APPELLATE CRIMINAL.

Before Mr. Justice West and Mr. Justice Nándbhái Haridás.

1886. *August* 12

QUEEN EMPRESS *v.* MAGAN HARJIVAN AND ANOTHER.*

Municipal Act (Bombay) VI of 1873, *Sec.* 66—*Sale of fruit in a private shop—Power of the municipality to prevent such a sale—Market, definition of.*

The municipality of Ahmedabad issued a notification to the effect, that no one should, within six hundred yards of the municipal market, open or establish a shop for the purpose of selling vegetables or fruits without a license, and that if any one acted in contravention of this notification, he would be dealt with according to law.

The accused hired a house, and opened a shop for selling fruit within six hundred yards of the municipal market without obtaining a license from the municipality. The Second Class Magistrate convicted and sentenced each of the accused to pay a fine of Rs. 5. The District Magistrate, relying on the case of *Rájá Pábá Khoji*(1), reversed the conviction and sentence.

Held, that what the municipality had authority to direct, under section 66 of (Bombay) Act VI of 1873, was that no place, other than the municipal markets or other places licensed as markets, should be used by anybody *as a market*. But they had no authority to issue a notification affecting other places which might be used for selling vegetables, &c., otherwise than as a market.

That, inasmuch as the using of the shop by the accused was confined simply to the selling of fruit, and not of "vegetables" in the popular sense, it could not be affected by the prohibition contemplated by section 66 of the Act.

That, if the prohibition of the municipality was meant to affect the private rights of persons to use their shops for selling their own commodities, that would amount to an excess of the authority conferred by the District Municipal Act (Bombay) VI of 1873.

That the shop used by the accused for the sale of their own commodities was not a "market" within the meaning of section 66 of Bombay Act VI of 1873.

The Mayor, &c., of London v. *Low*(2) and *The Mayor of Manchester* v. *Lyons*(3) followed.

The case of *Rájá Pábá Khoji*(4) explained.

APPEAL by the Government of Bombay against an order of G. B. Reid, Magistrate (First Class) of Ahmedabad, reversing the conviction and sentence passed on the accused by Azam Jethálál Haribhái, Honorary Second Class Magistrate.

* Criminal Appeal, No. 112 of 1886.

(1) I. L. R., 9 Bom., 272.
(2) 49 L. J., Q. B., 144.
(3) L. R., 22, Ch. Div., 287.
(4) I. L. R., 9 Bom., 272.

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On the 9th March, 1885, the municipality of Ahmedabad published a notice, directing that no person should, without a license, open a shop for the sale of vegetables and fruits within six hundred yards from the municipal market; and that if any person acted in contravention of this notification he would be dealt with according to law. In spite of this notice, both the accused hired a house and opened a shop for selling custard-apples within six hundred yards of the municipal market without obtaining a license from the municipality.

Thereupon the secretary of the municipality lodged a complaint against them under section 66 of Act VI of 1873.

The Second Class Magistrate convicted and sentenced the accused each to pay a fine of Rs. 5. On appeal, the District Magistrate, following the ruling in the case of *Rájá Pábá Khoji*(1), reversed the conviction and sentence.

Against this order of acquittal the Government of Bombay appealed to the High Court.

Hon. Ráv Sáheb *V. N. Mandlik* for the Crown :—The case of *Rájá Pábá Khoji*(1) turns on the definition of the word "place" as given in (Bombay) Act VI of 1873. But that definition is repealed by Act II of 1884. That Act came into force on the 10th of August, 1884, when the offence was committed. The ruling, on which the lower Court relied, does not apply. Clause 2, section 66 of (Bombay) Act VI of 1873 says that exposure of goods for sale contrary to clause (i) is punishable; that is to say, if they are exposed in a place which the municipality directs shall not be used as a market. In this case the accused opened a shop for sale of custard-apples, contrary to the notification of the 9th March, 1885. They are, therefore liable to punishment under section 66.

There was no appearance for the accused.

WEST, J.:—This is an appeal made on behalf of the Government of Bombay against an order of the District Magistrate of Ahmedabad, reversing the conviction and sentence passed on Magan Harjivan and Moti Kuber by the Honorary Second Class Magistrate, Azam Jethálál Haribhái, on a charge of selling vegetables

(1) I. L. R., 9 Bom., 272.

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without a license under section 66 of the Bombay Municipal Act VI of 1873.

The municipality of Ahmedabad, in March, 1885, issued a notification to the effect, that no one was to use, within six hundred yards of the municipal market, any place as a market for the purpose of selling vegetables or fruits without a license, and that, if any one acted in contravention of this notification, he would be dealt with according to law.

The accused in this case appear to have hired a house and opened a shop within six hundred yards of the municipal market to sell fruit without a license from the municipality. The Second Class Magistrate convicted and sentenced each of them to pay a fine of Rs. 5 only. The District Magistrate, relying on a former decision of this Court reported at I. L. R., 9 Bom., p. 272, reversed the conviction and sentence.

An appeal to this Court is brought, on the ground that the definition of the word "place," as given in (Bombay) Act VI of 1873, having been repealed by (Bombay) Act II of 1884, the municipality were at liberty to say that any place whatever should not be used for the purposes of selling any such commodity, and the decision referred to by the District Magistrate in his judgment did not apply to the present case.

The first question that arises for consideration is, whether the notification was, in fact, within the authority given by the Municipal Act, section 66. What that section says is: "It shall be lawful for the municipality to direct that no place shall be used, *as a market*, for the sale of animals, meat, fish, and *vegetables intended* for *human food*, or as slaughter-house, excepting the public markets or slaughter-houses * * * * or such markets or slaughter-houses as may have been licensed by the municipality &c., &c., &c."

Clause 2 of the section says: "Whoever, contrary to such direction or without such license *as aforesaid*, sells or exposes for sale any such animals or commodities, or uses any place as a slaughter-house, shall be liable to the penalty hereinafter provided."

What the municipality had authority to direct under this section was, that no place, other than the municipal markets or

other places licensed as markets, should be used by any body *as a market*. They had no authority to issue a notification affecting other places which might be used for selling vegetables, &c., otherwise than *as a market*.

The accused in this case having hired a house for storing and selling one particular kind of *fruit* (custard-apple), and not "vegetables" in the popular sense, the question for determination is, whether the opening of a shop, as in the present case, without a license, constitutes the using of a market so as to bring this Act within the prohibition of the municipality. Supposing, for a moment, that the using of the shop by the accused was, in a sense, a using of it as a market, still it could not be affected by the prohibition contemplated by the section, inasmuch as the using of the shop was confined simply to the selling of fruit, and not of "vegetables," and the section contains nothing to warrant our including the case of fruit-selling within it.

If the prohibition of the municipality was meant to affect the paivate rights of persons to use their own places for selling any commodity, that would amount to an excess of the authority conferred by the Bombay Municipal Act.

The word 'market' is not defined in the Act; and before we can say whether a particular place was used as a market or not, we must refer to the cases decided by Courts in England in connection with market rights.

In the case of *The Mayor, &c., of London* v. *Low*[1] in the Queen's Bench, Cockburn, C. J., says: "The establishing of a new market, and thereby infringing the rights of the owners of the ancient market, is not, *in se*, actionable. It is actionable only, because it constitutes a disturbance; but it is not necessary, in order to constitute a disturbance of market rights, that a new market should be established. The disturbance may be constituted by some thing very short of the establishment of a new market. It is enough, therefore, if, on the part of the plaintiffs, it is established that there has been a disturbance of the market rights of the plaintiffs."

(1) 49 L. J., Q. B. 144-149.

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This appears to be the strongest of all the authorities in favour of the municipality, and yet it simply goes to show that to constitute the use of a place as a market so as to interfere with any other market, it is not sufficient that it is used as a shop, but there must be something in addition to show that there has been a disburbance of the market rights.

In *Mayor of Manchester* v. *Lyons*(1), Jessel, M. R., says at p. 307: "It has been held more than once in modern times, whatever may have been the case in former days, that as an ordinary rule the sale of a man's own goods in the regular and ordinary course of business in his own shop is not a disturbance of a market, and that something more must be shown to make it a disturbance. How much more will be sufficient, it is not for me now to say. In the present case, I can find no evidence whatever of disturbance beyond the mere fact, that the defendants sell their own goods, in the course of business, in their own shop. In my opinion, that does not amount to a disturbance of the market, and the appeal must be dismissed."

At pages 309 and 310 in the same case, Cotton, L. J., says: "Since it has been established that, unless an old franchise is proved which confers a special right on the owners of the market, shop-keepers are not prevented from selling their goods in their shops on a market day. Here the defendants are selling their own goods in their shops in the ordinary way of their business. There is not any evidence to show that, under the pretence of carrying on their business, they take in the goods of other people, and enable them to be sold at the shop, nor that they go into the market to solicit people to come out to them, but they merely sell their own goods in their shop in the ordinary way of business."

At page 311 of the same case, Bowen, L. J., says: "It is said by Littledale, J., in *Mayor of Macclesfied* v. *Pedley*,(2) and his remarks are supported by the language of Baron Parke and Lord Abinger in *Mayor of Macclesfield* v. *Chapman*(3), that there is no case which

(1) L. R., 22 Ch. Div., 287.
(2) 4 B. & Ad., 397.
(3) 12 M. & W., 18.

has decided that the mere selling in a private shop, not within the limits of a market place, marketable articles on market days is an injury to the market in point of law."

All these were civil cases no doubt, but they point out for practical purposes where a market begins and where it ends.

We can, on these authorities, say that the accused did not make use of this shop as a market for selling "vegetables" in the sense of the notification.

A similar question, or rather an analogous one, was before the Court in November, 1884, and the decision on it is reported at I. L. R., 9 Bom., 272, which is quoted by the District Magistrate in his judgment. Two persons were in that case accused of a similar offence, one of whom used his own *ottá* for selling some vegetables, and the other came there occasionally and hired an *ottá*. As to the latter, the Court rejected his application, as he might be said to be using the shop as a market; but, as regards the former, the Court was of opinion that the use of a man's shop could not be regarded as its use as a market. As the case of a prohibition or interference by a Magistrate in India is the exercise of a *quasi* magisterial jurisdiction, his authority was construed strictly, and the Court held that the use of the accused's *ottá* in that case did not constitute the use of it as market.

The municipality could not prohibit its use in that way, and no offence was committed under section 66 of that Act.

We, therefore, decline to interfere with the decision of the District Magistrate, and dismiss the appeal made on behalf of Government.

Appeal dismissed.