *Mersey Steel and Iron Co. v. Naylor Benzon & Co.* (1882) 9 QBD 648.

43. In my view the language used in the relevant section indicates that the Magistrate is to exercise a judicial function. Even if it be contended that two constructions are possible I would accept the one which is more reasonable and in consonance with natural justice.

44. In the view expressed above, even though there is no direct provision that a formal notice is to be given to the party before any action is taken either under Sub-section (2) or Sub-section (3) of Section 421 the Magistrate is bound to give notice before he arrives at a decision. It cannot also be contended that an order passed by a Magistrate u/s 421 (2) could be deemed to be merely a ministerial order against which the party aggrieved cannot move this Court. The proposition that all actions taken by the Magistrate u/s 421 (2) of the Act are merely of a ministerial or executive nature is fundamentally opposed to all notions of justice and caucus of fairness. On a reading of the provisions contained in Section 421, and interpreting the section as a whole and the context in which it appears, there is no escape from the conclusion that the order is a judicial order.

45. I have discussed the question as to the nature of the order passed u/s 421 on the basis of the language used in the Act without any reference to the authorities which were cited before us and which were baaed on provisions other than one the now before us. As indicated already, there is no direct decision on Section 421 of the Act covering the point now raised. But I would now consider the authorities to which reference had been made before us.

46. We may in the first instance consider those decisions which have been referred to and arise out of other provisions of the Calcutta Municipal Act.

47. In those decisions, whether u/s 421 or other provisions where the jurisdiction of the High Court was presumed and there is no actual decision on the point now raised need not be considered.

48. The question of jurisdiction appears to have been raised for the first time in *Abdul Samad v. Corporation of Calcutta* 33 Cal 287: 3 CriLJ 211. This was an application in revision against an order passed by the Municipal Magistrate for demolition for infringement of building rules and the order was one passed u/s 449, Calcutta Municipal Act (Bengal Act III [3] of 1899 now repealed, (the corresponding section under the new Act being Sections 363 and 364). It having been urged on behalf of the corporation that the High Court had no jurisdiction, sitting in revision, before they could deal with the order that had been made. *Woodroffe and Mookerjee JJ.* indicated that the then General Committee had under the section a discretion, as also the Magistrate, when the matter was

brought before him. As the Magistrate had a discretion either to make or revise the order u/s 449 of the said repealed Act, the discretion so vested could only be exercised in a judicial manner. This would give the High Court jurisdiction to entertain an application in revision and the order complained of was actually revised. Although the section in question was not the one which is now before us, but the principle similar to the one enunciated by Lord Esher M. R. in *Partridge v. General Council of Medical Education* (1890) 25 QBD 90 : 59 LJQB 475, already referred in an earlier part of the judgment, was applied for testing whether an order was in the nature of a judicial order or not.

49. In *Ram Gopal Goenka Vs. Corporation of Calcutta*, , another case arising out of the building Regulations (Sections 363 and 364 of the present Calcutta Municipal Act, Bengal Act III [3] of 1923) a question was specifically raised as to the jurisdiction of the High Court to entertain an application in revision against an order u/s 363 of the said Act. Sanderson C. J. held (Panton J. agreeing) that the Municipal Magistrate, appointed u/s 531 of the Act for the trial of offences under the said Act, is a criminal Court and the order of the Magistrate was a judicial order revisable by the High Court whether in the exercise of criminal or civil jurisdiction.

50. In a later case, however, *Krishen Doyal Jalan Vs. Corporation of Calcutta*, , where the only question which arose for decision was, whether in a proceeding pending before the Municipal Magistrate for an order for the demolition of an unauthorised structure, the owner of the said unauthorised construction was or was not an accused person. The question being answered in the negative, such a person was held as not exempted from the administration of oath u/s 342 (4), Criminal P. C. This Court seemed to have been of the view that so long as there was no disobedience to the order of demolition passed by the Magistrate, there was no offence. Suhrawardy and Gammiade JJ. distinguished the clean and unequivocal decision by Sanderson C. J. as being an obiter only, I respectfully agree with the decision as given in the earlier case. It was not an obiter but a decision which was necessary for the disposal of the matter--the Court, before it could interfere with the order passed by the Magistrate, had to decide whether the former had jurisdiction to entertain the petition in revision. It is not necessary for us to consider whether the limited and distinct question which came up for decision in *Krishen Doyal Jalan Vs. Corporation of Calcutta*, , was correctly decided. When the proper occasion comes it may be necessary to reconsider the proposition laid down. Without going into the details it may just be indicated that under the Calcutta Municipal Act, it is not always the case that an offence is not committed until there is a disobedience of an order of demolition passed by the Magistrate. The offence, on the other hand, may have been committed when the structure was raised without the necessary sanction or in deviation of an order passed by the Corporation. The jurisdiction of the Municipal Magistrate is invoked when an offence has in the opinion of the Corporation already been committed. What the Magistrate is required to consider is whether the offence had been so committed.

51. The three decisions referred to above arose out of Section 363 of the Act and it may be argued that the provisions of that section are materially different from those found in Section 421 of the Act. Accordingly these cases are no direct authority for the proposition that an order passed by a Magistrate u/s 421 (2) is an order passed by him in a judicial capacity and that he is a Court subordinate to the High Court. But there is a clear Bench decision, so far as the legal position of the Municipal Magistrate, who is also acting as the Presidency Magistrate of Calcutta, to the effect that he is a Court subordinate to the High Court. For determining the test for differentiating a judicial order from a ministerial one, *Abdul Samad v. Corporation of Calcutta* 33 Cal 287 : 3 CriLJ 211 is of some assistance. But strictly speaking there being no direct authority on Section 421 of the Act, we had proceeded to interpret the section as it stands and have already come to a conclusion as stated already.

52. As regards provisions in other statutes, similar to the one in Section 421, Calcutta Municipal Act, reference need be made only to Section 13, Bengal Food Adulteration Act (Bengal Act VI [6] of 1919). The language used and the procedure laid down is almost similar to those in Section 421 of the Act. In a number of cases the High Court had interfered in revision against orders passed by the Magistrate u/s 13, Bengal Food Adulteration Act. The two of the recent decisions are *Benarasi Lal Marwari v. Chairman, Asansole Municipality* 42 CWN 731 and *Sachi Nandan Piri Vs. Chairman Midnapore District Board*, . In both these cases the Magistrate had in the same proceedings passed orders for destruction or forfeiture as also orders on the basis that an offence had been committed u/s 6 of the same Act. Whether the order is passed u/s 6 or Section 13 of the said Act, the foundation must be on a decision whether the article is to be condemned or not. The anomalous position which would arise on one part of the proceedings being considered to be ministerial while the other is accepted as judicial has already been referred to. Although the question of the jurisdiction of the High Court was not specifically raised and decided in either of these two cases these are apposite instances which show what difficulties and anomalies would have ensued had the two parts of the proceedings been treated differently.

53. Reference has now to be made to some of the English decisions on which principally the learned Advocate-General rested his argument. Reference is made in these decisions to Sections 116 and 117, Public Health Act 1875 (38 and 39 Vict. C. 55). This old statute has been modified in many important particulars and we shall have to refer to one of the more recent statutes which are now in force. Sections 116 and 117 of the 1875 Act were in the following terms :

"Section 116. Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of men, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting

with the party charged ; and if any such animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice.

Section 117. If it appears to the justice that any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal, carcase or fish or piece of meat, flesh or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread or flour or for the milk so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months.

The justice who, under this section, is empowered to convict the offender may be either the justice who may have ordered the article to be disposed of or destroyed, or any other justice having jurisdiction in the place."

54. Section 308, Public Health Act, 1875, entitles the party aggrieved to bring the same question for a decision by the justice for further consideration. These proceedings are by way of a claim for compensation and most of the authorities cited before us were at the stage when proceedings had been started u/s 308 which runs as follows :

"Section 308. Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers : and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of twenty pounds, the same may at the option of either party be ascertained by and recovered before a Court of summary jurisdiction."

55. In the first place it is to be noticed that Section 117 deals with merely articles of a perishable nature and instead of giving any authority to certain officers, as u/s 420, Calcutta Municipal Act for immediate destruction, under the English Statute direction has to be obtained from a justice. The test of extreme urgency and promptitude applies to actions u/s 117 of the English Act as the justice has to deal with articles of a perishable nature. Observations in decisions on Section 117 are more apposite if at all, to a case coming u/s 420 and not Section 421, Calcutta Municipal Act. If we overlook this primary distinction between Sections 420 and 421, Calcutta Municipal Act on the one hand and

Section 117, English Act on the other we are apt to be misled.

56. There is another very important aspect which we cannot lose sight of. Under the English Act even in the case of a perishable article the emergent orders which may be passed by the justice are not final. Further opportunity is afforded to the aggrieved party to have the question, whether the goods ought to have been condemned or not, brought at a subsequent stage before another Tribunal. Under such circumstances the English Courts have interpreted the orders passed u/s 117 in a particular way. There are material points of difference between Section 117, English Act and Section 421, Calcutta Municipal Act; the two statutes are moreover, conceived on different principles and the setting in which the particular sections appear in the two statutes are fundamentally different. It is not only undesirable but we would not be justified in applying stray observations from the decisions of the English Courts for interpreting altogether different provisions which are to be found in the Calcutta Municipal Act.

57. Although the correct view would be not to rely upon these decisions but as great emphasis had been laid on behalf of the Government we may proceed to consider some of the more important authorities cited before us.

58. In *Walshaw v. Brighthouse Corporation* (1899) 2 QB 286 : (68 LJQ 828), the question arose not at the stage when the meat was destroyed but at a later stage when compensation was claimed u/s 308, Public Health Act by the party aggrieved by reason of the seizure of the meat. What the Court of Appeal was called upon to consider was the extent of the powers and authority of an arbitrator u/s 308, Public Health Act. The observations made in connection with the interpretation of Sections 116 and 117, Public Health Act, 1875, must be taken as influenced by the provisions of Section 308 of which there is no counter part in the Calcutta Municipal Act. It was found that the order of condemnation passed u/s 117 was revisable by the arbitrator. No question arose as to whether the ordinary Court would have had jurisdiction to revise the order passed by the justice u/s 117, if that order had been moved against. The only question was that there being a special provision as contained in Section 308 of that Act, vesting the arbitrator with certain powers, whether the order previously made u/s 117 would be binding on the arbitrator or not. The Court of Appeal found that the arbitrator was not bound by the earlier order as regards the unsoundness of the meat. One of the reasons given, on consideration of the special provisions of English Act that the order passed u/s 117 was an administrative order not a judicial order, is of very little assistance for deciding the case now before us.

59. The procedure to be followed by the justice when passing an order u/s 117 came up for consideration in *In re Bater & Birkenhead Corporation* (1893) 1 QB 679: 62 LJMC 107. In that case also the matter came up before the Court after fresh proceedings had been started u/s 308. The question was as to how the compensation payable u/s 308 was to be ascertained. During the proceedings u/s 117, the owner of the meat had attended and given evidence in defence of the meat. Was he entitled to be reimbursed so far as the cost incurred by him for

appearance through the Section 117 proceedings ? The Court held that he was entitled to be repaid the cost reasonably incurred by him in attending before the justice and resisting the condemnation of the meat. Charles J. observes at p. 684 :

"It is said that the attendance was not the ordinary and natural consequence of the net of the Inspector in seizing the meat I am unable to agree to that contention. A man who knew, as the appellant did, that the Magistrate would be invited to destroy as unfit for the meat which he believed, and could prove to be not unwholesome or unfit for human food, would naturally attend before the Magistrate, although he was neither summoned nor bound to do so, for registering the destruction of the meat. It was perfectly natural and right for the appellant in my opinion, to go before the Magistrate with his witnesses. But then it is said that the Magistrate had no power to hear of him or his witnesses. No case decides that. No doubt Field J. in *White v. Redfern* (1880) 5 QBD 15 : 49 LJMC 19 and in *Vinter v. Hind* (1883) 10 QBD 63 : 52 LJMC 93 says that the Magistrate need not hear the owner if he likes to refuse to do so; but no case goes so far as to say that the Magistrate has no power to listen to the owner of the meat. Although he is not entitled to be heard, the Magistrate may hear him. If he thinks fit, and on his attendance before the Magistrate, if a charge were formulated against him u/s 117, Public Health Act, with a view to his committal to prison, the Magistrate would have power, I think to bear and determine the charge, then and there, and would have jurisdiction over the cost of the witnesses u/s 18 of 11 and 12 Vict. C. 43. That however was not done. The Magistrate was asked to condemn the carcase, and he very properly heard the evidence tendered by the owner of the carcase, although he was not bound to do so, and in the result he declined to make the order condemned the meat."

60. The owner of the meat had declined to take the meat so released and the Court rightly held that he could not have refused to take it back.

61. The provisions in the 1875 [Act] were so interpreted holding that the Magistrate, though not bound, could allow the owner to adduce evidence and also be heard. The position has now been made clear by the Food and Drugs Act, 1938, (1 and 2 Geo. VI, C. 56). u/s 10 of this Act it is now provided that when officers seizing the articles or food bring it before the justice of peace, if he attends before him upon the application for his condemnation "be entitled to be heard and to call witnesses." This provision confirms the right of the owner to adduce evidence and the law in *Bater's case* 1893 1 QB 679 : 62 LJMC 107 is made a part of the statute withdrawing the discretion of the Magistrate. It has been pointed out that ordinarily the owner appears and the Magistrate requires his assistance in determining whether the article should be condemned or not.

62. In the case above mentioned as also in other decisions of the English Courts emphasis is laid on the emergency of the order. This emergency the Legislature in Bengal takes due note of and makes the necessary provision in Section 420, Calcutta Municipal Act. There is no such emergency in an enquiry u/s 421,

Calcutta Municipal Act, It is only when the food or drug is not of a perishable nature the Corporation is bound to take it before the Magistrate. Under the English law, even in the case of perishable articles, no officer of the local body is authorised to destroy the same as in the Calcutta Act. But he must take it to the justice for exercise of the summary power, subject to the revisionary powers as contained in Section 308 of the old 1875 Act. This summary power is given under the Calcutta Act to the different persons mentioned in Section 420.

63. It would be a wrong analogy to apply these English decisions for the interpretation of Section 421 of the Calcutta Act merely because perishable articles have under the English statute to be taken before a Magistrate and non-perishable ones under the Calcutta Act.

64. In our view the English decisions referred to cannot be of any assistance or be used as authority in support of the contention that the orders passed by the Municipal Magistrate u/s 421, Calcutta Municipal Act is not a judicial order.

65. The preliminary objection raised must be overruled. We therefore proceed to consider the case on the merits.

66. In this part of the case it may be stated at once that the petitioner has failed to show that there has been any error of law or miscarriage of justice committed by the Magistrate.

67. The question whether the particular tinned foodstuff is or is not deleterious and injurious to public health is a question of fact which must be determined on the evidence adduced in the case.

68. Reliance is placed on the report submitted by the Director of Public Health Laboratory on 6th December 1947, indicating that there were no indications of deterioration of the contents of the tins examined and that after culture no organism of certain varieties could be isolated. It is also urged that when there are a very large number of tins the examination of some only could not in law be justified as sufficient to condemn the whole lot.

69. If any complaint can be made against the procedure adopted by the Magistrate it is against the long-drawn enquiry which was undertaken by him, After notice to the party concerned, the Court proceeded to examine on the basis of the evidence laid before it the allegations.

70. The report by the Director of Public Health is only one of the many pieces of evidence which the Magistrate had before him. The examination by the Director was only of particular specimen sent to him whereas before the Magistrate the examination was of a larger number of specimens both by the Corporation experts as also the witnesses brought by the owner. The opinion given by the Director is in no way conclusive and binding on the Magistrate. It was open to him to consider the evidence as adduced and come to a decision. No complaint can be made about the procedure adopted by the Magistrate.

71. With regard to the other question as to the number of the specimens examined before the Magistrate it cannot be argued that he must examine each and every particle of the foodstuffs or each and every one of the tins Liberty was given to the opposite party for putting all such samples as he wanted to be examined by the witnesses on behalf of the Corporation. Moreover, even the representative from Mazdas, who had been called by the petitioner had expressed, during his cross-examination, that many of the tins contained unwholesome food. How many tins have to be examined in any particular case must depend upon the facts in each case. In *Sachi Nandan Piri Vs. Chairman Midnapore District Board*, , sample taken from one tin out of 25 tins of mustard oil, all being of the same brand and forming part of one consignment, was held to be sufficient in the eye of law to make the forfeiture order with regard to the whole of the consignment. In the case now before us, the original 20 oz. tins were repacked after being reprocessed. "A very large number of smaller tins after being reprocessed were found to contain unwholesome food. For the further reasons given by the Magistrate I do not see any reason for disagreeing that the whole lot should be condemned. I have myself gone through the evidence as adduced before the Magistrate and I have no doubt that the conclusion arrived at by him is the only one possible.

72. The provisions contained in this part of the Calcutta Municipal Act are provisions for the safety of public health and no risk can or should be taken in this matter. In the interest of public health and in view of the provisions in the Act the order passed by the Magistrate is unassailable.

73. In this view this rule must be discharged and the order passed by the Municipal Magistrate affirmed.

74. *Das Gupta J.*--On 2nd December 1947 Haran Ch. Saha of the Calcutta Corporation, on inspection of a stock of jams stored by the petitioner Messrs. A. Hasan & Co. in a godown at 30 Park Lane, seized a number of tins and sealed the remainder of the stock. He produced the tins that were seized by him before the Municipal Magistrate, Calcutta, and prayed for an order for destruction, u/s 421, Calcutta Municipal Act, of the tins produced before him and also the stock sealed in godown. The Magistrate issued notices on the proprietor, manager and others of the petitioner company, and on consideration of oral and documentary evidence that was produced by both sides and examination of some tins, came to the conclusion that the entire stock was unwholesome and unfit for human consumption, and ordered the destruction of the entire stock u/s 421 (2), Calcutta Municipal Act, referred to hereafter as the Act.

75. The first question for decision, in considering the present petition calling for our interference with this order of destruction, in the exercise of our powers of revisional jurisdiction u/s 435, Criminal P. C., is whether the Magistrate acting u/s 421 (2), Municipal Act is a "Court" within the jurisdiction of this Court. The Advocate-General, appearing for the Government of West Bengal, contends that the Magistrate acts as an executive officer u/s 421, Calcutta Municipal Act, and

not a Court and the order passed by him is an administrative order and not a judicial order. If this contention be correct, it is obvious, this Court has no jurisdiction to interfere with the order passed in the present proceedings.

76. It is indisputable that the mere fact that a "Magistrate" acts u/s 421 of the Act, does not make his order amenable to the jurisdiction of this Court. Common sense and authority tell us with one voice that a Magistrate may have executive as well as judicial function to perform, and that whatever functions a Magistrate has to perform under a statute are not necessarily judicial. One of the earliest Indian decisions on this point is reported in *In the matter of Rahman Sarkar* 10 BLR App 4: 18 WBCR 67, where it was held that the order of a Magistrate under the Police Act appointing some persons as special constables was an executive act, with which the High Court could not interfere. In *Hasanali v. Emperor* 47 Cal 843 : AIR 1920 Cal 635, it was held that a District Magistrate in granting or refusing an application to take the name of a person out of the register, in which it had been entered under the provisions of Section 5, Criminal Tribes Act, does not perform any judicial function, that his functions are administrative, and that the High Court is not entitled to interfere with such an order. In *Vijayaraghavalu Pillai v. Theagoroya Chetti* 38 Mad 581 : AIR 1915 Mad 360, the Madras High Court had to consider whether they had any power to revise the order of a Magistrate allowing an application to declare that the inclusion of the petitioner before the Court as a candidate for municipal election by the President of the Madras Corporation was illegal. The learned Advocates for the petitioner conceded there that the petition did not lie u/s 439, Criminal P C., but contended that under the Charter Act, the High Court was competent to revise the order. The Court rejected this contention, holding that the Magistrate in this instance was not a Court of law.

77. When we turn to Section 421 of the Act, the first thing we notice is that the law does not require the Magistrate to issue any notice on any party, or to examine any witness.

78. Section 421 runs thus :

"(1) Any animal, food, drug, utensil, or vessel seized u/s 419 which is not destroyed in pursuance of Section 420 shall, subject to the provisions of Section 419, Sub-section (3), be taken before a Magistrate as soon as may be after such seizure.

(2) If it appears to the Magistrate that any such animal is diseased, or that any such food or drug is unsound, unwholesome, or unfit for human food, or for medicine, as the case may be, or is adulterated, or that any such utensil or vessel is of such kind or in such state as is mentioned in Section 419, Sub-section (2), or is used for preparing, manufacturing or containing such food or drug, he shall cause the same to be destroyed at the expense of the person in whose possession it was at the time of its seizure or to be otherwise disposed of by the Corporation so as not to be capable of being used as human food or

medicine.

(3) If it appears to the Magistrate that any such, animal is not diseased or that any such food or drug is not unsound, unwholesome, or unfit for human food, or for medicine, as the case may be, or is not adulterated, or that any such utensil or vessel is not used for preparing, manufacturing, or containing the same, the person from whose shop or place the animal, food, drug, utensil, or vessel was taken shall be entitled to have it restored to him, and it shall be in the discretion of the Magistrate to award him such compensation, not exceeding the actual loss which he has sustained, as the Magistrate may think proper."

It is abundantly clear from the words "if it appears to the Magistrate" and the absence of any words requiring any enquiry to be made, or any notice to be issued, that the Magistrate may by just looking at the food produce, be satisfied that it is unwholesome or unfit for human food, or is adulterated, and if he is so satisfied, he shall cause the same to be destroyed. If what is produced before him is an animal, and by merely looking at it he is satisfied that it is diseased, he shall cause the same to be destroyed. It is useful to notice in this connection that some other sections of the Calcutta Municipal Act which entrust the Magistrate with the performance of functions other than the trial of offences, contain clear provisions that notice should be issued on parties concerned, and enquiry held, In Section 363 under which a Magistrate may, on the application of the Corporation, make an order directing demolition or alteration of structures, it is provided that the Magistrate shall not make any such order

"without giving the owner or occupier of the building to be so demolished or altered full opportunity of adducing evidence and of being heard in his defence."

79. Section 381, which empowers the Magistrate to prohibit the use of buildings for human habitation, provides that the Magistrate shall serve a notice on the owner or occupier of the building of being heard in the Court, and hold such inquiry as he thinks fit to make.

80. A comparison of these provisions with those of Section 421 of the Act brings home forcibly the deliberate care with which the Legislature omitted from Section 421 the requirement of the Magistrate giving any notice to any party or hearing any evidence, or holding any enquiry, before passing an order of destruction.

81. It is helpful in this connection, to consider the scope and purpose of Chap. XXVIII of the Act, in which chapter, Section 421 occurs. Part V of the Act contains the provisions concerning "the Public Health, Safety and Convenience." Chapter XXVIII is one of the seventeen chapters in this Part, and is about Food and Drugs, which is obviously a very important matter if not the most important matter, for the purpose of "Public Health." Of the 22 sections comprising this chapter Sections 405 to 416 are with regard to the sale of food and drugs ; 417 to 421 with regard to inspection, seizure and destruction ; 422 to 425 are as regards the analysis of food and drugs, while Section 426 provides about the restoring of condemned food or drug in the Corporation. Some of the first twelve

sections (405 to 416) provide for the licensing of sellers of food etc., while some prohibit the sale of adulterated food, or of food which is not of the prescribed standard of purity, or of "diseased animals or unwholesome articles intended for human food." Contravention of these prohibitions are punishable, and the penalties are laid down in Section 488. Obviously, however, preventive action is even more necessary than penal steps if the sale of unwholesome food is to be stopped. Sections 417 to 421 are designed for the purpose of this preventive action. Section 417 gives the Health Officer of the Corporation power to inspect places where unlawful slaughter of animals or sale of flesh is suspected ; Section 418 enjoins the Corporation to provide for inspection of animals, food and drugs intended for human consumption ; Section 419 gives the Health Officer or any person authorised by him power to inspect and examine, any animal, food, or drug intended for human consumption, and to seize any such animal or any such food or drug that appears to him to be unsound, unwholesome or unfit for human food or to be adulterated. Sections 420 and 421 are the two sections provided for destruction; Section 421

has already been set out.

82. Section 420 runs thus :

"When any animal, food, drug, utensil, or vessel is seized u/s 419, it may, with the consent of the owner or the person in whose possession it was found, be forthwith destroyed ; or if such consent be not obtained, then, if any food or drug so seized is of a perishable nature and is, in the opinion of the Executive Officer, the Health Officer and Assistant or District Health Officer or any Councillor or Alderman unsound, unwholesome or unfit for human food or medicine, it may likewise be destroyed. The expenses incurred in taking any action under Sub-section (1) shall be paid by the person in whose possession such animal, food, drug, utensil, or vessel was at the time of its seizure."

Two things appear clear from this analysis. The first is that the Legislature thought that both preventive action before sale and penal action after sale were necessary to secure the desired result--the protection of public health against unwholesome food etc. The second is that the preventive measures viz., seizure

and destruction were to be taken very speedily. That is why u/s 419, officers may inspect and seize at any time by day or by night, and u/s 420, if consent of the owner or the possessor was obtained, destruction may take place forthwith; even if consent was not obtained, and the article be food or drug which is perishable, it may be likewise destroyed, if the Executive Officer, or Health Officer, and Assistant or District Health Officer or Councillor or Alderman, consider it unwholesome. Where action is not taken u/s 420, food or drug etc., seized shall be taken to a Magistrate as soon as possible after seizure, and if it appears to him unwholesome, he shall cause it to be destroyed. If anything is clear from the above, it is the importance the Legislature attached to the urgency of speedy action. This alone precludes the possibility of any intention of the Legislature that the procedure of Courts of law for judicial determination should be followed, and explains why, unlike Sections 363 or 381, Section 421 contains no provision for issuing any notice, or holding any enquiry, or hearing any evidence.

83. It is also clear that the Magistrate u/s 421 is in the cases of perishable articles of food or drug only an alternative authority to the Executive Officer, the Health Officer or Assistant or District Health Officer, or Councillor, Alderman; but his functions u/s 421 (2) are fundamentally the same as the functions of the above-mentioned officers u/s 420. No person would dream of characterising the action taken by any of these officers "judicial action"; if the same action is taken by a Magistrate, who has not got to follow any different procedure, how can it become judicial action ?

84. These conclusions that the Magistrate acting u/s 421 (2) is just an alternative to the several corporation officers or a Councillor or an Alderman acting u/s 420, and that the law does not require the Magistrate to issue any notice, take any evidence, or hear any party before passing any order u/s 421 (2) make inevitable the further conclusion that the Magistrate acting u/s 421 (2) is an executive officer and not a Court, and his order for destruction is an administrative, and not a judicial order. This Court has, therefore, no jurisdiction to revise the order passed by a Magistrate u/s 421 (2), Calcutta Municipal Act.

85. Different considerations may arise as regards an order passed u/s 421 (3) of the Act, awarding compensation, but these do not in my opinion affect present problem; viz., whether an order u/s 421 (2) of the Act is a judicial or an administrative order.

86. I have approached the question as a *res integra*, for, as far as I could find out, there is no Indian decision as regards the nature of the order u/s 421 (2), Calcutta Municipal Act or any similar provision of any other Municipal Act of India. Two cases under the Food Adulteration Act, where orders under somewhat similar provision as embodied in Section 13 of that Act came before this Court are *Sachi Nandan Piri Vs. Chairman Midnapore District Board*, ; *Banarasi Lal v. Chairman, Asansole Municipality* 42 CWN 731. In neither of these cases, however, was the question of this Court's jurisdiction raised or decided. It has to be noticed that in both these cases, the order for destruction or forfeiture was

passed by the Magistrate in the same proceeding in which some person was being tried for an offence u/s 6 Food Adulteration Act, so that the scope of an argument that the Magistrate in passing the order u/s 13 was not a Court was considerably reduced. In *Chunder Kumar Biswas v. Municipal Corporation, Calcutta* 7 CWN 27, an order for destruction of damaged rice passed by a Magistrate u/s 505 of the old Calcutta Municipal Act was set aside by this Court in its criminal revisional jurisdiction; but here also the question whether the Court has such jurisdiction was not raised or decided. A large number of cases were cited before us on Section 363 of the Municipal Act. In only three of these, was the question of jurisdiction raised. In 1903, this was raised in *Abdul Samad v. Corporation of Calcutta* 33 Cal 287, but no decision, was recorded. In fact, there is no discussion at all in the judgment of this point. *Ram Gopal Goenka Vs. Corporation of Calcutta*, , it was held that this Court had jurisdiction to revise such an order as the Magistrate acting u/s 363 was a criminal Court or at least a civil Court. Two years later, in *Krishen Doyal Jalan Vs. Corporation of Calcutta*, , it was held by Suhrawardy and Cammiade JJ. that the Criminal Procedure Code did not apply to proceedings u/s 363, Municipal Act, and that the observation of Sanderson C. J. in *Ram Gopal Goenka Vs. Corporation of Calcutta*, that the Criminal Procedure Code did apply to such proceedings, was obiter, and not binding as an authority. It is not necessary for us to consider this question however; for supposing we are bound by authority to hold that a Magistrate acting u/s 363 of the Act is a criminal Court, that authority is of no assistance for the decision of the question whether the Magistrate acting u/s 421 (2) of the same Act is a Court, for as already pointed out, the terms of Section 363 are substantially different from those of Section 421.

87. Of more assistance are some English decisions, in which though the question whether the Court has jurisdiction to interfere with an order passed for the destruction of goods was not in terms raised, the question whether such an order u/s 117, Public Health Act is a judicial order or not, and whether it is necessary to hear witnesses, before passing an order for destruction came up for consideration.

88. Section 117 runs thus :

"If it appears to the Justice that any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man, and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal carcase or fish or piece of meat, flesh, or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread or flour or for the milk so condemned or, at the discretion of the Justice, without the infliction of a fine, to imprisonment for a term of not more than three months.

The Justice who under this section is empowered to convict, the officer may be either the Justice who may have ordered the article to be disposed of or destroyed, or any other Justice having jurisdiction in the place." It is clear that the function of the Magistrate under the first part of Section 117 is just the same as that of the Magistrate u/s 421, Calcutta Municipal Act. In *Walshaw v. Brighthouse Corporation* (1899) 2 QB 286 : 68 LJQB 828 where the Magistrate condemned the meat u/s 117, Public Health Act, and the arbitrator held that the meat was sound, an argument that the decision of the Magistrate was a judicial decision was negated. The observation of Vaughan Williams L. J. reported at p. 292 may be noticed. After stating that there can be no doubt that the arbitrator acted within his jurisdiction in finding that the meat was sound and the finding cannot be disputed by anyone interested, he proceeds :

"I understood at one time in the argument that it was meant to be suggested that there had been a judicial order condemning the meat and determining its soundness. In my judgment the order for condemnation of the meat u/s 117 is nothing of the kind."

The question came up in another form in *Bater's case* (1893) 1 QB 679 : 62 LJMC 107. Meat belonging to the appellant was seized by the Borough Inspectors u/s 116, Public Health Act, and carried before a justice. The appellant attended and brought evidence to show that the meat was sound. The Justice, after hearing the evidence, refused to condemn the meat. The appellant declined to receive it back. One of the questions which arose for decision was whether the appellant was entitled to be repaid the costs incurred by him, in appearing before the Magistrate and bringing evidence to show that the meat was not unfit. The Court decided that he was so entitled, and there was nothing to stop the Magistrate from hearing evidence. It was observed, however, that it was entirely the Magistrate's discretion to hear any evidence or not. "The procedure by which the condemnation of meat takes place," it was observed "is no doubt to some extent anomalous, since it may take place behind the back of the owner, or if he is present without his being heard at all."

89. These observations of the English Courts on the provision of Section 117, Public Health Act fortify me in the conclusion I have arrived at on a consideration of the provisions of Section 421, Municipal Act that the Magistrate acting u/s 421 (2) is not a Court but is an executive officer and that his order is an administrative order and not a judicial order.

90. I agree that the rule be discharged.