

(1979) 01 SHI CK 0006

In the High Court Of Himachal Pradesh

Case No : Criminal Appeals No's. 24, 25, 26 and 27 of 1971

Municipal Committee

APPELLANT

Vs

Shri Birja Nand Negi and Others

RESPONDENT

Date of Decision : 10-01-1979

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 247
Himachal Pradesh Municipal Corporation Act, 1994 — Section 233

Citation : (1979) ShimLC 242

Hon'ble Judges : H.S. Thakur, J; D.B. Lal, J

Bench : Division Bench

Advocate : H.K. Bhardwaj, for the Appellant; M.G. Chitkara, for the Respondent

Final Decision : Dismissed

Judgement

D.B. Lal, J.—In these four criminal appeals, Cr.A. No. 24 of 1971 and the other connected Criminal Appeals Nos. 25, 26 and 27 of 1971, a common question of law and fact arises and hence all of them can be disposed of by a single judgment.

2. The prosecution case in all these appeals was that the accused did some construction of a building against the Municipal Bye-laws and as such they were prosecuted for committing the offence u/s 233 of the Himachal Pradesh Municipal Act. The respective complaints were filed by the Appellant-Municipal Committee before the Sub-Divisional Magistrate, Rampur Bushehr, and the order-sheets of the dates of which the accused were acquitted u/s 247 of the then Code of Criminal Procedure are written as follows:

Cr.A. No. 24/71.- Court's order dated 21-5-71.

Called. None is present on behalf of the complainant. Both the accused are present. Now it is 3 p.m. Hence the case u/s 247, Code of Criminal Procedure is hereby dismissed and the accused persons are acquitted. File be consigned to the record room.

Sd/- S.D.M., Rampur Bushahr, Mahasu Distt. (H.P.)

Cr.A. No. 25/71.- Court's order dated 1-6-71:

The representative of M.C. Rampur Shri Kishori Lal not present inspite of knowledge of the date of hearing. Accused Ram Lok present. To come up at 3 p.m.

Sd/- S.D.M. 1-6-71.

Court's order dated 1-6-71:

Called thrice. Accused Ram Lok present. Kishori Lal compLalnnt not present in spite of knowledge of the date of hearing. I, therefore, acquit the accused Ram Lok u/s 247, Code of Criminal Procedure. The file be consigned to the record room. Announced.

Sd /- S.D.M. 1-6-1971.

Cr.A. No. 26/71.- Court's order dated 21-5-71:

Called. None is present. Now it is 3.10 p.m. Hence the case is dismissed in default of the presence by the compLalnnt. The accused is absolved of the case u/s 247, Code of Criminal Procedure. The file be consigned to record room.

Sd/- S.D.M., Rampur Bhshahr, Distt. Mahasu, H.P. 21-5-71.

Cr.A. No. 27 of 1971.-"Court's order dated 19-5-71:

Called. Now it is 2 p.m. The compLalnnt is not present. He was present op the previous date of hearing. The offence is icompoundable. The accused along with her Counsel Shri Kailash Chand, Advocate, present. Case u/s 247, Code of Criminal Procedure be filed owing to the absence of the compLalnnt. The order accounced to the accused.

Sd/- S.D.M., Rampur Bushahr, Mahasu Distt., H.P. 19-5-1971.

3. In all these cases the dates were fixed for the appearance of the accused and obviously the compLalnnt was also required to be present on these dates. The Magistrate did not choose to adjourn the hearing of the cases to some other date, nor did he choose to exempt the personal attendance of the compLalnnt. The result was that he proceeded u/s 247 of the then Code of Criminal Procedure and acquitted the accused. The Municipal Committee, Rampur Bushahr has felt aggrieved of the decision and has preferred these four appeals.

4. Shri Bhardwaj the learned Counsel for the Municipal Committee, emphasised in the beginning that one Kishori Lal, Store Keeper of the Municipal Committee, was put in-charge of these cases. He was on strike on all these dates and as such did not appear before the Magistrate. Kishori Lal has given an affidavit in all these cases, which indicates that he was on strike and as such he deliberately avoided his presence before the Magistrate. According to Shri Bhardwaj, the

learned Magistrate should have considered the circumstance of strike and as such he had reasons before him to adjourn the hearing of the cases to some other date, or at any rate to exempt the personal attendance of the complainant. According to the learned Counsel, the order of acquittal was per se invalid because of that reasons. In that connection Shri Bhardwaj pointed out that the expression "shall" used in Section 247 is not mandatory and in a given situation it has to be interpreted as merely directory. The learned Counsel is correct when he asserts that if circumstances are made out before a Magistrate which justify him to adjourn the case to another date, or which may rather compel him to exempt the personal attendance of the complainant in these cases due to unforeseen strike, the expression "shall" may not be held mandatory and the learned Magistrate could as well have proceeded to adjourn the cases to some other date or to exempt the personal attendance of the complainant. But in the instant cases, we have to consider if any material was at all available before the Magistrate so that he could exercise his discretion of adjourning the cases to some other date, or of granting personal exemption for appearance of the complainant. Shri Bhardwaj contended that the complainant in the instant cases was the Municipal Committee being a corporate body. As such it had to act under some employee of its own and Kishori Lal, Store Keeper, was deputed for this work. The affidavit of Kishori Lal no doubt indicates that he deliberately remained absent as he was participating in a strike. But our difficulty is that before the learned Magistrate on that date there was absolutely no material to indicate that any strike was being held, or that Kishori Lal was also taking part in that strike, or that Kishori Lal deliberately avoided presence due to that strike. It is immaterial that Kishori Lal gives an affidavit now before this Court. He could as well have gone to the Magistrate on that date and could have represented that he would not put in appearance in the complaint-cases due to strike. Had he done so that learned Magistrate would have been confronted with the situation regarding the strike, and the learned Counsel for the Appellant could have successfully argued that perhaps the learned Magistrate should have exercised his discretion of adjourning the cases to some other date, or exempting the appearance of Kishori Lal on that particular date. But, as we find, there was no material before the learned Magistrate to think on those lines. We have to consider as to whether the order of acquittal passed by him is per se invalid and can be set aside in these appeals.

5. Shri M.G. Chitkara, the learned Counsel representing the accused, pointed out that although the Municipal Committee was a corporation, yet nonetheless they were at liberty to engage a Counsel for the date and such Counsel could as well put in appearance on behalf of the Committee. The very fact that the Committee remained oblivious of the incident of strike and the very fact that they did not engage a Counsel for that date rather indicates that they never cared for these cases, and the learned Magistrate was left with no choice but to acquit the accused u/s 247 of the then Code. A reading of Section 247 rather indicates that failing to exercise discretion which has to be judicial, for adjourning the hearing

of a case to some other date or for exempting the personal attendance of the complainant the Magistrate is left with no choice but to acquit the accused under that section. However, in a particular case if circumstances are made out wherein it could be held that the Magistrate had reasons before him to adjourn the hearing of the case to some other date or to exempt the personal attendance of the complainant, he had to exercise a judicial discretion, and despite the mandatory character denoted by the use of the expression "shall" in the section the Magistrate would be justified not to acquit the accused under Section 247. As we have pointed out above, in the instant cases, no circumstances whatsoever are shown wherein the Magistrate could have exercised his discretion for adjourning the hearing of the case, or for exempting the personal attendance of the complainant. That being so, the expression "shall", in our opinion, assumed the mandatory character and in such a case the Magistrate was left with no choice but to acquit the accused u/s 247.

6. In these appeals the only question that arises before us relates to the legality of the order of acquittal passed by the learned Magistrate. In our opinion, no flaw can be found in that order and it cannot be stated that the learned Magistrate exercised any wrongful discretion or failed to exercise any judicial discretion. He was left with no choice but to acquit the accused u/s 247 because the cases were tried as summons" cases and Section 247 had its application.

7. The four appeals are thus without any merit and the same are dismissed.

8. This judgment is being given in Cr.A. No. 24 of 1971 (Municipal Committee, Rampur Bushahr v. Shri Birja Nand Negi), and shall govern the decision in the other three connected criminal Appeals Nos. 25, 26 and 27 of 1971. A copy of this judgment shall be kept on the records of the other connected appeals.