
(1935) 02 PAT CK 0011
In the Patna High Court
Case No : Criminal Ref. No. 64 of 1934

Bal Kishun Das Marwari, In the matter of	APPELLANT
Vs	
Emperer	RESPONDENT

Date of Decision : 04-02-1935

Acts Referred:

Citation : (1935) 02 PAT CK 0011

Judgement

Macpherson, J.—Under the provisions of S. 438, Criminal P.C., the Sessions Judge of Singhbhum on 8th December last submitted the record of The King Emperor v. Balkishun Marwari in which the accused was convicted by a Magistrate of Chaibassa under R. 2 (2) (a) of the rules framed by the local Government under the provisions of S. 4, Bihar and Orissa Highways Act 3 of 1926, and sentenced to a fine of four rupees and also ordered under R. 36 (2) to remove the encroachment within a month.

failing which a further fine of eight annas only will be imposed for each day during which the encroachment continues.

2. The learned Judge recommended that the conviction and the sentence be set aside and the case be returned to the lower Court with a direction to take further evidence on the question of the age of the encroachment and the responsibility of the petitioner. A single Judge of this Court has directed that the case be placed before a Division Bench. The learned Sessions Judge made a local inspection and recorded the following memorandum :

The petitioner has a shop in a crowded portion of the Chaibasa bazar. The shop front is on the edge of a pakka drain, and projecting from the wall at a height of seven or eight feet, there is a piece of tin roofing, sloping towards the road. It projects as far as the further side of the drain, and I think an inch or two more, although I did not actually measure it. It does not look many years old.

3. The proceedings were started by the Subdivisional Officer who complained that one Nankaran Marwari had made an encroachment over the "Government

road." that is to say over the road side drain of the Chaibassa Chakradharpur mad, by placing a tin shed over it. Nankaran being dead, summons was issued on Balkishun Das who keeps shop in the house and he was convicted and sentenced Before the learned Sessions Judge it was contended that he was only a partner and not the person really responsible for the alleged encroachment, but the learned Judge pointed out that that was purely a question of fact. It was next contended that the extension of the tin shed over the drain was not an encroachment within the meaning of the term. This point will be discussed later. The third plea was that the projection was an ancient one existing long before the Act came into force on 13th October 1926. The Magistrate had considered it unnecessary to determine whether the encroachment had been made before or after the Act came into operation, or before the time when the accused himself came into possession. That view is, in the opinion of the learned Judge, erroneous. His recommendation is due to the fact that the prosecution had not adduced any evidence on the point and his inspection made him think that the tin roofing was not many years old. Finally he would uphold the plea that the order as to continuing fine is illegal. Mr. B.C. De supports the reference so far as it is in his favour but he contends further that the case ought not to be remanded for further hearing on the two points mentioned, since S. 428, Criminal P.C., does not properly apply to it, since there is no encroachment within the meaning of the Act and since the only evidence on record goes to show that if there is an encroachment, it was made before the Act came into operation. He would rely upon the decisions of a learned Judge of this Court in Criminal. References Nos. 68 and 69 of 1934. The plea as regards S, 428 is not well founded. Even assuming, that the learned Sessions Judge may not have been entitled to direct additional evidence to be taken, the provision authorizes this Court to make such an order if it thinks additional evidence to be necessary. But in view of the order which is to be passed in this case, the point does not really arise.

4. On the question whether there has been an encroachment punishable under R. 2 (2) (a), it is necessary to consider what rule-making powers the Act confers. The preamble of the Act shows that it was intended to provide inter alia for the prevention of obstruction and encroachments and or nuisances on or near Government roads and for the preservation of such roads. A "Government road" is defined as a road vested in, or under the control and administration of, the Public Works Department, and includes (among many other things) the side-drains on any such road. Obviously the side-drain on the road in question is a "Government road" within the meaning of the Act. Under S. 4 the Local Government is empowered to make rules inter alia for prevention of encroachment on the side-drain and for the preservation of the side drain as being a "Government road." The rules framed are designed to carry out these purposes by imposition of penalties for a, breach or a continuing breach of the rules. Rule 2 (2) (a) prohibits any person from making or causing any encroachment without written permission of the Executive Engineer, on any such road by means of any building and R. 36, fixes a maximum penalty for infraction

of the rule. As the learned Judge has pointed out, the tin roofing projecting from the petitioner's shop front well over the road-side drain is an encroachment over the "Government road" as above defined. From its nature this building is also necessarily an obstruction.

5. As to the third plea of the accused, I agree with the view of the learned Sessions Judge that the Act is not retrospective. Its terms indicate that it is intended to prevent obstruction and encroachment or nuisance on or near the roads and to preserve the roads, that is to say, that it contemplates the future. The Magistrate has not held on the defence evidence that the encroachment was prior to the operation of the Act, and in fact he failed to direct his attention to the question. The two decisions which have been referred to, do not avail the accused. The Deputy Commissioner made the reference on 20th December 1934, that is, after the present reference has been made by the Sessions Judge. He recommended that the convictions be set aside since the Act, having no retrospective effect, did not apply because the encroachment had in one case been in existence for forty or fifty years and in the other for many years prior to 1926. The learned Judge of this Court pointed out in the first case that there was no provision in the Act applying to constructions in existence for so long a period before the passing of the Act and in the second case that the rule contemplated by S. 4 is a rule for the prevention of obstruction and that a rule under that section cannot be construed as a rule providing for the punishment in respect of existing constructions. I would accept the view expressed in the first case, but consider that the observation in the second case is not exhaustive since the rules contemplated by S. 4 may include, besides rules for the prevention of obstruction, both rules for the prevention of any encroachment and for the preservation of the road, for instance, by removal of the encroachment whether by continuing fine or otherwise.

6. With regard to the continuing fine, S. 5 provides that when the breach is a continuing one, the Local Government may direct that a continuing breach of a rule made by it under this Act shall be punishable with further fine not exceeding one rupee for every day after the date of the first conviction during which the offender is proved to have, persisted in the offence. R. 36 (2) makes a continuing breach of R. 2 and the other rules mentioned in R. 36 (1) punishable with a further fine for every day during which the breach is continued after the offender has been convicted for such breach. R. 36 (2) must however be read with S. 5 of the Act which limits the power to impose such a fine to every day after the date of the first conviction during which the offender is proved to have persisted in the offence. Obviously the Magistrate could not legally impose an anticipatory fine on and from the day when he convicted of the offence. The second part of his order therefore cannot stand. It is also proper that the fine should be imposed when the Court has proof before it of the continuing breach and the length of it. I would accept this reference in part, set aside the conviction and sentence and direct a fresh trial of the case by the same Magistrate, or if he is not available, by Such other Magistrate as the Deputy Commissioner may direct.

James, J.

7. I agree.