

that in many ways the client is very helpless. In many litigations he is fighting for a very large stake and he is at the mercy of the solicitor and is prepared to accept his advice. But that makes the responsibility of the solicitor all the greater, and we think, and we want to say it again, that it was improper on the part of Mr. Kantilal to insist upon the client to give an authority to brief as many Counsel as he liked. His client did not know what would be the number of Counsel to be briefed, what would be the fees to be paid and what would be his ultimate liability. We have now altered the rules governing the dual system with the sole object that the costs should be cut down and also that a litigant should know what extra costs he will have to pay even after he has succeeded in his litigation. Solicitors should try and help to work the system in the spirit in which it originated and the spirit in which the rules now require it should be worked. The most important feature of the system to-day is that the solicitors should realise that they should make it perfectly clear to the clients what risks they are running in litigating and coming to this Court and taking advantage of the dual system, and all that can be done if this r. 568 is properly followed. In our opinion in this particular case r. 568 was not followed. We are sorry to say, but we are compelled to say that Mr. Kantilal should not have taken this authority in the language and in the term in which it was taken.

The appeal, therefore, fails and must be dismissed with costs. Cross-objections dismissed. No order as to costs of the cross-objections. Liberty to the respondent's attorney to withdraw the sum of Rs. 500 deposited. The respondent undertakes that if there is any surplus he will return it.

Attorneys for appellant : *Kantilal & Co.*

Attorneys for respondents : *M. N. Mankar & Co.*

Appeal dismissed.

P. M. P.

APPELLATE CRIMINAL

Before Mr. Justice Shah and Mr. Justice Vyas.

STATE *v.* YEMANAPPA LIMBAJI PANDHARE.*

Bombay Police Act (Bom. XXII of 1951), ss. 31 (2), 31 (1) (b), 132, 147—Indian Penal Code (Act XLV of 1860), ss. 332, 323, 99—Order issued by District Superintendent of Police calling upon accused, a dismissed constable, to vacate premises in Police quarters—D. S. P. not authorised by State Government to exercise powers under s. 31 (2)—Accused

*Criminal Appeal No. 745 of 1955.

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offering resistance and causing hurt to P. S. I. who went to execute the order—Whether accused guilty under s. 332 I. P. C.

The District Superintendent of Police issued a notice calling upon the accused, a dismissed Head Police Constable, to vacate within 7 days the premises occupied by him in the Police Quarters. His (of the accused) application for permission to stay on in the premises having been refused, the D. S. P. directed a Police Sub-Inspector to take legal action against the accused. When the Sub-Inspector went to the premises to execute the order of the D. S. P. the accused offered resistance and caused hurt to the Sub-Inspector. On being prosecuted under s. 332 of the Indian Penal Code, the accused contended that (i) the D. S. P. had no authority to issue an order of forcible eviction under s. 31 (2) of the Bombay Police Act, 1951, and that (ii) when the Police Sub-Inspector went to evict him forcibly he was not acting in the discharge of his duty and that in resisting him he (the accused) had not committed any offence,

Held, (i) that the authorisation issued by the State Government to the D. S. P. under s. 31 (1) (b) of the Bombay Police Act, 1951, was not an authorisation for the purpose of taking action under s. 31 (2) of the Act and a separate and distinct authorisation under s. 31 (2) was essential,

(ii) that there being no notification by the State Government authorising the D. S. P. to exercise powers under s. 31 (2) of the Act, the order passed by him was without authority,

(iii) that the order not being *ex facie* bad or defective the Police Sub-Inspector was in executing the order acting in the discharge of his duty as a public servant,

(iv) that the mere fact that the order was defective for want of authorisation did not justify the accused in resisting its enforcement,

(v) that in any case as the Police Sub-Inspector was acting in good faith under colour of his office, the accused had no right of private defence.

(vi) that, therefore, the accused was guilty of an offence under s. 332 of the Indian Penal Code.

Queen Empress v. Dalin,⁽¹⁾ *Emperor v. Madho*,⁽²⁾ *Public Prosecutor v. Suryanarayana Reddi*,⁽³⁾ and *Bhawoo Jivaji v. Mulji Dayal*,⁽⁴⁾ referred to.

Appeal against an order of acquittal made by K. M. Hambarhatty, Esquire, Additional Sessions Judge, Sholapur, reversing the decision of A. S. Nadgauda, Esquire, Judicial Magistrate, First Class, Sholapur.

The facts are sufficiently set out in the Judgment.

H. M. Choksi, Government Pleader, for the State of Bombay.
Y. V. Chandrachud, for the Accused.

Vyas J.—This is an appeal by the State of Bombay from an appellate judgment of the learned Additional Sessions Judge, Sholapur, acquitting the respondent Yamanappa Limbaji Pandhare, who was convicted of an offence under s. 332 of the Indian Penal Code by the Judicial Magistrate, First Class, III Court, Sholapur.

1. (1896) 18 All. 246.

3. (1937) M. W. N. 741.

2. (1918) 40 All. 28.

4. (1888) 12 Bom. 377.

This appeal raises a question of construction of s. 31 of the Bombay Police Act No. XXII of 1951 and the question has arisen in this way. The respondent Yamanappa Limbaji Pandhare, whom I shall hereafter refer to as the accused, was originally serving as a head constable in the Police Department. On April 3, 1954 he was dismissed from service. During the tenure of his service he was provided with quarters in room No. 45 of Block No. 3 in 'A' Division Police Lines, Sholapur. After his dismissal the accused applied to the District Superintendent of Police, Sholapur, on April 25, 1954, for permission to stay on in the abovementioned premises. On May 3, 1954 the District Superintendent of Police issued a notice to the accused, calling upon him to vacate the premises, which were occupied by him, within seven days of the receipt of the notice. On May 5, 1954, Mr. Sapre, the Second Sub-Inspector of Police attached to the 'A' Division Police Station, went to the room of the accused in order to serve upon him the abovementioned notice which was issued against him by the District Superintendent of Police. The accused refused to sign the notice as it was not accompanied by a duplicate copy. On May 11, 1954, Mr. Sapre again went to the room of the accused to serve the notice upon him. At that time Mr. Sapre had taken the notice and also a duplicate copy thereof with him. Even on that occasion the accused refused to accept the notice and his contention in that behalf was that the duplicate copy of the notice did not bear the signature of the District Superintendent of Police. Thereafter, on May 25, 1954, the District Superintendent of Police issued another notice against the accused. By this notice, which is exhibit 2, the District Superintendent of Police called upon the accused to vacate the premises occupied by him within seven days from the receipt of the notice. The District Superintendent of Police further warned the accused that in case he failed to comply with the notice, action under s. 31 of the Bombay Police Act, 1951, would be taken against him. This notice, exhibit 2, was served on the accused on June 3, 1954. It would appear that even in the case of this notice the accused refused twice to accept it upon one pretext or another. Ultimately it was on June 3, 1954, that the notice was served upon him. Thereafter, on two occasions, the police Jamadar Javalgikar went to the room of the accused as the accused had failed to vacate his premises within seven days from the receipt of the District Superintendent of Police's notice. The two occasions upon which Mr. Javalgikar went to the room of the accused were once on June 28, 1954, and again on July 25, 1954. On both these occasions the accused told the Jamadar that he would not vacate the premises and that he would see the Sub-Inspector in that connection. On July 26, Sub-Inspector Salvi went to the room of the accused and asked him to vacate the premises. On that day (July 26, 1954) the

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accused gave Sub-Inspector Salvi an application addressed to the District Superintendent of Police, Sholapur. By that application the accused asked for permission to stay on in the premises till August 10, 1954, as he had preferred an application to the High Court at Bombay against the order of his dismissal. The accused's application for permission to stay on in the premises was rejected by the District Superintendent of Police. Thereafter, on July 29, 1954, the District Superintendent of Police directed the Sub-Inspector attached to the 'A' Division Police station to take legal action against the accused and to report the result of the action taken to the District Superintendent of Police within seven days. Pursuant to the abovementioned order of the District Superintendent of Police dated July 29, 1954, Sub-Inspector Salvi went to the room of the accused along with panchas and constables. On August 11, 1954 when Mr. Salvi went to the accused's room to execute the order of the District Superintendent of Police dated July 29, 1954, the accused offered resistance to Mr. Salvi and assaulted him while he was discharging his duty as a public servant, namely as a Police Sub-Inspector. As a result of the assault made by the accused upon Mr. Salvi, the accused was prosecuted upon a charge under s. 332 of the Indian Penal Code.

The accused pleaded not guilty to the charge and contended that the District Superintendent of Police, Sholapur, had no authority to issue an order for his forcible eviction from his premises under s. 31, sub-s. (2) of the Bombay Police Act, 1951. The accused contended that the order of the District Superintendent of Police dated July 24, 1954, merely authorised Mr. Salvi to take legal action against the accused. The accused said that the expression 'legal action' meant a prosecution under s. 132 of the Bombay Police Act and did not mean forcible eviction. Consequently, said the accused, when Sub-Inspector Salvi went to his room on August 11, 1954, to evict him forcibly from his premises, he (Mr. Salvi) was not acting in the discharge of his duty, but was on the contrary committing an offence himself which was punishable under s. 147 of the Police Act. In other words, the accused contended that he had only resisted an unauthorised entry of Sub-Inspector Salvi into his premises. He maintained that he did not assault Mr. Salvi nor caused hurt to him.

Now, the learned trial Magistrate who heard and decided the case against the accused held that, though the writing, exhibit 2, dated May 25, 1954, was styled "notice" by the District Superintendent of Police, it was virtually an order issued under s. 31 of the Bombay Police Act, inasmuch as it stated that the accused had been dismissed from service on April 3, 1954, that therefore he had no right to reside in room No. 45 any longer, that he

should vacate the premises occupied by him within seven days of the receipt of the order and that, on his failing to do so, legal action against him would be taken. The learned Magistrate held further that the above order was issued by the District Superintendent of Police, Sholapur, under sub-s. (2) of s. 31 of the Bombay Police Act, and in the learned Magistrate's view it was a competent order. While dealing with this point the learned Magistrate observed that it was true that no separate notification under s. 31, sub-s. (2), was issued by the State Government authorising a District Superintendent of Police to exercise powers under s. 31, sub-s. (2), but, said the learned Magistrate, no separate notification under s. 31, sub-s. (2), was necessary. In the view of the learned Magistrate, since the words in s. 31, sub-s. (1), cl. (b) are "any officer authorised by the State Government in this behalf" and since the words in s. 31, sub-s. (2), are "the officer authorised in this behalf by the State Government", the word 'officer' in s. 31, sub-s. (2), means and refers to the 'officer' authorised under s. 31, sub-s. (1), cl. (b). In other words, the learned Magistrate held that a District Superintendent of Police or an Additional District Superintendent of Police or a Deputy Commissioner of Police, Greater Bombay, empowered by the State Government under s. 31, sub-s. (1), cl. (b), can validly issue an order to the person concerned to vacate the premises and can validly direct a police officer to enter upon the premises occupied by the person concerned and to remove the said person from the said premises.

Then the learned Magistrate held that by the words "legal action" in the District Superintendent of Police's order dated July 29, 1954, the District Superintendent of Police meant an action under s. 31, and not under s. 132 of the Bombay Police Act, since "an action under s. 31 of the Bombay Police Act, 1951," was expressly referred to by the District Superintendent of Police in his notice dated May 25, 1954. Concluding his observations on this point, the learned Magistrate said that "the action taken by Shri Salvi was a legal one and it was the action intended to be taken under order exhibit 2."

On merits the learned Magistrate held that hurt was caused by the accused to Sub-Inspector Salvi when Mr. Salvi was discharging his duty as a public servant. Accordingly, the learned Magistrate convicted the accused of an offence under s. 332 of the Indian Penal Code and sentenced him to imprisonment till the rising of the Court and to pay a fine of Rs. 25 or in default to suffer 15 days' rigorous imprisonment.

On the accused appealing to the Court of Session at Sholapur, the learned Additional Sessions Judge, Sholapur, held firstly that the District Superintendent of Police had no power to issue an order such as the one issued by him on July 29, 1954 and

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secondly that the words "legal action" used by the District Superintendent of Police in his order dated July 29, 1954, would mean "a civil action for eviction or a prosecution under s. 132 of the Bombay Police Act, but by no stretch of imagination an action under s. 31, sub-s. (2)." On merits, the learned Additional Sessions Judge agreed with the learned Magistrate that hurt was caused by the accused to Sub-Inspector Salvi; but as he held that the District Superintendent of Police's order dated July 29, 1954, was incompetent under s. 31, sub-s. (2), it was an order without jurisdiction and therefore the accused was entitled to resist it in the exercise of his right of self-defence. To use the language of the learned Judge,

"in the present case, there was complete want of jurisdiction in the action taken by the P. S. I. and consequently the accused had a right to defend himself against it."

Accordingly, the learned Additional Sessions Judge reversed the order of conviction and sentence passed against the accused and ordered the accused to be acquitted of the charge which was preferred against him. The state of Bombay has come in appeal from this judgment of acquittal passed by the learned Additional Sessions Judge, Sholapur, in favour of the accused.

The learned Government Pleader before us supports the view taken by the learned Magistrate and contends that the authorisation issued by the State Government under s. 31, sub-s. (1), cl. (b) would be an authorisation for the purpose of an action to be taken under s. 31, sub-s. (2) also and that a separate authorisation under s. 31, sub-s. (2), as distinct from the authorisation under s. 31, sub-s. (1), cl. (b), is not necessary for taking action under s. 31, sub-s. (2). For this submission, the learned Government Pleader relies on the words "the officer authorised in this behalf" in s. 31, sub-s. (2) and contends that these words would mean "the officer authorised in the matter of requiring the person concerned to vacate the premises occupied by him." Then the learned Government Pleader says that the authorisation in the matter of requiring the person concerned to vacate the premises occupied by him is the authorisation to which s. 31, sub-s. (1), cl. (b), refers. It is in this manner that the learned Government Pleader submits that the authorisation referred to in s. 31, sub-s. (1), cl. (b) and the authorisation referred to in s. 31, sub-s. (2) is the same authorisation and that two distinct authorisations, one under s. 31, sub-s. (1), cl. (b) and the other under s. 31, sub-s. (2), are not contemplated by the Act.

In our view the learned Government Pleader is in error. Section 31, sub-s. (1), cl. (b) of the Bombay Police Act, 1951, reads:

"Any Police Officer occupying any premises provided by the State Government for his residence shall, notwithstanding anything contained in any law for the time being in force, vacate the same on his ceasing

to be a Police Officer or whenever the State Government or any officer authorised by the State Government in this behalf thinks it necessary and expedient to require him to do so."

It is clear that cl. (b) of sub-s. (1) of s. 31 refers to two classes of Police Officers who must vacate the premises provided to them by the State Government for their residence, and the two classes of the Police Officers are (1) those who on ceasing to be Police Officers automatically cease to be entitled to remain in occupation of the premises provided to them by the State Government for their residence while they were in service and (2) those who are in service but whose removal from the premises provided to them for residence by the State Government is considered necessary and expedient by the State Government or any officer authorised by the State Government in that behalf. The important point to be noted is that so far as the provisions of s. 31, sub-s. (1), cl. (b) are concerned, no authorisation of any officer is necessary before that officer can call upon a person who has ceased to be in the service of the Police Department to vacate the premises which were allotted to him by the State Government for his residence while he was in service and were continued to be occupied by him even after his ceasing to be in service. A person who ceases to be in the service of the Police Department automatically ceases to be entitled to remain in occupation of those premises and he must vacate those premises. He could be asked by his departmental superior to remove himself from the said premises and this could be done under s. 31, sub-s. (1), cl. (b), without any authorisation of the said superior by the State Government in that behalf. Under s. 31, sub-s. (1), cl. (b), an authorisation of an officer by the State Government is essential only where it is considered necessary and expedient to require a Police Officer who is still in service to vacate the premises allotted to him by the State Government for his residence.

Now, let us turn to the provisions of s. 31, sub-s. (2). It reads:

"If any person who is bound or required under sub-s. (1) to vacate any premises fails to do so, the State Government or the officer authorised in this behalf by the State Government may order such person to vacate the premises and may direct any Police Officer with such assistance as may be necessary to enter upon the premises and remove therefrom any person found therein and to take possession of the premises and deliver the same to any person specified in the direction."

The words "any person who is bound under sub-s. (1) to vacate" refer to a person who has ceased to be a police officer and has, therefore, automatically ceased to be entitled to remain in occupation of the premises which were provided to him by the State Government for residence while he was in service and is accordingly bound to vacate those premises. The words "any person who is required under sub-s. (1) to vacate" refer to a police officer who is still in service, but whose removal from

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the premises provided to him by the State Government for residence is considered necessary and expedient and who is, therefore, required to vacate the said premises. It is thus clear that the action contemplated by sub-s. (2) of s. 31 is the action to be taken against both the classes of police officers—police officers who have ceased to be in service and those still in service—who are referred to in sub-s. (1), in case they fail to vacate the premises which they are bound to, or required, to, vacate as the case may be. Section 31, sub-s. (2) provides that such an action can only be taken by the State Government or by the officer authorised in that behalf by the State Government. Sub-section (1) of s. 31 merely directs that a police officer shall vacate the premises provided to him for residence by the State Government on his ceasing to be a police officer or when required by the State Government or by the authorised officer to do so. It does not provide for the action to be taken against a police officer in case he does not vacate the premises, though bound to or required to do so. A situation arising out of non-compliance by a police officer with the provisions of sub-s. (1) is the subject-matter of sub-s. (2), and sub-s. (2) provides that the said situation could be dealt with only by the State Government or the officer authorised by the State Government in that behalf. The subject-matter of the two sub-sections of s. 31 being thus different, the authorisation of an officer under sub-s. (1) would not avail for the action to be taken under sub-s. (2). That the authorisation contemplated by sub-s. (1) and the authorisation referred to in sub-s. (2) are intended for different purposes is evident from the provisions of the two sub-sections. An authorisation under sub-s. (1) confers only to a limited authority upon an officer who is authorised. That authority extends only to the issuing of a requisition upon a police officer who is still in service to vacate the premises allotted to him by the State Government for his residence when the officer authorised by the State Government in that behalf considers it necessary and expedient that he must do so. That the authorisation for the purpose of sub-s. (1) is distinct from the authorisation for the purpose of sub-s. (2) is clear from the words “in this behalf” used by the Legislature in sub-s. (1). These words (i.e. “in this behalf”) mean “in behalf, or for the purpose, that is mentioned in sub-s. (1).” Now the purpose for which an officer is authorised by the State Government under sub-s. (1) is that he should in the first instance determine whether it is necessary and expedient that a police officer other than an officer who has ceased to be in the service of the Police Department should be removed from the premises provided to him by the State Government for residence and should then issue a requisition upon the police officer concerned in that connection. Under the authority conferred upon an officer by the State Government under sub-

s. (1), it is not competent to the officer to take any action if a police officer who has ceased to be in service as such does not vacate the premises which he becomes automatically bound to vacate upon his ceasing to be a police officer, or if an officer serving in the Police Department does not remove himself from the premises allotted to him by the State Government for residence, though required to do so. The action to be taken upon such a contingency occurring is the subject-matter of sub-s. (2), and it is only the State Government or the officer authorised by the State Government in that behalf who can take that action. Before a person who has ceased to be a police officer may be called upon by his superior to vacate the premises, it is not necessary that the said superior should have been authorised in that behalf by the State Government. The right of an officer who has ceased to be in the Police service to continue in occupation of the premises which were allotted to him for his residence by the State Government is automatically lost upon his ceasing to be a police officer and he can be asked to vacate those premises straightaway. No authorisation of any officer in that behalf by the State Government is necessary before he can be so asked. But if a police officer, other than an officer who has ceased to be in the police service, is to be asked to vacate the premises, only the State Government or an officer authorised in that behalf by the State Government under sub-s. (1) can do so. But the said authority extends only to the determination whether it is necessary and expedient that the police officer concerned should be called upon to vacate the premises assigned to him by the State Government for his residence, and if it is considered necessary and expedient that the said police officer must vacate the premises, the officer authorised (under sub-s. (1)) can require him to vacate those premises. But under that authority, that is, the authority conferred by the State Government under sub-s. (1), the authorised officer can take no further action against the police officer concerned if the said officer does not vacate the premises, though required to do so, the reason being that the further action is the subject-matter of sub-s. (2) and is not contemplated by sub-s. (1).

The position on the subject may be summed up thus: The words "in this behalf" in sub-s. (1) mean "in behalf of requiring a police officer other than an officer who has ceased to be in the service of the Police Department to vacate the premises provided to him by the State Government for his residence." The words "in this behalf" in sub-s. (2) mean "in behalf of action to be taken for recovering possession from a police officer who is bound, or required, to vacate, but does not do so and for delivering it to another specified person." Thus, the provisions of the two sub-sections themselves show that the scope and extent of the authorisation under sub-s. (1) differ from the scope and

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extent of the authorisation under sub-s. (2). Accordingly, an authorisation under sub-s. (1) will be no authorisation for taking action under sub-s. (2).

Now, there is no doubt that the action which Sub-Inspector Salvi understood as the action directed to be taken by the District Superintendent of Police by his order dated July 29, 1954 was the action under s. 31, sub-s. (2), and it is not disputed in this case that so far as an authorisation by the State Government under s. 31, sub-s. (2) is concerned, the District Superintendent of Police was not so authorised. In this connection, we may turn to the Government Notification, Home Department, No. 8484/5-II (G), dated September 22, 1951, which was in these terms:

"In exercise of the powers conferred by Sub-Clause (b) of clause (1) of s. 31, of the Bombay Police Act, 1951 (Bom. XXII of 1951) the Government of Bombay is pleased to authorise a District Superintendent of Police, an Additional District Superintendent of Police and the Deputy Commissioner of Police, Head Quarters, Greater Bombay, to exercise the powers under the said sub-clause (b) with respect to Police Officers under their respective jurisdiction."

In this notification, there was an express authorisation by the State Government of a District Superintendent of Police, an Additional District Superintendent of Police and the Deputy Commissioner of Police, Head Quarters, Greater Bombay, for exercising the powers under cl. (b) of sub-s. (1) of s. 31 of the Bombay Police Act. There is no evidence to show that a similar notification was issued by the State Government authorising a District Superintendent of Police or an Additional District Superintendent of Police to exercise powers under s. 31, sub-s. (2). Therefore, we must agree with the view of the learned Additional Sessions Judge, Sholapur, that the order which the District Superintendent of Police, Sholapur, passed on July 29, 1954 for taking action against the accused, the result of which was to be reported to him in seven days' time, was without his authorisation by the State Government in that behalf. It was, therefore, an order without authority.

But we cannot accept the learned Judge's view that on that account the accused was entitled to resist Sub-Inspector Salvi when the Sub-Inspector went to the accused's room to execute that order. The mere fact that the order, for the enforcement of which the Sub-Inspector went to the accused's room, was defective at the source for want of authorisation of the District Superintendent of Police by the State Government under sub-s. (2) of s. 31 cannot assist the accused in his defence that he was justified in resisting the execution of the order by obstructing the Sub-Inspector and causing hurt to him, once we are satisfied that the Sub-Inspector was acting in the discharge of his duty as a public servant when he went to the accused's room to enforce that order. Now, in this case we entertain no

doubt whatever that Sub-Inspector Salvi was bound to carry out the order of the District Superintendent of Police, Sholapur, given to him on July 29, 1954. He could not possibly know of a subtle and technical legal distinction between an authorisation under s. 31, sub-s. (1), cl. (b) and an authorisation under s. 31, sub-s. (2) of the Bombay Police Act nor could he be expected to consult legal opinion for verifying the technical propriety of the order before executing it. As a subordinate officer, he would naturally proceed on the assumption that the order given to him by his superior officer, the District Superintendent of Police, was a good and correct order and it was his duty to execute that order. It was not for him to adopt a critical or sceptical attitude and suspect the validity of that order or test the propriety thereof. The District Superintendent of Police's order dated July 29, 1954, was not such as would *prima facie* appear to be a defective or bad order. It would have been a different matter if on the face of the order itself it had appeared defective or incorrect. If *ex facie* the order had been such that the Sub-Inspector should or could have known that he was asked to do something which was contrary to law, it might have raised a different question. We are not called upon to answer that question in this appeal. As I have just stated, as Sub-Inspector Salvi was bound to carry out the District Superintendent of Police's order which was given to him on July 29, 1954, he could not possibly tell the District Superintendent of Police that he would first wish to satisfy himself that the order was legally sound and would then obey it. We have, therefore, no doubt that, when Sub-Inspector Salvi went to the room of the accused on August 11, 1954 to execute the aforesaid order of the District Superintendent of Police, Sholapur, he was acting in the discharge of his duty as a public servant.

In support of his contention that Sub-Inspector Salvi was not acting in the discharge of his duty, when he went to the accused's room to enforce the order of the District Superintendent of Police, Mr. Chandrachud has referred us to the Allahabad cases of *Queen Empress v. Dalin and others*,⁽⁵⁾ and *Emperor v. Madho and another*.⁽⁶⁾ In *Queen Empress v. Dalin and others* a warrant was issued by a Magistrate for the arrest of one Dalip under s. 114 of the Code of Criminal Procedure. This warrant was sent to a certain thana for execution. When the constable to whom the warrant had been made over had left the thana, it was discovered that Dalip was in a village other than that in which he had been supposed to be. Thereupon the officer temporarily in charge of the thana made a copy from the book at the thana, endorsed on the back the names of one Nazir Husain and some other constables and, having signed the endorsement, sent Nazir

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5. (1896) 18 All. 246.

6. (1918) 40 All. 28.

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Husain and the others out with this paper to arrest Dalip. Nazir Husain and his companions arrested Dalip; but, as they were returning with him in custody, some of Dalip's friends, aided by Dalip himself, attacked them, rescued Dalip and caused hurt to the police. It was held by a Division Bench of the Allahabad High Court consisting of the learned Chief Justice and Mr. Justice Burkitt that the Police officers concerned in arresting Dalip under the circumstances above described were not acting in the lawful discharge of their duty within the meaning of s. 332 of the Indian Penal Code, so as to render the accused liable to conviction under that section. With respect, we hesitate to accept the proposition that merely because Dalip who was described as residing within the limits of a particular thana was actually found residing within the jurisdiction of another thana, the officer who arrested Dalip from the village within whose jurisdiction he was actually residing could not be said to be acting in the discharge of his duty as a public servant. The subject of the arrest to be effected was Dalip, and so long as it was the same Dalip who was arrested, it did not matter whether he was arrested from one village or the other. It was not anybody's contention that Dalip, who was arrested, was a different person from Dalip who was intended to be arrested under the warrant. At any rate, this decision cannot be an authority for the proposition which Mr. Chandrachud is contending for, namely that if the order passed by a superior officer is initially bad for want of jurisdiction in the said officer to pass it, the subordinate officer who has no reason to suspect the jurisdictional defect in the order and who goes to enforce that order could not be said to be acting in the discharge of his duty as a public servant.

In *Emperor v. Madho and another*, a police constable was assaulted whilst endeavouring to enforce an order passed by the District Magistrate as to the carrying of lathis by Pragwals, which order, originally lawful, had become obsolete. It was held by Mr. Justice Banerji, who was sitting as a single Judge, that in the circumstances the persons who assaulted the constable could not be convicted under s. 332 of the Indian Penal Code, but they were liable to conviction under s. 323. In the body of his judgment, Mr. Justice Banerji observed that if the order passed by the District Magistrate could not be lawfully issued by him, it was not the duty of the constable to obey that order. Therefore, said Mr. Justice Banerji, when the constable was carrying out that order, he could not be said to be discharging his duty as a public servant. Again, with respect, it is difficult to understand how the order of the District Magistrate in that case could be said to have been not lawfully issued by the District Magistrate. What had happened was that the order, which presumably was a lawful order at the time when it was issued,

had become obsolete by reason of its expiry at a particular date. That could hardly be a ground for holding that the order at its inception was not a lawfully issued order. This case also is no authority for holding that, if an order, which *prima facie* appears to be a good order, is defective at its source for want of jurisdiction, a subordinate officer enforcing that order is not acting in the discharge of his duty as a public servant. As I have stated above, we are satisfied in this case that Sub-Inspector Salvi was acting in the discharge of his duty as a public servant when he went to the accused's room to execute the order dated July 29, 1954, of the District Superintendent of Police, Sholapur.

On merits, as I shall presently point out, we are in agreement with the conclusion reached by both the Courts below that, when Mr. Salvi went on August 11, 1954, to the room of the accused to enforce the order of the District Superintendent of Police, Sholapur, resistance was offered to him and hurt was caused to him by the accused. Accordingly, we come to the conclusion that the accused was guilty of an offence under s. 332 of the Indian Penal Code.

While we are thus satisfied that the accused committed an offence under s. 332 of the Indian Penal Code, it would appear on the authority of the very Allahabad cases *Queen Empress v. Dalin and others* and *Emperor v. Madho and another*, to which Mr. Chandrachud for the accused has referred, that he would in any case be guilty of an offence under s. 323 of the Indian Penal Code as Sub-Inspector Salvi was acting in good faith under colour of his office and as therefore the accused would have no right of private defence to obstruct him. In *Queen Empress v. Dalin and others*, the Allahabad High Court held that inasmuch as the police officers concerned in arresting Dalip were acting in good faith under the colour of their office, s. 99 of the Indian Penal Code applied and Dalip and others could be properly convicted under ss. 147 and 323 of the Indian Penal Code. Similar was the view taken in *Emperor v. Madho and another*. In our opinion, the good faith of Sub-Inspector Salvi could not be doubted. A Sub-Inspector is not expected to consult legal opinion as to the soundness or legality of a District Superintendent of Police's order which he is asked to execute. He is not expected to test and satisfy himself as to the technical propriety of the order which he is called upon to enforce. For instance, in this case he could not be expected to apprehend a fine distinction between an authorisation contemplated by s. 31, sub-s. (1), cl. (b), and an authorisation under s. 31, sub-s. (2). He could not be blamed if he did not see a distinction between the scope and extent of sub-s. (1) and sub-s. (2) of s. 31. He could not be found fault with if he thought that the District Superintendent of Police, Sholapur, wanted him to act under s. 31, sub-s. (2). He would naturally co-relate the expression "legal action" contained in the District Superintendent of Police's order dated

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July 29, 1954, with the expression "action under s. 31 of the Bombay Police Act" contained in the said officer's notice dated May 26, 1954. Now, it is clear that action, properly so-called, is the subject-matter of s. 31, sub-s. (2), and not of s. 31, sub-s. (1). Section 31, sub-s. (1), merely lays down a direction that a police officer shall vacate his premises on ceasing to be in service or when called upon to do so by an officer authorised by the State Government. Section 31, sub-s. (1) does not prescribe what action should be taken if the police officer concerned does not vacate the premises. That action is prescribed by s. 31, sub-s. (2). Therefore, if Sub-Inspector Salvi, reading the District Superintendent of Police's notice dated May 25, 1954, with his order dated July 29, 1954, understood that the District Superintendent of Police's order wanted him to act under s. 31, sub-s. (2), he could not be blamed. In short, there is nothing in the circumstances of this case which should make us doubt Mr. Salvi's good faith.

Further, there is no doubt that Mr. Salvi was acting under colour of his office when he went to the accused's premises on August 11, 1954, to execute the order of the District Superintendent of Police, Sholapur. He was acting as a Sub-Inspector attached to the 'A' Division police station, Sholapur. The accused knew that Mr. Salvi was executing the District Superintendent of Police's order as a Sub-Inspector. The D.S.P.'s notice dated May 25, 1954, and a copy of it were sent to the Police Sub-Inspector, 'A' Division, Sholapur, which office Mr. Salvi was holding at the time. The Police Sub-Inspector, 'A' Division, Sholapur, was directed by the District Superintendent of Police, Sholapur, to obtain the accused's signature on a copy of the notice, and in that matter also due steps were taken by Mr. Salvi as a Sub-Inspector in charge of the 'A' Division Police Station. Finally, the Sub-Inspector was asked by the District Superintendent of Police's order dated July 29, 1954, to take "legal action" against the accused, and that order also was given to Mr. Salvi. Thus, there is no doubt that when Mr. Salvi on August 11, 1954 went to the accused's room to execute the District Superintendent of Police's order, he went there under colour of his office as a Sub-Inspector attached to the 'A' Division police station, Sholapur. It is thus clear that, when Mr. Salvi went to the accused's room to enforce the District Superintendent of Police's order dated July 29, 1954, he was acting in good faith and under colour of his office. Accordingly, the principle of *Queen Empress v. Dalin and others* and *Emperor v. Madho and another* would apply and in any event the accused would be liable to be convicted under s. 323 of the Indian Penal Code. The fine imposed by the learned Magistrate upon the accused could also be imposed under section 323.

In *Public Prosecutor v. Suryanarayana Reddi*,⁽⁷⁾ certain custom officials, on search, found that goods were smuggled from Yanam into Indian territory. The smugglers in the course of the search attacked the officials and caused injuries. They contended that the customs officials had not the power to stop or search, because there was no notification declaring Yanam to be a foreign territory under s. 5 of the Indian Tariff Act. It was held that the customs officers were entitled to stop, search and seize goods which were brought into Indian territory without payment of duty and that even if there was no notification, the customs officers must be deemed to have acted in good faith under colour of their office and therefore no right of private defence arose in that case.

In *Bhawoo Jivaji v. Mulji Dayal*,⁽⁸⁾ the facts were that on December 29, 1887, the accused, a police constable, was on duty at a temporary post near the Arthur Crawford Market. His turn of duty lasted from 4 to 7 p.m. Between 4-30 and 7 a.m. he saw the complainant carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen property, he went up to the complainant and questioned him. In answer to one of the questions the complainant stated that the cloth was made in England. The accused police constable, noticing that each piece bore Gujarati marks and not knowing that such marks were placed on English-made goods, concluded that this statement was false and that the cloth had been stolen. He took hold of one of the pieces of cloth in order to examine it more closely. The complainant objected to this and there was a scuffle between them for the possession of the cloth. The accused then arrested the complainant and took him to a European Inspector to whom he stated the facts, alleging that he had arrested the complainant because he had assaulted him. The Inspector let the complainant go as he saw that he was an old man and as the accused said that he was not hurt. The complainant then lodged a complaint before the Acting Chief Presidency Magistrate, charging the accused with wrongful restraint and wrongful confinement. The defence of the accused constable was that the complainant had assaulted him and had been on that account arrested and kept in confinement until released by the Inspector of Police. The Magistrate found that there was no justification for the suspicion which the accused professed to entertain, that there were no reasonable grounds for questioning the complainant about the cloth in his possession, and that the scuffle was caused solely by the action of the accused in treating the complainant as a suspected thief without any valid reason. The Magistrate convicted the accused of wrongful confinement under s. 343 of the Indian Penal Code and sentenced him to four months' rigorous imprisonment. On the accused appealing, it was held

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7. (1937) M. W. N. 741.

8. (1888) 12 Bom. 377.

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by the High Court that the conviction was wrong. It was held that the accused, having under the circumstances of the case an honest suspicion that the cloth in the possession of the complainant was stolen property, was justified in putting questions to the complainant, the answers to which might clear away his suspicions, and having received answers which were not, in his opinion, satisfactory, he acted under a *bona fide* belief that he was legally justified in detaining what he suspected to be stolen property. The High Court held that even though the act of the accused in detaining the cloth might not have been strictly justifiable by law, that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the cloth was stolen property, still the complainant had no right of private defence under s. 99 of the Code, as the accused was a public servant acting in good faith under colour of his office and as his act was not one which caused the apprehension of death or of grievous hurt.

If we turn to s. 99 of the Indian Penal Code, it says:

"There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law."

Therefore, in any case, as the Sub-Inspector was acting in good faith under colour of his office, when he went to the accused's room to execute the District Superintendent of Police's order dated July 29, 1954, the accused had no right of private defence against him. It is not the case of the accused that, if he had not exercised his right of private defence, there was an apprehension that his death would be caused or grievous hurt would be caused to him.

Mr. Chandrachud for the accused contends that an opportunity should be given to his client to show that Sub-Inspector Salvi was not acting in good faith under colour of his office when he visited his premises on August 11, 1954 to enforce the order of the District Superintendent of Police, Sholapur. In this connection, if we turn to the judgment of the learned Additional Sessions Judge, Sholapur, this is what the learned Judge has observed in paragraph 6:

"But his simple contention (the learned Judge is referring to the contention of the pleader for the accused) is that the accused committed no offence in resisting his physical eviction, for the order under which the P. S. I. was acting was illegal and without jurisdiction. The accused was acting in self-defence against wrongful eviction and this right was not taken away by the provisions of s. 99, I. P. C. In my opinion, this contention will have to be upheld and the conviction of the accused set aside, in the peculiar circumstances of the case."

It would, therefore, be clear that before the learned Additional Sessions Judge it was sought to be argued on behalf of the

accused that a right of self-defence was available to him. The learned Judge examined that contention and accepted it, holding that the provisions of s. 99 of the Indian Penal Code would not be attracted in this case. Now, if we turn to the provisions of s. 99 of the Indian Penal Code to which I have just referred, there is a clear reference therein to a public servant acting in good faith under colour of his office. Therefore, when the accused's pleader argued before the learned Judge that the right of self-defence was available to the accused under s. 99, he contended by necessary implication that the Sub-Inspector was not acting in good faith under colour of his office when he went to the accused's room. That being so, there is no case now made out on behalf of accused for allowing him an opportunity to show that Sub-Inspector Salvi was not acting in good faith under colour of his office on August 11, 1954 when he went to his premises.

On merits it is to be noted that both the Courts below have come to the conclusion that when Sub-Inspector Salvi went to the accused's room on August 11, 1954 to enforce the order of the District Superintendent of Police, Sholapur, resistance was offered to him by the accused, that a scuffle had ensued between Mr. Salvi and the accused and that during the course of that scuffle, hurt was caused by the accused to Mr. Salvi. In this connection, we have only to turn to the evidence of Mr. Salvi and the panchnama about the injuries which were sustained by Mr. Salvi on his person. Mr. Salvi has stated in the course of his evidence that when he went to the accused's room on August 11, 1954, the accused was standing at the door. Mr. Salvi asked the accused to vacate the room, whereupon the accused told him that he would not vacate the room. Then Mr. Salvi asked his subordinates to take out the articles, which belonged to the accused, from the room. The Sub-Inspector was standing in the court-yard. He had his uniform on, which again would show that Mr. Salvi was acting at the time under colour of his office. At that time, the accused, says Mr. Salvi, held his bush coat and held him by the neck. The result of this was that the button of Mr. Salvi's bush-coat became loose and his underware was torn. Then Mr. Salvi in his evidence says that he sustained an abrasion on his left cheek and blood came out of it. We have no reason to disbelieve the evidence of Mr. Salvi. If there was a scuffle between the accused and the Sub-Inspector as a result of the former having offered resistance to the Sub-Inspector and if during that scuffle the Sub-Inspector was injured in such a manner that blood came out of his cheek, we must come to the conclusion that hurt was caused to the Sub-Inspector by the accused. If we turn to the panchnama of the injuries sustained by Sub-Inspector Salvi, it states :

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"On examining the person of S. M. Salvi, P. S. I., we saw a scratch of one inch in length on the left cheek which has got a curve. The skin on it has come out. The inner flesh looks red. He has worn uniform of bush shirt and the first upper button has recently come out."

The very fact that the skin of the Sub-Inspector's cheek had come off and the flesh below the cheek had appeared red would show that the Sub-Inspector is stating the truth when he deposes that he was assaulted by the accused and hurt was caused to him by the accused. On merits, therefore, we endorse the conclusion arrived at by the Courts below.

In the result, therefore, the appeal filed by the State of Bombay must succeed. The order of acquittal passed in favour of the respondent by the learned Additional Sessions Judge, Sholapur, is set aside and the order of the learned trial Magistrate is restored. In other words, the accused is convicted of an offence under s. 332 of the Indian Penal Code. He is sentenced to pay a fine of Rs. 25; in default of payment of fine, he is sentenced to suffer fifteen days' rigorous imprisonment.

Order of acquittal set aside.

K. B. S.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

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THE NEW SHORROCK SPINNING AND MANUFACTURING CO., LTD.
APPLICANTS *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY
NORTH, KUTCH AND SAURASHTRA, AHMEDABAD, RESPONDENT.*

Indian Income-Tax Act (XI of 1922), s. 10 (2) (v)—Expenditure incurred for replacing certain looms in Mills—Such expenditure incurred after sixty years—Whether such expenditure permissible expenditure under s. 10 (2) (v)?—"Current repairs", meaning of.

The expression "current repairs" in s. 10 (2) (v) of the Indian Income-Tax Act, 1922 means such repairs as are attended to as and when the need for them arises and which are not allowed to fall into arrears or be accumulated. The question as to when a building, machinery, plant or furniture requires repairs or when the need for repairs arises is to be decided not by any academic or theoretic test but by the test of commercial expediency.

The allowance for current repairs under s. 10 (2) (v) of the Act refers to expenditure on buildings, machinery, plant and furniture which is incurred not for the purpose of renewal or restoration but for the purposes of preserving or maintaining an already existing asset; an expenditure which is incurred for bringing a new asset into existence or for giving to the assessee a new or different advantage is not a permissible deduction under that section.

Lurcott v. Wakely and Wheeler,⁽¹⁾ referred to.

Commissioner of Income-Tax v. Darbhanga Sugar Co., Ltd.,⁽²⁾ and

*Income-Tax Reference No. 38 of 1955.

1. [1911] 1 K. B. 905.

2. [1956] 29 I. T. R. 21.