APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *October 5.*

NAGAR VALAB NARSI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE MUNICIPALITY OF DHANDHUKA, (ORIGINAL DEFENDANT), RESPONDENT.*

Bombay District Municipal Act (VI of 1873), Sec. 17—Street—Authority of the Municipality under Section 33—Civil Courts' interference with the discretion given to public bodies.

The word "street" in section 17 of the Bombay District Municipal Act (VI of 1873) means and includes not merely the surface of the ground, but so much above and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes.

The plaintiff proposed to make a balcony projecting over a public road. The Municipality objected to the work, as an encroachment on a public street. He, therefore, sued the Municipality to establish his right to build the proposed balcony.

Held, that, so far as the column of space standing over the street was vested in the Municipality, the plaintiff had no right to occupy it with a balcony, which by intercepting light and air would greatly impair the use of the area as a street.

Section 33 of the Bombay District Municipal Act (VI of 1873) gives the Municipality a discretion to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion, unless it is exercised in a capricious, wanton, and oppressive manner.

The plaintiff was the owner of two houses on each side of the passage of a *khidki*, or open square, containing three or four other houses. He proposed to connect the two houses by building a story across the passage at such a height as not to interfere with the passage of those who were entitled to go to and fro. He applied to the local Municipality for permission to build in the manner he proposed. The Municipality forbade the work, on the ground that it was likely to interfere with the access of light and air to the neighbouring houses.

The plaintiff thereupon sued the Municipality to establish his right to build the proposed structure. It was contended for the plaintiff that the Municipality ought not to have refused permission in the interests of the neighbouring householders, who were able to protect their own rights in case of injury.

Held, that the suit would not lie, as the order of the Municipality refusing permission was not an unreasonable one under the circumstances of the case.

Held, further, that the authority of the Municipality was not in any way affected by the circumstance that the proposed erection might be an encroachment on private rights subjecting the plaintiff to an action by the persons injured.

* Second Appeal, No. 615 of 1885.

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SECOND appeal from the decision of A. Shewan, Assistant Judge of Ahmedabad, in Appeal No. 159 of 1883.

The plaintiff sued to establish his right to build a certain superstructure on open ground lying between two houses belonging to him and facing each other, and also to make a hanging balcony, with a weather-frame over it, adjoining the two houses and the proposed new structure.

The plaintiff's premises were situated in a *khidki*, or open square, formed by a number of houses, two of which belonged to the plaintiff and the others to the defendants Nos. 2—5. The houses were in two rows, facing each other on opposite sides of the square. The only entrance was by a door on the side of the *khidki* which faces the street. On the two sides of the entrance stood the two houses belonging to the plaintiff opposite each other, and separated by the central passage of the *khidki*. He proposed (1) to connect these two houses by building an upper story across the passage at such a height as not to interfere with the passage of those who were entitled to go to and fro; and (2) to make a balcony overhanging the street outside.

The plaintiff applied to the Municipality of Dhandhuka for permission to build in the manner he proposed. The Municipality refused permission, on the ground that the proposed structure above the passage was likely to interfere with the access of light and air to the neighbouring houses, and that the balcony would be an encroachment on a public street.

The plaintiff thereupon filed the present suit against the Municipality.

The plaintiff alleged that the Municipality were wrong in refusing to grant the permission he had applied for; that it was not necessary for the Municipality to consider the interests of third parties, who ought to have been left to protect their own rights in case of injury; and that the houses in the *khidki* had been formerly divided between the members of a family, and that by the deed of partition a right was reserved to build on the ground in question.

The defendant No. 1, the Municipality, pleaded that the place where the plaintiff wanted to build had always been open ground;

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that the objection to granting permission was that the plaintiff's proposed building would obstruct the access of light and air to the neighbours; and that the matter was one in the discretion of the Municipality.

Defendants Nos. 2—5, who were subsequently added as parties, contended that they were joint owners of the *khidki* with the plaintiff, and had a right of way over the open ground between the two houses belonging to the plaintiff; that the plaintiff had no right to build on the open ground; and that the proposed building would interfere with their enjoyment of light and air.

The Subordinate Judge found that the supply of light and air to the houses of defendants Nos. 2—5 was likely to be diminished if the plaintiff were allowed to build the proposed structure, and that the Municipality had used its discretion wisely in refusing permission. The plaintiff's suit was, therefore, dismissed.

This decision was confirmed, on appeal, by the Assistant Judge. His reasons were stated as follows :—

"I hold that section 33 of the Municipal Act (Bombay) VI of 1873 gives the Municipality power to deal with a question like the present. The terms of that section are quite general. Any one beginning to erect a building, or alter externally, or add to an existing building, *any where*, must give the Municipality notice, and the Municipality may thereon issue orders of approval or otherwise. And if they are not to be applied to when the building is, as in the present case, actually on the public street, it is difficult to imagine a case in which they require to be consulted. Besides, if the case was beyond the Municipality's jurisdiction, why did plaintiff apply to them at all?

"Next, as to their reasons for refusing permission. They said as regards the structure above the passage, that it would lessen the supply of air and light to the other dwellers in the *khidki*, and it has always been said, in the course of the case, that, if fire broke out inside the *khidki*, assistance could be rendered less easily than now. And there is no doubt, that, as regards air and light, the objection of the Municipality is a good one. The main

supply of air to the people inside the *khidki* and a good deal of the light must come at present through the opening between his houses, which plaintiff proposes to block up; and as regards fire, the proposed addition certainly would not improve matters. But, at any rate, I hold that on the score of obstruction of light and air the Municipality were quite justified in acting as they did. They are trustees of the public, and responsible for preventing anything which would affect the sanitary condition of the town. It is impossible in this case to say they acted unwisely in forbidding a man to block up the passage between two houses which had from time immemorial conveyed air and light to persons dwelling behind him. There are only three or four houses behind, it is true, and it is also the case that the owners would have their remedy. But, however few, they are members of the public, and entitled to consideration by the Municipality. I see no reason to interfere with this exercise of discretion on the part of the latter.

"So as to the proposed balcony, two and a half feet broad, overhanging a roadway of eighteen feet. The road cannot be called a broad one. Any diminution of the space between the houses on either side is to be deprecated. Plaintiff has no *otlá* on, or any right to, the ground below. I cannot say that the refusal to allow balconies on houses in a road only eighteen feet in breadth is so plainly unreasonable that I should interfere with it."

Against this decision the plaintiff appealed to the High Court.

Ráv Sáheb *Vásudev Jagannáth Kirtikar* for the appellant:—The Municipality had no right to forbid the proposed structure. They cannot interfere with private rights. The authority given to the Municipality under section 33 of Bombay Act VI of 1873 is to be exercised only for sanitation. The *khidki* in question is not public ground; it is private property. The Municipality had no right to interfere on behalf of three or four families who reside in the neighbourhood. Refers to *Empress* v. *Sadánand Shrikrishnaji*[1]; *Kálidás* v. *The Municipality of Dhandhuka*[2];

(1) I. L. R., 8 Bom., 151. (2) I. L. R., 6 Bom., 686.

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Chairman of the Naihati Municipality v. *Kishori Lal Goswami*(1); *Wandsworth Board of Works* v. *United Telephone Company*(2).

Ráv Sáheb *Vishvanáth Náráyan Mandlik*, for the respondent, was not called on.

WEST, J. :—The defendants other than the Municipality of Dhandhuka were improperly admitted as parties to set up a case against the plaintiff which had no natural connexion with the suit as against the Municipality. Whether the added defendants had a right to an injunction or other relief against the plaintiff, on the ground of his proposed erection interfering with the access of light and air to their premises, was a question entirely different from that of whether the plaintiff had a good ground for relief against the Municipality, which had forbidden him, under section 33 of Bombay Act VI of 1873, to go on with his proposed building. The case has been disposed of entirely by reference to the authority asserted by the Municipality and denied by the plaintiff, and we propose to limit ourselves to the contention on that point without pronouncing on the private rights and obligations subsisting or not subsisting between the plaintiff and the defendants Nos. 2—5.

The plaintiff being owner of the houses on each side of the passage of a *khidki* containing three or four other houses, proposed to build across the passage at such a height as not to interfere with the passage of those entitled to go to and fro. The municipal commissioners forbade the work, as calculated to interfere with the access of light and air to the houses inside the *khidki*. It is now contended that the commissioners had no right to interfere or to refuse permission to build on such a ground as this. The protection of the rights of the neighbouring householders ought, it is urged, to have been left to the householders themselves. The section, however, (section 33 of Bombay Act VI of 1873) under which the permission of the commissioners was sought and refused, is, as the Assistant Judge has pointed out, perfectly general in its terms. It does not follow that the commissioners could, therefore, exercise the authority thus given to them in a capricious, wanton, and oppressive manner

(1) I. L. R., 13 Calc., 171. (2) L. R., 13 Q. B. Div., 904.

Public authorities even acting within the defined limits of their powers must not conduct themselves arbitrarily or tyrannically (see *Leader* v. *Moxon* [1] approved by Gibbs, C. J., in *Sutton* v. *Clarke*[2]). But the case last cited shows that public functionaries, acting within the limits prescribed by the statute which gives them authority, are not subject to a suit for thus discharging their duties according to their judgment. A public body must keep within its powers, and must use them considerately (see *per* Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* [3], but so acting it is safe—*Dixon* v. *The Metropolitan Board of Works* [4]). There is a further principle of great importance laid down by Lord Selborne, L. C., in *Clark* v. *School Board for London* [5]. His Lordship says: "It seems to me that the Legislature, in authorizing the School Board, for important public purposes, to exercise these large powers.....meant to give them a discretion suitable to the nature and importance of the duties to be discharged by them." The late Sir G. Jessel, M. R., citing this *dictum* in *Duke of Bedford* v. *Dawson* [6] adds that "the public body.....are to be the judges, subject to this, that if they are manifestly abusing their powers.....the Court will say it is not a fair and honest judgment, and will not allow it." These cases define with clearness what discretion a public body may use and at what point the interference of the Courts is justifiable. In the present case, the Courts below have found that the order of the commissioners was not an unreasonable one. That is a question of fact rather than of law; but we concur in the view taken by the Courts below, and we do not think that the authority of the commissioners was in any way affected by the circumstance that the proposed erection might be an encroachment on private rights subjecting the plaintiff to an action by the persons injured.

As to the balcony proposed to be thrown out over the street, the section (17) of the Act which vests "streets" in the Municipality, though it gives perhaps only a limited estate, yet gives not merely the bare surface of the ground, but so much above

(1) 2 W. Bl., 924.
(2) 6 Taunt. at p. 43.
(3) L. R., 3 App. Ca. at p. 455.
(4) L. R., 7 Q. B. Div., 418.
(5) L. R., 9 Ch. App. Ca., 122.
(6) L. R., 20 Eq. Ca., at p. 358.

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and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes (see *Coverdale* v. *Charlton* (1) and Lord Bramwell cited by Brett, M. R., in *Wandsworth Board of Works* v. *United Telephone Company* (2)). It is obvious that if the column of space standing over a street were occupied by projections, the interception of air and light would greatly impair the use of the area as a street. So far, therefore, the column of space is vested as part of its property in the Municipality, and the commissioners were justified in forbidding the plaintiff to occupy it with his balcony, and thus begin a series of encroachments which might cause serious mischief.

For these reasons we confirm the decree of the District Court, with costs of the Municipality as against the plaintiff.

Decree confirmed.

(1) L. R., 4 Q. B. Div., 104. (2) L. R., 13 Q. B. Div., p. 913.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

1888.
January 12.

ZIA'ULNISA BEGAM AND ANOTHER, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* MOTIRA'M AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

The Nawáb of Surat Act XVIII of 1848, *Sec.* 1—"*Sue forth*," *meaning of —Construction—Sanction obtained after suit filed.*

The expression "sue forth" in section 1 of Act XVIII of 1848 does not mean to sue for and to obtain so as to make the consent of the Governor a condition precedent to the institution of a suit.

Accordingly where the grand-daughter of the Nawáb of Surat was sued along with her husband without previously obtaining the required consent, and it was contended that the suit was irregularly instituted, and the proceedings thereunder void,

Held, that the suit was rightly instituted, such a consent not being a condition precedent to the filing of the suit.

THESE were second appeals from the decision of E. M. H. Fulton, Acting District Judge of Surat.

* Second Appeals, Nos. 395 and 664 of 1884.