(1957) 10 KL CK 0007

High Court Of Kerala

Case No: Criminal Revision Petition No''s. 45 of 1955 and 91 of 1956 (E)

The City Corporation, Trivandrum		APPELLANT
	Vs	
M. Muhammad Haneefa		RESPONDENT

Date of Decision: Oct. 15, 1957

Acts Referred:

- Constitution of India, 1950 - Article 14
- Trivandrum City Municipal Act, 1116 - Section 409, 9
- Trivandrum City Municipal Rules, 1116 - Rule 31, 31(2)

Citation: AIR 1958 Ker 61 : (1958) CriLJ 503

Hon'ble Judges: Koshi, C.J; Vaidialingam, J; M.S. Menon, J

Bench: Full Bench

Advocate: K.K. Mathew, Amicus curiae, K.S. Chellappan Pillai and P. Govindan Nair, M.U. Issac, for the Appellant; S. Easwara Iyer and N. Kanakadas, for the Respondent

Judgement

Vaidialingam, J.

This is a revision by the City Corporation, Trivandrum, against the order of the learned Corporation 1st Class Magistrate acquitting the respondent u/s 245(1) of the Criminal P. C.

2. The respondent-accused was charged by the Revenue Inspector of the City Corporation, Trivandrum, u/s 409 of the Trivandrum City Municipal Act (Act IV of 1116), read with Rule 31 (2) of Part VI, Schedule II of the said Act. ,

3. According to the prosecution, the respondent was the highest bidder at the auction held for the right to run the cantonment Connemara Market for the period 1-4-1952 to 31-3-1953. The respondent is stated to have entered into an agreement with the Corporation, agreeing to pay the bid amount in certain instalments stated therein.

He is stated also to have agreed that in case of default, the corporation could re-auction the right and collect from him any fine imposed by the Corporation together with other losses incurred by the corporation by such re-auction. It is the case of the corporation that the accused failed to remit the amounts as agreed to by him, and in consequence, the right to collect the market dues was put up in re-auction and the corporation sustained loss thereby. As distraint of his property was found impracticable, the present charge was laid and the subject-matter of the charge was to prosecute him for failure to pay the sum of Rs. 915/4/- being the loss, including fines, due to the corporation from the accused.

4. Before the learned Magistrate, the accused raised no other plea excepting that of pleading "not guilty". But during the later stages of the proceedings before the Court the accused appears to have raised two specific contentions stating:--

(a) that the charge is barred by limitation u/s 415 of Act IV of 1116; and

(b) that the prosecution is not maintainable, as the amount due from the accused is on account of arrears of money due to the corporation on account of market dues defaulted by him as per terms of the agreement, and as such, the claim is of a civil nature to be agitated in a civil court;

The trial court held against the accused on point (a) on the view that the section that is applicable is Section 413 and not Section 415.

5. On point (b), the Magistrate held, following the ruling of the Travancore-Cochin High Court reported in Ahemad Hydros v. Always Municipality 1950 KL.T. 345: (AIR 1951 Trav Co. 82) (A), that the amount due under a contract for the collection of market cess will not come under the dues mentioned in Section 409 of Act IV of 111G. In view of his finding on point (b), he held that the prosecution started against the accused is incompetent and as such, acquitted the accused u/s 245(1), Criminal P.C.

6. The City Corporation, Trivandrum, has filed this revision against the said order of the lower Court. It appears to have come before a single Judge of the Travancore-Cochin High Court, who referred the matter to a Bench of two Judges. The learned counsel for the respondent-accused filed an application dated 27-1-1956 being Criminal M.P. 174/1956 for permitting him to raise the contention about the validity of Section 409 of Act TV/1116 in view of Article 14 of the Constitution. His contention is found in paragraph 2 of the petition which runs as follows:--

"In so far as Section 409 empowers the corporation to start prosecution for realising dues or damages in respect of breach of contract committed by a person the section is discriminatory and offends Article 14 of the Constitution of India".

6a. On 20-3-1956. my Lord the Chief Justice and Mr. Justice Joseph, sitting in a Bench, ordered this application as there was no opposition to the same. Further, the same

learned Judges, by order dated 29th August 1956, referred the Criminal R.P. for decision by a Pull Bench.

7. Though the Corporation was the petitioner, we permitted the respondent to first argue the case about the constitutional validity of Section 409 of the Act; because if that contention was accepted, the whole prosecution itself will fall to the ground and it may not be necessary for us to canvass the reasons given by the trial Court for acquitting the accused.

8. The sole contention of Mr. Easwara Iyer, learned counsel for the accused respondent, was that Section 409 of Act IV of 1116 is discriminatory and void as offending Article 14 of the Constitution. Section 409 of the Act runs as follows:

"Payment of compensation etc., by and to the Corporation. 409. Recovery of sums due as taxes.-- All costs, damages, penalties, compensation, charges, fees, rents, expenses, contributions and other sums which under this Act or any rule, bye-law or regulation made thereunder or any other law or under any contract, including a contract in respect of water-supply or drainage made in accordance with this Act, and the rules, bye-laws and regulations shall, if there is no special provision in this Act for their recovery, be demanded by bill containing particulars of the demand & notice of the liability incurred in default of payment and may be recovered in the manner provided by Rules 31 and 37 of the rules contained in Part VI of Schedule II unless within fifteen days from the date of service of the bill, such person shall have applied to the District Court of Trivandrum u/s 410".

Mr. Easwara Iyer contended that the relevant portion in Section 409 -- "and may be recovered In the manner provided by Rules 31 and 37 of the rules .....--" leaves some discretion without any guidance, in an Executive Authority to exercise, the powers given under this section. Rule 31 (2) in Part VI of schedule 11 of the rules framed under the Act runs as follows:

"If for any reason the distraint or a sufficient distraint of the defaulter''s property is impracticable, the Commissioner may prosecute the defaulter before a Magistrate".

According to Mr. Easwara Iyer, this sub-rule makes the Commissioner the sole judge for taking action under this sub-clause without giving or indicating any guiding rule or principles as to how the commissioner is to act.

9. Article 14 of the Constitution on which the contention regarding discrimination is based states:

"The State shall not deny to any person equality before the law or, the equal protection of the laws within the territory of India."

We may state that Mr. Easwara Iyer did not attack the validity of this Section 409 apart from Article 14 of the Constitution. He relied upon the well known cases of the Supreme Court reported in The State of West Bengal Vs. Anwar Ali Sarkar, ; Kedar

Nath Bajoria Vs. The State of West Bengal, , and the decision of the Travancore-Cochin High Court reported in P.J. Joseph v. Asst. Excise Commr. AIR 1953 Trav Co. 146 (D). He also relied upon the decision in Bahadur Singh and Another Vs. Jaswant Raj Mehta and Others, . In The State of West Bengal Vs. Anwar Ali Sarkar, , their Lordships of the Supreme Court were considering the validity of the provisions contained in the West Bengal Special Courts Act X of 1930. The particular section which came in for severe attack was Section 5 of the said Act which provides:

"The special courts shall try such offences or classes of offences or cases or classes of cases as the State Government may, by general or special order in writing direct."

The point of attack was that the said section gave a naked and arbitrary power to the executive without laying down any standard or rules of guidance to make use of the procedure laid down by it. Dealing with this attack on the said clause, their Lordships observe:

"The selection is left to the absolute and unfettered discretion of the Executive Government with nothing in the law to guide or control its action. This is not a reasonable classification at all but an arbitrary selection".

The Supreme Court, by a majority held, that the provisions of Section 5 (1) of the said Act are ultra vires of the Constitution by reason of their being in conflict with Article 14. In the next case reported in Kedar Nath Bajoria Vs. The State of West Bengal, , their Lordships of the Supreme Court considering the provisions of the West Bengal Criminal Law Amendment (Special Courts) Act XXI of 1949 observed, at page 406 as follows:

"Now it is well settled that the equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply, all that is required in class or special legislation Ss that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the equal protection of the law.....".

Dealing with the argument that the vice of discrimination consisted in the unguided and unrestricted power of singling out for different treatment, one among a class of persons, all of whom are similarly situated and circumstanced, their Lordships observed at p. 407 as follows:

"The argument overlooks the distinction between those cases where the Legislature itself makes a complete classification of persons or things and applies to them the law which it enacts and others where the Legislature merely lays down the law to be applied to persons or things answering to a given description or exhibiting certain common characteristics, but toeing unable to make a precise and complete classification, leaves it to an administrative authority to make a selective application of the law to persons or things within the defined group, while laying down the standards or at least indicate in clear terms the underlying policy and purpose in accordance with and in fulfilment of, which the administrative authority is expected to select the persons or things to be brought under the operation of law."

Finally their Lordships concluded:

"Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down".

Ultimately their Lordships held that Section 4 of the Act, challenged before them, was constitutionally valid. In AIR 1953 Trav Co. 146 (D), Sankaran and Subramonia Ayyar JJ. had to deal with Rule 7 framed under the Cochin Abkari Act, I of 1077. Rule 7 was as follows:

"Licenses for the sale of foreign liquor ....Indian made foreign spirits, etc- etc., shall be in the forms appended hereto ..... This will be issued at the discretion of the commissioner for an annual fee of Rs. 1,000. Under this license, the sale of foreign liquor to any person other than a retail or tavern licensee Is prohibited except in sealed bottles to ''such extent'' and in such manner as may be permitted by the Commissioner .....".

This rule was challenged before the learned Judges on the ground that power has been given to an officer to fix the quantity in a naked and arbitrary manner and has a potency of being exercised with unjust discrimination as there are no principles or standards prescribed to guide or regulate the exercise of power. The learned Judges observed at p. 151 of the report:

"Whatever might have been the validity of such an authority before 26-1-1950, when the Constitution of India came into force, every citizen of India being thereunder and thereafter entitled to "equality before the law" or "the equal protection of laws", under Article 14, such power which is capable of being used with discrimination in favour or against particular individuals would be void and inoperative".

The last case relied upon by Mr. Easwara Iyer is In Bahadur Singh and Another Vs. Jaswant Raj Mehta and Others, . The learned Judges there had to deal with Section 48 of the Matsya Customs Ordinance 1948. Section 48 left it to the discretion of the Superintendent of Customs either to prosecute an offender under the Ordinance in

a court of law or to deal with him departmentally and impose penalties prescribed thereunder. Following the decision of the Supreme Court in The State of West Bengal Vs. Anwar Ali Sarkar, , and other cases, the learned Judges held, that the officer therein has been given an unrestricted power to send any cases he likes to a court of law and retain any case of the same type to be dealt with departmentally at his discretion by his own self and that there was no reasonable classification. The learned Judges observed at p. 162 :

"The provision of law, which gives such an unbridled and arbitrary power to an Executive officer to make distinction between one man and another similarly situated cannot but be termed a discriminatory and hostile provision, and is clearly hit by the provision of Article 14 of the Constitution. In my opinion, Section 48 of the Ordinance offends against the fundamental rights of equal protection of laws and equality before the laws enshrined in Article 14 of the Constitution, and is, therefore, void under Article 13."

Based upon the principles laid down in the above rulings, Mr. Easwara Iyer contended that Section 409 of the Act is void as it offends the prohibition against discrimination embodied in Article 14 of the Constitution. He contends that there is nothing in the Statute to indicate in what manner the discretion is to be exercised u/s 409 or under Rule 31 (2) of the Taxation Rules. He says that such a power is likely to be abused and exercised arbitrarily by the commissioner who has been vested with such a power.

10. In this particular case it must be stated, that the accused does not contend that that power has been exercised in any way arbitrarily or mala fide by the Commissioner in deciding to prosecute him under Rule 31 (2). Mr. Easwara Ayyar''s further contention is that there is an objectionable discrimination shown in favour of the corporation u/s 409 read with Rule 31 (2). While the corporation can enforce its rights in the manner provided therein, the party in the same position, is left to work out his right under the ordinary law.

11. Mr. Govindan Nair, learned counsel for the petitioner corporation contends that the provisions contained in Section 409 or Rule 31 (2) do not in any way infringe upon the equal protection guaranteed under Article 14. His contention is that the section and the rules are only in the interests of securing the finances of a public body which itself exists in the interests of the general public. He says that the special right given to the corporation is amply justified and those provisions have been made to enable the public body, like the corporation, to collect its dues and other amounts as expeditiously as possible.

It does not require any argument that a Municipal body cannot effectively discharge the various duties imposed upon it to the public unless its financial position is sound. With this object the Act and the rules have made some special provisions for a speedier collection of the amounts due to the corporation.

12. Even apart from this, the learned counsel argues that a party who enters into a con-tract with the Municipality must be deemed to be aware of the several provisions of the City Municipal Act which gives special rights to the public body in the matter of the realisation of is dues. Further, Section 409 itself contemplates the issue of a bill containing the claim of the Municipal council being served on the party charged with a liability and also further intimating him by notice of the liability inclined in default of payment.

The said section further gives a right to a party to apply, within 15 days of the receipt of such demand from the Municipal Council, to the District Court of Trivandrum u/s 410 of the Act. It is only after default is committee in payment alter the service of the bill, the Municipality is authorised to recover the amount in the manner provided by Rules 31 and 37 of the rules contained in part VI of schedule II. Rule 31 (1) provides for giving an opportunity to the party of showing cause against the demand made by the Municipal Council.

If the party has not shown cause to the contrary to the Commissioner, the Commissioner is authorised to recover the amount by distraint and sale of the movable property of the defaulter. If the default is in respect of any building or land, the Commissioner is also given powers to enforce by distraint and sale of any moveable property found on such building or land and collect the amount. The proviso to Section 31 (1) exempts from distress the items of moveable pro- perty described in the proviso to Sub-section (1) of Section 62, C. P. C. Clause 2 of Rule 31 states, that if for any reason, the distraint or a sufficient distraint of the defaulter''s property is impracticable, the Commissioner may prosecute the defaulter before a Magistrate. We are in entire agreement with the contentions of Mr. Govindan Nair.

13. Mr. Govindan Nair further argues that the Commissioner being the Chief Executive Officer of the Municipal Council, can be trusted to exercise his discretion in an honest and bona fide manner. Further Section 9 or the Act itself says that the Commissioner is to perform all the duties and exercise all the powers specifically imposed or conferred on him, subject to all the other restrictions and limitations and conditions provided in the Act. In our opinion, Rule 31 (2) itself provides a restriction on the powers of the Commissioner or in any event, it gives a legislative guidance indicating under what circumstances the Commissioner may prosecute the defaulter.

It is very clear from Rule 31 (1) that the Com- missioner has first to issue a notice of demand and then wait for the party to show cause against the demand. It is only through that he is given the power to distrain the movable property of the defaulter. Rule 37 provides an additional power to the Commissioner to distrain the movable property of a defaulter wherever it may be found within Travancore and clauses (b) to (g) of Rule 37 provide the procedure to be followed in that respect.

14. Rule 31 (2) makes it a condition precedent for prosecution, the impracticability of the Commissioner being able to effect a distraint. Even in respect of such a prosecution it will be seen that he can be convicted under Rule 40 (I) only when the Magistrate is satisfied that the omission to pay the amount was wilful and not otherwise. Therefore, the Commissioner before he proceeds to exercise his powers under Rule 31 (2) will have to be satisfied about the impracticability of a distraint and also prima facie about the wilful nature of the default. If he does not exercise his mind and satisfies himself about these points a prosecution under Rule 31 (2) is bound to fail.

15. Mr. Govindan Nair has relied upon the decision of the Madras High Court in R. Kuppuswamy Gramani Vs. State of Madras and Another, , where Mr. Justice Subba Rao of the Madras "High Court, in considering the special powers given to the Government under the Madras Revenue Recovery Act has held that those provisions do not infringe Article 14 of the Constitution. Section 52 of the Madras Revenue Recovery Act (Act II of 1864) provided among other things for the recovery of

"all sums due to the State Government including compensation for any loss or damage sustained by them in consequence of a breach Of contract in the same manner as arrears of land revenue under the provisions of this Act."

The clause that was impugned in Section 52 was:

"And all sums due to the Provincial Government including compensation for any loss or damage sustained by them in consequence of a breach of contract."

This was attacked as infringing Article 14 of the Constitution. It was contended that the said clause makes unreasonable discrimination, between the Government and a person other than the Government. It was also argued that in the case of the Government, they can recover'' the amount by resorting to coercive process under the Revenue Recovery Act, whereas a party in the same circumstances, has to file a suit for the ascertainment of the amount due, get a decree and execute the same against the Government through Court. The learned Judge observed at page 187 (of Mad LJ): (at p. 24 of AIR) as follows:

"There cannot be any doubt that the impugned clause discriminates the State from any other person in the matter of realising a debt. But the question is whether the said act of discrimination can be justified on the basis of a reasonable classification ..... The purpose of the classification is apparent ..... It is equally its duty, if it should function effectively to realise the amounts spent on such activities as early as. possible. Public interests demand that such dues should be collected expeditiously ..... The classification, therefore, is not arbitrary. There is reasonable basis for the classification, having regard to the obvious differences between the State and the private individual in their relation to the object underlying the impugned legislation."

With respect, we agree with these forceful observations of the learned Judge. This is a case of a public body and all the observations of the learned Judge apply with equal force to the case that we have now on hand. In our opinion the power given u/s 409 to the Municipal Council, has really to be read in the context of the various duties imposed on the Municipal Council under the Act, and considered from this point of view, we do not see anything wrong In Section 409 as infringing Article 14 of the Constitution.

16. In our view Rule 31 (2) is also not hit in any way by Article 14. As indicated earlier, there is no such naked and arbitrary power vested in the Commissioner.

17. In Globe Theatres Ltd. and Others Vs. State of Madras and Others, , a Bench of the Madras High Court consisting of Rajamannar, Chief Justice and Panchapakesa Ayyar, Justice, in considering the powers given to the Government u/s 13 of Madras (Buildings Lease and Rent Control) Act XXV of 1949 to exempt buildings from the operation of the Act held that it does not in any way offend Article 14. Section 13 of that Act runs as follows:

"Notwithstanding anything contained in this Act the State Government may, by notification in the Port St. George Gazette exempt any buildings or class of buildings from all or any of the provisions of this Act."

The learned Chief Justice considered the scope of the decisions of. the Supreme Court in The State of West Bengal Vs. Anwar Ali Sarkar, and Kedar Nath Bajoria Vs. The State of West Bengal, , referred to above and summarised the effect of these decisions as follows at p. 698.

"The net result of these decisions of the Supreme Court appears to me, to be this. If the policy and object of the Act can be discovered within the four corners of that Act including the preamble, and discretion is vested in the Government to make a selection in furtherance of that policy and object for the application of the Act, then the provision conferring such power is not void as offending Article 14 of the Constitution. If such power is improperly exercised in any particular case, that is, not in furtherance of the policy and the object of the Act, but arbitrarily then the Court can strike down the exercise of such power on every such occasion."

Applying this test the learned Judges came to the conclusion that Section 13 that was challenged before them, cannot be struck down. The learned Judges further observed at p. 698 :

"But if it be shown in any given case that the discretion has been exercised in disregard of the standard or contrary to the declared ''policy and object of the legislation or arbitrarily or mala fide, then such exercise can be challenged and declared void under Article 14."

We are in respectful agreement with the reasoning of the learned Judges in the above mentioned decision,

18. That the conferring of a discretion in an officer, by itself, will not bring it within the mischief of Article 14 of the Constitution, has also been held in a recent decision of the Supreme Court reported in Pannalal Binjraj Vs. Union of india (UOI), . Their Lordships had to consider the scope of Section 5(7A) of the Income Tax Act which runs as follows :

"The Commissioner of Income Tax may transfer any case from one Income Tax Officer subordinate to him to another, and the Central Board of Revenue may transfer any case, from any one Income Tax Officer to another. Such transfer may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Income Tax Officer from whom the case is transferred."

In considering the attack on the said section with reference to Article 14, their Lordships observe at page 408 as follows :

"Nevertheless this power which is given to the Commissioner of Income Tax and the Central Board of Revenue has to be exercised in a manner which is not discriminatory. No rules or directions having been laid down in regard to the exercise of that power in particular cases, the appropriate authority has to determine what are the proper cases in which such power should be exercised having regard to the object of the Act and the ends to be achieved.... Such discretion would necessarily have to be vested in the authority concerned and merely because the case of a particular assessee is transferred from the Income Tax Officer of an area within which he resides or carries on business to another Income Tax Officer whether within or without the State will not by itself be sufficient to characterise the exercise of the discretion as discriminatory. Even if there is a possibility of discriminatory treatment of persons falling within the same group or category, such possibility cannot necessarily invalidate the piece of legislation."

After stating that the power in that case is vested not in minor officials but in top ranking authorities in the Income Tax Department, their Lordships observed :

"This power is discretionary and not necessarily discriminatory and abuse of power cannot be easily assumed where the discretion is vested in such high officials."

Their Lordships further observed at p. 409 :

"There may be cases where inmproper execution of power will result in injustice to the parties. As has been observed, however, the possibility of such discriminatory treatment cannot necessarily invalidate the legislation and where there are abuse of such power, the parties aggrieved are not without ample remedies under the law. What will be struck down in such cases will not be the provisions which invest the authorities with such power but the abuse of the power itself."

Their Lordships have reviewed all the previous decisions of the Supreme Court concerning this matter including their decisions in The State of West Bengal Vs.

Anwar Ali Sarkar, and Kedar Nath Bajoria Vs. The State of West Bengal, already referred to earlier in this judgment.

19. Following the decision of the Madras High Court in AIR 1954 Mad 630 (G) and the latest decision of the Supreme Court in (S) Pannalal Binjraj Vs. Union of india (UOI), we hold that neither Section 409 of Act IV/1116 nor Rule 31 (2) in Part VI of Schedule. II of the said Act is void or repugnant to the provisions of Article 14 of the Constitution. In this view, the main contention urged by Mr. Easwara Iyer fails. During the hearing of this revision, we entertained a doubt as to whether a prosecution under Rule 31 (2) will be a manner of recovery of the dues as contemplated u/s 409 of the Act. As the assistance of the counsel who was appearing for the respondent-accused was not available to us during the further hearing of the case we requested Mr. K.K. Mathew, Advocate to assist us on this matter and he appeared and argued the case on this point in response to our request.

20. As the counsel for the accused-respondent himself did not seriously argue this point, we do not think it necessary to very elaborately consider this aspect. But after hearing Mr. Govindan Nair, learned counsel for the city corporation and the learned Public Prosecutor who supported the stand taken by Mr. Govindan Nair for the complainant and Mr. K.K. Mathew as Amicus Curiae, we are of opinion, that prosecution under Rule 31 (2) is a manner of recovery for the amounts mentioned in Section 409 of the Act,

21. Section 409 enables the corporation to recover the several amounts, including amounts due under any contract, in the manner provided by Rules 31 and 37 of the rules contained in part VI of Schedule II.

22. We may also state that no contentions were urged that Section 409 does not embrace amounts due under any contract. In fact, it could not 08 argued because the section is very clear and takes in all sums due under any contract also. Section 375 provides several penalties for several acts mentioned therein. Non-payment of a tax as such, has not been made an "offence" under any pro-vision of the Act. That there could be a proseoution under the Act under two different circumstances is well brought out by the provisions of Sections 413 and 415 of the Act. Section 413 states that no distraint shall be made, no suit shall be instituted and no prosecution shall be commenced in respect of any sum due to the corporation under this Act after the expiration of a period of three years from the date, on which distraint might first have been made, a suit might first have been instituted or prosecution might first have been commenced as the case may be, in respect of such sum. This section, in our opinion, contemplates a prosecution for something other than an offence under the Act. Prosecution for any offence under any of the provisions of the Act, rule, or bye-law etc. is provided u/s 415 and the period of limitation is fixed as six months from the commission of the offence. Therefore, Sections 413 and 415 deal with two different types of prosecutions.

23. The rules relating to the manner of collection of taxes is embodied in part VI of Schedule. II of the Act. It is common ground that but for the provision made in Section 409, the several amounts mentioned therein cannot be collected by the procedure applicable to taxes alone. The provisions made applicable u/s 409 are Rules 31 and 37. Rule 31 (1) provides for distress proceedings being taken by the Commissioner regarding the movables of the defaulter. It says ; "The Commissioner may recover etc. etc.". Again Clause (3) of Section 31 speaks of recovery of tax, duty or other amount by resorting to a Civil Court. Rule 31 (2) states that if distraint or a sufficient distraint is impracticable, the Commissioner may prosecute the defaulter before a Magistrate. That this is a manner of recovery will also be clear for two reasons. One is, Section 409 itself says that the amount may be recovered in the manner provided by Rule 31 etc. Rule 31 has got three clauses. Clause (2) providing for prosecution being in Rule 31 must have been considered by the Legislature also as a manner of recovery.

The second reason is that Rule 31 (2) will have to be read along with Rule 40 of the Taxation Rules, Rule 40 (1) states that every person who is prosecuted under Sub-rule (2) of Rule 31, shall be liable, on proof to the satisfaction of the Magistrate that he wilfully omitted to pay the amount due by him, to pay a fine not exceeding twice the amount which may be due by him on account of the tax etc. and the expenses for distress. Clause (2) of Rule 40 enjoins upon the Magistrate to re-cover summarily from the accused, apart from fine, the amount of tax etc. mentioned in Clause (1) of Rule 40. This itself clearly shows that when a prosecution is made under Clause (2) of Rule 31, the other provisions of Rule 40 will also follow. That is by resorting to prosecution under Rule 31 (2) the corporation will be enabled to collect the amount due to them through the Magistrate. Rule 31, Clause (3) also gives a clear indication that prosecution under Clause (2) is a manner of recovery.

24. In this connection, we may also have regard to the marginal note to Section 409 which is:

"Recovery of sums due as taxes."

In The Bengal Immunity Company Limited Vs. The State of Bihar and Others, their Lordships held that prima facie the marginal note furnishes a clue as to the meaning and purpose of the Article. Therefore, even on this basis Section 409 must be considered to make available all the provisions for recovery of taxes pure and simple.

25. Mr. K.K. Mathew, who has appeared at our request, as Amlcus Curiae, contended that prosecution is not a mode of recovery. He also contended that it could not have been in the contemplation of the legislature that parties Who enter into a contract with a Municipal Body should be liable to be prosecuted under that Act. He also placed great reliance upon the non-mentioning in Section 409 that the various amounts are to be considered as taxes or deemed to be considered as taxes.

Therefore, according to him; even such a legal fiction has not been incorporated in the section. He also contended that breach of contract is not a public wrong and referred to certain American decisions on this point. He also placed very strong reliance on the wording in Clause (2) of Rule 40. Clause (2) of Rule 40 starts by saying:

"Whenever any person is convicted or an offence under Sub-rule I the Magistrate shall in addition to any fine etc. etc."

Mr. Mathew contended that the conviction under Rule 40 (1) is for an offence and non-payment of amounts due under a contract will certainly not be an offence. Though we do see very great force in his argument based upon Clause (2) of Rule 40, we have also to consider that there is no provision in the Statute making even the nonpayment of a tax an offence. Therefore, the expression "offence" under Clause (2) of Rule 40 is used in a very loose sense. But when we take the whole of Rule 31 and Rule 40 together, we do not see any reason against holding that these are modes of recovery.

26. in fact, we put It directly to Mr. Mathew about the application of Clause (1) and Clause (3) of Rule 31 regarding the amounts mentioned u/s 409. He readily agreed that those two clauses will be ''a manner of recovery'' contemplated by Section 409. If so, we are not able to see how Clause (2) which finds a place in Rule 31 can be taken to be something other than a manner of recovery. In fact, Mr. Mathew found it very difficult also to explain the prosecution contemplated u/s 413 and the prosecution contemplated u/s 419. We have indicated earlier our views about the two different prosecutions contemplated under the two different sections.

27. Mr. Mathew further contended that it is very unconscionable for a Municipal council to collect nearly double the amount by virtue of a prosecution under Rule 31 (2) read with Rule 40. When the section itself is not challenged on any other ground, the clear wording of the section brings within its ambit also amounts due under a contract. It is not as if that a party is not without a remedy, because the remedy is provided u/s 410 onwards. Futher, it is not as if that the Municipality is entitled to get double the amount when there is a conviction under Clause (1) of Rule 40. The said rule only gives power to the Magistrate to levy a fine not exceeding twice the amount due mentioned in Clauses (a) and (b) therein. Futher, the corporation can succeed In a prosecution only when the magistrate is satisfied that the omission to pay the amount was wilful. The Corporation will get only the amounts as provided in Clause (2) of Rule 40.

28. Mr. Mathew next contended that rule 40 will not apply because it deals only with taxes. The short answer is that Part VI of schedule II Itself deals only with collection of taxes and but for the special provision made u/s 409, Rules 31 and 37 will not at all apply to the amounts mentioned in the said section. The object of the section Is to enable the council to recover those amounts as if they were taxes by adopting the

manner indicated in rules 31 and 37. When Clause a of Rule 31 is invoked, Rule 40 also necessarily operates as It has to be read along with Rule 31 (2).

29. After considering the arguments of Mr. Mathew and Mr. Govindan Nair on this point, we are satisfied that prosecution is a manner of recovery contemplated u/s 400 of the Act.

30. Before concluding, we must express our grateful thanks for the valuable assistance given to us by Mr. K.K. Mathew as Amicus Curiae, in response to our request.

31. Coming to the actual merits of the case, we must state that Mr. Easwara Avyar did not argue any point other than the validity of Section 409 as being hit by Article 14.

32. Mr. Govindan Nair, learned Counsel for the petitioner, contends that the actual decision of the lower court based on the decision in 1950 KLT 345: (AIR 1851 Trav Co. 82) (A) is not correct. The decision in 1950 KLT 345: (AIR 1951 Trav Co. 82) (A), related to a question arising u/s 365 of the Travancore District Municipalities Act, the wording of which is quite different from the section before us namely, Section 409 of the Trivandrum City Municipal Act IV/1116, Section 409, as discussed above, specially takes in all sums due "under any contract including etc. etc." Therefore the trial Court was not correct in applying the decision in 1950 KLT 345: (AIR 1951 Trav Co. 82) (A) and acquitting the accused.

33. In the result, the order of the lower Court is set aside and the case remanded to that Court for fresh disposal on the merits according to law and in the light of the observations contained in the judgment.