

# ALLAHABAD HIGH COURT

Mithan

Vs.

Municipal Board of Orai

Criminal Revn. No. 876 of 1953  
(Desai and Sahai, JJ.)

18.11.1955

## JUDGMENT

**Desai, J.**

1. This is an application in revision against an order of a Sub-Divisional Magistrate, confirmed by the Sessions Judge, Orai, directing the applicants under Section 247(1), U.P. Municipalities Act to stop using their houses for habitual prostitution. The revision application has been filed under Sections 435 and 439, Criminal P.C.

When it was put up for disposal before our brother James, a preliminary objection was raised on behalf of the Municipal Board that it was not maintainable. The contention of the Board was that an order passed by a Sub-Divisional Magistrate under Section 247(1) of the Municipalities Act cannot be revised by the High Court under Section 439, Criminal P.C.

2. The High Court is authorized by Section 435(1) of the Code to "call for and examine the record of any proceeding before any inferior criminal Court." Section 439 lays down that in the case of any proceeding the record of which has been called for by itself or which has been reported for orders, the High Court may exercise any of the powers conferred on a Court of appeal by Sections 423 etc. Section 247(1), U.P. Municipalities Act is to the effect that "when a Magistrate of the first class receives information" that a house in the vicinity of a place of workshop etc. is used as a brothel or for the purpose of habitual prostitution, "he may summon the owner, tenant ..... to appear before him either in person or by agent; and if satisfied that the house is used as described" above may order such owner, tenant etc. to discontinue such use. Such action can be taken either on a complaint of the Municipal Board or of three or more persons residing in the immediate vicinity or with the sanction or by the order of the District Magistrate. Section 247(2) lays down that if the person against whom the above order has been passed fails to comply with it within the time allowed, "the Magistrate may impose on him a fine."

3. In '*Madho Das v. Rex*'<sup>1</sup>,

(A) It was held by Seth, J. that an order passed under Section 310(2), U.P. Municipalities Act by a Magistrate directing a person to vacate a house is not

<sup>1</sup> AIR 1949 All 738

an order passed in a proceeding of a criminal Court and cannot be revised by the High Court under Section 439 of the Code. An order passed by a Magistrate under Section 247(1) is analogous to an order passed by a Magistrate under Section 310(2) and there is a good ground for holding that if one order is passed by a Magistrate as a criminal Court, the other also is.

(B) Therefore, on the analogy of the decision in the above case an order passed under Section 247(1) is not an order passed in a proceeding in a criminal Court. Our brother James, however, doubted the correctness of the decision of Seth, J. and, therefore, has referred to us the following two questions :

1. What is a "Criminal court" ?
2. Whether a Magistrate who passes an order under Section 247 (1) or Section 310(2) of the Municipalities Act does so as a "criminal court"?

The question in the present case is simply whether an order passed under Section 247(1) is an order passed in a proceeding before any inferior criminal Court .and with great respect to our brother we shall answer only that question.

Anything we say about an order passed, under Section 310(2) would be simply obiter and not bind any Court. We may also be excused for not entering into a discussion as to what is a criminal Court; what we say on the question whether a Magistrate passing an order under Section 247(1) acts as a criminal Court will be a decision in the case, but what we say on the question whether a Magistrate passing any other order does so as a criminal Court will be obiter.

4. In order to understand what is meant by a "proceeding before any inferior criminal Court" it is necessary to understand the scheme of the Code of Criminal Procedure. The Code is not to affect "any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force" (vide Section 1(2)). The Code defines "judicial proceeding" (to mean any proceeding in the course of which evidence is or may be legally taken on oath), but not "proceeding." All offences under the Indian Penal Code must be investigated, inquired into and tried according to the provisions of the Code; all offences under any other law also must be investigated etc. according to the same provisions but subject to any enactment regulating the manner or place of investigating etc. or otherwise dealing with such offences (vide Section 5). Thus the Code lays down the procedure to be followed in every investigation, inquiry into, or trial for, every offence, whether under the Indian Penal Code or under any other law. The Code makes provisions for not only investigation, inquiry into, or trial for, offences but also inquiries into certain specific matters. The procedure laid down for inquiring into the specific matters naturally cannot be applied to inquiring into other matters and that explains why there is no general provision relating to inquiries not connected with trials. An inquiry not connected with a trial and not provided for in the Code cannot possibly be governed by any provision of the Code; the law regarding the procedure to be followed in such an inquiry must be found in the enactment conferring jurisdiction to hold the inquiry. Besides the High Courts and the Courts constituted

under any other law there are to be five classes of criminal Courts, one being of Magistrates of the first class (vide Section 6).

In every district Government must appoint a Magistrate of the first class to be known as the District Magistrate (vide Section 10). Besides the District Magistrate Government may appoint Magistrates of the first class in any district (vide Section 12). Any Magistrate of the first class may be placed in charge of a sub-division by Government; he will be known as the Sub-Divisional Magistrate (vide Section 13).

All Magistrates appointed under Sections 12 and 13 and all Special and Honorary Magistrates are to be subordinate to the District Magistrate under Section 17. Neither the Magistrates nor the District Magistrate are to be subordinate to the Sessions Judge except to the extent and in the manner expressly provided in the Code. The powers that are conferred upon the Magistrates are all mentioned in the several sections of the Code and are collected together in Sch. 3. The powers that are conferred upon the Magistrates by other Acts, such as the U.P. Municipalities Act, are not mentioned anywhere in the Code. Among the powers which are conferred upon the first class Magistrates or the District Magistrate are the powers to appoint a village headman (under Section 45(3)), to arrest a person who commits a crime in the presence of the Magistrate (under Section 64), to prohibit repetition or continuance of a public nuisance (under Section 143), to pass orders to prevent danger to human life, health or safety, or a disturbance of the public tranquility, or a riot (under Section 144) and to appoint a Public Prosecutor for any case (under Section 492). Among the proceedings other than trials for offences and investigations and inquiries in connection with trials, for which the Code provides are those under Section 112 etc. for demanding security to keep the peace or to be of good behavior, under Section 133 for removal of public nuisance, under Section 145 for settling disputes regarding immovable property and likely to cause a breach of the peace, under Section 464 etc. for inquiring into lunacy, under Section 476 for inquiring into offences referred to in Section 195(1)(b) and (c), under Section 480 for contempt committed in view or presence of the Court and under Section 483 for ordering a person to make a monthly allowance for the maintenance of his wife and children. There is to be no appeal from any judgment or orders of a criminal Court except as provided for by the Code (vide Section 404). The Code provides for appeals from convictions and acquittals in regular trials and from orders passed in several proceedings not connected with a trial for an offence. The powers of an appellate Court are described in Section 423. The High Court and Sessions Judges and District Magistrates are empowered by Section 435 to call for records of "any proceeding before any inferior criminal Court" for the purpose of satisfying themselves as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court; the orders that can be passed by the High Court on examination of the records and proceedings are laid down in Section 439. The High Court is precluded from exercising its revisional jurisdiction in a case in which an appeal lies but no appeal has been brought (see Section 439(5)).

5. The provisions in Section 435 of the Code are to be read and interpreted in the light of the other provisions of the Code. When they refer to "the record of any proceeding", they mean the

record of any proceeding as contemplated by the Code. The Code provides for only certain specific proceedings in criminal Courts and the record of any proceeding must obviously mean the record of any of those proceedings.

The Code does not purport to deal with any Jurisdiction or power conferred upon criminal Courts under other Acts; it does permit their being conferred with special jurisdiction by other Acts but does not regulate the procedure to be followed when exercising the special jurisdiction and does not provide for any appeal, review or revision from orders passed in exercise of it. The other Acts conferring special jurisdiction may provide for the procedure to be followed in exercising it and for appeals, revision and review etc. of the orders passed, but the Code has absolutely nothing to do with them. Therefore, any proceeding held by any criminal Court in exercise of the special jurisdiction conferred by other Acts is not a proceeding within the meaning of Section 435 of the Code. It should be made clear that by the special Jurisdiction we mean special jurisdiction to hold an inquiry or to pass an order; as regards the trials for offences created by Acts other than the Indian Penal Code, the Code has made a provision (we have referred to Section 5(2)). Once a trial for an offence takes place in accordance with the provisions of the Code, the provisions in the Code relating to appeal, revision etc. will apply to the final orders passed in the trial. As regards proceedings other than a trial for an offence, the matter is entirely different and the Code makes no provisions to regulate their procedure and for appeal, revision etc. from orders passed in them. Therefore, a record of any proceeding, that is not governed by or held under the provisions of the Code, cannot be called for and examined under Section 435 even if it is held by an inferior criminal Court.

A first class Magistrate is a criminal Court as already stated. A proceeding held by him in exercise of any of the powers conferred upon him by the Code, is a proceeding before an inferior criminal Court within the meaning of Section 435 and its record can be called for and examined by the High Court, but a proceeding held by him in exercise of any special jurisdiction conferred by any other law is not. Accordingly a proceeding before a first class Magistrate under Section 247(1) of the Municipalities Act is not a proceeding within the meaning of Section 435. Even if he were deemed to be exercising jurisdiction as a criminal Court when proceeding under Section 247(1), the inquiry that he holds is not a proceeding as contemplated by Section 435. Had the Legislature intended that the revisional jurisdiction can be exercised by the High Court even in a case governed not by the Code but by some local or special Act, it would have laid down that the record of any proceeding whether held in exercise of the jurisdiction conferred by the Code or held in exercise of any special jurisdiction, can be called for and examined by the High Court. The bar on the High Court's power to interfere in revision when an appeal could lie but was not brought shows that the exercise of revisional jurisdiction is connected with the exercise of the appellate jurisdiction, and the appellate jurisdiction, as explained earlier, is confined only to orders passed in regular trials and in certain specified inquiries.

6. The revisional jurisdiction can be exercised only over an inferior criminal Court. The explanation to Section 435 makes it clear that all Magistrates are to be deemed to be inferior to the Sessions Judge for this purpose. They are necessarily inferior to the High Court. The five

classes of criminal Courts are arranged in a certain order; a Sessions Court is the highest Court and a Magistrate of the third class is the lowest Court. But this gradation of the criminal Courts is only for the purposes of the jurisdiction conferred by the Code. A Magistrate, first class, is a higher Court than a Magistrate second class when both exercise jurisdiction conferred by the Code. No comparison between one criminal Court and another can be made when one Court exercises Jurisdiction, conferred by the Code and the other exercises jurisdiction conferred by some other law. A Magistrate of the second class when trying a person for an offence cannot be compared with a first class Magistrate exercising jurisdiction under Section 247(1) of the Municipalities Act and cannot be said to be a lower or inferior Court. Similarly a District Magistrate when exercising jurisdiction under the Code cannot be said to be a superior or higher Court than a Magistrate first class exercising jurisdiction under Section 247(1) of the Municipalities Act, or a Court of Session cannot be said to be a higher Court than him. The High Court is not created by the Code; under the Constitution it has powers of superintendence over all Courts and tribunals situated within its territorial limits, but as regards the revisional jurisdiction conferred by Sections 435 and 439, a first class Magistrate when exercising the special jurisdiction conferred by Section 247(1) of the Municipalities Act may not be said to be an inferior Court.

7. A criminal Court can also be invested with Jurisdiction to pass executive orders. It is created by the Code which expressly permits it to be invested with special or extra jurisdiction. When it exercises the jurisdiction conferred by the Code, it acts as a criminal Court; it is created just for the purpose of exercising jurisdiction conferred by it. But when it exercises extra or special jurisdiction conferred by other law, it does not act as a criminal Court but acts as a *persona designate*. It is a mere accident that the authority on which the special jurisdiction" is conferred is a criminal Court. Though a criminal Court can be conferred extra jurisdiction, it is not created in order to exercise it. According to this view the criterion is not whether the extra jurisdiction is to be exercised judicially or as a judicial body; even if the extra jurisdiction is of a judicial nature, the authority is a *persona designata* and not acting as a criminal Court within the meaning of the 'Code. But when the extra jurisdiction is to be exercised not judicially or through a judicial proceeding but is in the nature of an executive action, the authority is all the more not a criminal Court within the meaning of the Code. When we said above that any jurisdiction conferred by the Code and exercised by a criminal Court is exercised by it as a criminal Court, it is true with regard to most of the powers conferred by the Code, but there are a few exceptions. There are certain powers conferred by Sections 45, 494 etc. (to which a reference has been made above), which are to be exercised by the criminal Court not as such but in its executive capacity. So our saying that any jurisdiction exercised by a criminal Court under the Code is exercised by it as such should be read subject to this reservation. What we wish to emphasize is that any jurisdiction conferred by other law upon a criminal Court is not exercised by it as such. Some authorities have laid down that the criterion for deciding whether an order is revisable by the High Court or not is whether it is a judicial order; see for instance - '*Ujamshi Govindji v. Emperor*<sup>2</sup>', and - '*Mst. Hazari v. Emperor*<sup>3</sup>', In the Bombay case an order made under Rule 81(2)

of the Defence of India Rules requiring a person to let out a part of his house to another person was held to be an executive order and not a judicial order. The real basis for the decision, however, was that the proceeding in which it was passed was not a proceeding before an inferior criminal Court. In the Allahabad case an order passed by a District Magistrate under Section 4, Naik Girls' Protection Act (No. 2), 1929, was held to be not revisable on the ground that it is

<sup>2</sup> AIR 1946 Bom 533

<sup>3</sup> AIR 1939 All 124

an executive, and not a judicial, order. It was observed that an order which is not a sentence or punishment for an offence within the meaning of the Penal Code and the Code of Criminal Procedure cannot be deemed to be a judicial order by a Criminal Court. We do not accept this as a correct criterion. But we respectfully agree with the observation that the District Magistrate did not function as a criminal Court and that even if he had to hold any proceeding before passing the order, it was not a proceeding governed by the Code of Criminal Procedure. In - *Averam Das v. Abdul Rahim*<sup>4</sup>, the test laid down was whether the proceeding was of a criminal nature and a proceeding under Sections 2 and 3, Workmen's Breach of Contract Act (No. 13), 1859 was held to be not a criminal proceeding. In the case of *Madho Das (A) Seth, J.* observed that a proceeding under Section 310(2) of the Municipalities Act is not a criminal proceeding and that the Magistrate did not act as a criminal Court. We doubt whether it is necessary to decide whether the proceeding is a criminal proceeding or not, but we respectfully agree with the following observation on page 739 :

"In the present case the Bench of Magistrates was neither trying the applicant for any offence nor was it holding any inquiry into the commission of any offence or crime. It was not conducting any proceeding contemplated by the Code of Criminal Procedure and was not exercising any power of the Magistrate detailed in Sch. 3 of the Code."

That the test is whether the proceeding is one in exercise of the jurisdiction conferred by the Code was also laid down in - *Rajani Khemtawali v. Emperor*<sup>5</sup>, and - *Annie Besant v. Advocate General of Madras*<sup>6</sup>. The Privy Council had to deal with an order made under Section 3(1), Press Act of 1910 and the question before their Lordships was whether it could be revised by the High Court. Their Lordships found it difficult to see how the proceedings under Section 3(1), Press Act could be deemed criminal proceedings within the Code of Criminal Procedure. In the case of *Rajani Khemtawali, Stephen and Carnduff, JJ.* observed that the power conferred by Sections 2 and 3, Eastern Bengal and Assam Disorderly Houses Act (No. 2), 1907 which contains provisions very similar to those in Section 247 of the Municipalities Act, was "not a power to hold a criminal trial or to take any preliminary proceedings under the Criminal Procedure Code" (at page 291). In the *Municipal Board, Benares v. Ram Sahai*<sup>7</sup>, Bajpai, J. refused to entertain an application for revision of an order passed by a District Magistrate under Section 160, Municipalities Act, declaring that the imposition of certain octroi duty was illegal. The learned Judge remarked on page 283 that what one has got to see is in what capacity the District Magistrate purported to act and that undoubtedly be acted under the Municipalities Act and not as a criminal Court. In - *Habib Ahmed Rizvi v. The Crown*<sup>8</sup>, an order passed by a Deputy

Commissioner under the Influx from Pakistan (Control) Ordinance of 1948 directing a person to return from India to West Pakistan was held to have been passed in executive capacity and not in the capacity of a District Magistrate. An order passed by a District Magistrate under Section 45(3) of the Code was held to be not revisable, because it was passed in executive and not in judicial capacity, by Banerji, J. in 'In the Matter of the petition of Damma', 29 All 5(53 (I)); the inquiry into the capacity of the

<sup>4</sup>27 Cal 131    <sup>6</sup> AIR 1919 PC 31    <sup>8</sup> AIR 1950 Nag 181

<sup>5</sup>37 Cal 287    <sup>7</sup> AIR 1933 All 281

District Magistrate was very pertinent. He exercised jurisdiction conferred by the Code itself, but it was recognized that all powers conferred even by the Code are not judicial powers or have not to be exercised judicially and that if some of them are to be exercised as executive powers, they are not to be treated as exercised by a criminal Court. When, some authorities stated the test to be whether the proceeding is criminal and when others stated it to be whether the authority passed the order in judicial capacity or in executive capacity, in essence they meant the same thing, namely, whether the proceeding in which the order was passed was held in exercise of the jurisdiction conferred by the Code. A contrary view was taken in - '*Emperor v. Devappa Ramappa*<sup>9</sup>', in which an order passed by a Magistrate under Section 2, Workmen's Breach of Contract Act directing the refund of money advanced was held to be revisable by Pratt, J. with the concurrence of Heaton, J. The learned Judges stated at page 159 :

"The power of revision ..... refers to any proceeding before any inferior Court ..... The test is not the nature of the proceeding held by the Court, but the nature of the Court in which that proceeding is held. Proceedings of a civil nature may be held in a criminal Court, as for instance, applications for maintenance under Section 488, Criminal Procedure Code, and these are subject to revision." We are unable to accept the test so broadly laid down. The nature of the Court and the nature of the proceeding both should be taken into consideration; not only should there be an inferior criminal Court but also it must be a proceeding before an inferior criminal Court as contemplated by the Code. A proceeding under Section 483 of the Code satisfies both the requirements, and, therefore, an order passed in it is revisable; it is not revisable just because it is passed by a criminal Court.

Every order by a criminal Court is not revisable; evidently when it is recognized that special jurisdiction which may not be of a criminal or even a judicial nature and executive powers can be conferred upon a criminal Court, every order passed by it cannot be subject to the High Court's revisional jurisdiction.

8. An order under Section 421(2), Calcutta Municipal Act (No. 3), 1923, passed by a Magistrate declaring certain goods as unfit for human consumption and directing their destruction was held to be revisable by Mookerjee, J. and not revisable by Das Gupta, J. in - '*Abdoola Haroon and Co. v. Corporation of Calcutta*<sup>10</sup>', Mookerjee, J. conceded that the mere fact that an order is passed by a criminal Court does not make it revisable by the High Court and that if lie exercises

jurisdiction as *persona designata*, he does not act as a criminal Court within the meaning of Section 435 of the Code. The only question according to him was whether the order was a judicial or an executive order. If the authority had to exercise a judicial discretion, he thought that the order was a judicial order. The Calcutta Municipal Act contained no provision "for the issue of a notice to the party affected or for hearing him before passing the order, but the learned Judge held that neither would the absence of a specific provision for the issue of a notice or hearing the party affected convert an otherwise judicial proceeding into an executive proceeding nor would the existence of

<sup>9</sup> AIR 1919 Bom 158

<sup>10</sup> AIR 1950 Cal 36

such a provision convert an otherwise executive proceeding into a judicial one.

Since the Magistrate could pass the order if it appeared to him that the goods were unfit for human consumption, it was taken to be in exercise of judicial discretion on a proper appreciation of the materials placed before him. The inquiry to be made by him was of a summary nature, but that was held to be not sufficient to make it an executive proceeding. With great respect to the learned Judge, we do not think that the matter was approached correctly. Whether the Magistrate acted as an inferior criminal Court when he passed the order, or whether the proceeding held by him was a proceeding within the meaning of Section 435 of the Code, was not considered. Had the learned Judge meant by judicial proceeding a proceeding in exercise of the jurisdiction conferred by the Code, there would have been no difficulty, but he seems to have taken it to be not identical with a proceeding under the Code. When the Legislature used the words "a proceeding before any inferior criminal Court", the problem is to interpret those words, and it is hardly rendered easier by importing other words, such as judicial discretion, judicial capacity, etc. It is not easier to explain what is a judicial order or a judicial proceeding than to explain what is a proceeding before an inferior criminal Court : on the other hand besides explaining these phrases one has also to establish that a proceeding before an interior criminal Court means nothing more and nothing less than judicial proceeding before any criminal Court in exercise of any jurisdiction.

9. Section 247(2) of the Municipalities Act creates an offence; this is made clear by Section 314 read with Sch. 8 and Section 315. The offence would be tried in accordance with the provisions of the 'Code; a proceeding in the trial would, therefore, be a proceeding before an inferior criminal Court and would be revisable. We are unable to understand why it is said that the Magistrate, i.e., the Magistrate who passes an order under Sub-Section (1), Will impose a fine for disobedience of the order. The language of Sub-Section (2) may suggest that the proceeding before the Magistrate for imposition of a fine is also of an executive nature and is not to take the form of a trial under the Code of Criminal Procedure. But when regard is had to the express provisions in Sections 314 and 315, one is not left in any doubt and whatever might be the reason for the Legislature's requiring that the same Magistrate, who passes an order, should try (the

person disobeying it, we have no reason to think that the proceeding under Sub-Section (2) is anything but a proceeding before an inferior criminal Court. Merely because a proceeding before a Magistrate under Sub-Section (2) is a proceeding before an inferior criminal Court, it cannot be said that a proceeding under Sub-Section (1) before him also is a proceeding before an inferior criminal Court. One proceeding may be a proceeding before a criminal Court and another, though connected with it, may not be. The test is not whether a proceeding under consideration is connected with a proceeding before an inferior criminal Court; the test always is whether the proceeding under consideration itself is a proceeding before an inferior criminal Court. There are several offences consisting of disobedience of orders passed in proceedings other than proceedings before inferior criminal Courts. In order that disobedience of an order may be punished as an offence, it is not essential that it should have been itself passed in a proceeding before an inferior criminal Court. Section 188, Penal Code only requires that the order must have been promulgated by a public servant lawfully empowered to promulgate it. Disobedience of an order passed under Section 144 of the Code though not a judicial order according to one view, is undoubtedly an offence under Section 188, I.P.C. In the case of 'Rajani Khemtawali (E)' some importance was attached to the fact that the authority empowered to try a person for disobeying an order passed under Section 3, Eastern Bengal and Assam Disorderly Houses Act need not be the authority passing the order. It is not clear from the language of Section 247(2) of the Municipalities Act whether the Magistrate passing the order under Sub-Section (1) must himself try the person disobeying it, but even if he must, the proceeding under Sub-Section (1) cannot be said to be before an inferior criminal Court just because that under Sub-Section (2) is. In the case of 'Averam Das (D)' the Court doubted if the proceeding under Section 2 of the Workmen's Breach of Contract Act could be said to be one before a criminal Court even though a proceeding under Section 2 was a criminal proceeding. Under Section 161(2), Bombay District Municipalities Act (No. 3) 1901 any prosecution under the Act or under any bye-laws may be lodged before any Magistrate and all claims to compensation or other expenses may be recovered on application to such Magistrates. A Notified Area Committee ordered Dinbai to carry out a work which she failed to do and the Committee itself got the work done and applied to a Magistrate under Section 181(2) for the recovery of the expenses incurred by it. The Magistrate issued a warrant of attachment to recover the expenses and it was held by Heaton and Shah, JJ., that the order of the Magistrate could be revised; see - 'In re, Dinbai Jijibhoy Khambata', AIR 1919 Bombay 93 CD. With great respect to the learned Judges we are unable to agree that the proceeding under the later part of Section 161(2) relating to recovery of compensation and other expenses is one before a criminal Court merely because the proceeding in prosecution under the earlier part is undoubtedly before a criminal Court. But even if it were so, the facts in the case before us are entirely different; here the earlier proceeding or the proceeding dealt with in the earlier part of Section 247 of the Municipalities Act is in question and not the subsequent proceeding in prosecution. If once an authority acts as an inferior criminal Court, a subsequent proceeding before it may also be said to be one before an inferior criminal Court, but it does not follow that because a subsequent proceeding is before an inferior criminal Court, the earlier proceeding also is, especially when the two proceedings are entirely distinct from each other

though one follows the other.

10. The jurisdiction conferred by Section 247(1) of the Municipalities Act upon a first class Magistrate is special or extra jurisdiction conferred upon him. All that he is required to do in exercise of the jurisdiction is to summon the owner, tenant etc. of the house and to satisfy himself that the house is used as a brothel. He is not expressly required to hold an inquiry; since he has to summon the owner, tenant etc., it may be said that he must hear him, but there is nothing to suggest that he must hold an inquiry and record evidence of the parties. He has to satisfy only himself that the house is used as a brothel; how he has to do this is left to his absolute discretion. These facts are consistent more with his acting as an executive authority than with his acting as a judicial Authority. In the case of 'Rajani Khemtawali (E)' the fact that the Court making an order under Section 3, Eastern Bengal and Assam Disorderly Houses Act had no duty except to satisfy itself that the house was used as a brothel was relied upon for the finding that the proceeding was executive. One of the reasons given by Mulla, J. in the case of 'Mt. Hazari (C)' for holding an order under Section 4, Naik Girls' Protection Act to be an executive order is that the Magistrate was not required to hold any inquiry before passing it. The Legislature could have conferred jurisdiction to pass an order under Section 247(1) upon any authority other than a Magistrate; it could have conferred it upon an engineer or a doctor or any employee of the municipal board. If the proceeding before any of those authorities would not have been one before a criminal Court, the mere accident that the jurisdiction has been conferred upon a Magistrate, who is a criminal Court, will not make the proceeding one before a criminal Court. The jurisdiction is not at all required to be exercised as jurisdiction of a criminal Court; it is to be exercised by the first class Magistrate as a *persona designata*. We need not say anything more on the point because it has been dealt with by one of us in - '*State of U.P. v. Ram Ratan*<sup>11</sup>', a first class Magistrate exercises jurisdiction under Section 247(1), the nature of the proceeding held by him does not at all depend upon his being a first class Magistrate; that he is an inferior criminal Court in the capacity of a first class Magistrate is entirely irrelevant when one has to judge the nature of the proceeding. This Court was impressed with the argument that if some authority other than a Magistrate had been invested with jurisdiction to pass an order under Section 247(1), it would not have been held to be revisable; see '*Municipal Board v. Ram Sahai*', '*Mt. Hazari v. State*' and '*Deodat Rai v. State*<sup>12</sup>', One of us was a party to the case mentioned last.

11. The Legislature of Saskatchewan enacted the Trade Union Act, 1944, providing for the creation by the Lieutenant Governor of Labour Relations Board to decide certain questions and a question arose whether this enactment did not contravene the provisions of Section 96, British North America Act, 1867, laying down that the Judges of the Superior, District and County Courts in each province, including Saskatchewan, shall be appointed by the Governor General. The Judicial Committee of the Privy Council answered it in the negative in - '*Labour Relations Board of Saskatchewan v. John East Iron Works Ltd*<sup>13</sup>'. Their Lordships held that the Board was not a Superior, District or County Court within the meaning of the British North America Act, Section 96. The real question, according to their Lordships, was "Does the jurisdiction conferred

by the Act upon the appellant Board broadly conform to the type of jurisdiction exercised by the Superior, District of County Courts?" (p. 135). Similarly the real question before us is - "Does the jurisdiction conferred by Section 247(1) of the Municipalities Act broadly conform to the type of jurisdiction exercised by an inferior criminals Court?", and the answer is undoubtedly "No"-Their Lordships stated on page 133 that if an authority does not exercise a judicial power, it is not a Court at all and accepted the broad features of judicial power stated by Griffith C.J. in - '*Huddart Parker and Co. Proprietary Ltd. v. Moorehead*<sup>14</sup>', Their Lordships pointed out that there are certain essential features of judicial power, but they are not conclusive and even administrative tribunals may have combinations of those features, that policy may also have to be considered before deciding the question finally, that the conception of judicial function is inseparably bound up with the idea of a suit between parties, with whom alone it rests to initiate or defend or compromise the proceedings and that it is against the traditional conception of a Court if the

<sup>11</sup> AIR 1956 All 258      <sup>13</sup> AIR 1949 PC 129

<sup>12</sup> AIR 1951 All 713      <sup>14</sup>(1909) 8 CLK 330 at p. 357

authority is empowered to grant relief to an individual in a controversy raised by others without his assent and, it may be, against his will. Under Section 247(1) of the Municipalities Act relief may be given to the neighbours of a brothel in a controversy raised by the Municipal Board or by the District Magistrate without their assent, and it may be, against their will. They may not be even present when the relief is given to them by the Magistrate. Justices at a licensing meeting are not a Court of summary jurisdiction; vide - '*Boulter v. Justices of Kent*<sup>15</sup>', and - '*Attwood v. Chapman*<sup>16</sup>', In the latter case at page 285 Avory, J. stated that the fact that an authority is required to act judicially, i.e., "with the fairness and impartiality which characterize proceedings in Courts of justice", does not convert it into a Court. A meeting of the London County Council for granting music and dancing licences under a certain statute is not a Court within the meaning of the rule by which defamatory statements made in the course of proceedings before a Court are absolutely privileged; see - '*Royal Aquarium and Summer and Winter Garden Society v. Parkinson*<sup>17</sup>', Before the London County Council was authorized to grant licences, Justices had the power to grant them. Lord Esher, M.R., stated on page. 4.43 that the Justices had two distinct and separate duties, (1) judicial duties of trying criminal cases and (2) administrative duties, one of which was of granting licences. Fry L., J. pointed out on page 446 that a Court may perform various functions and that Parliament is a Court, though its duties as a whole are deliberative and legislative and the duties of a part of it only are judicial. In - '*Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation*<sup>18</sup>', a question similar to that raised in the case of the 'Labour Relations Board (O)' was raised and their Lordships of the Judicial Committee decided that the Board of Review created to review decisions of the Commissioner of Taxation was not a Court within the meaning of Section 71 of the Constitution of Australia. At page 297 their Lordships observed that a tribunal is not necessarily a Court because it gives a final decision, or because it hears witnesses on oath, or because two or more contending parties appear before it between whom it has to be decided, or because it gives decisions which affect the rights of subjects, and at

page 298, that an administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court.

12. In '*Deodat Rai v. State*' one of us held that an order passed by a Sessions Judge under the Prevention of Crimes (Special Powers) (Temporary) Act (No. 5), 1849, was revisable by the High Court. The Sessions Judge while exercising the special jurisdiction conferred by the Act was held to be a Court, and since he was not a Court of concurrent or superior jurisdiction, he was held to be an inferior Court. The question whether the proceedings held by him were proceedings before an inferior criminal Court within the meaning of Section 435 was neither raised nor discussed nor decided. Moreover, since the provisions of Sections 121, 122, 123, 124 and 126, Criminal P.C. were applied to the proceedings held by him, the order passed by him was treated as an order passed under Section 118 of the Code and he was deemed to have acted under the Code. Therefore, that case is to be distinguished from the present case.

<sup>15</sup>1897 AC 556      <sup>17</sup>1892-1 QB 431

<sup>16</sup>1914-3 KB 275      <sup>18</sup>(1931) AC 275

13. In - '*Corporation of Calcutta v. Bhupal Chandra Sinha*<sup>19</sup>', Chunder and Guha, JJ. upheld the view taken by Mukerji, J. in the case of '*Abdoola Haroon and Company (K)*' and held that a proceeding under Section 421, Calcutta Municipal Act is a proceeding before a criminal Court. One of the reasons given for the view is that an offence is an act which is made punishable and the punishment is not confined only to fine or imprisonment but may take the form of destruction or demolition of property. The learned Judges were of the view that an order declaring goods as unfit for human consumption is in the nature of prosecution for an offence. We respectfully disagree and are supported by the decision in the case of '*Ujamshi (B)*'. We are unable to agree that an order under Section 247(1) amounts to punishing for an offence and, therefore, a judicial order.

14. An order under Section 247(1) was revised under Section 439, Cr. P.C., by this Court in - '*Mt. Imaman v. Emperor*<sup>20</sup>', and - '*Basanti v. Emperor*<sup>21</sup>', In the case of '*Mt. Imaman (V)*' the question whether the order could be revised or not was neither raised nor discussed. In the other case also this Court did not discuss the question though it was discussed by the Sessions Judge in his referring order. Therefore, neither case is an authority for the proposition that the order can be revised. In the case of '*Kajani Khemtawali*', a similar order passed under the Eastern Bengal and Assam Disorderly Houses Act was probably held to be not revisable. The judgment in that case, however, is not clear and revision of the order was refused on merits and not on the ground that the order could not be revised, In - '*In re, Chinto Vinnayak*', 2 Bom LR 801 (X) an order directing a person under Section 2, Workmen's Breach of Contract Act to pay a certain amount of money was revised without any discussion whether it could be revised. On its basis a similar order was revised in the case of '*Devappa (J)*'. For the reasons given by us we are unable to agree that such orders are revisable. In - '*Madusudan Lal v. Emperor*<sup>22</sup>', a District Magistrate refused to exercise jurisdiction to withdraw a complaint for an offence under Section 182, I.P.C., made by a

returning officer. The returning officer, though he was a Magistrate, was exercising jurisdiction not as a criminal Court but as a persona designata and the complaint was made by him as a persona designata. The District Magistrate, as a superior authority, might have had jurisdiction to withdraw the complaint made by the returning officer but if he withdrew it, it would not be in exercise of his jurisdiction as a superior criminal Court and, therefore, his order could not be revised.

15. Our answers to the two questions are that a Magistrate passing an order under Section 247 (1) of the Municipalities Act does not do so as an inferior criminal Court within the meaning of Section 435, Criminal P.C.

(NOTE : After the receipt of answers to the questions referred to the Division Bench James, J. dismissed the revision application in accordance with that opinion by his order dated 1-12-1955 but granted a certificate of fitness for leave to appeal to the Supreme Court).

Answers accordingly.

<sup>19</sup>AIR 1950 Cal 421

<sup>21</sup>AIR 1925 All 245

<sup>20</sup>AIR 1920 All 176

<sup>22</sup>AIR 1929 All 931