

CRIMINAL REVISION.

Before Mr. Justice Shah and Mr. Justice Marten.

EMPEROR v. NAGINDAS CHHABILDAS.*

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Bombay District Municipalities Act (Bombay Act III of 1901), sections 70, 113 and 122†—Public street—Projection—Projecting a shop-board into a

January 25.

* Criminal Application for Revision No. 391 of 1917.

† 70. (1) When any license is granted by the Municipality under this Act, or when permission is given by them for making any temporary erection or for putting up any projection, or for the temporary occupation of any public street or other land vested in the Municipality, the Municipality may charge a fee for such license or permission.

(2) The Municipality may also charge such fees as may be fixed by by-laws under clause (a) of sub-section (1) of section 43 for the use of any such places mentioned in that sub-section, as belong to the Municipality.

113. (1) The Municipality may give written permission to the owners or occupiers of buildings in public streets to put up open verandahs, balconies, or rooms, to project from any upper storey thereof, at such height from the surface of the street as the Municipality may fix by by-laws from time to time, and to an extent not exceeding four feet beyond the line of the plinth or basement wall, and may prescribe the extent to which, and the conditions under which, roofs, eaves, weather-boards (shop boards) and the like may be allowed to project over such streets.

(2) Any such owner or occupier putting up any such projections as aforesaid without such permission or in contravention of such orders, shall be punished with fine which may extend to twenty-five rupees, if any such owner or occupier fails to remove any such projection as aforesaid in respect of which he has been convicted under this section, he shall be punished with further fine which may extend to five rupees for each day on which such failure or neglect continues.

122. (1) Whoever in any place after it has become a Municipal District, shall have built or set up, or shall build or set up, any wall or any fence, rail, post, stall, verandah, platform, plinth, step, or any projecting structure or thing, or other encroachment or obstruction, in any public street, or shall deposit or cause to be placed or deposited any box, bale, package or merchandise, or any other thing in such street, or in or over or upon, any open drain, gutter, sewer, or aqueduct in such street, shall be punished with fine which may extend to twenty-five rupees.

public street without permission or without paying fees—Surat City Municipality's By-laws 3 and 10†—By-law not ultra vires.

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The accused rented a shop on a public street and projected therefrom a shop-board into the street without having obtained permission of the Municipality and without paying the fees prescribed in that behalf by the Municipality in its by-law 10. On prosecution for offences under sections 113 and 122 of the Bombay District Municipalities Act, 1901, the accused contended that by-law 10 was *ultra vires*.

(2) The Municipality shall have power to remove any such obstruction or encroachment, and shall have the like power to remove any unauthorized obstruction or encroachment of the like nature in any open space not being private property, whether such space is vested in the Municipality or not, provided that if the space be vested in His Majesty the permission of the Collector shall have first been obtained, and the expense of such removal shall be paid by the person who has caused the said obstruction or encroachment, and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under Chapter VIII.

† The by-laws run as under:—

By-law 3. In no public street shall any new permanent open verandah, balcony or room be permitted at a height of less than 12 feet from the ground and where the street is less than 16 feet in width.

By-law 10. Projections may be permitted only on the following conditions:—

(i) That the owner of a projection in respect of which the fees have not been compounded (vide Rule 239) shall, at 48 hours' notice from the Municipal Commissioner, remove the whole or part of such projection on refund of a portion of the annual fee proportionate to the unexpired portion of the year of license, or in case of any breach of these conditions, without such refund.

(ii) In the case of fixed steps on public streets or drains that the owner shall take on lease the land occupied.

(iii) That the owner shall duly pay in advance (vide Rule 244) the fees prescribed by rules under section 46 (i).

The following rules are also material:—

Rule 235. For the purposes of these rules public streets are classified in three classes as per Schedule D and include roadside drains and gutters.

Rule 236. (a) Subject to Rules 237 and 238 the annual fees for balconies, open verandahs and projecting rooms constructed after these rules come into force shall be as shown in Schedule E.

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Held, that the by-law 10 was not *ultra vires* of the Municipality; and that the accused had contravened the by-law.

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THIS was an application in revision from an order passed by S. J. Murphy, Sessions Judge of Surat, confirming the conviction and sentence passed by Ranjit Kalabhai Lallubhai, Honorary First Class Magistrate at Surat.

The accused rented a shop on a public road known as the Galemandi Road in the city of Surat. He projected a shop-board, 16 feet long and 2 feet wide; and it overhang the road at a height of three feet. For this, no permission was obtained from the Municipality; and he paid no fees for the projection, as provided in by-law 10 framed by the Surat City Municipality.

The Municipality thereupon prosecuted the accused for an offence punishable under section 122 of the Bombay District Municipalities Act, 1901. At the trial, an alternative charge under section 113 of the Act was added.

The trying Magistrate convicted the accused of offences under both sections charged, but sentenced him only under section 122 to pay a fine of Rs. 10.

(b) The annual fee for shop-boards shall be as shown in Schedule F but no shop-boards exceeding two feet, one and a half feet and one foot in width shall be allowed to be put up in streets of Classes I, II and III, respectively.

(c) The above annual fees shall be for the official year ending 31st March.

Rule 244. Fees chargeable under section 70 (1) shall be payable and shall be recovered by the Municipal Commissioner before the license or permission is granted.

SCHEDULE F.

Annual fees for shop-boards [Vide Rule 236 (b)].

Public streets, *Class I.* Eight annas per running foot or portion of a foot.

Class II. Six annas per running foot do.

Class III. Four annas per running foot do.

The Sessions Judge, on an application made to him, declined to interfere with the conviction and sentence, on the following grounds :—

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Section 113 opens with the statement that a Municipality may give written permission to occupiers and owners of buildings in public streets, to put up verandahs, balconies and rooms, to project from an upper storey, on certain conditions which are specified. The next clause, separated from what goes before by a comma, is the one relied on. It runs " And the Municipality may prescribe the extent to which, and the conditions under which.....shop boards and the like may be allowed to project over such streets."

The obvious differences between the two clauses are, that the first deals with what may be considered more serious projections, from an upper story only : while the second specifies minor projections, which may be from any part of the building, while under the former clause the Municipality may give written permission ; and in the latter it may prescribe the extent to which and the conditions on which, these specified projections are allowed.

The underlying idea is, I think, that the former class of projections are dealt with on their individual merits ; while the latter are evidently to be provided for by general rules to lay down the extent they may assume, and the conditions on which they may be allowed-

The 2nd para. of the section clearly deals with both classes of projections covered by " any such projections as aforesaid " and imposes a fine for indulging in them " without permission " which appears to refer to the former class ; or " in contravention of such orders ". This seems to me to refer to the prescriptions as the extent and condition, referred to in the first paragraph.

The point in this case is that the Surat Municipality exacts a fee from persons who put up shop-boards ; and applicant put up his without paying this fee, though it appears from the proceedings that he made an attempt to pay it after the prosecution was instituted. It is evident, one of the conditions which may be imposed by a Municipality under the first clause of section 113 is the payment of a fee, and section 70 of the Act specifically empowers it to do so, in the cases of putting up any projections. Any person who puts up such a projection, and does not comply with the condition of paying the fee, may consequently be punished by a fine under the 2nd clause. The conviction under this section is consequently proper.

One of the arguments addressed to me, however, was that if at all the conviction can be had under this section, the fact excludes the possibility of a conviction under section 122, under which section only applicant has been punished. I cannot accede to this argument.

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Section 122 of the Act deals with the cases of persons who put up any structures, including a projection, "or other encroachment or obstruction" in a public street. The argument is that a 'shop-board', not arising actually out of the road, but projecting over it, does not fall under the section. But the section actually contains the words "projecting structure", and I think the distinction is fanciful, for a structure to be an "obstruction" need not necessarily be fastened to some part of the road way. A short rod or wire stretched across a street from house to house, would at a certain level be a very serious obstruction, though not falling within the definition which it is sought to read into the section.

This shop-board admittedly projects 2 feet into the public road at a height of 3 inches from the ground and is to that extent an obstruction of the traffic.

Clause 5 of this section specifically excepts the cases of projections authorized under section (1) of the sub-section 113. "Authorized" can only mean allowed, after compliance with the necessary conditions laid down; but applicant's case is that he is entitled, as of right, to put up a shop-board without complying with any conditions. There I think he is wrong.

The essential difference between the two sections appears to me to be, that under section 113 the punishment is for disobedience of the Municipal rules, while under section 122 it is for obstructing the public way, apart from any such rules. In the present case applicant could have been fined under either section. I think his fine imposed under section 122 is a proper one.

The accused applied to the High Court.

N. K. Mehta, for the accused.—We submit that we have committed no offence either under section 122 or 113 of the Bombay District Municipalities Act, 1901. The former is a general section dealing with obstructions or encroachments in public streets. The latter deals with special class of projections. Sub-section 1 of section 113 deals with two classes of cases: (1) projections as to which the Municipality has the power to grant written permission subject to certain conditions; and (2) powers of the Municipality to impose general conditions, either by general orders, or rules, subject to which projections dealt with can be put up.

The projection complained of here does not contravene any of the by-laws. The accused cannot, therefore, be said to have put up any projection in contravention of

the orders (within the meaning of sub-section 2). We are also under the saving Clause 5 of section 122, as being duly authorised under sub-section 1 of section 113.

Non-payment of fees under by-law 10 is not a contravention of an order under sub-section 2 of section 113, for the by-law applies to such projections only for which previous permission is required. If, however, the by-law applies to any other projections, it is *ultra vires* of the Surat Municipality.

Section 70 of the Act gives power to the Municipality to charge fees; but that power can only be exercised where permission is required for putting up of a projection: see *Dullabh Shivlal v. Hope et al*⁽¹⁾.

S. S. Patkar, Government Pleader, for the Crown, was not called upon.

SHAH, J.:—The point raised in support of this application is that the putting up of the shop-board by the applicant was duly authorized under sub-section 1 of section 113 and was, therefore, exempt from punishment either under section 122 or under section 113 of the Bombay District Municipalities Act of 1901. It is argued that it was duly authorized under section 113 as it was in accordance with by-law 8 of Chapter XIV of the by-laws of the Surat City Municipality.

The board put up is in accordance with by-law 8. But the applicant has clearly contravened by-law 10, sub-clause 3, which requires that the owner shall duly pay in advance the fees prescribed by rules under section 46 (i). It is an admitted fact that the prescribed fee was not paid. It is urged, however, that this by-law 10 is not applicable to such a projection, and even if applicable, it is *ultra vires* of the Municipality to levy any fees. The by-law provides that projections may be permitted only on the conditions which are

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laid down in the three sub-clauses, and under section 113 it is open to the Municipality to prescribe the extent to which, and the conditions under which, shop-boards may be allowed to project over public streets. The by-law, therefore, in my opinion, is clearly applicable to the projection such as we have in this case.

I do not see how it is *ultra vires* in view of the power which the Municipality has under the section to prescribe the extent to which and the conditions under which such projections may be allowed. I do not see any reason to think that the power to prescribe the conditions does not include the power to levy fees before the projections are permitted. Section 70 of the Bombay District Municipalities Act was referred to as showing that the power to charge fees was limited in the manner stated in that section. But it seems to me that under the terms of the section when permission is given for putting up any projection, the Municipality may charge a fee for such permission. There is nothing in the words of the section to justify the applicant's contention that the word "permission" there means "written permission" as contemplated by the first part of section 113, sub-section 1, or that it means permission given in each specific case and not a general permission subject to certain conditions. I feel clear that the fee which is prescribed by by-law 10 is within the powers conferred on the Municipality by the Bombay District Municipalities Act which provides that when permission is given for putting up any projection, the Municipality may charge a fee for such permission. Here the permission granted is general subject to the payment of the prescribed fee. I am, therefore, of opinion that the contention that this part of the by-law is *ultra vires* must be disallowed. No other point has been urged on behalf of the applicant. I would, therefore, discharge the rule.

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MARTEN, J. :—We have here the advantage of a clear judgment from the learned Sessions Judge, Mr. Murphy, with which I entirely agree. In the first place it is clear, I think, that the Municipality have purported to prescribe the payment of certain fees as a condition under which the projecting shop-boards are to be allowed under Chapter XIV, by-law 8. Those conditions are specified in by-law 10 which begins “Projections may be permitted only on the following conditions,” one of which, viz., condition (iii) is that the owner shall duly pay in advance certain fees prescribed by rules under section 46 (i). Then if one turns to the rules, which are in another lengthy volume, one finds in rule 236 that the annual fees for shop-boards shall be as shown in Schedule F; and at last in Schedule F one discovers that these fees are 8, 6 or 4 annas per running foot according as the public street in question is class 1, 2 or 3.

It was contended before us that the “projections” referred to in by-law 10 did not include the projecting shop-boards mentioned in by-law 8. This contention appears to me untenable. By-law 10 refers to projections generally, and sub-section 3 incorporates by reference the above Rules of the Surat Municipality and it is clear from these Rules and in particular from Rule 236 already mentioned that the Municipality require fees for shop-boards. Therefore by erecting his shop-board without first paying those fees I think the applicant broke the condition which the Municipality purported to impose on such erection.

The next point taken by the applicant is that if by-law 10 does cover projecting shop-boards, it is *ultra vires* as the Municipality had no power to prescribe the payment of fees as a condition under section 113 of the Act. But when one turns to section 113, one finds that the Municipality may

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prescribe the extent to which and the conditions under which shop-boards may be allowed to project. The condition which they have imposed *inter alia* is that certain fees should be paid in advance. In my opinion they are entitled to impose a monetary condition and this view is borne out by section 70 of the Act. I accordingly think that the rule should be discharged.

Rule discharged.

R. R.

PRIVY COUNCIL.*

P. C.^o

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ABDUL RAHIM MAHOMED NARMA AND OTHERS (PLAINTIFFS) v.
MUNICIPAL COMMISSIONER FOR CITY OF BOMBAY.

[On appeal from the High Court of Judicature at Bombay.]

Bombay City Municipal Act (Bom. Act III of 1888, as amended by Bom. Act V of 1905)—Construction of Act, sections 290, 297, 299, 301—Powers of Municipal authorities acting in conformity with terms of Act—"Preservation of line of street"—Building a bridge over level crossing of railway—Land Acquisition Act and compensation to owners of land acquired.

Under the Bombay City Municipal Act (Bom. Act III of 1888, as amended by Bom. Act V of 1905), the Municipal authorities have power to acquire land for widening, extending, and improving a public street, and to pay compensation to the owner of the land, notwithstanding that the purpose for which the land is taken is not solely the "preservation of the line of the street," but includes the building of a bridge to carry the road over a railway on the level of the street. They are not restricted to acquiring the land, and paying compensation for it under the Land Acquisition Act. They can prescribe a line for the street and take possession of the part of the owner's land which falls within the line, and so avoid having to proceed under the latter Act.

Cases in which it has been held that powers conferred only for a statutory purpose cannot be validly exercised for a different purpose were not in point. Such an exercise of those powers is outside the Act which confers them. In the present case the exercise of the powers given was within, and in strict conformity with the terms of the Act. The "preservation of the line of the street" was not laid down as the definite and sole object for which the power is to be exercised.

* *esant* ;—Earl Loreburn, Lord Dunedin and Lord Sumner.