
(1969) 11 CAL CK 0017
In the Calcutta High Court

Ganapati Sur and Another

APPELLANT

Vs

The State and Another

RESPONDENT

Date of Decision : 25-11-1969

Acts Referred:

Calcutta Police Act, 1866 — Section 66
Penal Code, 1860 (IPC) — Section 109

Citation : (1971) CriLJ 107 : 74 CWN 660

Hon'ble Judges : N.C. Talukdar, J

Bench : Single Bench

Judgement

N.C. Talukdar, J.—These ten Rules which involve the same points were heard analogously and are taken up together for disposal. The Rule are for quashing ten criminal proceedings, being Cases Nob. P. Rule 86 i to 873 of 1968, pending in the Court of Sri 8. N. Mukherjee, Presidency Magistrate, 15th Court, Calcutta, u/s 66 of the Calcutta Police Act (Act IV of 1966) against the accused-opposite party No. 2 and u/s 66 of the said Act read with Section 109 of the Indian Penal Code, against the petitioner No. 1.

2. The facts leading on to the Rules may be put in a short compass. The petitioner No. 1 in each Rule is the Chairman of the Standing works and Town Planning Committee of the Calcutta Corporation, the petitioner No. 2, constituted u/s 14 of the Calcutta Municipal Act (West Bengal Act XXXIII of 1951) and the accused-opposite party No. 2 is a hawker selling his articles on the pavement of the Chowringhee Road after obtaining a local temporary licence from the Corporation of Calcutta under schedule IV, Rule 1, Item 142 and schedule IV, Rule 2 of the Calcutta Municipal Act, 1951. On the 18th August, 1968, the accused opposite parties in the different Rules were arrested by S. I., 8. Dhar accompanied by Sergeant S. Mukherjee u/s 66 of the Calcutta Police Act, 1866 for a purported obstruction of the pavement. The police report inter alia is that on the 13th August, 1968, at about 8-25 p. m. the different hawkers obstructed the pavement between premises Nos. 1 and 7, Chowringhee Road by spreading their wares, to wit frocks, for sale and thereby caused serious obstruction to the

free movement of the pedestrians and that the accused No. 2, Ganapati Sur, being the Chairman of the Standing Works and Town Planning Committee of the Corporation of Calcutta, ordered the issue of receipt, against certain payments of money, from the Corporation of Calcutta, without any authority, allowing: the hawkers concerned to occupy and hawk their wares in the aforesaid portion of the pavement on the Chowringhee Road, and thereby aiding and abetting the hawkers in committing an offence u/s 66 of Bengal Act IV of 1866. A challan was submitted before the learned Chief Presidency Magistrate, Calcutta on 12-12-68 against the hawkers u/s 66 of Bengal Act IV of 1866 and against the Chairman of the Standing Works and Town Planning Committee, Corporation of Calcutta, u/s 66 of Act IV of 1866 read with Section 109,1. P.C. Summons were issued and the accused were placed on their trial before the learned Presidency Magistrate, 15th Court, Calcutta, on the abovementioned charges. These proceedings were impugned as not maintainable in law and on merits and the present ten Rules were obtained.

3. Mr. Nityaranjan Biswas, Advocate, appearing in support of all the Rules, on behalf of the two petitioners, made a six-fold submission. Two other contentions were also put forward touching the Constitution but they were ultimately given up by Mr. Biswas. The first contention of Mr. Biswas is procedural viz., that the petitioner No. 1 being a public servant u/s 605 of the Calcutta Municipal Act, 1951 within the meaning of Section 21 of the Indian Penal Code and the acts done by him being in discharge of his official duties, the present proceedings have been vitiated by the absence of the relevant sanction. Mr. Biswas's second contention is a material one and goes to the root of the case. The steps of his reasoning, in this context, are that u/s 349 of the Calcutta Municipal Act, 1951, the Corporation of Calcutta is the absolute owner of all the streets in Calcutta; that u/s 361 (c) of the said Act, the Corporation has the legal right to "temporarily or permanently close any public street or any part thereof"; that the resolutions passed on the footing thereof are quite within the bounds of the Municipal statute and the powers conferred thereunder upon the Corporation of Calcutta; and that the criminal proceedings based thereupon do not disclose any offence in law against the petitioner No. 1. Mr. Biswas on this point referred also to the provisions of Ss. 5 (60) and 596 of the Calcutta Municipal Act, 1951. The third submission of Mr. Biswas is that the Corporation has the right to grant licence Under Sections 218 and 219 read with schedule IV, Rule 1, Item 142 and Rule 2 of the Calcutta Municipal Act, 1951, and as such the Corporation being a statutory body, the police can merely ask the said body to perform its duties and therefore the present criminal proceedings are either maintainable against the petitioner No. 1 nor against the opposite party No. 2.

The fourth contention of Mr. Biswas is that in any event, the acts complained of having been done in the lawful exercise of the powers and functions laid down under Ss. 25, 26 and 548 (2) of the Calcutta Municipal Act, 1951, and done lawfully and in good faith and with due care and attention u/s 587 _ of the Act, the present proceedings u/s 66 of Bengal Act IV of 1866 are not maintainable

against the petitioner No. 1 or the municipal authority. The fifth contention of Mr. Biswaa is that it was the Commissioner who had granted the licence and not the Chairman and as such the criminal proceedings against the petitioner No. 1 should be quashed. The sixth and last submission of Mr. Biswas is that the petitioner No. 1 not being the Chairman on the date of the occurrence, viz., on 13-8-1968, the present proceedings against him are wholly unwarranted and untenable. The next two contentions of Mr. Biswas since given up touch the Constitution. Mr. Biswas in this context submitted in the first instance that the present proceedings amount to an infringement of the proprietary right of the Corporation and also its right u/s 361 (e) of the Calcutta Municipal Act amounting to an infringement of the right to or in respect of the property, conferred under Article 31 of the Constitution and as such the present proceedings are ultra vires the said article. The next contention of Mr. Biswas in this behalf is that the proceedings encroach upon the fundamental rights of the citizen to acquire, hold and dispose of property or to carry on any trade and as such are ultra vires Article 19 (1) (f) (g) of the Constitution of India. These two points however as mentioned above were given up by Mr. Biswas, who submitted that these are under consideration in the application pending in the Special Writ Jurisdiction of this High Court. Mr. Amar Prosad Chakraborty, Advocate (with Mr. Parimal Bhattacharya, Advocate) appearing on behalf of the opposite party No. 2 in all the Rules adopted the contentions of Mr. Biswas and also submitted that the proceeding against the opposite party No. 2, the hawker, is deeply misconceived and untenable inasmuch as the hawkers obtained the requisite licence under 8a. 218 and 219, Rule 1, Item 142 on payment of the local license fee under Rule 2 of Sch. IV of the Calcutta Municipal Act, 1951 and that the said licences were duly signed by the Commissioner u/s 548 (1) of the said Act. Mr. Chakraborty further submitted that no offence as alleged or at all has been committed by any accused and that the entire proceeding is an abuse of the process of the Court and as such should be quashed. Mr. Chakraborty also referred to the pending Rule in the Constitutional Writ Jurisdiction over this matter relating to the points mentioned above touching the Constitution. Mr. Jitendra Kumar Bhattacharya, Advocate, appearing on behalf of the State joined issue. Mr. Bhattacharya contended in the first place that the question of quashing the present proceedings at this stage is premature, as up to now no evidence has been adduced and that the points at issue should properly be determined in a full-fledged trial. The next contention of Mr. Bhattacharya is that the objection taken by Mr. Biswas to the maintainability of the proceedings, on the ground of the absence of a sanction, is misconceived inasmuch as the accused-petitioner No. 1, the Chairman of the Standing Works and Town Planning Committee of the Calcutta Corporation, is not a public servant removable from his office save by or with the sanction of the State Government or the Central Government although he may have been acting or purporting to act in the discharge of his official duties. Mr. Bhattacharya's third submission is that Under Sections 349 and 361 (c) of the Calcutta Municipal Act, 1951, public streets and squares have not only been vested in the corporation, with powers even to temporarily or permanently

close any such public street or part thereof, but the Corporation also has been conferred with powers under the said statute to prevent obstructions to the user of the same and the grant of such powers is entirely for the benefit of the members of the public. Accordingly Mr. Bhattacharya contended that when such rights are threatened by obstructions and the beneficiaries call upon the Corporation to exercise all such powers, then the power is no longer a discretion but a statutory duty which must be exercised for removing the said obstruction. Mr. Bhattacharya further sub-mitted in this context that any encroachment on a public thoroughfare for purposes not enjoined under the Act is an offence and the Commissioner has no right to allow such an offence to be committed whether temporarily or otherwise. He referred in this connection to the case of *Sudhir Kumar Bannerjee v. Commr., Corp. of Calcutta* in (1961) 65 Cal W N 133 and the same will be considered in its proper context. Mr. Bhattacharya next contended that the right to grant licence under Sa. 218 and 219 read with Sch. IV, Eule 1, Item 142 and Rule 2 of the Calcutta Municipal Act, 1951, is not an unfettered right and it is the duty of the police to remove an offence, committed as a result thereof, on a public thoroughfare causing obstruction to the members of the public. Mr. Bhattacharya finally submitted that the last two contentions put forward by Mr. Biswas, on behalf of the Corporation of Calcutta, relating to the licence being granted by the Commissioner and not the Chairman and the petitioner No. 1 being not even:the Chairman on the date of the occurrence viz,, on 13 d-68, are more technical than real and do not constitute, in any event, sufficient grounds for quashing the criminal proceedings at this stage.

4. Having heard the learned Advocates appearing on behalf of the respective parties and on going through the materials on the record, I hold that the first contention raised by the Biswas on behalf of the petitioners is not maintainable in law. In order to attract the bar u/s 197 of the Code of Criminal Procedure, the accused concerned must not only be a public servant purporting to act in discharge of his official duties but be also one "not removable from his office save by or with the sanction of the State Government or the Central Government." A reference to the provisions of the Calcutta Municipal Act, 1951, is pertinent in this context to establish that the Chairman of the Standing Works and the Town Planning Committee does not belong to that category of public servant, removable from his office by or with the sanction of the State Government. Unlike the Commissioner, as provided for u/s 19 of the Calcutta Municipal Act, 1951, the petitioner No. 1 is neither appointed by the State Government nor is removed by the said authority. The Chairman of a Standing Committee, as enjoined u/s 17 (1) of the Act, is elected from the members of the Standing Committee concerned at the first meeting each year and holds office in accordance to the provisions of Sub-section (2) thereof "until the election of his successor in office unless in the meantime he resigns." A Standing Committee, in its turn is constituted u/s 14 of the Act and consists of not more than 9 Councillors or Aldermen as provided for u/s 15. Under Sub-section (4) to Section 15, a member of a Standing Committee, shall hold office as such "unless

he sooner resigns the same till his term of office as Councillor or Alderman or as such person is in any manner determined." Section 8 of the West Bengal Act XXXIII of 1951, again enjoins that such councillors are elected by the constituencies while Section 9 lays down that the Aldermen are also elected at a meeting of the Councillors. u/s 11 of the Act, such a Councillor or Alderman may resign his office by giving notice to the Mayor. It is therefore abundantly clear that the Chairman of the Standing Works and the Town Planning Committee is not a public servant "who is not removable from his office, save by or with the sanction of a State Government or the Central Government," and accordingly no previous sanction, as enjoined u/s 197 of the Code of Criminal Procedure, is required by the court for taking cognizance of the offence against him. I hold therefore that the present proceedings have not been in any way vitiated by the absence of a proper cognizance based upon a previous sanction. The first contention of Mr. Biswas accordingly fails.

5. The second contention of Mr. Biswas, however, based upon the provisions of Sections 849, 361 (c), 5 (60) and 596 of the Calcutta Municipal Act, 1951, has a considerable force behind it. I would refer to Section 349 of the West Bengal Act XXXIII of 1951 in the first instance providing as follows ;

All public streets and squares (not being the property of and kept under the control of Government, the Commissioner for the Port of Calcutta or the Board of Trustees for the Improvement of Calcutta), including the soil, sub-soil, and the side-drains, footways, pavements, stones and other materials, of such streets and squares, and all erections, materials, implements and other things provided for such streets or squares, which are situated in Calcutta, shall vest in and belong to the Corporation.

It would accordingly appear that all public streets etc., as referred to in the aforesaid section, shall vest in and belong to the Corporation. Section 361 (c) of the said Act next provides that the Corporation may turn, divert or temporarily or permanently close any public street or part thereof, or permanently close any public square or garden. There is no cloud again on the definition of "public street" and the same has been laid down in Section 5 (60) of the Calcutta Municipal Act, 1951 meaning any street etc., whether a thoroughfare or not, over which the public have a right of way. It is therefore abundantly clear that the statute provides that all public streets and squares vest in and belong to the Corporation and accordingly under the doctrine of incidental powers of the Corporation, normal incidents of ownership should be given to the said body unless and until the statute lays down any restriction encroaching upon the same. One such restriction is provided for in the West Bengal Act XXXIII of 1951 itself u/s 351 ;

The Corporation shall, so far as it may consider it necessary to do so for the public convenience, cause such public streets, squares and gardens, as it may from time to time determine, to be watered, oiled or otherwise treated in a suitable manner, and take all necessary steps for that purpose.

The Statute therefore casts a duty upon the Corporation of Calcutta for the purpose of public convenience for suitably maintaining the public streets etc, and enjoins upon it to take necessary steps in furtherance thereof. The statute further confers an express right to the Corporation as would be evident from the provisions of Section 361 (c) of the Calcutta Municipal Act, 1951 referred to above, even to "temporarily or permanently close any public street or part thereof". This concept arises out of the common law doctrine of the high way with the right of way at any time and as a thoroughfare. A reference in this connection may be made to the case of *Suhrit Mitra v. Corporation of Calcutta* (1958) 62 CW N 186, wherein Mr. Justice P. B. Mukharji while considering the position in law as relating to a public squares, considered the provisions of Be. 349 (I); and 361 (o) of the West Bengal Act 33 of 1951 and held that in view of the said provisions "the normal incidents of ownership should be given to the Corporation unless the statute expressly creates any inroad upon them or provides for any restriction". I respectfully agree with the said observations and rely on the same for determining the point at issue. A reference also may be made in this context, to the case of (1961) 65 CWN 133. In support of his contention, Mr. Bhattacharyya appearing on behalf of the State pinpointed the observations of Mr. Justice D. N. Sinha (as His Lordship then was), at page 142, viz., that

At all times, an encroachment upon a public thoroughfare for such a purpose is an offence, and the Commissioner of Police has no right to permit an offence to be committed, whether temporarily or otherwise.

Mr. Biswas also relied upon the above, mentioned case and submitted that the principles laid down therein rule out the contentions of Mr. Bhattacharya but dovetail into Mr. Biswas's submissions and lend assurance to the same I must hold that Bhattacharyya's contention overlooks the expression "for such a purpose" as also the other significant observations made in the body of the said judgment and the ultimate findings arrived at by the learned judge. Mr. Justice Sinha (as His Lordship then was), clearly observed at page 143 that

just as the Commissioner to the Corporation and the Corporation of Calcutta have a legal duty to clear all obstructions to the user of public streets, including public footways and/or footpaths, the Commissioner of Police and his subordinates have a duty to assist them in removing such obstructions and/or preventing the same If these persons fail to perform their statutory duties, this Court has a right to command them by a writ in the nature of mandamus to do so.

The context of facts however, is entirely different in the instant case where the hawkers have been bona fide exercising their right to carry on their trade (on the basis of requisite licences duly granted by the Corporation of Calcutta in that behalf and the Commissioner of Police and his subordinates were not called upon at any stage to assist the Commissioner to the Corporation for removing such obstruction and/or preventing the same. In my view the principles ultimately laid

down in the abovementioned two decisions are not in conflict as submitted by Mr. Bhattacharya appearing on behalf of the State but support the submissions of Mr. Biswas. I respectfully agree with the observations made in the abovementioned cases and I hold that the question of maintainability of the present proceedings must abide the same.

6. It is against this background that one must proceed to consider the provision of Section 66 of the Calcutta Police Act, 1866, and its applicability to the facts of the present case. Section 66(4a) of Bengal Act 4 of 1866, the purported contravention whereof is the subject-matter of the present proceedings, is as follows :

Whoever, within such limits as shall be from time to time defined by the Commissioner of Police, with the sanction of the said (State) Government in any street, thoroughfare or place of public resort, commits any of the following offences shall be liable, on summary conviction before a Magistrate, to a fine not exceeding fifty rupees;?.....

(4a) Whoever exposes or keeps any article so as to cause obstruction in any public thoroughfare.

The use of the word "offence" in Section 66 is quite significant and some meaning and effect must be given to it. The facts constituting the present proceedings do not disclose such an "offence" because the hawkers in question were armed with requisite licences granted by the Corporation of Calcutta, entitled to grant the same under the statute, and accordingly the carrying on of their trade by the hawkers concerned would not by itself be an offence, unless and until the grant of the said licences is in conflict with any express restriction laid down by the statute, encroaching upon the aforesaid right of the Corporation. Section 66 of the Calcutta Police Act, 1866, in view of the terms thereof, does not constitute such a restriction and on the basis of the doctrine of incidental powers of the Corporation, the normal incidents of ownership should be allowed to be enjoyed by the said statutory body. In this case it is pertinent to consider that at no point of time and at no stage of the case the Commissioner to the Corporation and the Corporation of Calcutta felt any inability to clear the obstructions to the user of the public street and called upon the Commissioner of Police and his subordinates, having a duty to assist them in removing such obstructions to help them to perform their statutory duties. That being so, the hawkers have committed no offence and consequently no abetment thereof has been made by the petitioner No. 1. I find accordingly that Section 66 of the Calcutta Police Act, 1866, the kingpin whereof is any one of the offences catalogued therein, would have no application to the facts of the present case.

7. For a proper interpretation of the provisions of Section 66 of the Calcutta Police Act, 1866, and the words used therein viz , "any of the following offences" one will have to depend on the Rules relating to the interpretation of statutes and one of the elementary rules of such construction is the principle ruling out

redundancy. As was observed by Lord Sumner in the case of *Qubec Railway, Light, Heat and Power Co. Ltd. v. Vandry* AIR 1920 P0 181 that "effect must be, given if possible, to all the words used, for the legislature is deemed not to waste its words or to Bay anything in vain". A reference again may be made in this context to the case of *Ghanahyam Fas v. Regional Asst. Oommr. of Sales Tax, Nagpur*, reported in AIR 1964 8 SC 166 wherein Mr. Justice Subbarao (As his Lordship then was), observed that "A construction which would attribute redundancy to a legislature shall not be accepted except for compelling reason". I agree with the said principles and I hold that in order to give proper effect and meaning to the words "any of the following offences" as used by the legislature in Section 66 of Bengal Act 4 of 1866, the same must be deemed to qualify the provisions in Sub-clause 4(a) of the said Section and not equated with the said provisions themselves. It is only when the provisions of S. 66 (4a) of the Calcutta Police Act, 1866 are interpreted that way, the provisions of the other Act viz., of Sections 349, 361 (c), 5 (60), 596, 218, 219 read with Sob. IV. Rule 1, Item 142 and Rule 2 of the Calcutta Municipal Act, 1851 do not become either redundant or conflicting with the afore-said provisions of S. 66 of the Calcutta Police Act, 1866. This interpretation, in my view conforms to the principle of harmonious construction of statutes, ruling out any ultimate conflict between the two sets of statutes. In my view, the incident of an "offence" within the meaning of Section 66 (4a) of Bengal Act 4 of 1866 would take place when a hawker without being granted a licence in that behalf plies his trade in a busy thoroughfare or pavement obstructing thereby the flow of traffic in crowded city humming with life. In the instant case, however, the hawkers had proper licences and those are only temporary ones, granted for the festive season, and catering perhaps to the needs of numerous fellow citizens while causing obstruction to some. I hold accordingly that the provisions of Ss. 349, 361 (c), 5 (60), 596, 218, 219 read with Sob. IV, Rule 1, Item 142 and Rule 2 of the Calcutta Municipal Act, 1951 and those of S. 66 (4a) of the Calcutta Police Act, 1866, are not in conflict but are like the two prongs of a scissor cutting the cloth but not cutting each other. The dominant consideration of the aforesaid two sets of provisions is the benefit of the public at large. Upon ultimate analysis I find that when the obstruction caused to the pavement or a public thoroughfare does not amount to an offence in law but causes inconvenience to the members of the public, a duty is cast as enjoined under the relevant statutes, on both the Corporation of Calcutta and the Police to remove the same for the benefit of the public at large and the duty ascribed to the Commissioner of Police and his subordinates is a duty to assist the municipal authority in removing such obstruction and/or preventing the same. Mr. Justice Sinha (As His Lordship then was), has observed in the case in (1961) 65 CW N 133 that "If these persons fail to perform their statutory duties, this Court has a right to command them by a writ in the nature of mandamus to do so", but where the obstruction complained of amounts to an offence under the existing laws it comes clearly within the ambit of Section 68 (4a) of Bengal Act 4 of 1866. Any interpretation short of the same may be long off the mark and lead on to conflict and redundancy. The proper remedy for removing the

inconvenience, if any, in such facts and circumstances, will lie as directed by Mr. Justice Sinha (as His Lordship then was) in a proper application to the High Court for commanding the defaulting parties to remove the obstruction by a writ in the nature of mandamus. For the purpose, however, of the present case and within the ambit of my jurisdiction, such a consideration is neither relevant nor permissible and I have been also informed by the learned Advocates appearing on behalf of the respective parties that a petition is already pending in the special writ jurisdiction of this court for the said purpose. The objection in this behalf raised by Mr. Bhatta-charya, Advocate for the State, cannot therefore be sustained. Mr. Chakraborty appearing for the opposite-party No. 2 has supported the submission of Mr. Biswas and the interpretation given by him to Sections 349, 361 (c), 5 (60) and 506 of the Calcutta Municipal Act, 1951, and contended that any other interpretation would defeat and frustrate the intention of the legislature and render the said provisions nugatory. I agree with the submissions of Mr. Biswas and Mr. Chakraborty and I hold that the present proceedings u/s 66 of the Calcutta Police Act, 1866, against the accused are not maintainable in law and a continuance thereof, in the facts and circumstances of the cases, would be an abuse of the process of the court. The second contention of Mr. Biswas as supported by Mr. Chakraborty accordingly succeeds.

8. The third contention of Mr. Biswas is that the present criminal proceedings are not maintainable against the accused persons inasmuch as the corporation is a statutory body and has the right to grant licence under ss. 218 and 219 read with Sch. IV, Rule 1, Item 142 and Rule 2 of the Calcutta Municipal Act, 1951, and that the police can merely assist the Corporation to perform its duties. On a consideration of the aforesaid provisions and also of ss. 349 and 361 (c) of the West Bengal Act 33 of 1951, I hold that this contention of Mr. Biswas also stands on a firm footing. The normal incidents of ownership accrue to the statutory body under the doctrine of incidental powers of the Corporation unless and until the statute lays down any restriction encroaching upon the same. A reference may be made in this context to the case in (1958) 62 CW N 186. The said case has already been discussed in another context and I have respectfully agreed with the observations of Mr. Justice P. B. Mukharji as made therein. Section 66 of Bengal Act 4 of 1866 comes into operation only when any of the offences referred to therein is committed. In the present proceedings the incident complained of is not an offence because the hawkers were armed with the requisite licences granted by the Corporation of Calcutta and were bona fide carrying on their trade on the footing thereof. As has been observed by Mr. Justice D. N. Sinha (as His Lordship then was), in the case reported in (1961) 65 CW N 133 and considered in the previous context, the Commissioner to the Corporation and the Corporation of Calcutta being a statutory body has a duty to clear such obstructions to the public streets etc. and in that behalf it is entitled to assistance from the Commissioner of police and his subordinates "which assistance is not a matter of grace but is a matter of legal right" and that the police have also a duty to assist them in removing such obstructions and/or

preventing the same. It was further observed by His Lordship that "if these persons fail to perform their statutory duties, this Court has a right to command them by a writ in the nature of mandamus to do so". In the present proceeding the Corporation of Calcutta did not complain of any undue obstruction but on the other, hand had granted requisite licences to the hawkers for plying their trade and consequently there was neither any necessity on the part of the Corporation to remove such obstruction nor any occasion for the police to perform their duties to assist the Commissioner to the Corporation and the Corporation of Calcutta in that behalf. The instant complaints therefore disclose no offence within the meaning of Section 66 of the Calcutta Police Act, 1866 and the present criminal proceedings are not maintainable in law. The proper remedy for the purported obstruction is a writ in the nature of mandamus commanding the persons, charged with certain statutory duties, to perform the same if and when such obstructions are found to be established. The third contention of Mr. Biswas therefore also succeeds.

9. The fourth contention of Mr. Biswas viz., that acts complained of having been done in the lawful exercise of the powers and functions laid down under the Act and done lawfully and in good faith and with due care and attention, the present proceedings u/s 66 of Bengal Act 4 of 1866 do not lie, is not maintainable upon ultimate analysis. In support of his contention Mr. Biswas has referred to the provisions of Sections 25 and 26 of the West Bengal Act 33 of 1951 and also to the provisions of Section 548 of the said Act providing for the duration, conditions; suspension, revocation etc. of licences and written permissions. Mr. Biswas further relied on s. 587 of the Act conferring indemnity to the Corporation and providing that no suit shall be maintainable against any municipal authority or any municipal officer or servants or any person acting under the direction of any municipal authority or municipal officer or servants or of a magistrate etc. in respect of any work done in good faith and with due care and attention under this act or under any Rule or bye-laws made thereunder. It is difficult to agree with the steps of reasoning of Mr. Biswas and I agree with the submissions of Mr. Bhatnagar made in this behalf viz., that the indemnity conferred is a qualified one relating to suits and does not provide any legal bar to the institution of any criminal proceedings for the contravention of a penal statute. The interpretation sought to be given by Mr. Biswas to the abovementioned Section as constituting an absolute bar to the institution of a criminal proceeding against a municipal officer or servant or a person acting under the direction of the municipal authority or officer or servant is too wide and is dehors the intention of the legislature. The fourth contention of Mr. Biswas accordingly fails.

10. The last two contentions advanced by Mr. Biswas appear however to be based on facts and as such the same should abide determination by a full-fledged trial, but in any event, a decision thereof is not necessary in this case in view of the findings already arrived at by me on the other material points, disposing of the rule.

11. Before I part with the case I must refer to an ancillary submission made by Mr. Bhattacharya on behalf of the State. The learned Advocate has sought to interpret the provisions of the Calcutta Police Act, 1866, on the grounds of public policy and the convenience of the public. He has urged that the grant of the licences to the hawkers concerned by the civic authorities has not only been not conducive to public amenities but on the other hand has been arbitrary and antisocial. He has however cited no authorities for his proposition. I may refer in this context to a recent treatise on "The Judge as Law Maker," by Frederic Reynold wherein the author has observed that "decisions of the higher courts involving a conflict of opinion some times revolve in essence on questions of policy or social principle rather than on pure questions of law and there in a reference was made to the case of *M'Alister (or Donoghue) Pauper v. Stevenson* 1932 A C 562. In that case the majority of the Law Lords, viz., Lord Atkin, Lord Macmillan and Lord Thankerton de-Quarred themselves in favour of the manufacturer's liability, which was the subject matter in that case, on the ground that it was morally and socially necessary and Lord Macmillan observed that "in the daily contacts of the social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows..... The criterion of judgment must adjust and adapt itself to the changing circumstances". I agree with the said observations, which are undoubtedly true to a degree and as stated by Frederick Reynolds, judges may be

hardly inclined to reason within a closed system of thought, nor at a level of abstract theory, even when moral questions do not really impinge.

But the backdrop of facts in the instant proceedings is quite distinct from that obtaining in the abovementioned case in 1932 AC 562. The question involved in these cases is not so much one of interpretation of the provisions of a statute on the grounds of public policy or social principle but of the interpretation of an existing statute viz., the Calcutta Municipal Act, 1951, vis-a-vis the provisions of another one, in force, viz., the Calcutta Police Act, 1866 (Bengal Act IV of 1866). When Mr. Justice McCardie observed in *Ronald True* case reported in the *Notable British Trials*, Volume on *Ronald True*, pp. 246 that "all law must progress or it must perish in the esteem of man", the learned Judge never meant that existing laws will be by-passed on the ground of new social principles. The Calcutta Police Act, 1866 may be an old and antiquated Act, leaving scope for improvements, but the duty of the court is to interpret the law as it is and not as it should be. It is difficult also for this Court to fathom the inner springs of human thoughts and try to interpret the provisions of the statute in the light thereof for holding that the grant of the licences has been in any way antisocial or arbitrary. Until "such progressive laws" are made, as submitted by Mr. Bhattacharya, the court must continue to abide by the existing laws as otherwise it will enter into the realm of legislation. The ancillary submission of Mr. Bhattacharya accordingly fails.

12. In the result, I make the Rules absolute; and I hereby quash the proceedings against the petitioner No. 1 and the opposite party No. 2, u/s 66 of the Calcutta

Police Act, 1866, read with Section 109 of the Indian Penal Code and u/s 66 of the Bengal Act IV of 1866 respectively in cases Nos. P. Rule 864 to 873 of 1968,, pending before Sri S. N. Mukherjee, Presidency Magistrate, 15th Court, Calcutta.