
(1936) 08 PAT CK 0010
In the Patna High Court

Manager, Dhalbhum Estate

APPELLANT

Vs

Overseer, Jugsalai Notified Area Committee

RESPONDENT

Date of Decision : 06-08-1936

Acts Referred:

Bihar and Orissa Municipal Act, 1922 — Section 238, 242

Citation : AIR 1937 Patna 224 : 169 Ind. Cas. 38

Hon'ble Judges : Varma, J

Bench : Single Bench

Judgement

Varma, J.—This is a reference by the Sessions Judge of Manbhum-Singhbhum against an order of the Magistrate convicting the Manager of the Dhalbhum Estate u/s 242 Bihar and Orissa Municipal Act, by his judgment and order dated March 21, 1936, and sentencing him to pay a fine of Rs. 50.

2. The case against him, as appears from the record, was that there were kachcha drains on either side of the road within the Jugsald Notified Area, which were not in a satisfactory condition and were such as to affect injuriously the health of the public. A notice was served upon the Manager of the Dhalbhum State u/s 238 of the Act; but it appears from the evidence that no attempt was made by him to comply with the order mentioned in the notice before the prosecution actually started. As the form of the notice has been the basis of a reference by the learned Sessions Judge, I think it necessary to give it in extenso, so that one can appreciate the argument advanced on behalf of the petitioner by Mr. Manohar Lal and the reply thereto by the learned Government Pleader for the Crown. The notice runs as follows:

Under Section 238 (1) and (2), Bihar and Orissa Municipal Act.

To

The Manager,

Dhalbhum Estate.

Whereas it appears that the kacchha drains on both sides of the road from Nayabazar road to Nullah and also the kachcha drain along Gaushala Nayabazar road are for want of proper drainage in a state injurious to health and offensive as all the water remains standing on them and stagnates, which is a very unsatisfactory arrangement of drainage.

You are hereby required u/s 238 (1) and (2), Bihar and Orissa Municipal Act, to improve the drainage along both these in Nayabazar area by constructing proper type of drains within one month of the receipt of this notice. Failing compliance, proper legal action shall be taken against you in due course.

Dated Jugsalai,

(Sd.) Illegible. 22-10,

The October 22, 1935.

Chairman,

Jugsalai N.A. Committee.

3. The learned Sessions Judge refers to Clause (2), Section 359, Bihar and Orissa Municipal Act, and says that the non-compliance with the provisions thereof makes the notice served upon the petitioner an illegal one. Section 359 runs as follows :

Whenever it is provided in this Act that the Commissioner or the Commissioners at a meeting may require the owners or the occupiers, or the owners and occupiers of any land, to execute any work or to do anything within a specified time, such requisition shall be made, as far as possible, by a notice to be served on every owner or occupier who is required to execute such work or to do such thing; but if there be any doubt as to the persons who are owners or occupiers, such requisition may be made by a notice to be posted up on or near the spot at which the work is required to be executed or the thing done, requiring the owners or the occupiers, or the owners and occupiers, of any land, to execute such work or to do such thing within a specified time; and in such notice it shall not be necessary to name the owners or the occupiers.

(2) Every requisition as aforesaid, other than a requisition u/s 196 or Section 197; shall give notice to the persons to whom it is addressed that, if they fail to comply with the requisition or to prefer an objection against such requisition as provided in the next succeeding section, the Commissioners will enter upon the land and cause the required work to be executed, or the required thing to be done; and that in such case the expenses incurred thereby will be recovered from the persons who are required in such requisition to execute such work or do such thing.

4. Now a mere glance at the notice which I have quoted in ex tension will show that the provisions of Clause (2), Section 359 have not been complied with. The learned Advocate who opposes the reference has urged that the last sentence of

the notice is a sufficient compliance with Clause (2), Section 359. I am afraid I cannot accept that contention. The last sentence says :

Failing compliance, proper legal action shall be taken against you in due course.

5. So the action to be taken is against the person on whom the notice was to be served, and the only thing that could be done against that person was to prosecute him under the provisions of the Municipal Act. The only alternative that if he did not do what he was being asked to do, the "Commissioners would get it done themselves, was not mentioned in the notice and as in Clause 2, Section 359, the word "shall" is used, the observance of its provisions seems to me imperative. I agree with the learned Sessions Judge that this defect in the notice makes it illegal, and no prosecution could be based thereon.

6. My attention has been drawn to the case *Chairman of Puri Municipality v. Kissori Lal Sen* 1 C.W.N. 244n., in which it was held that non-mention of the second portion of the section (which corresponds to Section 359, Bihar and Orissa Municipal Act) made the notice illegal inasmuch as the mention of the second portion was imperative and no prosecution could be started for failure to comply with the requisition of such a notice. But as against that, the learned Government Pleader has relied upon the decision in *Jagadis Chandra Ganguly v. Sreenath Bose* 2 C.W.N. 187n where the case which I have just mentioned was discussed. We have not got a full report of the case. The petitioners in that case were residents within the jurisdiction of the Barrack pore Municipality and notice was issued upon them under the provisions of Section 175, Bengal Municipal Act (Act III of 1884), to remove a privy in their house which was considered to be a nuisance by one of the neighbours. I have already mentioned that Section 175, Bengal Municipal Act, corresponds to Section 359, Bihar and Orissa Municipal Act. When they failed to comply with that requisition a prosecution was started which ended in their conviction. It was argued, it seems, that before prosecuting the petitioners a further notice was necessary to be served upon the accused in that case. Their Lordships saw that it was not necessary to serve a second notice. A second notice only becomes necessary under the provisions of Section 175, Bengal Municipal Act, which corresponds with Section 559, Bihar and Orissa Municipal Act. I do not think that this decision in any way throws any light upon the validity or the invalidity of the notice which we have been discussing in this case. The true argument was based upon the assumption that a valid requisition u/s 175 (s. 359, Bihar and Orissa Municipal Act) was served on the accused.

7. I am further of opinion that the notice is very vague. It asked the manager of the Dhalbhum Estate to construct proper type of drains within one month. Now, the idea of the Municipal Authorities with regard to the proper type of drains may differ considerably from the idea of a proper type of drain possessed by the petitioner. If they wanted him (the accused) to repair according to their ideas, they ought to have given in the notice itself some specification to enable him to comply with the order. As to the question whether the notice which is supposed to have been served u/s 238, Bihar and Orissa Municipal Act, could have been

served under that section, I am of opinion that Section 238 deals with cases of land where water stagnates and where there is no proper arrangement for drainage. Clause 1 C.W.N. 244 deals with such lands which are at a distance of 100 feet from the nearest drain; and Clause (2) deals with cases of land where there is no such drain near by. The learned (Government Pleader urges that when the notice was served, evidently the authorities meant that there is no proper drainage of the land from which the water comes and stagnates in this drain. The very wording of the notice indicates that there were specific circumstances in their contemplation when the notice was issued by the Municipal Authorities. Therefore, I have very grave doubts as to the applicability of Section 238 itself. Then arises the question as to what could have been the section under which similar notices should have been issued to the accused. For that I find that the Municipality is authorized u/s 217 to deal with the existing drains and there it would have been necessary to give specifications of the alterations ordered to be made by the notification. Section 217, Municipal Act, runs as follows :

(1) The Commissioners may require by notice the owner or occupier of any land or building, within a period to be specified in the notice, to do all or any of the following things : (a) to close, remove, alter, repair, disinfect or put in good order any latrine, urinal, cesspool, drain or receptacle for sewage, offensive matter or rubbish pertaining" to such land, and, (2) When requiring under Sub-section (i) anything to be provided, altered or done, the Commissioners may specify in the notice the description of the thing to be provided, the pattern to conform with which the thing is to be altered, and the manner in which the thing is to be done.

8. No specification has been supplied and to that extent the notice is defective ever from the point of view of P. 217. The case in *Kanai Lal Jalan v. The Corporation of Calcutta* 11 C.W.N. 508 : 5 Cri. L.J. 293 has been referred to be the accused where it was held that if the Municipality wanted the owners of the basi within the Municipality to carry out certain improvements, they ought to have served them with a copy of the standard plan approved by the General Committee u/s 407, Calcutta Municipal Act, and pointed out to them on that plan what work they were to do. Failure to do that would make the conviction illegal. The position seems to be very much like that contemplated by Section 217, Clause (2), Bihar and Orissa Municipal Act. Mr. Manohar Lal for the petitioner has raised another point, and that is that the petitioner who happens to be the manager of the Dhalbhum Estate should not have been prosecuted because he is not the owner, strictly speaking. As against that my attention has been drawn to the definition of "owner" in Section 3, Clause (18). Clause (18) says : "owner" includes "(6) a manager on behalf of any such person." If that were all, there would have been no difficulty in prosecuting the manager. But we find that there is a proviso attached to the list of persons who are included in the term "owner" and that proviso runs as follows :

Provided that such manager, agent or trustee shall be liable to do anything required by this Act to be done by the owner, nor shall he be subject to any fine

for omitting to do such thing, unless he has sufficient funds in his hands as such manager, agent or trustee to do such thing.

9. I need not express any opinion upon this part of the argument, because I find that for the purposes of this case the conviction cannot stand for the reasons given by the learned Sessions Judge and for the supplementary reasons given by me in the early portion of the judgment. I would, therefore, accept the reference, set aside the conviction and sentence, and acquit the petitioner.