CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *March* 24.

KALA GOVIND *v.* THE MUNICIPALITY OF THA'NA.*

Municipality—Bombay District Municipal Act (Bom. Act VI of 1873), *Sec.* 48—*Re-erection of a structure formerly existing not within the section.*

Section 48 of the Bombay District Municipal Act (Bom. Act VI of 1873) refers to the erection of a thing for the first time, and not to the re-erection of an old structure which had been taken down for a temporary purpose only.

The accused was the owner of a shop in a public street at Thána. The shop had planks attached to it in front, overhanging a public gutter. These planks had been in existence before the District Municipal Act came into operation at Thána. In April, 1897, the planks were temporarily removed under the orders of the plague authorities. The plague having ceased, the accused replaced the planks in October, 1897, without the permission of the municipality. For this he was prosecuted and fined under section 48 of Bombay Act VI of 1873.

Held, reversing the conviction and sentence, that the refixing of the planks was not an "erection" within the meaning of section 48 of the Act.

Application under section 435 of the Code of Criminal Procedure (Act X of 1882).

The applicant was prosecuted by the Municipality of Thána under section 48 of Bombay Act VI of 1873 for causing an obstruction to the public road under the following circumstances.

The applicant was the owner of a shop in a public thoroughfare at Thána.

The shop had planks attached to it in front to serve the purpose of a platform, where the owner sat and on which he exposed his goods for sale.

The planks overhung the public gutter and had been in existence before the District Municipal Act of 1873 came into force at Thána.

In April, 1897, the planks were temporarily removed under the orders of the plague authorities. In October, 1897, after the epidemic had subsided, they were refixed without the permission of the municipality.

For this act the present prosecution was instituted against the applicant under section 48 of Bombay Act VI of 1873.

* Criminal Revision, No. 51 of 1893.

Ráo Bahádur A. G. Kotwal, Magistrate First Class at Thána, convicted the accused and sentenced him to pay a fine of Rs. 5, or in default to suffer five days' simple imprisonment.

Against this conviction and sentence the applicant moved the High Court under its revisional jurisdiction.

Trimbak Ramchandra Kotwal for the applicant.

Ráo Sáheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

PARSONS, J.:—The applicant owns a shop in the main street at Thána. As is very commonly the case with such shops, there were planks attached to it in front which extended over the gutter and formed a sort of shelf or platform, on which the owner could sit and display his wares. No doubt while they thus greatly increased the dimensions of the shop, they were an encroachment upon the public road. By reason, however, of their having been lawfully erected before the District Municipal Act VI of 1873 came into operation in Thána, the municipality could only have removed the planks after making reasonable compensation to the owner as provided for by section 42 of the Act. In April last, the plague authorities, under the very wide powers vested in them by law, caused the planks to be removed, in order, we presume, to be able more effectively to flush and keep clear the gutter of the street. In October last the plague having ceased, and all prohibitions and restrictions of the plague authorities having been removed, the applicant refixed the planks, and for this he has been prosecuted and fined under section 48 of the Act, in that after the Act came into operation he had erected what was an obstruction in the public street.

The conviction is, we think, illegal. We must construe the words used in section 48 of the Act as referring to the erection of a thing for the first time, and not to the simple re-erection of an old structure, which had been taken down for a temporary purpose only. This view receives support from the decisions of this Court upon the meaning of the word "erect" used in section 33 of the same Act (Criminal Ruling 63 of August 30th, 1888, and *Krishnaji Narayan Pokshe* v. *The Municipality of Tasgaon*)[1]. We find that the same construction of a very

(1) (1893) 18 Bom., 547.

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similar provision in their local enactments has been taken by the Calcutta High Court in *Eshan Chunder* v. *Banku Behari Pal* (1), and by the Madras High Court in *Municipal Council, Tanjore* v. *Visvanatha Rau* (2). For this reason we reverse the conviction and sentence.

(1) (1897) 25 Cal., 160. (2) (1897) 21 Mad., 4.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *April* 4.

GOPAL BALKRISHNA KENJALE (ORIGINAL PLAINTIFF), APPELLANT, *v.* VISHNU RAGHUNATH KENJALE AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Adoption—Adoption by a daughter-in-law of A after the estate has vested in A's widow—Permission by A to adopt—Non-consent of widow—Divesting of estate once vested—Widow's authority to adopt in Bombay—Daughter-in-law must have permission—Co-widows—Adoption by one co-widow—Adoption of a son older than adoptive mother.

An adoption cannot divest a person of an estate which has once vested in him, unless such adoption is made with his consent. An exception to this rule is where a co-widow adopts. Such an adoption will divest the younger widow of her estate. Another exception is where a daughter-in-law adopts with the authority of her father-in-law, who is head of the family, as in *Vithoba* v. *Bapu* (1).

Unless prohibited expressly or by implication, a widow in the Presidency of Bombay has authority to adopt, but a daughter-in-law, *i.e.*, the widow of a predeceased son, must be specially authorized by her father-in-law in order that she may make a valid adoption binding as against the heirs of her father-in-law.

Sakubai was the widow of Balkrishna, who died in 1877 in the life-time of his father Raghunath. Fourteen years later, *viz.*, in 1891, Raghu died, leaving a widow Saibai, who succeeded to his estate as his heir. In March, 1892, Sakubai adopted the plaintiff Gopal, who was older than herself, as son to her husband, alleging that she had Raghu's permission to do so. The plaintiff sued for a declaration that as adopted son of Balkrishna he was entitled to succeed as heir to the property of Raghu, as against the defendant Vishnu, who claimed to have been adopted by Saibai as son to Raghu. The lower appellate Court disallowed the plaintiff's adoption on the grounds (1) that Saibai had not consented to it, and (2) that the plaintiff was older than his adoptive mother Sakubai.

* Second Appeal, No. 957 of 1897.

(1) (1890) 15 Bom., 110.