

CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Ranade.

MUNICIPALITY OF BOMBAY v. SUNDERJI.*

1897.

December 1.

Municipality—Bombay City Municipal Act (Bom. Act III of 1888), Sec. 461 (d)—By-law—By-law restricting the height of buildings on a site previously built upon—Validity of such by-law.

The Municipality of Bombay has power under section 461, clause (d)⁽¹⁾, of Bombay Act III of 1888 to make a by-law restricting the height of a new building erected on a site which has been previously built upon.

THIS was a reference under section 432 of the Code of Criminal Procedure (Act X of 1882) by W. R. Hamilton, Acting Chief Presidency Magistrate.

The following are the material clauses of the reference :—

“One Sunderji Shivji has been charged under section 353 of the Municipal Act for not carrying out the orders with reference to the height of his building. It appears he had pulled down an old building and has rebuilt it to one and half times the width of the street on which it abuts. He was, therefore, ordered to reduce the height.

“2. The road is 25 feet 2 inches wide and the height of the house is 60 feet 7 inches (39' 3" + 21' 4").

“3. Section 461 (d) of the Municipal Act (Bom. Act III of 1888) empowers the Corporation to make by-laws to regulate ‘the provision and maintenance of sufficient open space, either external or internal, about buildings to secure a free circulation of air and of other means for the adequate ventilation of buildings.’

“4. The by-laws published in the *Government Gazette* of the 3rd August, 1892, provide as follows :—

‘30. A person who shall erect a new building which abuts on a street of less than 50 feet in width or any part of which is within a distance of half the width of such street from a street of less width than 50 feet, shall not without the written permission of the Commissioner erect such building to a greater height than one and a half times the width between the point

* Criminal Reference, No. 106 of 1897.

(1) Section 461, clause (d) provides—

“The Corporation may from time to time make by-laws, not inconsistent with this Act, with respect to the following matters (namely),

(d) The provision and maintenance of sufficient open space, either external or internal, about buildings to secure a free circulation of air, and of other means for the adequate ventilation of buildings.

at which such building approaches nearest to the street and the opposite side of such street.'

"5. The accused is charged with an infraction of this by-law. His solicitor contends that the by-law is *ultra vires*, because section 461 (d) does not give any power to regulate the height of a building. It does give power to secure sufficient open space round about a building, but it gives no power to restrict its height. The height is expressly regulated by section 348 (e), which restricts the height to one and a half times the width of the street it abuts on when the street is of a less width than 50 feet. And this section 348 applies to buildings newly erected on any site previously unbuilt upon, and it is implied that rebuilding on a site previously built upon cannot be restricted as to height. So that if a man had a house 100 feet high he might pull it down and rebuild it 100 feet high, although it may be in excess of the height of $1\frac{1}{2}$ times the width of a narrow street.

"6. It was also argued that the height of the front part of the building is only 18 inches more than the $1\frac{1}{2}$ times the width of the road, and that all the Municipality can insist upon (if they have the power under the by-law) is to reduce that height by 18 inches.

"7. The house then goes back 13 feet where there is an open terrace and rises by 21 feet 4 inches. It is contended that the by-law, if valid, does not apply to this part of the building, which in fact is distant from the street by 13 feet, which is more than half the width of the street.

"8. The solicitor for the Municipality contends that the by-law is not *ultra vires*. Section 348, he argues, applies to buildings on new sites. Whereas this is a building on an old site. The by-laws can regulate the height of buildings on old sites, and secure air to the neighbouring buildings by limiting the height. If houses could be built to any height, they would seriously interfere with the ventilation of smaller houses and the access of air to them. The words 'sufficient open space' apply to the space above a building as well as to the space on the sides. The same object is secured in the model by-laws of the Local Government Board in England (Knight's Annotated Model By-laws, Section 54, on page 169), when the space to be left at the back of a building must not be less than 10 feet or 15 feet, if the opposite house is 15 feet higher, 20 feet if the opposite house is 25 feet high, and 25 feet if the opposite house is 35 feet high or more.

"9. He also contends that if any part of the house is within a distance of half the width of the street from the street, the by-law applied. The front part of this house abuts on the street, and the height of the whole house must be regulated by the by-law. It is not allowable to divide the house into two parts and restrict the height of the front part only and let the height of the back part be unrestricted.

"13. In my opinion, I believe that section 461 (d) does not give power to regulate the height of a building, and that the power to regulate open spaces about buildings applies only to lateral open spaces, and it may also apply to new

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buildings on sites previously unbuilt upon. The by-laws cannot be inconsistent with the Act, and it would be inconsistent to restrict the height of a building by a by-law which was purposely left unrestricted by section 348.

14. As the question is one of considerable importance, I beg to refer the question for the favour of the opinion of the High Court, and to ask, whether the Municipality have the power under the by-law quoted to restrict the height of a new building on a site which has been previously built upon."

The reference was argued before a Division Bench (Parsons and Ranade, JJ.).

Inverarity for the Municipality.

Lang, Advocate General, for the accused.

PARSONS, J. :—The Acting Chief Presidency Magistrate (Mr. W. R. Hamilton) has referred to this Court the following question, *viz.*, whether the Municipality have the power under by-law 30 to restrict the height of a new building on a site which has been previously built upon. By-law 30 is as follows: "A person who shall erect a new building which abuts on a street of less than fifty feet in width, or any part of which is within a distance of half the width of such street from a street of less width than fifty feet, shall not, without the written permission of the Commissioner, erect such building to a greater height than one and a half times the width between the point at which such building approaches nearest to the street, and the opposite side of such street. Provided that nothing herein contained shall debar any person from building up to the full height of any building (belonging to himself) which has stood within two years on the same site, and on which he has not been precluded from building by any injunction or order of a Court." It purports to have been passed under the authority conferred by section 461 of the City of Bombay Municipal Act, 1888 (hereinafter called the Act). Clause (d) of this section is as follows:—(d) the provision and maintenance of sufficient open space, either external or internal, about buildings to secure a free circulation of air and of other means for the adequate ventilation of buildings. The Magistrate thinks that the by-law is illegal, as being inconsistent with the Act. Section 348 of the Act, he says, makes certain provisions in respect of buildings, which are to be newly erected on sites previously unbuilt on. Buildings already existing are left unprovided for

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and unrestricted by section 348 : a by-law, therefore, providing for the application to them of any of the matters or restrictions mentioned in section 348 is inconsistent with the Act. No doubt section 348 of the Act does deal with buildings to be newly erected on sites previously unbuilt on, and one of its clauses (*e*) regulates the height of such buildings. It may, therefore, be argued that there must be very clear words used elsewhere in the Act to enable the Municipality to make a by-law which shall affect buildings to be newly erected on sites already built on. The obvious reply, however, to this argument is that section 461 of the Act contains these very clear words. Except in clause (*c*) it deals entirely with already existing buildings, premises, and conditions of things. It could never be argued that because section 348 of the Act enacts certain regulations to be observed in the case of new buildings to be erected on new sites, there could be no power given elsewhere by the Act to make by-laws enjoining similar or even the same regulations to be observed in respect of buildings either already standing or to be erected on old sites. Undoubtedly, such a power could be given, and in our opinion section 461 clearly gives the power to make by-laws in respect of the matters mentioned in clause (*d*). There is nothing, therefore, illegal or *ultra vires* in the by-law.

The only point mentioned by the Magistrate which remains for decision is whether clause (*d*) allows of a by-law which restricts the height of a building. The Magistrate thinks that it does not, but that it only applies to lateral open spaces. We cannot see the distinction. We assume that the word "buildings" means the building that is standing or is being erected, in respect of which a circulation of air and ventilation is required to be provided. It seems to us that the result is exactly the same whether the regulation be, for example, that if a house is 20 feet high a space of 20 feet shall be left in front of it, or that the height of a house shall not be more than 20 feet, if the space left in front of it is only 20 feet wide. The model by-law quoted by the Magistrate shows this. It regulates the width of the open spaces by the height of the houses. It thus regulates the height of the houses just as the by-law in question here does. In the present case all that the accused has to do, if he wishes to

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build; his house 60 feet high, is to build it so far back from the road as to leave the necessary open space required by the by-law for that height "between the point at which the building approaches nearest to the street, and the opposite side of such street." We return the case, with our answer to the question in the affirmative.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

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December 6.

ANANDIBAI (ORIGINAL DEFENDANT), APPELLANT, v. RAJARAM GHINTA,
MAN PETHÉ (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), Sec. 266 (k)—Execution—Attachment—Spes successionis—"Expectancy of succession by survivorship"—Not attachable—Widow—Widow's estate.

One Sadashiv Anant devised a house, which was his self-acquired property, to his widow (the defendant), and died leaving a son, Vasudev. The will did not expressly give the widow power to dispose of it. The plaintiff in execution of a decree against Vasudev sought to attach Vasudev's interest in the house. The lower Court held that as the interest taken by the defendant in the house under her husband's will was only a widow's estate, Vasudev as her husband's son had an interest in the house which might be attached by the plaintiff.

Held (reversing the decree) that Vasudev had no interest in the house. He had only a *spes successionis*—an expectancy of succession by survivorship, and such a hope or expectancy is not attachable under section 266 (k) of the Civil Procedure Code (Act XIV of 1882).

The entire estate was vested by the testator in the defendant. No doubt her estate was a widow's estate. Her estate in it closely resembled that of a married woman in England to whom property is given with a restraint against alienation. That being so, she was unable to dispose of it, but still she was its full owner. The whole property passed to her from the testator. Nothing was left in him. But until she died it could not be known who would inherit the house.

Annaji v. Chandrabai⁽¹⁾ distinguished.

SECOND appeal from the decision of Ráo Bahádur D. G. Gharpure, additional First Class Subordinate Judge of Násik with appellate powers, reversing the decree of Ráo Sáheb L. K. Nulkar, Joint Subordinate Judge.

* Second Appeal, No. 661 of 1897.

(1) I. L. R., 17 Bom., 503.