
(1951) 09 CAL CK 0005
In the Calcutta High Court

Bhadreswar Majhi

APPELLANT

Vs

Corporation of Calcutta

RESPONDENT

Date of Decision : 06-09-1951

Acts Referred:

Penal Code, 1860 (IPC) — Section 53

Citation : AIR 1952 Cal 683 : (1952) CriLJ 1364 : 56 CWN 558 : (1953) 1 ILR (Cal) 255

Hon'ble Judges : Lahiri, J;K.C. Das Gupta, J

Bench : Division Bench

Judgement

K.C. Das Gupta, J.—The question that arises for decision in this case is whether after an application u/s 363 of the Calcutta Municipal Act has been, withdrawn by the Corporation a fresh application lies under the same section with respect to the same structures.

2. The present Rule was issued on the Municipal Magistrate and the Corporation of Calcutta to show cause why the proceedings now pending before the Municipal Magistrate on the application u/s 363 of the Calcutta Municipal Act that was filed in January 1951 with respect to some alleged unauthorised structures should not be quashed. It appears that for a portion of the structures that are now alleged to be unauthorised and sought to be demolished, an application u/s 363 of the Calcutta Municipal Act was made by the Corporation on the 1st June 1949. After the proceedings instituted on this application had continued for some days, the Corporation asked for leave to withdraw that application and, on the 1st of March 1950, the learned Magistrate passed the following order:

Corporation prays for leave to withdraw this application on the ground that there is a formal defect in the precis, which should be cured and fresh case filed on the basis of a corrected precis. Application allowed to be withdrawn and the proceedings are dropped.

3. It is contended on behalf of the petitioner, the owner of premises No. 6B,

Nabin Sarkar Lane, that the order that was passed by the Magistrate had in law the effect of an order of acquittal on a charge of having constructed unauthorised structures and so a fresh application is barred under the provisions of Section 403, Criminal P.C.

4. Whether or not Section 403, Criminal P.C. bars the present application u/s 363 of the Calcutta Municipal Act depends mainly on the question whether the hearing of an application u/s 363 of the Calcutta Municipal Act is in substance a trial for an offence. If the hearing of such an applications is a trial for an offence, the person who was proceeded against, may be held to have been acquitted when the application was withdrawn and the present application will, in that case, not lie under the provisions of Section 403, Criminal P.C. If, however, an application u/s 363 of the Calcutta Municipal Act is in substance not a trial for an offence, Section 403, Criminal P.C. could obviously be no bar to the present application.

5. The question whether a fresh application u/s 363 of the Calcutta Municipal Act will lie with regard to the structures in. respect of which there was a previous application under the same section which was allowed to be withdrawn, can however not be considered to be "res integra." In a recent case not yet reported, the case of Dhanapati Devi v. Corporation of Calcutta Criminal Revn. No. 999 of 1950 (Cal) this very question was raised and a Bench of this Court Chakravarti and S.R. Das Gupta JJ., came to the conclusion that this objection could not be sustained and a fresh application will lie in spite of the fact that a previous application has been withdrawn. While Chakravarti J. delivering the judgment of the Court did say also that even if the hearing of the proceedings u/s 363 of the Calcutta Municipal Act amounted to a trial, Section 403, Criminal P.C. would have no application inasmuch as no formal order of acquittal was passed. His Lordship recorded his definite conclusion that the hearing of an application u/s 363 of the Calcutta Municipal Act did not amount to a trial and that the erection of an unauthorised structure was not an offence within the meaning of Criminal P.C.

6. It may be mentioned that there is a long line of decisions one of which has been mentioned in Dhanapati Devi's Case Cri. Revn. No. 999 of 1950 (Cal) to the effect that proceedings u/s 363 of the Calcutta Municipal Act or u/s 449 of the Old Calcutta Municipal Act did not amount to a trial.

7. In the matter of In Re: The Corporation of Calcutta , the question arose whether the rule of limitation of three months should apply to proceedings for demolition of unauthorised structure. The Court decided that this limitation did not apply to such proceedings, and observed that proceedings u/s 449 (corresponding to Section 363 of the present Act) were not instituted on complaint, nor was the demolition of unlawfully executed work a punishment within the meaning of Section 631. The question was thoroughly discussed in the case of Krishen Doyal v. Corporation of Calcutta 31 CWN 506, the question there being whether the person against whom an application u/s 363 of the Calcutta Municipal Act had been made, was an accused within the meaning of Section

342, Criminal P.C., and whether oath could be administered to him.

Their Lordships recorded their conclusion in these words:

Offence has been defined in Section 4, Clause (o), Criminal P.C., as any act or omission made punishable by any law for the time being in force. The word "punishable" has not been defined in the Code, but in Section 53, I.P.C., every kind of punishment has been mentioned of which demolition of structure is not one. We agree with the observation made in the case of *In Re: The Corporation of Calcutta* that the demolition of unlawfully erected work is not a punishment within the meaning of Section 363 of the present Act.

These authorities were followed by another Bench of this Court and it was decided that the period of limitation of three months as laid down in Section 534 of the Calcutta Municipal Act was not applicable to proceedings u/s 363 of the Calcutta Municipal Act. As already indicated, the same view was taken in *Dhanapati Debi's Case* Cri. Revn. No. 999 of 1950 (Cal).

8. Mr. Santosh Kumar Basu appearing for the petitioner tried to persuade us that all these cases mentioned above were wrongly decided and he laid much stress on the fact that Section 536 of the Calcutta Municipal Act had not been considered in these cases. Section 536 of the Calcutta Municipal Act is in these words:

When under this Act or under any rule or by-law made thereunder any person is liable, in respect of any unlawful work,

(a) to pay a fine, and

(b) to be required to demolish the work,

A Magistrate may in his discretion and subject to the provisions of Sections 363, 364 and 493, direct the said person to pay the fine and also to demolish the work.

Mr. Basu contends that by reason of Section 536 of the Calcutta Municipal Act, the Magistrate could, in the proceedings, instituted on the application u/s 363 of the said Act, pass an order of fine on the person held guilty of unauthorised work in addition to an order of demolition. Even supposing that the Magistrate could do so, we are of opinion that that would not turn the proceedings u/s 363 of the Calcutta Municipal Act into a trial for a criminal offence. It is worth mentioning however that in the application for leave to appeal to the Supreme Court against the decision in *Dhanapati Debi's Case* Cri. Revn. No. 999 of 1950 (Cal) which has been mentioned above, it was decided that the contention that the Magistrate could fine a person for putting up unauthorised structure in addition to the making of an order of demolition when proceedings had been instituted on an application u/s 363 of the Calcutta Municipal Act was not sustainable.

The following observation from that judgment may be usefully quoted:

It was contended by Mr. Basu that by reason of Section 536 of the Calcutta Municipal Act, the Magistrate could fine the proposed appellant as well as make an order of demolition but it seems to me quite clear that u/s 536 of the Municipal Act the Magistrate cannot both make an order for demolition u/s 363 of the Calcutta Municipal Act and fine him because his powers are made subject to the provisions of Sections 363, 364 and 493 of the Act. Those sections make it clear that proceedings for demolition or for fine are alternative and both proceedings cannot be taken in respect of the same act. That being so, if the Corporation had instituted proceedings u/s 363 of the Calcutta Municipal Act, they could not ask that the offender be fined, ff the Corporation cannot ask that the offender be fined, it would be strange if the law allowed the Magistrate to fine him. It is quite clear that the Magistrate has no such power u/s 536.

9. After careful consideration of Mr. Basu's argument, we have come to the conclusion that the fact that the provisions of Section 536 of the Calcutta Municipal Act were not taken into consideration by this Court in the cases mentioned earlier does not in any way affect the authority of these decisions.

10. Mr. Basu also drew our attention to certain observations in two cases which according to him supported his view that the proceedings u/s 363 of the Calcutta Municipal Act did not amount to a trial. One of these is the case of Ram Gopal v. Corporation of Calcutta 52 Cal 962 and the other is the case of Corporation of Calcutta Vs. Bhupal Chandra Sinha and Another, .

11. In our Judgment, none of these observations really affect the authority of the cases mentioned earlier, In the case of Ram Gopal v. Corporation of Calcutta 52 Cal 962 in dealing with the question whether this Court had jurisdiction u/s 439, Criminal P.C. to revise an order passed u/s 363 of the Calcutta Municipal Act Sanderson C.J., held that the court has such jurisdiction and in coming to that conclusion said:

I think it may be said that the Municipal Magistrate appointed to deal with offences against the Calcutta Municipal Act is a Court constituted under a law other than the Code for the time being in force, and comes within Section 6. Consequently, I am not prepared to hold that Sections 435 and 439, Criminal P.C. do not apply to these proceedings.

What is clear from this is that in his Lordship's opinion if a Magistrate is dealing with an offence under the Calcutta Municipal Act he is really trying an offence within the meaning of Criminal P. C. Whether in hearing an application u/s 363 of the Calcutta Municipal Act, a Magistrate is in fact dealing with an offence, was not discussed. It may be pointed out also that his Lordship in a later part of the judgment said that whether or not the Code of Criminal Procedure applied to this case was not of much importance because, in any case, the Court had Jurisdiction to interfere even, if it was a civil matter.

12. The observations in the case of Corporation of Calcutta Vs. Bhupal Chandra Sinha and Another, were made in connection with proceedings u/s 421 of the

Calcutta Municipal Act and have nothing to do with Section 363 of the Calcutta Municipal Act.

13. We have come to the conclusion that so far as this Court is concerned, the law must be taken to be well settled that the hearing of an application u/s 363 of the Calcutta Municipal Act does not amount to a trial for an offence within the meaning of Criminal P.C. Consequently, Section 403, Criminal P.C. can have no application to a case where a previous application u/s 363 of the Calcutta Municipal Act has been permitted to be withdrawn.

14. As this is the only point raised on behalf of the petitioner, fails, we order that this Rule be discharged.

Lahiri, J.

15. I agree.