

(1956) 01 CAL CK 0001
In the Calcutta High Court

The Corporation of Calcutta

APPELLANT

Vs

Dip Narayan Lachmi Prasad

RESPONDENT

Date of Decision : 18-01-1956

Acts Referred:

Bengal General Clauses Act, 1899 — Section 25

Citation : (1957) CriLJ 249

Hon'ble Judges : Debabrata Mookerjee, J

Bench : Single Bench

Judgement

Debabrata Mookerjee, J.—The petitioner Corporation of Calcutta prosecuted the opposite party u/s 439 (5)/537 of the Calcutta Municipal Act 1951 for using certain premises in a forbidden area for purposes referred to in Section 437 of the Act.

2. The opposite party was tried by a Municipal Magistrate upon the charge, who however by an order dated the 7th July 1955 acquitted him. The Corporation of Calcutta thereafter applied to this Court and obtained the present rule, which was issued to show cause why the acquittal should not be set aside and the opposite party retried in accordance with law.

3. The facts shortly stated are that the opposite party carried on at No. 3 Raja Gopi Mohan Street the business of storing for sale "Iron Scrap" in contravention of a notification issued by the Corporation of Calcutta dated the 26th July, 1951 u/s 387 of Calcutta Municipal Act of 1923. A sanitary inspector visited the place on the 31st March 1954 and found the petitioner carrying on business as aforestated. The case is that the opposite party having used the premises in contravention of the notification was liable to be punished u/s 439 (5) of the Calcutta Municipal Act, 1951.

4. The petitioner pleaded innocence and his defence was that he had been permitted to carry on the trade as evidenced by the trade licences which had been issued in his favour from year to year including the year of the prosecution.

It was said that the Corporation should not have prosecuted the opposite party after having realised the trade licence fees without any notice whatever calling upon him to show cause why he should not be prosecuted for contravention of the Act. A further defence was that iron scrap had not been stored but the premises were being used as a show-room for exhibition of samples of iron.

5. Upon the evidence called in the case the Learned Magistrate came to the finding that it had been conclusively proved that the accused actually stored old iron on the premises during the period and that he had paid trade licence fees to the Corporation year after year including the current year for carrying the trade of "new and old iron, metal seller and order supplier".

6. At the conclusion of the trial the learned Magistrate observed that the opposite party ought to have been served with notice by the Corporation of Calcutta before he was actually prosecuted since it appeared that the corporation had year after year granted him licence for carrying on the trade. The learned Magistrate's view seems to be that there was a sudden change of front on the part of the Corporation since they had issued trade licences in his favour year after year. His view seems to be that instead of revoking the trade licence the Corporation did not act properly in making accusation of an offence u/s 439 (5) of the Act straightway against the opposite party. It is in this view that he considered the present prosecution to have been misconceived and directed the acquittal of the opposite party. The Corporation of Calcutta challenges that position in this Rule.

7. It is to be observed that the order of acquittal in so far as it is based upon this view proceeds more upon ethical than legal ground that the opposite party who was paying trade licence should not have been prosecuted for contravention of the Act. This view does not appear to be sustainable, The existence of a trade licence in favour of a party cannot by itself be used as a shield against prosecution for contravention of a specific provision of the Act. The mere fact that a trade licence has been issued in favour of a particular party does not entitle him to plead that licence in answer to a charge that he has contravened a specific provision of the Act.

8. Although I am not prepared to uphold the observation of the learned Magistrate that the existence of a trade licence in favour of the opposite party proved that the present prosecution was misconceived, I am however bound to say that the prosecution could not possibly succeed on other grounds to which I am about to refer. This application being one directed against an order of acquittal, the order cannot be lightly interfered with when it is quite clear that the prosecution was indeed misconceived for reasons other than the one given by the learned Magistrate.

9. Section 437 of the Act of 1951 provides that no person shall use or permit to be used any premises for any of the purposes mentioned in that section without or otherwise than in conformity with the terms of a licence granted by the

Corporation in that behalf. The section gives power to the Corporation to fix the scale of fees to be paid in respect of premises licenced under the section and prescribes the limit of such fees. There are four purposes mentioned in Sub-section (I) which have to be taken note of. Firstly, the premises cannot be used without or contrary to a licence for the purposes specified in Sch. 18. Secondly, they cannot be used if in the opinion of the Corporation the purposes affect public health and safety or are likely to create a nuisance. Thirdly, if the purposes relate to the keeping of cattle, four-footed animals or birds for sale or hire or sale of the produces thereof. Lastly, for purposes of storing for other than domestic use or of selling of certain combustible things. Sub-section (I) of Section 439 therefore forbids use of premises without a licence or contrary to the terms of a licence when the premises are used for one or other of the purposes I have just detailed above. It is said on behalf of the Corporation that the "purpose" in the present case is the purpose mentioned in Clause (a) of Sub-section (I) of Section 437; that clause contains reference to Sch, XVIII. Item 8 of that schedule is the relevant item which provides that Iron amongst other things cannot be stored, packed, pressed cleansed, prepared or manufactured by any process whatever in excess of the quantity prescribed for the article by the Corporation in this behalf. Reading Sub-section (I) of Section 437 along with item 8 of Sch. 18 it is quite plain that the Act forbids the use of premises contrary to the terms of a licence in the sense of storing, manufacturing etc., in excess of the quantity prescribed for the different articles mentioned in item 8. In the present case however, no license was issued and that being so, no question of acting contrary to the terms of a license arises. Sub-section (I) read with Clause (a) merely means that no person can use or permit to be used any premises contrary to the terms of a licence prescribing the quantity for the article for which licence is issued; but that presupposes the existence of a license.

10. In this case however the prosecution is laid u/s 439, Clause (5) of the Act which forbids the use of a premises in a declared area for any of the purposes referred to in Section 437 which I have read above. A notification was proved in this case dated the 26th July 1951 purported to have been Issued under the corresponding Section of the Calcutta Municipal Act of 1923 which provided that "no person shall use any premises for the purposes of storing, packing, pressing, cleansing, preparing or manufacturing by any process whatsoever any of the articles, viz., iron, brass, steel and tin;- "within a certain boundary mentioned in the notification itself. It is common ground that the place of business of the opposite party is within the area specified in the notification. This notification was made u/s 387 of the Act of 1923 which has been replaced by the Act of 1951 and re-enacted in Section 439 of the new Act. The new Section provides that the Corporation may give public notice of their intention to declare that in any area specified in it no person shall use any premises for any of the purposes referred to in Section 437, Sub-section (I). The Section then proceeds to provide for the hearing of objections to the proposed declaration and gives power to the Corporation to make a declaration to be published in the official gazette in such

other manner as the Corporation may determine; and if thereafter any person acts in contravention of that notification and uses any premises for any of the purposes referred to in Section 437 (I) of the Act, he shall be liable to be prosecuted and the Commissioners shall have power to stop such use of the premises,

11. It is to be observed that there has been no fresh notification whatever made and issued under the amended Act. The question then arises whether the notification under the repealed Act can be depended upon as furnishing a legal basis for prosecuting the opposite party. In order that this notification might be of any assistance to the petitioner, it must be shown that it is sanctioned by Section 25 of the Bengal General Clauses Act. That Section provides that when any enactment is repealed and re-enacted by a Bengal Act with or without modification, then unless otherwise expressly provided the notification made or issued under the repealed enactment shall in so far as it is not inconsistent with the provision re-enacted continue in force and be deemed to have been made under the provisions so re-enacted unless and until it is superseded by a notification made and issued under the provision of the Act so re-enacted. The Calcutta Municipal Act of 1923 was repealed by the Act of 1951 and Section 387 of the Act of 1923 was re-enacted in Section 439 of the present Act. There is no express provision in the Act of 1951. which would rule out the application of Section 25 of the Bengal General Clauses Act. The only question is whether there is anything inconsistent between the notification and the provisions re-enacted. It is quite clear that unless all the conditions mentioned in Section 25 of the Bengal General Clauses Act are fulfilled that Section cannot be called in aid for the purposes of making use of a notification issued and made under the repealed Act of 1923. It is true that there is no express provision suggesting abrogation or authorising exclusion of the notification. But Section 439 expressly incorporates the provisions of Section 437 of the Act and Sch. 18 mentioned in Clause (a) of the latter section makes it quite clear that there is at the present moment an inconsistency which cannot be smoothed over or overlooked. It is to be observed that under the repealed Act item 8 of Sch. XIX read as "Storing, packing, pressing, cleansing, preparing or manufacturing, by any process whatever, any of the following articles", and then followed a list of articles. This has been amended by the addition of words, "in excess of the quantity prescribed for each of such article by the Corporation in this behalf" to be found in item 8 of the corresponding schedule in the new Act. This to my mind imports entirely new considerations which were not pertinent in the repealed Act and brings in a certain inconsistency which makes Section 25 of the Bengal General Clauses Act inapplicable. If that is the position then it must be held that there is in the present prosecution no notification under the Act and unless and until there is such a notification in existence issued and made in accordance with law, there could not possibly be a conviction for contravention of the provision of Section 439 (5) of the Calcutta Municipal Act of 1951. It is of course true that the learned Magistrate did not proceed on these grounds; but that does not prevent

this Court from examining them when raised before it decides to set aside an order of acquittal. Therefore, in these circumstances, it is extremely difficult to see how a prosecution can possibly be launched against a person for alleged contravention of the provision of Section 439 of the Act of 1951. In the absence of an appropriate notification legally made and issued under the new Act, the prosecution could not succeed, since the old notification to which I have referred cannot possibly do duty for a notification under the new Act in view of the inconsistency brought on by the amendment of the Schedule, The old notification cannot therefore be relied upon for the purpose of holding that the opposite party was guilty of the charge brought against him.

12. The position to my mind becomes still more difficult if the Corporation think that they can successfully prosecute a person for alleged contravention of the provision of Section 439 of the Act of 1951, by depending upon Sch. 18 of the Act. Section 439 (5) contemplates clearly a case where the Corporation have already taken a decision to notify in accordance with law certain area as an area Within which particular types of trade or calling are prohibited. If after the issue of a public notice of their intention to declare that in any specified area no person shall be permitted to use any premises for purposes mentioned in Section 437, the Corporation arrive at the decision which is duly published, then indeed the person who carries on his business in contravention of the declaration by the Corporation in that behalf, be-comes liable to be punished u/s 439 (B). In the present case there seems to me to have been confusion as respects the real offence which the Corporation wanted to charge the opposite party with. If it is a case u/s 439 (5), then the real requirement was to prove that there was a valid notification under the law which could be depended upon for the purposes of showing that the Corporation had declared a particular area to be a prohibited area in respect of certain trades and calling and the opposite party despite the declaration carried on business in that area. But the notification proved cannot be adopted in the present case and that being so, the prosecution Was bound to fail.

13. I do not express any opinion on the other questions raised in the case by either of the parties before me because I think that they are not strictly relevant to the decision I have reached, I think therefore, that in the circumstances of this case I must hold that this application cannot succeed and the order of the learned Magistrate acquitting the opposite party must be upheld, although on very different grounds.

14. The result therefore is that this Rule is discharged.