

(1940) 11 CAL CK 0019
In the Calcutta High Court

Kumar Jitendra Mullick and Another

APPELLANT

Vs

Corporation of Calcutta

RESPONDENT

Date of Decision : 28-11-1940

Acts Referred:

Calcutta Municipal Act, 1923 — Section 179, 492

Citation : AIR 1941 Cal 560

Hon'ble Judges : Sen, J

Bench : Division Bench

Judgement

Sen, J.—The two appellants have been prosecuted for exercising their rights as the owners of a market without taking out a license and each of them has been sentenced to pay a fine of Rs. 855. The case against them briefly is as follows. Both the appellants are shebaitis and also trustees of the estate of the late Raja Rajendra Mullick Bahadur and as such shebaitis they are in possession of a market at 356 Upper Chitpore Road called the Nutan Bazar. For the first half of the municipal year 1937-1938 they paid a scavenging tax of Rs. 450 calculated on the basis that the quantity of rubbish removed daily was 180 cubic feet. They have been prosecuted for not taking out a license with respect to the second half of the year 1937-1938. On or about 13th. August 1937, the Superintendent of the market complained to the Corporation that the refuse of the bazar was not being properly removed and that a big heap of refuse had collected. To this a reply was sent on 3rd or 4th September 1937 by the District Engineer, stating that whereas the appellants had been paying a scavenging tax for the removal of 180 cubic feet of refuse daily, as a matter of fact 450 cubic feet of market refuse were being removed daily. He told them in this letter that they would have to pay, for the next half year, a tax calculated on the basis that 450 cubic feet of refuse were being removed daily. (This letter is Ex. 3.) To this the Superintendent of the market replied that the refuse which was being removed was not entirely that of the market but that some of the Corporation "Dhangars" were in the habit of bringing rubbish into the market from outside and dumping it in the bin of the market. There was further correspondence and ultimately the

two appellants were prosecuted for not taking out a license and convicted as stated above.

2. Mr. N.K. Basu on behalf of the appellants contends that inasmuch as there had not been a determination of the average quantity of the rubbish removed by the Corporation and the fee payable for the license the conviction cannot be sustained. Secondly, his contention is that there was not sufficient evidence to prove that 450 cubic feet of refuse was removed daily. Mr. Santosh Kumar Basu on behalf of the Corporation contends that the offence of which the appellants have been convicted consists not in the failure to pay the license fee or tax but in the exercising of the rights of the owner and occupier of a market without a license and that even without a determination of the tax payable a conviction could be had. He asserts further that there has been a due determination of the tax payable. The first question for decision is whether the determination of the amount of rubbish or offensive matter removed by the Corporation is necessary before a conviction can be had. Section 179, Calcutta Municipal Act, says:

Every person who exercises in Calcutta any of the callings indicated in Part I of Schedule IX shall every half-year take out a license and pay for the same a fee, to be calculated:

(a)....

(b) in the case of the owner or occupier of a market, according to the average quantity of offensive matter and rubbish removed daily, as determined from time to time by the Corporation, at the rates mentioned in Part II of the said schedule.

3. Now, it is clear from this section that the fee to be paid will depend upon the determination by the Corporation of the amount of offensive matter and rubbish removed daily by the Corporation. I shall now refer to Section 492, Calcutta Municipal Act. This section says that if any person exercises on or after the first day of June or the first day of December in any year any calling referred to in chap, XIII without having the license prescribed by this chapter he shall be punished with fine which-(i) may extend to three times the amount payable in respect of such license, and (ii) shall not ordinarily be less than one and a half times such amount

4. Chapter XIII relates inter alia to the scavenging-tax, payable by the owner of a market and to the license which such owner has to take out. Section 492 therefore prescribes that if any one exercises his rights as the owner or occupier of a market without having taken out a license prescribed in Chap. XIII, he shall be punished in a certain manner. It is evident from the provisions of Section 492 that the owner or occupier of a market cannot be punished unless and until the amount payable in respect of the license fee has been determined. The only sentence that can be passed is that prescribed in the section. Sub-section (i) provides the maximum sentence which may be passed and sub-s.(ii) the minimum sentence which may ordinarily be passed. Now, unless and until the fee payable for the license is determined it is not possible for the Court to pass any

sentence for, until that is done, it cannot be known whether or not the sentence passed would be illegal as exceeding the maximum or insufficient as being under the ordinary minimum. It follows from this that the intention of the Act is that a person cannot be tried for an offence punishable u/s 492 unless there has been a determination of the scavenging tax by the corporation. This view is supported by the other provisions of the Act. u/s 179 the owner of the market is to take out a license and pay the fee. Obviously a person cannot take out a license until he pays the fee and he cannot pay the fee unless the fee is determined. It follows therefore that if the Corporation does not determine the fee, it cannot be permitted to prosecute any one for not taking out a license.

5. The next question for decision is whether in this case the Corporation has determined the fee payable for the license. Under S.179 . it is the Corporation which is to determine the amount of the fee payable. This duty on the part of the Corporation has been delegated to the Chief Executive Officer and the evidence is that the Chief Executive Officer has delegated these powers to four persons, namely the Deputy Executive Officer, the Licensing Officer, the Deputy Licensing Officer and the Licensing Inspectors. I have been through the evidence and I am unable to find that any one of these persons have determined the amount of fee payable for the license of this market. In the course of the argument by the lawyer for the defence in the Court below it was pointed out that there had not been a determination of the amount of the fee by the Corporation. The Corporation was allowed an adjournment and an Inspector of Licenses, Mr. S. C. Banerjee, was examined as a court witness. All that this gentleman proved was that the power of determining the amount of fee payable has been delegated by the Corporation to the Chief Executive Officer and by the Chief Executive Officer to the four persons I have mentioned above. He then goes on to give evidence regarding the manner in which measurements were made of the refuse removed. He says that the License Officer sends a list to the District Engineer regarding the various markets for which a scavenging tax is payable, and the District Engineer is asked to note the average quantity of refuse removed daily from the markets during the half year. The District Engineer then sends to the License Officer his report and the License Officer accepts that report as correct unless there is a dispute or objection. He adds that any objection by a party is to be made to the License Officer. In cross-examination he says that if there is an objection regarding measurement it is dealt with by the District Engineer, and if there is any objection regarding assessment it is dealt with by the License Officer. He nowhere says that in this case, where there was undoubtedly a dispute regarding the measurement of the District Engineer, he or any one of the four persons mentioned above considered the dispute and then determined the amount of fee payable. He has merely given evidence of the procedure generally followed regarding these matters but there is no evidence to show that in this particular case any of the four persons mentioned above, who had the power to determine the amount of scavenging tax payable, did in fact determine it. This simple case was tried for a period of over two years and during all this period no evidence

was given to prove that the Corporation had determined the amount payable as scavenging tax for this market.

6. Section 179(b) says that it is the Corporation which has to determine the average quantity of offensive matter and rubbish removed daily. The Inspector of Licenses says that the District Engineer determines this and that even if there is a dispute the District Engineer decides the dispute. If this is the procedure followed then it is not in conformity with the provisions of Section 179 (b). Upon the evidence adduced I must hold that there has been no determination by the Corporation of the amount of tax payable. The conviction and sentence must therefore be set aside and the accused acquitted. The fines if paid shall be remitted.