

(1949) 05 CAL CK 0025
In the Calcutta High Court

Ashutosh Roy and Another	Vs	APPELLANT
The Corporation of Calcutta		RESPONDENT

Date of Decision : 03-05-1949

Acts Referred:

Calcutta Municipal Act, 1923 — Section 533

Citation : AIR 1949 Cal 589 : (1950) CriLJ 123 : 53 CWN 847 : (1950) 2 ILR (Cal) 70

Hon'ble Judges : Harries, C.J.;J.P. Mitter, J

Bench : Division Bench

Judgement

Harries, C.J.—This is a petition for revision of an order passed by a Municipal Magistrate convicting the petitioners under Schedule XVIII Rule 4, Sub-rule (1), Calcutta Municipal Act, and sentencing them each to pay a fine of Rs 100 and in default of payment of the fine each to undergo simple imprisonment for two months.

2. The petitioners were the owners of certain property known as 85 Kali Kumar Banerjee Lane. These premises were let to the Calcutta Corporation at which a school was carried on under the direction of the Corporation. It was alleged by the Corporation that the premises were in a deplorable state of disrepair and eventually the Corporation served a notice on the petitioners under Rule 4, Sub-rule (1) of Schedule XVIII, Calcutta Municipal Act calling upon them to secure and repair the premises. In this notice details of the necessary repairs were stated.

3. The Corporation said that they were prepared to give vacant possession of the premises to enable the repairs to be executed, whereas the petitioners' case is that they could not execute the repairs by reason of the fact that the Corporation remained in possession. However, it is clear that on 23rd December 1917, the Corporation lodged a complaint which came in due course before a Municipal Magistrate. On 29th September 1948, the Municipal Magistrate made the following order:

Heard pleader for the accused and also the pleader for the Corporation. Both the parties agree that the building is in a dangerous state. The Corporation is prepared to give facilities for necessary repairs as per requisition mentioned in the notice.

It is therefore ordered that (1) Corporation will shift its school elsewhere temporarily, (2) the owner will allow the Corporation to occupy the so-called outhouse, (3) the repairs will be executed in course of 2 months under the supervision of the Corporation officials and the main entrance of the house will be in their charge, To 24th November 1948.

4. On 24th November 1948, the case came again before the learned Magistrate, but neither of the petitioners appeared. It is clear that in the order of 29th September 1948, the case was expressly adjourned to 24th November 1948, and the Magistrate points out that at the earlier hearing the petitioners were represented by their pleader and they were informed by the Bench Clerk of the date of the adjourned hearing. It is not suggested that the petitioners were unaware of the date of the adjourned hearing.

5. As neither of the petitioners appeared, the learned Magistrate heard the evidence of the District Building Surveyor and convicted the accused in their absence under Schedule 18, Rule 4, Sub-rule (1), Calcutta Municipal Act and sentenced them as I have indicated.

6. Mr. Sudhangsu Mukherjee has contended that the petitioners could not be convicted in their absence. Normally, the presence of the accused is required in Court, but it is urged on behalf the Corporation that a Municipal Magistrate may convict an accused in his absence of an offence against the Municipal Act by reason of Section 533, Calcutta Municipal Act, That section is in these terms:

If any person summoned to appear before a Magistrate to answer a charge of an offence against this Act or against any rule or by-law made thereunder fails to appear at the time and place mentioned in the summons, the Magistrate may, if

(a) service of the summons is proved to his satisfaction, and

(b) no sufficient cause is shown for the non-appearance of such person, -hear and determine the case in his absence.

7. On behalf of the Corporation, it is urged that this section clearly applied and the Magistrate acting under it could convict the petitioners in their absence.

8. This power of a Municipal Magistrate, to convict the accused in their absence is an exception to the general rule and it appears to me that the section must be construed strictly. If the ordinary grammatical meaning is given to the words in the section, it seems to me clear that it can only apply where an accused person fails to appear at the time and place mentioned in the summons. It is clear that 21st November 1943 was not the time mentioned in the summons, because the case had already been before the Magistrate and had been adjourned to 24th

November. It may be that Section 633 was intended to cover all cases where an accused failed to appear. But it has been so drafted as to cover only the failure of an accused person to appear at the initial hearing, that is, at the hearing on the date and time and at the place fixed in the summons. It appears to me on the plain words of the section that it cannot apply where an accused person fails to appear at an adjourned hearing, because if he fails to appear at such hearing, it is not a failure to appear at the time, and place fixed in the Bummons. The result may be unfortunate, but the section must be given its ordinary meaning.

9. The section has been construed by two single Judges of this Court. The first case is that of Kusum Kumari Dehi v. Corporation of Calcutta AIR 1987 Cal 218 : 38 Cri.L.J. 632, in which Jack J. held that the terms of Section 533, Calcutta Municipal Act could not be extended against the accused in such a manner as to entitle the Magistrate to hear the accused in his absence because he had not appeared on the subsequent date on which the case was adjourned.

10. In the case of Bhupendra Nath Roy Vs. Corporation of Calcutta, , Henderson J. held that after an accused person has appeared to answer a charge of an offence under the Cal. Outtalk Municipal Act, the Magistrate cannot, u/s S33 of the Act, hear and determine the case ex parte on one subsequent date to which the trial is adjourned.

11. Learned advocate for the Corporation has pointed out that these cases are not binding upon this Bench and has urged that they should be overruled. I am not satisfied that these cases are wrongly decided. The result, odd as it may seem, is due to the drafting of the section and if the words are given their ordinary meaning, it can not be said that these earlier cases are wrongly decided.

12. The result, therefore, is that the Magistrate could not convict the petitioners in" their absence and as he did so the convictions and sentences must be set aside and the accused are acquitted.

13. The rule is made absolute. If the petitioners have paid the fine or any part thereof such must be refunded.

14. Let the counter-affidavit filed in Court today be kept on the record.

J. P. Mitter, J.

15. I agree.