ORIGINAL CIVIL.

Before Mr. Justice Russell and on appeal before Mr. Justice Chandavarkar and Mr. Justice Batty.

APPEAL No. 1298.

HAJI ISMAIL HAJI ESSAC (ORIGINAL APPLICANT), APPELLANT, *v.* THE MUNICIPAL COMMISSIONER OF BOMBAY (RESPONDENT).

1903. *November* 17.

APPEAL No. 1299.

AHMED MOOSA AND ANOTHER (ORIGINAL APPLICANTS) *v.* THE MUNICIPAL COMMISSIONER OF BOMBAY (RESPONDENT).

License—City of Bombay Municipal Act (III of 1888), section 394—Specific Relief Act (I of 1877), section 45—Discretion.

The power of the Municipal Commissioner of Bombay to grant a license under section 394 of the City of Bombay Municipal Act (III of 1888) includes the power to refuse it.

PER CURIAM: The Court cannot substitute its judgment for that of the Municipal Commissioner. Unless it is clear beyond doubt that the Municipal Commissioner is using his authority with some indirect motive and for a collateral purpose, not for the purpose for which the Legislature has armed him with the power, the Court cannot interfere with his discretion.

MOTION.*

On the 27th of February, 1903, the applicant, Haji Ismail Haji Essac, obtained an order calling upon the Municipal Commissioner to show cause why he should not grant to the petitioner licenses to keep buffaloes in sheds situate at 48 and 53, Gawli Moholla, Memonwada. A similar order was obtained by the applicant Ahmed Moosa on the 6th of March, 1903.

The facts in Haji Ismail's case are set out in detail in the judgment of Russell, J.

The Exhibits B and C referred to in the judgment were two letters addressed by the Municipal Superintendent of Licenses to the applicant, the first of which was dated the 6th of June, 1902, and was in the following terms:—

"Mr. Haji Ismail Haji Essac is hereby informed that as his milch-cattle stable at No. 48, Memonwada Road, has been found a source of serious nuisance

* NOTE.—The application was made by motion in accordance with the ruling of Russell, J., reported in I. L. R. 27 Bom. 307.

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to the residents of the locality owing to its bad situation and faulty structure the Municipal Commissioner has, on the advice of the Health Officer, decided not to renew its license for the current official year 1902-03.

With a view to give him sufficient time to arrange about the removal of his animals to a better stable he is further informed that action under section 394 of the Municipal Act will be taken against him if he fails to remove his animals from the stable in question by the 31st October next."

The second letter (Exhibit C) was dated the 24th June, 1902, and was in almost identical terms, save that it stated that the Health Officer had decided not to renew the license.

The facts in Ahmed Moosa's case were very similar to those in Haji Ismail's case.

In the affidavit of the Municipal Commissioner dated the 29th June, 1903, he stated :—

"I have personally visited the said stables in Parel Road and also the proposed site in DeLisle Road and am of opinion that under no circumstances ought the license for the said stables in Parel Road to be renewed even temporarily, and as regards the premises in DeLisle Road I am further of opinion that it is not advisable in the public interests to grant a license for a buffalo-stable for the use of more than 100 buffaloes."

On the 30th September, 1902, the following letter was addressed by the Municipal Commissioner to the applicants :—

"With reference to your letter of the 8th instant I have the honour to state that it is reported that from a sanitary point of view the proposal is objectionable as a large milch-cattle stable on the site referred to would prove a serious nuisance to persons residing in the neighbourhood."

On the 8th November, 1902, he wrote as follows :—

"In reply to your letter of 10th ultimo I have the honour to inform you that I am prepared to allow a license to be given for a milch-cattle stable for 100 cattle on the site referred to, subject to all the requirements of the Health Officer being complied with."

The motion came on for hearing before Russell, J., who after argument delivered the following judgment in Haji Ismail Haji Essac's case :

RUSSELL, J.—On the 24th March, 1903, Haji Ismail Haji Essac the applicant, applied that the Municipal Commissioner should show cause why he should not grant to the applicant licenses to keep buffaloes in sheds Nos. 48 and 53 at Gawli Moholla, Memonwada. In his affidavit the applicant says that the said two sheds

have been used as buffalo-stables for more than sixty years, and by him for the last twenty years thereof, and the Municipality granted him licenses from year to year during those twenty years. On the 21st April, 1903, he applied for a renewal of the license, and on that day he was asked to pay Rs. 25, the license-fee for his buffalo-stable at No. 48. On the 6th of June he got a letter from the Municipality saying that stable No. 48 was found a source of serious nuisance to the residents of the locality, and that the license for 1902-03 could not be granted. On the 24th June he received a similar notice that the license for stable No. 53 could not be renewed. His affidavit goes on to describe the situation of the said stables respectively and the properties adjoining thereto. He further refers to complaints made against his stable No. 53 in 1894 and 1898. He says that those complaints came to nothing. In 1899 he says the Municipal authorities were satisfied that there was no nuisance with regard to either of these stables. In 1894 and 1902 he did certain repairs to the stables by order of the Municipality, and it appears from his affidavit that summonses in the Police Court have been taken out against him for his keeping buffaloes without license in the said stables.

On the 29th June, 1903, Mr. Harvey, the Municipal Commissioner, put in his affidavit, the material portion of which is paragraph 6, in which he says that he has satisfied himself from his own inspection and knowledge of the petitioner's stables and from the reports of the Health Department and Superintendent of Licenses that the grounds of objections stated in Exhibits B and C to the applicant's affidavit do exist with regard to both the stables; that he has also consulted the Executive Health Officer on the subject, and is of opinion that the petitioner's licenses in respect of the stables ought not to be renewed, and has therefore declined to renew the same, ample time having been given to the applicant to provide himself with other accommodation for his animals.

The question that now arises is whether having regard to sections 394 and 479 of the City of Bombay Municipal Act, 1888, the Municipal Commissioner has a discretion to grant licenses in respect of buffalo-stables.

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Section 394 comes within Chapter XV which contains sanitary provisions regarding the City of Bombay. The material words in section 394 are: "No person shall use any premises for keeping cattle without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf."

Now in the first place there are no words in this section to the effect that "the Commissioner shall grant the license," and reading the commencement of section 479 "Whenever it is provided in this Act that a license or a written permission may be given for any purpose," I am of opinion that the words in section 394 "license granted" are equivalent to "license which may be granted."

The well-known eating-house case, *Rustom J. Irani* v. *H. Kennedy*[1], was relied upon by Mr. Raikes on behalf of the petitioner. But I am of opinion, having read that judgment carefully through again, that that case does not support the applicant's contention, and in fact contains several passages which are strongly against it.

I can find no section which compels the Municipal Commissioner to renew licenses of buffalo-stables, and it is impossible to suppose that he could be intended to be compelled to do so, having regard to the changes which may or must take place with regard to their surroundings. Once a buffalo-stable is not always a buffalo-stable, and there is nothing in the Municipal Act to say that it must be.

I therefore discharge the rule with costs.

In Ahmed Moosa's case his Lordship did not deliver a separate judgment as he held it was not distinguishable on the facts.

The applicants appealed.

Davar for appellant in Haji Ismail's case.

Robertson for appellant in Ahmed Moosa's case.

Scott (Advocate General) and *Lowndes* for the respondent in both the appeals.

Their Lordships dismissed the appeals.

(1) (1901) 26 Bom. 396; 4 Bom. L. R. 1.

The judgment of the Court was delivered by

CHANDAVARKAR, J.:—It is true, as contended by Mr. Davar and Mr. Robertson in these appeals which have been heard together, that the City of Bombay Municipal Act does not say in so many words that it is within the competence of the Municipal Commissioner either to grant or to withhold a license for the purposes of milch-cattle stables as he in his discretion thinks fit. However, if we compare together the sections of the Act dealing with licenses or "the written permission of the Commissioner," the discretionary power of the Commissioner appears, in our opinion, to follow by necessary implication. Section 479 says that whenever it is provided in this Act that a license or a written permission "may be given for any purpose," such license or written permission shall specify the conditions, &c., on which they are granted. This section taken by itself throws no light on the construction of section 394 upon which the decision here turns. Had that section stood alone, it might have been possible to construe the words "may be given" as a mere recital, not as conveying the meaning that a license may be refused in any given case, if the Municipal Commissioner think fit. But there are other sections in the Act which show that wherever the Legislature intended that the power of refusal to grant a license or a written permission should be restricted they have distinctly said so and specified the conditions of restriction. For instance, in section 390, after providing:—"No person shall newly establish in any premises any factory, workshop or workplace in which it is intended that steam, water or other mechanical power shall be employed, without the previous written permission of the Commissioner," the Legislature go on to say:—"The Commissioner may refuse to give such permission if he shall be of opinion that the establishment of such factory, workshop or workplace in the proposed position is objectionable by reason of the density of the population in the neighbourhood thereof or will be a nuisance to the inhabitants of the neighbourhood." It may no doubt be urged as to this section that the power of giving a written permission vested in the Commissioner is obligatory under the 1st clause and that the 2nd clause creates merely an exception

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specifying those cases where alone the Commissioner can decline to exercise the power. But then we have section 402 under which the opening of new private markets "for the sale of, or for the purpose of exposing for sale, animals intended for human food or any other article of human food" is prohibited "except with the sanction of the Commissioner," and it is provided that in giving such sanction the Commissioner shall be guided by the decisions of the Corporation at the time in force under sub-section I. Here the Legislature have imposed a restriction on the Commissioner's power to sanction the opening of new private markets, implying thereby that it is a power to grant or refuse the sanction, subject to the restriction specified. But it is section 403 of the Act which furnishes a clearer clue to the meaning of section 394. Section 394 relates to licenses for using any premises for carrying on certain trades whereas section 403 relates to licenses for certain other purposes. The 1st clause of section 403 provides that no person shall do the acts therein specified "without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf." These latter words as to the necessity of a license occur also in the 1st clause of section 394, with the construction of which we are now concerned. There is a proviso, however, to section 403, according to which the Municipal Commissioner "shall not refuse" a license for one of the three purposes mentioned in clause 1—*viz.*, the keeping open a private market—except in the cases specified in the proviso. This restriction imposed on the Commissioner's power to grant a license for keeping open a private market shows that the power to grant licenses vested in the Commissioner by the words "without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf"—*i. e.*, for the purpose of a private market and for the two other purposes mentioned in clause 1 of section 403—was intended by the Legislature to include the power of refusal subject to the condition that the power of refusal shall be restricted in the case of licenses for keeping open private markets. There is no such restriction imposed on the power to grant licenses given in exactly the same words to the Commissioner in section 394 of the Act. It is clear, therefore, that the Legislature intended the

power to grant licenses, whether under section 394 or under section 403 to include the power to refuse them—in other words, it is a purely discretionary power.

It was urged before us that we should avoid this construction of section 394, if we can, because, it was said, such a construction has the effect of arming the Municipal Commissioner with the arbitrary power of prohibiting a man from carrying on a legitimate trade. It is not quite accurate to say that section 394 arms the Commissioner with any such arbitrary power. Upon the construction which, we think, ought to be put upon it, all it does is to prohibit a man from carrying on the trades specified in the section "in any premises." The power is restricted as to place. The object is to prevent a particular locality in any congested part of the city from becoming insanitary by reason of trades which, in the opinion of the Legislature, are injurious to health. Then it was said that section 394 occurred in a chapter, which was headed "Regulation of Factories, Trades, &c." and that the "regulation" of a trade in any premises by means of licenses could not mean the prohibition of that trade there. This argument seems at first sight to derive some force from the decision of the Privy Council in *Municipal Corporation of the City of Toronto* v. *Virgo* [1] where Lord Davey, delivering the judgment of their Lordships, said that, "there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed" and "that a Municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner." It was argued in that case that the by-law impugned there did not amount to prohibition because the persons prohibited could still carry on their business "in certain streets of the city." But their Lordships would not accede to that argument, because "the effect of the by-law is practically to deprive the residents of what is admittedly the most important part of the city of buying

(1) (1896) A. C. 88 at pp. 93, 94.

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their goods of or of trading with the class of traders in question." But there are also passages in this judgment of the Privy Council which support the view that the power to regulate a trade may, in certain cases, amount to a power of prohibition in the sense of restricting that trade to a certain place or places. As was said there :—"No doubt the regulation and governance of a trade may involve the imposition of restrictions in its exercise both as to time and *to a certain extent as to place* where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order." Upon the construction of the different sections of the Act there concerned, their Lordships held that the power to regulate did not imply a power to prohibit or prevent, because "when the Legislature intended to give power to prevent or prohibit it did so by express words;" and further that there was no question of apprehended nuisance raised in the case. That cannot be said of the City of Bombay Municipal Act. It is further to be observed that this judgment of the Privy Council in *Municipal Corporation of the City of Toronto* v. *Virgo*[1] was relied upon by Lord Shand in support of his view, dissenting from the other Lords, in *Scott* v. *Glasgow Corporation*[2], where the question was whether a by-law made by the Corporation prohibiting sellers of goods in a public market from limiting the class of purchasers with whom they meant to deal was *ultra vires* of the Corporation as fettering the common law right of every man to sell his goods to whom he liked. Lord Shand held on the authority of the Privy Council judgment that it was, but it is clear from his dissenting judgment that the by-law would have been valid and within the jurisdiction of the Corporation who made it, if it could have been shown that it was required on account of "any risk of disease" or "any want of suitable accommodation."

The power, then, to grant licenses vested in the Municipal Commissioner under section 394 being purely discretionary, the only limit to its exercise is that it should not be arbitrary, vague and fanciful; but it must be legal and regular. The Commissioner's refusal to grant a license for milch-cattle stables to the appellant in appeal No. 1298 has been impugned before us on

(1) (1896) A. C. 88. (2) (1899) A. C. 470.

these grounds. It is urged that the premises in dispute have been used as milch-cattle stables for 60 years, that they have never occasioned any nuisance and that the present complaint that they are a source of nuisance is due to the hostility of Devji Kanji and his son Sheriff Dewji. It appears from the affidavits put in that the appellant has gone to considerable expense on account of these stables. It may be a hard case, but the question is whether the Court can substitute its judgment for that of the Municipal Commissioner, who is by law the authority to decide whether a license should be granted or not. Unless it is clear beyond doubt that the Municipal Commissioner is using his authority with some indirect motive and for a collateral purpose, not for the purpose for which the Legislature has armed him with the power, we cannot interfere with his discretion. In the words of Lord Bramwell in *Sharp* v. *Wakefield*(1) "the hardship of stopping the trade of a man who is getting an honest living in a lawful trade, and has done so, perhaps, for years, with probably an expense at the outset, may well be taken into consideration; but it must be done so in conjunction with considerations the other way, and must be left to the discretion of the Justices." Here the discretion is left by law to the Municipal Commissioner and we are not satisfied that he has exercised it arbitrarily and without any regard to the sanitary interests of the City for which the power is vested in him.

These considerations also apply to appeal No. 1299 with this difference that in that appeal there has been no refusal to grant a license but the Commissioner has declined to grant one for more than 100 buffaloes whereas the appellant wants a license for 600. This is, strictly speaking, not a case of refusal but one where a term of the license which the Commissioner is willing to grant is impugned as beyond his powers. But that also is a question of discretion and we must decline to interfere with it for the reasons already given for our decision in the other appeal.

The result is that the orders of Russell, J., in both the appeals are confirmed with costs.

Orders confirmed.

(1) (1891) A. C. 173, at p. 183.

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Appeal No. 1298.

Attorneys for the appellant: Messrs. *Khanderao S. and L.*

Attorneys for the respondent: Messrs. *Crawford Brown & Co.*

Appeal No. 1299.

Attorneys for the appellants: Messrs. *Bicknell, Merwanji and Motilal.*

Attorneys for the respondent: Messrs. *Crawford Brown & Co.*

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1903. *November* 1.

JAMNA (ORIGINAL PLAINTIFF), APPLICANT, *v.* JAGA BHANA AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

Limitation Act (XV of 1877), section 20—Part payment—Statement in writing not in debtor's hand—Debtor's mark beneath—Limitation.

The condition prescribed by section 20 of the Limitation Act XV of 1877 that part-payment of the principal debt should appear in the handwriting of the person making the same is satisfied if the payer affixes his mark beneath an endorsement not written by him.

APPLICATION under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts' Act IX of 1887) against the decision of Mohanrai D. Desai, Subordinate Judge of Bulsar, in the Surat District, in Small Cause Suit No. 162 of 1903.

The plaintiff sued in the beginning of the year 1903 to recover rupees fifteen in the Court of the Subordinate Judge of Bulsar in his Small Cause jurisdiction basing his claim on a *khata* passed in his favour by the defendants Jaga Bhana and Kika Bhana on the 21st November, 1899. The plaintiff, in order to save the bar of limitation, relied on a part-payment of rupees four made by Kika Bhana on the 5th February, 1900. The part-payment was written by one Jivan Kessur and Kika Bhana had made his mark beneath the writing.

The defendants denied the *khata* and the part-payment and pleaded the bar of limitation.

* Application No. 175 of 1903 under the Extraordinary Jurisdiction.