

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

1894.

November 28.

THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANTS), APPELLANT, *v.* MANILA'L UDENA'ATH (ORIGINAL PLAINTIFF), RESPONDENT.*

The Bombay District Municipal Act (Bombay Act VI of 1873), Sec. 17†—Public street—Street—Construction of Act—The City of Bombay Municipal Act (III of 1888), Sec. 3.‡

In a suit brought by the plaintiff against the Municipality of Ahmedabad, the question was whether a certain street was a public street within the contemplation of the Bombay District Municipal Act (Bombay Act VI of 1873). The District Judge, on the evidence and having regard especially to the fact that the street in question was protected by a gate closed at night by a *police*, or watchman, who lived over the gate, and was under the control of and paid by the owners of the houses in the street, held that there had been no dedication of the land to the public, and that the public had not acquired such a right of going over it as to make it a public street vested in the Municipality. On second appeal by the defendant the High Court refused to interfere with the decision of the lower Court.

In the absence of a definition of a public street in the Bombay District Municipal Act VI of 1873 the High Court refused to apply the definition contained in the City of Bombay Municipal Act (III of 1888).

SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad, confirming the decree of Ráo Sáheb Mánek-lál Narottamdás, Joint Second Class Subordinate Judge of Ahmedabad.

* Second Appeal, No. 479 of 1892.

† Section 17 of the Bombay District Municipal Act (Bombay Act VI of 1873)—

17. All property of the nature hereinafter specified shall be vested in and belong to the Municipality, and shall, together with all other property, of what nature or kind soever, which may become vested in the Municipality, be under their direction, management, and control, and shall be held and applied by them as trustees for the purposes of this Act; that is to say:—

* * * * *

(f) All public streets not being portions of provincial high roads or trunk roads specially reserved by Government, and the pavements, stones, and other materials thereof, and also all trees, erections, materials, implements and things provided for such streets.

‡ Section 3 of the City of Bombay Municipal Act (III of 1888)—

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(x) "Public street" means any street heretofore levelled, paved, metalled, channelled, sewered or repaired by the corporation and any street which becomes a public street under any of the provisions of this Act.

The plaintiff sued for an injunction restraining the defendants from removing a bench standing upon the ground in front of the plaintiff's *otá* (verandah), alleging that the bench had been there for more than twenty years.

The defendants pleaded (*inter alia*) that the ground on which the bench stood, did not belong to the plaintiff, but was part of a public street.

The Subordinate Judge found (1) that the bench had been standing upon the ground in front of the plaintiff's *otá* (verandah) for upwards of twenty years, (2) that the ground on which the bench stood formed part of a street, but not of a public street, and (3) that the Municipality had no right to remove the bench. He, therefore, passed a decree for the plaintiff.

The defendants appealed, urging (*inter alia*) that as there had been no issue raised at the trial as to whether the ground on which the bench stood formed part of a public street, they had called no evidence on the point, and they contended that they should be given an opportunity of calling such evidence. The Judge confirmed the decree, but on second appeal by the defendants, the High Court remanded the case for a finding on the following issue (see I. L. R., 19 Bom., 212):—

“Whether the land in question forms part of a public street vested in the Municipality?”

The finding of the Judge was in the negative. The following is an extract from his judgment:—

“A public street is nowhere defined in the Bombay District Municipal Acts (No. VI of 1873 and No. II of 1884). An attempt has, therefore, been made to use the definition in section 3 of Bombay Act III of 1888, the City of Bombay Municipal Act. A public street is therein defined as ‘any street heretofore levelled, paved, metalled, channelled, sewerred, or repaired by the corporation, and any street which becomes a public street under any of the provisions of that Act.’ It has been contended for the defence that as the street is lighted and swept by the Municipality, and a channel is cut in it during the rainy season by the Municipality, and as the sullage water of the houses in the street is removed by municipal servants, the definition above quoted applies. On the other hand, it has been contended that as it is neither levelled, nor paved, nor metalled, nor sewerred, nor repaired by the Municipality, the definition does not apply. As to the facts, I believe the evidence of the Municipal Secretary, Mr. Dáyabhái, as it is not materially contradicted, and the facts of lighting, sweeping, and removal of sullage

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water are admitted, and the fact of channelling is proved by the accounts produced by him (Exhibits 48 and 49). But I do not think the definition given in an Act for the City of Bombay can properly be applied to a town in the Mofussil like Ahmedabad in all its strictness.

“The real test would seem to be whether every member of the public has the right of way over the street in question. I should think that they had not such right. This *pol* is completely closed on one side, and where it opens on the main road, there is a gate-way with a storey over it. A watchman, called a *polia*, lives on that storey and keeps charge of the gate and closes it at night, opening it when necessary. This gate-way and storey are kept in repairs by the house-holders of the *pol*, and the *polia* is also paid by them in various ways. Most of these facts are admitted by the Municipal Secretary, Mr. Dáyábhái. He says : ‘The street people are the owners of the storey, and the man who lives in it, does so for and on their behalf. The street has a gate with shutters. The street people repair the gate and shutters.’ The nature of the payments to the *polia* is stated by Motilál (Exhibit 57), a municipal inspector, who lives in the *pol* in question and was called as a witness by the Municipality and by the *polia* himself (Exhibit 78). The existence of the gate-way, its possession and control by the inhabitants of the street, and the fact that it is closed every night, show that the street has all along been a private one and has been intended to be so. Private individuals certainly cannot control the right of access to a public street. It has been contended that there exists no such control, because no case can be quoted in which such access was disputed. But the very fact of closing the gate at night is a proof of this control. No doubt it is opened, if necessary, for the purposes of the inhabitants of the *pol*, but it would hardly be contended that any member of the public can cause it to be opened in order to enter at any hour he chooses. For example, if 4 or 5 Mahomedans wanted to enter it at night, merely for the purpose of walking through the street, surely they would not have the right of causing the gate to be opened for the purpose. Similarly, if a couple of suspicious-looking Kolis wanted to enter the *pol*, the *polia* would be justified in keeping the door closed until they could give good reason for letting them in. If the road were public, could any private individual prevent access, in either case, without rendering himself liable to prosecution for wrongful restraint?”

The defendants filed objections to the above finding.

Wádia with *Gangáráam B. Rele*, for the appellants (defendants):—The Judge finds that the street in question is paved and channelled by the Municipality, but he holds that it is not a public street. The term “public street” is not defined in the District Municipal Act, but it is defined in the Bombay Municipal Act III of 1888, section 14, there being no definition in the District Municipal Act, the definition given in the similar Act relating to the City of Bombay should be accepted.

Chimantál H. Setalvad for the respondent (plaintiff):—The public may have a right of way in a street which is not a public

street, and the proprietary right to which may be in private individuals. The Judge has found that the persons who own houses in this street are the proprietors of the street. The Court cannot read into one Act a definition contained in another.

SARGENT, C. J.:—The issue sent down to the lower appellate Court (I. L. R., 19 Bom., 212) involves the question what constitutes a “public street” within the contemplation of Bombay Act VI of 1873. That Act contains a definition of a “street,” but not of a “public street,” although several sections refer only to public streets, among which is section 17, which provides for the vesting of “public streets” in the Municipality, but at the same time leaves the question still open as to what are “public streets”. The District Judge has come to the conclusion on the evidence, and more especially on the fact, that the street in question is protected by a gate closed at night by a *polia*, or watchman, who lives over the gate and is under the control of, and paid by, the owners of the houses in the *pol*; that there has been no dedication of the land to the public, and that the public has not acquired such a right of going on it as to make it a public street which it was intended by the Act to vest in the Municipality. The language of the High Court in *Kālidās v. The Municipality at Dhandhuka* ⁽¹⁾ supports the view of the District Judge, where they say “no one’s rights of property would be safe if the Municipality could take advantage of such limited access by members of the public, in order to make out a claim to hold the land in question as public property.”

It was contended before us, on appeal, that the Court should have applied the test afforded by section 3 of the Bombay City Municipal Act III of 1888. But that Act has no bearing on the Mofussil Municipal Act VI of 1873 in question, which relates to a state of things and conditions of life entirely different, and is, moreover, framed on entirely different lines. Under these circumstances we see no reason for interfering, on second appeal, with the finding on the issue, and must, therefore, confirm the decree with costs.

Decree confirmed.

(1) I. L. R., 6 Bom., 686 at p. 689.

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