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November 17.

CORPORATION OF CALCUTTA

v.

MULCHAND AGARWALLA.

[VENKATARAMA AYYAR and JAFER IMAM JJ.]

Calcutta Municipal Act, 1923, (Bengal Act III of 1923), ss. 363, 488 and Rule 62 of Schedule XVII—Prior proceedings taken by Corporation of Calcutta under s. 488 read with Rule 62 of Schedule XVII —Whether a bar to the subsequent proceedings under s. 363 of the Act —Inconvenience to neighbours—Whether relevant for making an order for demolition under s. 363 of the Act—Proceedings on the same facts competent to be taken under two different sections providing different penalties—Whether distinct proceeaings—Word "may" in s. 363 of the Act, whether means "shall"—Discretion vested in the Magistrate under s. 363—Order passed by an authority entrusted with discretion to pass such order—When liable to be interfered with by the appellate Court.

The Corporation of Calcutta is not precluded from taking proceedings under s. 363 of the Calcutta Municipal Act, 1923 by reason of its having taken proceedings prior thereto under s. 488 of the Act read with Rule 62 of Schedule XVII.

The question of inconvenience to neighbours is not relevant for the purpose of deciding whether an order for demolition should be made under s. 363 of the Act.

When the Legislature provides that on the same facts proceedings could be taken under two different sections and the penalties provided in those sections are not the same, it obviously intends to treat them as distinct, and, therefore, where no question under s. 403 of the Code of Criminal Procedure arises, proceedings taken under one section cannot be treated as falling within the other.

The word "may" in s. 363 of the Act does not mean "shall" and the Magistrate has under that section discretion whether he should pass an order for demolition or not.

It is a well-settled principle that when the legislature entrusts to an authority the power to pass an order in its discretion an order passed by that authority in exercise of that discretion is, in general, not liable to be interfered with by an appellate court, unless it can be shown to have been based on some mistake of facts or misapprehension of the principles applicable thereto.

In the present case, however, the orders of the courts below were based on mistakes and misdirections and therefore could not be supported.

But the Supreme Court did not think this to be a fit case for an order for the demolition of the buildings in view of certain special circumstances, viz., (1) though s. 363(2), which directs that no appli-

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cation for demolition shall be instituted after the lapse of five years from the date of the work, did not, in terms, apply as the proceedings had been started in time, it was nearly five years since the building had been completed and the interests of the public did not call for its demolition, and (2) the appeal came on a certificate granted under art. 134(1)(c) with a view to obtaining the decision of the Supreme Court on certain questions of importance.

Abdul Samad v. *Corporation of Calcutta* ([1905] I.L.R. 33 Cal. 287), referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 60 of 1954.

Appeal under Article 134(1)(c) of the Constitution of India from the Judgment and order dated the 19th January 1954 of the Calcutta High Court in Criminal Revision No. 865 of 1953 arising out of the Judgment and Order dated the 29th April 1953 of the Court of Third Municipal Magistrate, Calcutta in Case No. 108-A of 1951.

N. C. Chatterji, (*S. K. Bose* and *Sukumar Ghose,* with him) for the appellant.

G. P. Kar, (*A. K. Mukherjee* and *D. N. Mukherjee,* with him) for the respondent.

1955. November 17. The Judgment of the Court was delivered by

VENKATARAMA AYYAR J.—This is an appeal against the judgment of the High Court of Calcutta affirming the order of the Municipal Magistrate, whereby he dismissed an application filed by the appellant under section 363 of the Calcutta Municipal Act, 1923, hereinafter referred to as the Act, for demolition of certain constructions on the ground that they had been erected without the previous permission of the authorities and in contravention of the prescriptions laid down in the building rules.

The respondent is the owner of house No. 36, Armenian Street, Calcutta. On 28-10-1950 the Building Inspector of the Corporation discovered that some new masonry structures were being constructed on the fifth storey of that house. A notice under section 365 of the Act was immediately served on the respondent directing him to stop forthwith further con-

structions pending an application to the Magistrate under section 363 of the Act. What followed thereon is graphically described by the learned Chief Justice of the High Court in his order dated 9-4-1954 granting leave to appeal to this Court, as a hide-and-seek game. On receipt of the notice, the respondent stopped the work for a few days, and thereby lulled the Building Inspector into the belief that no further constructions would be made. When the Inspector ceased to inspect the premises daily, the respondent resumed the work, and on 7-11-1950 when the Inspector came again on the scene, he found that the construction was being proceeded with. A police constable was then posted for watch under section 365 (3) of the Act, and he continued there till 10-11-1950, on which date the respondent wrote to the Corporation that he would not proceed further with the construction. The police watch was thereupon withdrawn on the respondent paying Rs. 40 being the charges payable therefor. On 7-12-1950 the Inspector again inspected the premises, and found that the construction was being proceeded with, and had a constable posted again for watch. On 13-12-1950 the appellant lodged a complaint before the Magistrate under section 488 read with Rule 62 of Schedule XVII charging the respondent with constructing two rooms in the fifth storey without obtaining permission. Section 488(1) (a) enacts that whoever commits any offence by contravening any provisions of any of the sections or rules of the Act mentioned in the first column of the table annexed thereto, shall be punished with fine as specified in the said table. Rule 62 provides that the erection of a new building shall not be commenced unless and until the Corporation have granted written permission for the execution of the same. The complaint was heard on 11-4-1951. The respondent pleaded guilty, and was fined Rs. 200.

While the proceedings under section 488 were pending before the Magistrate, the Corporation would appear to have examined the nature of the constructions put up by the respondent, and found that they contravened Rules 3, 14, 25 and 32 of Schedule XVII,

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and decided to take action under section 363. They accordingly issued a notice to the respondent to show cause why action should not be taken under that section. The respondent appeared by counsel on 13-2-1951, and after hearing him, the appellant decided on 6-3-1951 to move the court for an order under section 363, and the petition out of which the present appeal arises, was actually filed on 4-4-1951. There was delay in serving the respondent, and after he was actually served which was on 17-9-1951, the case underwent several adjournments, and finally on 29-4-1953 the Magistrate passed an order dismissing the petition. There was no dispute that the building rules had been contravened. The Magistrate, however, held that he had a discretion under section 363 whether he should direct demolition, and that this was not a fit case in which an order should be made for demolition, because the constructions being on the fifth storey could not obstruct light and air and thereby inconvenience the neighbours, and there was no complaint from the residents of the locality, and that as the respondent had already been fined in proceedings under section 488, an order for demolition would be to penalise him twice over for the same offence.

Against this order, the appellant preferred a revision to the High Court of Calcutta. That was heard by K. C. Chunder, J. He agreed with the Magistrate that under section 363 the court had a discretion whether it should order demolition or not, and that as the Corporation had taken proceedings under section 488 and was content to have a fine imposed on the respondent for breach of Rule 62, it would be unjust to permit it thereafter to start proceedings under section 363 for the further relief of demolition of the building. He also commented on the undue delay on the part of the Corporation in taking out the application, and took into account the fact that no complaint had been received from the locality. In the result, he dismissed the revision.

The appellant applied under article 134(1) (c) for leave to appeal to this Court. Chakravarti, C. J. and

S. R. Das Gupta, J. who heard this application, considered that two questions of general importance arose on which it was desirable to have the decision of this Court, viz., (1) whether the Corporation was precluded from taking proceedings under section 363 of the Act by reason of its having taken proceedings prior thereto under section 488 of the Act read with Rule 62 of Schedule XVII, and (2) whether the question of inconvenience to neighbours was relevant for the purpose of deciding whether an order for demolition should be made under section 363 of the Act. They accordingly granted leave under article 134 (1)(c), and that is how the appeal is now before us.

The first question that arises for our determination is whether the present proceedings under section 363 are barred by reason of the application which was filed under section 488. It is conceded that there is nothing express in the statute enacting such a bar, but it is contended that it is to be implied from the proviso to section 363 that "where the Corporation have instituted proceedings under section 493, no application shall be made under this section". Admittedly, the appellant instituted no proceedings under section 493; but it is argued that proceedings under section 488 substantially fall within section 493, and that the proviso should therefore be held to be applicable. Under section 493, if the erection of any new building is commenced without obtaining the written permission of the Corporation, the owner of the building shall be liable to a fine which may extend up to Rs. 500. Then, there is a proviso that where an application had been made under section 363, no proceeding shall be instituted under this section. This corresponds to the proviso to section 363 set out above, and reading the two provisions, it is clear that the proceedings under the two sections are mutually exclusive. Now, the contention of the respondent is that a prosecution under section 488 for breach of rule 62 of Schedule XVII is, in essence, a prosecution under section 493(a), and that, therefore, the proviso to section 363 becomes applicable. We are

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unable to agree with this contention. When the Legislature provides that on the same facts proceedings could be taken under two different sections and the penalties provided in those sections are not the same, it obviously intends to treat them as distinct, and, therefore, where no question under section 403 of the Code of Criminal Procedure arises, proceedings taken under one section cannot be treated as falling within the other. The penalty prescribed in section 488 for breach of rule 62 of Schedule XVII is fine up to the limit of Rs. 200, whereas the penalty provided for the same offence under section 493(a) is fine which may extend to Rs. 500. It will not therefore be in consonance with the intention of the Legislature to hold that proceedings under section 488 are in substance the same as proceedings under section 493, so as to be subject to the disability enacted in the proviso to section 363. If the intention of the Legislature was that proceedings taken under section 488 read with rule 62 of Schedule XVII should bar proceedings under section 363, it could have said so expressly as it did with reference to proceedings taken under section 493. To accede to the contention of the respondent would be to read into section 363 limitations which are not to be found there. We cannot accept such a construction.

It was next argued by learned counsel for the respondent that it was open to the Corporation to have asked for demolition of the building in the proceedings taken by it under section 488, and as it did not ask for it and was content with the imposition of fine, it was precluded from claiming that relief in the present proceedings. This argument is based on section 536, which is as follows :

"When under this Act or under any rule or by-law made thereunder any person is liable, in respect of any unlawful work,—

(a) to pay a fine, and

(b) to be required to demolish the work,

a Magistrate may, in his discretion and subject to the provisions of sections 363, 364 and 493, direct the said person to pay the fine and also to demolish the work".

In his order dated 9-4-1954, the learned Chief Justice expressed a doubt whether the Corporation could apply for a demolition order, when instituting an application under section 488 for breach of Rule 62 of Schedule XVII. We are inclined to share this doubt. What Rule 62 prohibits is the erection of a building without permission, and under that Rule, the breach is complete when the erection has commenced, without reference to whether the construction is being carried on or completed. A question of demolition cannot therefore arise with reference to a breach of Rule 62. It can arise only when the construction of the building is carried on or completed otherwise than in accordance with the terms of the permission or in breach of any of the provisions of the Act or the rules. Now, in the table annexed to section 488, while a breach of Rule 62 of Schedule XVII is made punishable with fine which may extend to Rs. 200, there is no similar provision with reference to breach of Rules 3, 14, 25 and 32 of that Schedule. But there is, instead, a provision that when a direction is asked for under section 363(1) for demolition, an order can be passed imposing fine which may extend to Rs. 250. Under that section, it should be noted, an application for an order for demolition can be made on three grounds, viz., (1) that the erection of building has been commenced without permission, (2) that it has been carried on or completed otherwise than in accordance with the terms of the permission, or (3) that it has been carried on or completed in breach of the provisions contained in the Act or the rules. But there is this difference between an application based on ground No. 1 aforesaid and one founded on grounds Nos. 2 and 3, that while a question of demolition cannot arise with reference to the former when the charge is commencement or the construction without permission—and at that stage no question of demolition of a building necessarily arises, it does arise as regards the latter. Therefore, when an application is made under section 488, whether an order could be made under section 536 for demolition will depend on the ground on which it is founded. And, where, as in the

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present case, the application was based solely and exclusively on a breach of Rule 62 of Schedule XVII, no order could have been passed for demolition under section 536. It is immaterial for the present purpose that the building had been completed when the order was passed on 11-4-1951 on the application under section 488, because the power to pass an order under section 536 would depend on what the charge as actually laid in the petition was and not on what it might have been.

But even if the Magistrate had the power under section 536 to order demolition of the building, we cannot hold that the appellant is precluded from asking for such an order under section 363 merely by reason of the fact that the Magistrate had failed to pass such an order, or even that the Corporation did not ask for it in the prior proceedings. There is no question of the application of any principle of constructive *res judicata,* and there is nothing in the statute which bars the appellant from claiming relief under section 363. We cannot therefore uphold the contention that the appellant is precluded in any manner by the prior proceedings taken under section 488 from instituting the present petition under section 363.

In this view, the point for decision is whether the order passed by the Municipal Magistrate and affirmed by the learned Judge in revision is open to attack on the merits. The respondent contends that the Magistrate has under section 363 a discretion whether he should pass an order for demolition or not, and that this Court should not in appeal interfere with the exercise of that discretion especially when it has been concurred in by the High Court. Now, the language of section 363 is that the Magistrate *may* pass an order for demolition of the building, and though the word '*may*' might in some contexts be constructed as meaning '*shall*', that is not the sense in which it is used in section 363. We agree with the respondent that section 363 does not require that when a building is shown to have been erected without permission or completed otherwise than in accordance with the terms of the permission or in breach

of the building rules, an order for its demolition should be made as a matter of course. In our opinion, it does give the Magistrate a discretion whether he should or should not pass such an order. That was the construction put in *Abdul Samad* v. *Corporation of Calcutta*(1) on section 449 of the Calcutta Municipal Act, (Bengal Act III of 1899) which corresponds to section 363 of the present Act on language which is, so far as the present matter is concerned, the same. In re-enacting the present section in the same terms as section 449 of Bengal Act III of 1899, it must be taken that the legislature has accepted the interpretation put on them in *Abdul Samad* v. *Corporation of Calcutta*(1) as correctly representing its intention. It should accordingly be held that the word 'may' in section 363 does not mean "shall", and that the Magistrate has under that section a discretion whether he should pass an order for demolition or not.

Then the question is whether the exercise of that discretion by the courts below is open to review by this Court. It is a well-settled principle that when the legislature entrusts to an authority the power to pass an order in its discretion, an order passed by that authority in exercise of that discretion is, in general, not liable to be interfered with by an appellate court, unless it can be shown to have been based on some mistake of fact or misapprehension of the principles applicable thereto. The appellant contends that the orders under appeal are based on mistakes and misapprehensions, and are therefore liable to be reversed, and that contention must now be examined. The grounds on which the orders of the courts below are based are (1) that there has been considerable delay on the part of the appellant in moving in the matter, (2) that as in the proceedings taken under section 488 the respondent has been fined, an order for demolition was not called for, and (3) that the breach of the building rules has not resulted in any inconvenience to the public, nor has there been any complaint from the residents of the locality about this. The materials placed before us do not show

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that there has been any great delay on the part of the appellant. The learned Judge has stated that the present proceedings for demolition were taken subsequent to the imposition of fine on 11-4-1951 in the proceedings under section 488. This is a mistake. The proceedings under section 363 had been commenced as early as February 1951 when notice was issued to the respondent under the provisions of that section, and the petition was actually filed in court on 4-4-1951. It is true that the proceedings were pending for nearly two years before the Magistrate, but as observed by the learned Chief Justice, far from the Corporation being responsible for it, it appears to have been the victim of delay on the part of the respondent.

Both the courts below have mainly based their order on the fact that the Corporation having taken proceedings under section 488 and a fine having been imposed on the respondent, it would be unjust to impose a further penalty for the same offence by way of demolition. The assumption on which this reasoning rests is that the charge on which the present proceedings have been taken is the same as that on which the petition under section 488 was laid. But, as already pointed out, that is not correct. The proceedings under section 488 were taken for erecting a building without permission, whereas the present proceedings are taken substantially for breaches of the building rules, which are quite independent of the charge under Rule 62, and the respondent is therefore not punished twice over for the same default. The learned Judge observes that this was not a fit case for exercising the discretion in favour of the appellant, because in the prior proceedings under section 488, it did not ask for an order for demolition, nor was such an order made by the Magistrate. That is obviously with refernece to section 536 which we have held to be inapplicable to the present case. Moreover, when that section enacts that the Magistrate could both impose a fine and order demolition of the building, that clearly indicates that the fact that a fine has been imposed should not by itself and with-

out more, be taken as sufficient ground for refusing demolition.

The courts below were also influenced by the fact that there was no complaint from the neighbours about the erection of the building. It must be remembered that the building rules are enacted generally for the benefit of the public, and where those rules have been violated and proceedings are taken for an order for demolition of the building under section 363, what has to be decided is whether the breaches are of a formal or trivial character, in which case the imposition of a fine might meet the requirements of the case, or whether they are serious and likely to affect adversely the interests of the public, in which case it would be proper to pass an order for demolition. Whether there has been a complaint from the public would not as such be material for deciding the question, though if there was one, it would be a piece of evidence in deciding whether the interests of the public have suffered by reason of the breaches.

The position, therefore, is that the orders of the courts below are based on mistakes and misdirections, and cannot be supported. The conduct of the respondent in adopting a hide-and-seek attitude in completing the constructions in deliberate defiance of the law calls for severe action. It would be most unfortunate, and the interests of the public will greatly suffer, if the notion were to be encouraged that a person might with impunity break the building rules and put up a construction and get away with it on payment of fine. All this would be good justification for making an order for demolition. But then, it is now nearly five years since the building was completed, and though section 363(2) which directs that no application for demolition shall be instituted after a lapse of five years from the date of the work does not, in terms, apply as the proceedings have been started in time, we do not feel that after the lapse of all this time, an order for demolition is called for in the interests of the public. We also take into account the fact that the orders in question would not have come before us in the normal course by way of appeal,

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were it not that the appellant desired that the decision of this Court should be obtained on certain questions of importance, and that purpose has been achieved. On a consideration of all the circumstances, we do not think that this is a fit case in which we should pass an order for demolition. We should, however, add that we find no justification for the strictures passed on the appellant by the court below.

In the result, the appeal is dismissed.

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November 23.

IN THE MATTER OF

D AN ADVOCATE OF THE SUPREME COURT.

[B. K. MUKHERJEA, C. J., S. R. DAS and VENKATARAMA AYYAR JJ.]

Bar Councils Act—Misconduct in capacity other than professional —Jurisdiction of Court—Bar Councils Act (XXXVIII of 1926), s. 10—Supreme Court Rules, Order IV, Rule 30.

Section 10 of the Bar Councils Act confers on the Court jurisdiction to take disciplinary action against an Advocate not merely for professional misconduct but any other misconduct committed in any other capacity as well and leaves it to the Court's discretion to take such action as it thinks fit in any suitable case.

The Advocate-General of Bombay v. *Three Advocates* ([1934] I.L.R. 59 Bom. 57), *In the matter of an Advocate* ([1936] I.L.R. 63 Cal. 867) and *In re a Pleader* (I.L.R. [1943] Mad. 595), referred to.

In re Thomas James Wallace ([1866] L.R. 1 P.C. 283), and *In re an Advocate of Benares* (A.I.R. [1932] All. 492), held inapplicable.

Consequently, in a case where an Advocate figuring as an accused in a case under the Bombay Prohibition Act was persistently rude to and contemptuous of the trial Magistrate and did all in his power to hold up the trial and bring the administration of justice into contempt, he was guilty of misconduct and as such was liable to be suspended from practice.

D in person

M. C. Setalvad, Attorney-General for India, as amicus curiae.