

APPELLATE CIVIL,

1897
February 16.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

GANGA NARAIN (PLAINTIFF) v. THE MUNICIPAL BOARD OF CAWNPORE
(DEFENDANT).*

Act No. XV of 1883 (N.-W. P. and Oudh Municipalities Act), section 55, cl. (c)—Municipal Board—Powers of Municipal Boards to frame by-laws—Act No. XV of 1873, section 22—Nuisance.

Clause (c) of section 55 of Act No. XV of 1883 was not intended to empower a Municipal Board to make rules which would enable it to confiscate private rights without making any compensation, or to treat as nuisances acts which are not in law or with regard to public health or convenience capable of being considered nuisances.

The clause was meant to give to Municipal Boards power to make rules for prohibiting the establishment of markets, that is, to prevent new markets being established, and to give them power to control the maintenance of existing markets or of markets which might be established with their sanction.

By "maintenance" is meant the keeping up of a market in such a manner as would make it a fit place for the carrying on of a market having regard to public health and public convenience.

The facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal*, for the appellant.

Mr. *E. Chamier*, for the respondent.

EDGE, C. J. and BLAIR, J.—In this case the plaintiff sought an injunction restraining the Municipal Board of Cawnpore from interfering with the exercise of his right to hold and maintain a market for the sale of vegetables, fruit and other articles within the grounds of a temple of which he was manager. The defence to the suit was that according to certain rules of the Municipal Board the plaintiff had no right to establish or continue a market without the permission of the Municipal Board. It is necessary to see how this suit arose.

The Municipal Board of Cawnpore had established within the Municipality a market for the sale by wholesale of vegetables,

* Second Appeal No. 404 of 1895 from a decree of J. J. McLean, Esq., District Judge of Cawnpore, dated the 1st April 1895, modifying a decree of Syed Zainul-ab-din Khan, Subordinate Judge of Cawnpore, dated the 3rd October 1894.

1897

GANGA
NARAIN
v.
THE
MUNICIPAL
BOARD OF
CAWNPORE.

fruit and such like things. They had let that market to a contractor. The contractor had by his conduct so disgusted the people who had used the market that they had refused any longer to come to that market, and they had betaken themselves to a market in the cantonments of Cawnpore. One can easily understand that it was not pleasing to the Municipal Board of Cawnpore, that the market over which they had spent a considerable amount of money should be abandoned, and that the tolls which they expected to derive from the use of their market should go into other pockets. It is not quite clear how they approached the cantonment authorities of Cawnpore, but they were determined, if they could, to obtain the closing of the market in cantonments, in the hope, no doubt, of compelling the public to return to their own Municipal market. The correspondence between the cantonment authorities and the Municipality, if we had it, would probably be instructive. This much we know, that the cantonment authorities having granted a lease of their market to certain contractors were apprehensive that they might be sued for damages if they complied with the request of the Municipal Board, and that they insisted upon having an indemnity bond to secure them against loss by any damages which might be awarded to the persons with whom they were about to break their contract. Whether the cantonment authorities would have been liable in damages or not, and whether or not they had the power to put an end to the lease granted to their contractors are beside the question here. What we know is that the cantonment authorities thought it reasonable that they should get an indemnity bond, and declined to act without it, and that the Municipal Board of Cawnpore authorized the execution of an indemnity bond, and the bond was apparently given, signed by the Chairman. Whether the Municipal Board of Cawnpore intended, if the cantonment authorities were made liable for their breach of contract, to pay the damages out of the public moneys of the Municipal Board of Cawnpore, or whether the members of the Board intended to pay these damages out of their private purses, we do not know. It is probable that an auditor would

have surcharged the Municipal Board, and have forced the members of the Board individually to make good the sums, if any, which had been paid under that indemnity bond. Municipal Boards are not entrusted with public moneys in order that they may employ them in inducing other persons to break their lawful contracts. However, the indemnity bond was given; the cantonment market was closed, and thereupon customers who had formerly attended the market of the Municipal Board looked about to see whether they could find another place to sell their goods, and they proceeded to the market which had been held lawfully by the plaintiff within the grounds of the temple for a period of something like twenty-five years.

The Municipal Board by closing the cantonment market had not effected their object; but they were not to be defeated. The indemnity bond was given on the 25th of June, 1892. By the 23rd of July, 1892, the Board awoke to the necessity of closing another market in order to get back their customers, and on this occasion they had no cantonment authorities, who would be willing to close a market on receiving an indemnity, to deal with; they had to deal with the plaintiff in this suit. On the 23rd of July, 1892, they served the plaintiff with the following notice:—
 “Under order of this date you are directed to discontinue at once, within twenty-four hours, the holding of the bazar established by you without permission, otherwise proceedings will be taken. In case of non-compliance legal steps will be taken in accordance with the rules of the Municipal Board, and no excuse will be heard.” That threat was not sufficient: the market continued; and on the 25th of July, 1892, they served on the plaintiff the following notice:—
 “Under order of this date you are directed to close at once, within twenty-four hours, the bazar *Sabzi Mandi* (market for the sale of vegetables and fruit) which you have newly established without permission within the inclosure known as that of Prag Narain. Otherwise, in case of non-compliance, legal steps will be taken in accordance with the rules of the Municipal Board (section 56), and no excuse will be heard.” It so happened that the notice of the

1897

GANGA
NARAIN
v.
THE
MUNICIPAL
BOARD OF
CAWNPORE.

1897

GANGA
NARAIN
v.
THE
MUNICIPAL
BOARD OF
CAWNPORE.

23rd July was one which would not fit in with the existing rules of the Municipal Board. The then existing rules of the Municipal Board, even according to the contention of the Board, only gave them power to deal with new markets. It is to be observed that in the notice of the 23rd of July the Board did not suggest that the market was a new one, as in fact it was not; but they were determined to try it on, and accordingly served the notice of the 25th of July, in which they alleged the market to be new. Even that notice did not much frighten the plaintiff, for he continued to hold his market. Thereupon the Municipal Board proceeded to put the criminal law in motion. They did not attempt to prosecute the plaintiff under the Indian Penal Code for conducting a market which was a public nuisance, for in truth it was a well-conducted market and no case of nuisance could be made out, but they proceeded to prosecute his brother, Jamna Narain, who managed for him, under their rules. The case was tried by a Magistrate of another district, this Court having made an order of transfer, and the Magistrate of the other district (Fatehpur), on the 16th of November, 1892, acquitted Jamna Narain on the ground that the market was an old market. One would have thought that that ought to have satisfied the Municipal Board; but it was not so. They were determined not to let the matter drop, and were determined, if they could, to confiscate, in order to benefit their own market, the plaintiff's long acquired right in his market.

Accordingly, in December, 1892, they proceeded to apply to the Local Government for sanction of an amendment of the rule under which they had taken proceedings by leaving out the qualifying word "new" which that rule contained, and by practically reverting to the words of a rule which had been made under section 22 of Act No. XV of 1873, which was a section which gave a committee power to frame rules for declaring what acts or omissions within a Municipality shall be considered to be public nuisances. The old rule, which they practically wished to reinstate, was as follows:—It was declared that, "the establishment or maintenance of a public market, bazár, ganj or slaughter-house, except under such conditions

1897

 GANGA
 NABAIN
 v.
 THE
 MUNICIPAL
 BOARD OF
 CAWNPORE.

as the Board may from time to time prescribe" was a public nuisance. It has been contended here before us that under section 22 of Act No. XV of 1873, a Municipal Board had, subject to the sanctioning of their rules by Government, unlimited and uncontrolled discretion to declare any act or any omission within their Municipal boundaries to be a public nuisance, to declare, for instance that a man should not eat his dinner within his house, or that persons should not walk along the streets of Cawnpore with any clothes on; the argument went as far as that. The contention was that the Municipal Board in its discretion or indiscretion, whether for the purposes of public health or for the oppression of traders in Cawnpore, might by a rule declare anything which might happen in Cawnpore to be a nuisance, and that a person not hearkening to such a rule would be liable to a prosecution. In our opinion the Legislature was never so foolish as to intend to give so sweeping a discretion to a Municipal body. Certainly the proceedings in this case, as we shall presently point out, will be a warning, we hope, to the Legislature to be more precise in future in limiting and defining the powers which it grants to Municipal Boards in these Provinces.

Now we have said that in order to close the plaintiff's market the Municipal Board were desirous of getting back to some rule similar to the old one and of striking the limitation "new" out of the then rule. The matter went from the Municipal Board to the then Commissioner of Allahabad, apparently by means of a letter signed by the Chairman of the Board and dated the 6th of January, 1893, in which reference was made to some objections to any alteration of the rule recently taken by the plaintiff. The letter of the Chairman alleges that the insertion of the word "new" in the rule in question he believed was due to a mistake. We believe that it was more probably due to the fact that the High Court at Calcutta in the case of *Moran v. the Chairman of Motihari Municipality* (1) had pointed out in vigorous, but not too strong, language the lamentable consequences of entrusting Municipal

(1) I. L. R., 17 Calc., 329.

1897

GANGA
NARAIN
C.
THE
MUNICIPAL
BOARD OF
CAWNPORE.

Boards with powers under which they might practically confiscate private rights without making any compensation. The Chairman of the Board, in the letter to which we are referring, says, as to the objection that, if the word "new" is omitted from the rule, the Municipal Board will have authority to remove hundreds of markets from private places and establish them in places fixed by the Municipality, that "it cannot be said that the Board has misused the powers it had in the past." Probably not, before that period and before this case arose, because the Board had not found that the markets and shops of private persons in Cawnpore were in competition with the market which the Board had established. So soon, however, as the Board met with competition, it, in our opinion, misused its supposed powers. Then the Chairman goes on to make a representation as to the facts connected with this market. We cannot believe that he was acting on his own knowledge. We must believe that he was entirely misled by those about him. In fact the language of the sentence which we are about to quote is not the language which an educated Englishman would use. The letter says:—"When the Municipal Board tried to close this market it was heard that they could not do so under the new bye-laws, as for many years a few vegetable sellers had been allowed to sit in the temple compound for the convenience of people frequenting the temple."

It has been found, and we entirely agree with the finding, that the market was an old established market of from twenty to twenty-five years' standing, at which sales, not only by retail but also by wholesale, had been publicly conducted. We regard that description of the market as a false and misleading description. We do not believe that it was false and misleading to the knowledge of the Chairman, but certainly false and misleading to the knowledge of those who were instructing him. Now let us see what was the view that the Local Government took of this matter when it came before it. The Local Government, in reply to the Municipal Board of Cawnpore, says that "the amended rule which has been submitted for sanction really asks sanction for the following

proposals:—First, that no private bazar, however old, will be maintained until the sanction of the Board has been obtained; second, the Chairman may be empowered to shut up and close by means of a written notice any private bazar where retail selling is going on, however old and well managed it may be, and however willing its owner may be to carry out all instructions.” The Local Government had no difficulty in divining what the motives and object of the Municipal Board were. Its comment is as follows:—“From the foregoing it will appear that the Municipal Board should be empowered to withhold sanction to the holding of any particular private bazar at any time it likes without assigning any reason, and without making any compensation to the owner, who may lose his valuable right which he may have acquired by prescription. Furthermore, if the Municipal Board sanctions the holding of any private bazar, and that bazar is subsequently sold for a large value, the Chairman will, even if the conditions prescribed by the Board are fulfilled in that bazar, be empowered at any time he pleases to close the bazar without consulting the Board or taking any evidence or assigning any reason,” and it says further that “although the Government does not wish to curtail those powers, still it is quite inadvisable to grant such arbitrary powers to the Board as have been suggested.” On that the Chairman of the Municipal Board writes to the Commissioner and informs him that the Board is prepared to modify its request, we presume by leaving out the arbitrary powers of the Chairman, and to simply ask that the bye-law which was in force for years in the Municipality may be sanctioned, “as this bye-law is practically the same as the rule printed at p. 76 of the Government Manual as one of the rules approved by Government.”

The Chairman forgot to draw the attention of the Commissioner to the fact that section 22 of Act No. XV of 1873, under which the old rules or bye-laws had been made, had been most materially altered by section 56 of Act No. XV of 1883, the Act then in force. The Legislature by 1883 had obviously become aware of the danger of entrusting a power to Municipal Boards under which

1897

GANGA
NARAIN
v.
THE
MUNICIPAL
BOARD OF
CAWNPORE.

1897

GANGA
NARAIN
?.
THE
MUNICIPAL
BOARD OF
CAWNPORE.

they could declare any act or omission to do any act to be a nuisance and make a person liable to a prosecution.

The old rule which the Chairman asked the Government practically to re-introduce could not have been re-introduced under Act No. XV of 1883. The Municipal Board had no longer the right or the power, either with or without the sanction of the Local Government, to declare what acts or omissions should be deemed to be nuisances within Municipal limits. Section 56 of Act No. XV of 1883 put the question of nuisance at rest for ever by giving the Board power to interfere only in the case of a public nuisance.

How it came to pass we know not, but the Local Government sanctioned the following rule:—"No person shall establish or maintain a public market, bazar, ganj or slaughter-house in any place without the sanction of the Board or except under such conditions as the Board may from time to time prescribe." The Board, having been defeated up to that time in their attempts to confiscate without compensation the private rights and private property of the plaintiff, had now got a rule which, they thought, gave them a free hand, and accordingly they at once proceeded to prosecute the plaintiff again in order to force him to close the market and abandon the competition. That prosecution, we understand, is awaiting the decision of this case.

It has been said to us in this case on behalf of the Board that the Board will make compensation. All we can say is that, seeing how the Board has acted in this case, we should be very sorry to be anywhere in the position of the plaintiff going to the Board for compensation. The plaintiff forwarded a petition against this alteration of the rule to the Governor-General. The Board, we presume, had got their opportunity of representing the facts as they chose, for it is obvious, on looking at the letter of the 5th of February, 1894, from the Government of India to the Secretary to the Government of the North-Western Provinces, that misleading representations as to the facts had been put before the Government of India. It is obvious that it was represented to the Government of India that the selling of vegetables by wholesale in the plaintiff's

market was quite recent. That was not a fact. It was represented to the Government of India that if the Municipal Board did close the plaintiff's market under their rules, the plaintiff would have a right to obtain, through the Civil Courts compensation. In one sense that representation was true. If the Municipal Board, having no authority to close the market, did close it, no doubt they would have to pay damages, but if the Municipal Board was right in believing that they had the power to close the market lawfully, no provision had been made, either under the rules or by the Legislature, to compel them to pay one auna of compensation to any person whose rights they might confiscate. The Governor-General in Council decided that he did not consider that the previous practice in respect of this market should be stopped, or that the income derived from it should be confiscated, without a grant of suitable compensation, and the Governor-General in Council expressed an opinion that the new rule, *i. e.*, the altered rule, should be worked with due regard to the custom of the temple and to the rights which had accrued before the rule was framed, and a suggestion was thrown out that it might be possible that a Court of law might not hold that the last rule was retrospective, that is, that the last rule did not apply to a market which was in existence before it was made. So we understand it.

This case came on for trial before the Subordinate Judge of Cawnpore, who dismissed it on a preliminary point. He was set right upon that point, and then he started to try the case on the merits. He found that there had been no old market there for wholesale. A perusal of his judgment is sufficient to show that he went in that finding entirely against the evidence. The plaintiff's witnesses called by the Board proved the plaintiff's case; but the Subordinate Judge found for the defendants upon the evidence of three witnesses. What he has written about these three witnesses in our opinion shows that he ought not to have depended upon their evidence. The plaintiff appealed. The District Judge of Cawnpore, in a very careful and well considered judgment, found every issue of fact in the plaintiff's favour. He found that this

1897

GANGA
NARAIN
v.
THE
MUNICIPAL
BOARD OF
CAWNPORE.

1897

GANGA
NARAIN
v.
THE
MUNICIPAL
BOARD OF
CAWNPORE.

was an old market for retail sales and also for wholesale. He found that it was a well conducted market, against the management of which not one word could be said; and indeed the only thing that can be said in favour of the Municipal Board of Cawnpore is that, with all their determination to ruin the plaintiff, they have not ventured to suggest that any fault can be found with the management or with the conduct of the plaintiff's market. The District Judge, having found all the facts, as we think rightly, in favour of the plaintiff, dismissed his suit on a construction of the last rule to which we have referred, and which, he held, applied in this case.

We have got to consider, first, what is the true construction of cl. (c) of section 55 of Act No. XV of 1883. It is contended upon behalf of the Municipal Board that that section enables them to make a rule which they can put in force against new markets or old markets, whether they are well conducted and unexceptionable or the reverse, and that they can do this with the prime object of promoting the revenue of the Municipal market at the expense of the rate-payer or rate-payers of Cawnpore whose market is to be confiscated. In our opinion, although the clause is ambiguously worded, it never could have been the intention of the Legislature to give power to a Municipal Board to make a rule which would enable them to confiscate private rights in markets where the holding of the market and the maintenance of the market could not be objected to upon any public ground, and to do this without making any compensation to the person whose rights are affected. We find that in Act No. XV of 1883, when the Legislature did intend to give to Municipal Boards the power to acquire private property, they put them under the obligation of complying with the Land Acquisition Act, that is, if the Board desired to obtain the land of a private person, they had to pay just compensation for the rights which they were taking for themselves; but it is contended that, if the Board had a right to close any market in Cawnpore, although the market may be absolutely unobjectionable on the ground of public health or convenience, there was no obligation imposed by this Act on the Board to pay one anna of

compensation. It is quite obvious from the conduct of the Board in this case that it would not be advisable for the man whose rights were confiscated to trust himself to the tender mercies of the Board or to their conceptions of justice.

There is another reason against our construing this clause as the Board contends we should, and it is this. We do not believe it possible that the Legislature could have intended to give a power to the Board by the exercise of which they might confiscate private rights for the purpose of increasing their own revenues ; and that in truth is what the Board has been trying to do with regard to the plaintiff and his market. The Legislature could not have intended that a Municipal Board should, of its own free will, and at its own indiscretion, have a right to treat that as a nuisance which by no possible view could be regarded by the public or by a lawyer as a nuisance. As we read the clause it was meant to give to Municipal Boards power to make rules for prohibiting the establishment of markets, that is, to prevent new markets being established, and to give them power to control the maintenance of existing markets or of markets which might be established with their sanction. By "maintenance" we presume was intended the keeping up of a market in such a manner as would make it a fit place for the carrying on of a market having regard both to public health and public convenience. It also gave them the power to make rules for the management of such markets. But until the Legislature tell us that it was their intention to confer upon Municipal Boards power to confiscate private rights, the maintenance of which is entirely unobjectionable on public grounds, and to do so without paying any compensation, we must construe clause (c) in such a manner as not to cast the slur upon the Legislature of having worked a gross injustice, and we do so construe it.

We allow this appeal, with costs in this Court and in the Courts below ; and we decree the plaintiff's suit and make the declaration which he has asked for.

Appeal decreed.

1897

GANGA
NABAIN
v.
THE
MUNICIPAL
BOARDS OF
GAWNPORE.