

1856
 INDIAN
 GAZETTE
 COMPANY LTD.
 2.
 HARI POONJOO
 Kania J.

a wrong assumption that the old Act was in force. The report does not show that the Court was proceeding on the footing of the old Act and not Act VI of 1898 when that decision was given. The post office rules put before the Court, on the face of them, are only issued under the authority of the Post-Master General and the learned counsel for the plaintiffs did not draw my attention to its publication in the *Government Gazette* or to any statement indicating that they were made or published by the Governor General in Council under section 18 of the Act. I had therefore no occasion to consider the exact effect of those rules on the facts of this case.

The suit will, therefore, be dismissed with costs.

Attorneys for plaintiffs: Messrs. *Mulla & Mulla*.

Attorneys for defendants: Messrs. *M. V. Gokhale & Co.*

Suit dismissed.

B. K. D.

ORIGINAL CIVIL.

Before Mr. Justice Kania.

FAKIR MAHOMED MALANG v. THE MUNICIPAL COMMISSIONER OF THE CITY OF BOMBAY*

1936
 July 3

City of Bombay Municipal Act (Bom. III of 1888), section 411—Municipal Commissioner's power to issue license for butcher's shop—Discretion to refuse license—Specific Relief Act (I of 1877), section 45.

Section 411 of the City of Bombay Municipal Act, deprives every citizen living within the city of Bombay of the power to carry on the business of a butcher except on the grant of a license by the Municipal Commissioner. The power to grant a license for the purpose of carrying on the business of a butcher is vested in the Municipal Commissioner. He has power to refuse such license to a particular person. The power to grant a license necessarily implies a right to refuse to grant it in a particular case.

*Miscellaneous No. 58 of 1937.

This power to refuse to grant a license has to be exercised neither arbitrarily nor for an ulterior motive. So long as the Municipal Commissioner exercises the discretion vested in him for the proper administration of the area under his control, and from no other motive, the High Court will not interfere with his discretion under the powers given to it by section 45 of the Specific Relief Act, 1877.

Rossi v. Edinburgh Corporation⁽¹⁾ and *Gell v. Teja Noora*⁽²⁾, distinguished.

1930
 FAKIR
 MAHOMED
 MALANG
 v.
 THE MUNICIPAL
 COMMISSIONER
 OF BOMBAY

PETITION under section 45 of the Specific Relief Act, 1877.

The petitioner, Fakir Mahomed Malang, carried on business as a butcher at Charni Road in the city of Bombay, for a number of years under a license from the Municipal Commissioner of the City of Bombay. That license was renewed from time to time and the last renewal was for the period of one year ending March 31, 1931.

In 1930 the Bombay Municipal Corporation resolved to open a market at Chandanwadi and in order to popularise that market an intimation was given to several owners of private mutton shops including the petitioner, who were doing business near that locality, that their licenses would not be renewed after April 1, 1932. The reason given for not renewing the license was that the shop of the licensee was within half a mile of the market. The petitioner made several applications for the renewal of his license but it was not renewed. The petitioner alleged that in 1932 the Municipal Corporation passed a resolution not to allow any private mutton shop within half a mile of the Chandanwadi market. He alleged that his shop was not within half a mile of that market.

Several prosecutions were launched against the petitioner by the Municipality and he was fined on a number of occasions. He was again prosecuted in March 1936 under section 472 of the City of Bombay Municipal Act for carrying on the business of a butcher without a license. He applied for an adjournment of the complaint to enable him to

⁽¹⁾ [1905] A. C. 21.

⁽²⁾ (1903) 27 Bom. 307.

1936

FAKIR
MAHOMED
MALANGv.
THE MUNICIPAL
COMMISSIONER
OF BOMBAY

present a petition to the High Court under section 45 of the Specific Relief Act.

The petitioner filed such a petition calling upon the Municipal Commissioner to issue a license to him permitting him to carry on the business of a butcher at Charni Road, and in the meantime to restrain the Commissioner from prosecuting the petitioner under section 472 of the Bombay City Municipal Act.

It was contended for the petitioner that under the provisions of the City of Bombay Municipal Act, it was incumbent on the Municipal Commissioner to issue a license in favour of the petitioner and that he had no power to refuse to grant or renew the license applied for.

It was urged on behalf of the Municipal Commissioner that under the City of Bombay Municipal Act certain duties were imposed upon him regarding the supervision and control *inter alia* of markets for the sale of animal flesh and that such supervision and control were essential in the interests of public health. That he had a discretion vested in him to grant or refuse a license for the purpose of carrying on a butcher's shop, under section 411 of the Municipal Act and that he in exercising that discretion followed a policy which was reported to and met with the approval of the Municipal Corporation. The basis of that policy was that it was neither necessary nor desirable in the interest of public health to grant a license for such a purpose in respect of premises situated in proximity to a licensed private market or a Municipal market to which the public could conveniently resort.

The Municipal Commissioner made a statement on oath that he considered the petitioner's application for such a license on its merits and that he was of opinion that it would not be advisable in the public interests to grant a license to the petitioner. He further stated that he had already informed the petitioner that he would be prepared to

reconsider the petitioner's application for a license if and when the Chandanwadi Municipal market was closed.

H. D. Banaji, for the petitioner.

D. N. Bahadurji, for the respondent.

KANIA J. This is a petition filed under section 45 of the Specific Relief Act, praying that the respondent, the Municipal Commissioner, be ordered to issue a license to the petitioner permitting him to carry on the business of a butcher at Charni Road. There is a further prayer asking for an injunction against the respondent prosecuting the petitioner in the Police Court for carrying on the business of a butcher without a license.

The petition and the affidavits show that the petitioner has been carrying on the business of a butcher at a shop in Girgaum for many years past. In about 1928, the Municipality, after mature deliberation, came to the conclusion that it was in the municipal interest of the city of Bombay that the sale of meat should be confined to specific areas. From the annexures to the affidavit of Mr. Laud it appears that this policy was reiterated many times in the communications between the Municipal Committee and the Commissioner and the applicants for licenses and the Commissioner. It further appears that in pursuance of that policy the Municipality has erected a market at Chandanwadi. Besides this market there also exists another market at Chira Bazar, which is a private market, where meat is sold.

The petitioner applied for a license in respect of a shop at Charni Road but that was refused. After repeated attempts made by him to persuade the respondent to reconsider his decision and in view of the fact that the Municipality launched a criminal prosecution against him under the penal section of the Act, the petitioner has made this application to the Court. It is clear from the facts that the petitioner's shop is more than half a mile away from the Chandanwadi

1936

FAKIR
MAHOMED
MALANG

v.
THE MUNICIPAL
COMMISSIONER
OF BOMBAY

1936

FARUK
MAHOMED
MALANGv.
THE MUNICIPAL
COMMISSIONER
OF BOMBAY

Kania J.

market but within half a mile from the private market at Chira Bazar. It also appears that the policy of the Municipality is that shops of this nature should not be permitted within half a mile of a recognised market where meat is sold. In his affidavit the respondent says that this policy has been adopted with a view to facilitate the work of supervision and to meet the general requirements of the locality as a whole. In my opinion, the policy so adopted is not open to question as violating any principle of Municipal administration.

On behalf of the petitioner it is first contended that section 411 of the City of Bombay Municipal Act does not empower the respondent to refuse a license when applied for. It is urged that whenever legislature intended to invest the Commissioner with a discretion it had done so in specific terms. For this purpose reliance is placed on section 394 (4). The petitioner further relies on the decision in *Rossi v. Edinburgh Corporation*⁽¹⁾ to support his contention that it is only within the power of the legislature to deprive a citizen of his right to carry on a business as and where he pleases and it does not lie within the power of the Commissioner or any other person, unless expressly invested by legislature with such power, to curtail that liberty of a citizen. Further, reliance is placed on the decision in *Somas Pillai v. The Municipal Council, Mayavaram*,⁽²⁾ to show that in the event of a doubt as to the extent of the power of the Commissioner, the construction should be in favour of the subject and against the Commissioner. The petitioner further relied on *Rustom J. Irani v. H. Kennedy*,⁽³⁾ *Gell v. Taja Noora*,⁽⁴⁾ *Alimahomed v. Municipal Commissioner of Bombay*,⁽⁵⁾ and *Pachan Ladha v. The Municipal Commissioner, Bombay*,⁽⁶⁾ in support of the contention that the discretion exercised by the Commissioner in this

⁽¹⁾ [1905] A. C. 21.⁽²⁾ (1905) 28 Mad. 520.⁽³⁾ (1901) 26 Bom. 396.⁽⁴⁾ (1903) 27 Bom. 307.⁽⁵⁾ (1924) 27 Bom. L. R. 581.⁽⁶⁾ (1935) 60 Bom. 838.

particular case was arbitrary, and, therefore, should be set aside.

Section 411 of the City of Bombay Municipal Act runs as follows :—

“ No person shall without, or otherwise than in conformity with the terms of, a license granted by the Commissioner in this behalf—

(a) carry on within the city, or at any municipal slaughter-house, the trade of a butcher ;

(b) use any place in the city for the sale of the flesh of any animal intended for human food, or any place without the city for the sale of such flesh for consumption in the city.”

In my opinion the first contention of the petitioner is incorrect. Section 411 of the City of Bombay Municipal Act, in terms, deprives every citizen, living within the city or to whom the Act applies, of the power to carry on the business of a butcher. The only exception to that is the grant of a license by the Commissioner and carrying on the trade of a butcher in conformity with the terms of that license. The present case, therefore, differs materially from the decisions in *Rossi v. Edinburgh Corporation*⁽¹⁾ and *Gell v. Taja Noora*⁽²⁾ inasmuch as in those cases there was no express provision made by the legislature depriving every citizen of his right to carry on the particular trade. The relevant sections quoted in those decisions are the penal sections corresponding to section 471 of the City of Bombay Municipal Act. It is, therefore, not open to the petitioner to contend that the Commissioner has attempted to deprive the citizens of Bombay of their right to carry on the trade of a butcher. In fact by section 411 of the Act the legislature has imposed that restriction.

The next contention of the petitioner that the respondent is under an obligation to issue a license when asked for, is also unsound. In the Act there is no express provision giving power to the Commissioner to grant a license to carry on the trade of a butcher. By reason of the words

⁽¹⁾ [1905] A. C. 21.

⁽²⁾ (1903) 27 Bom. 307.

1936

FAKIE
MAHOMED
MALANG

THE MUNICIPAL
COMMISSIONER
OF BOMBAY

Kania J.

1936

FAKIR
MAHOMED
MALANGTHE MUNICIPAL
COMMISSIONER
OF BOMBAY

Kania J.

used in section 411 it seems that the power is impliedly vested in the Commissioner. If this view is not accepted the other alternative would be to consider that there is no power in the respondent to grant the license. That would be against the clear intention of section 411 and clearly detrimental to the rights of the public, because in that event there would be no licensing authority at all. If this power is deemed to exist in the Municipal Commissioner, impliedly by reason of the terms of section 411, it follows that the power to refuse the license must also be vested in the same authority because a power to grant necessarily implies a right to refuse. To consider otherwise would mean that there was an obligation on the Commissioner imperatively to grant a license and that he had no jurisdiction to refuse the same. There appears in the Act no words to justify such a conclusion. Whenever the legislature desired to impose any such obligation on a public servant the legislature used appropriate words to show clearly its meaning. A reference to section 12 of the City of Bombay Police Act quoted in the decision in *Rustom J. Irani v. H. Kennedy* makes this position clear. As pointed out by Jenkins C. J. in that case the legislature had deliberately made use of the word "shall" when it intended to impose on a public servant the obligation to issue a license. At the utmost, therefore, section 411 can be construed to mean that the Municipal Commissioner was not under an obligation to issue a license but had the power to issue the same. In that view, as I have pointed out, the power to grant a license must necessarily be accompanied with the right to refuse, because otherwise the term "power" would have no meaning.

If the Municipal Commissioner has, therefore, the power to grant a license it must be a power which he is to exercise in a proper manner, i.e. not arbitrarily or for an ulterior motive. Although no express words are found in the Act giving him the discretion or limiting his discretion in the exercise of his power, in my opinion that would be the

proper view to take of the limits of his power. In the present case the grounds stated by the Commissioner are set out *in extenso* in his affidavit. So long as the discretion is exercised for the proper municipal administration of the area under the control of the Commissioner, and from no other motive, I am unable to consider that the exercise of the power would be arbitrary or unlawful. The affidavit shows clearly that the Commissioner had exercised his discretion only for the purpose of the Municipal welfare of the inhabitants of the particular locality, in accordance with the considered policy of the Municipality. If that position is not found to be incorrect, there would be no justification to interfere with the discretion of the Municipal Commissioner.

On behalf of the petitioner it is contended that the Chandanwadi market has proved a failure and very few stalls are in fact in the occupation of vendors of vegetable, fish or meat. It is, therefore, contended that the Municipal Commissioner is not at present exercising the discretion in a proper way and the Court should interfere in the matter. While realising that if the market proved to be a failure the Municipal Commissioner may properly reconsider his decision in granting the license to the petitioner, I see no reason at this stage to interfere with the exercise of his discretion. The Commissioner has already intimated to the petitioner that as and when the Chandanwadi market scheme is found to be a failure and the building is directed to be used for another purpose, he would reconsider the question of granting the petitioner a license. So long, however, as in fact the Chandanwadi market is used for the avowed object of furthering the Municipal policy laid down in the resolutions, it cannot be stated that the scheme had failed, and, therefore, action should be taken on the footing that the scheme did not exist. The Chandanwadi market yet exists for the use and benefit of the vendors who choose to go there. The ground mentioned by the Municipal

1936

FAKIR
MAHOMED
MALANG

v.
THE MUNICIPAL
COMMISSIONER
OF BOMBAY

Kania J.

1936.

FAKIR
MAHOMED
MALANG

v.

THE MUNICIPAL
COMMISSIONER
OF BOMBAY

Kania J.

Commissioner, viz., to facilitate the supervision of such shops, is still applicable inasmuch as there is another market (although a private market) at Chira Bazar where meat is being sold. Under the circumstances I am unable to consider that the exercise of the discretion by the Commissioner on the face of it is arbitrary or unlawful. The Court would not, therefore, be justified in interfering with the same.

The petition is, therefore, dismissed with costs.

Attorneys for applicant : Messrs. *Cama & Co.*

Attorneys for respondent : Messrs. *Crawford, Bayley & Co.*

Petition dismissed.

B. K. D.

APPELLATE CIVIL.

Before Mr. Justice Barlee and Mr. Justice Tyabji.

1936
October 9

PALLONJEE EDULJEE AND SONS, CARRYING ON BUSINESS IN PARTNERSHIP AT BOMBAY BY THEIR PARTNER PALLONJEE EDULJEE (ORIGINAL PLAINTIFF), APPELLANT *v.* THE LONAVLA CITY MUNICIPALITY THROUGH ITS CHIEF OFFICER (ORIGINAL DEFENDANT), RESPONDENT.*

Indian Contract Act (IX of 1872), section 70—Bombay Municipal Boroughs Act (Bombay Act. XVIII of 1925), sections 48 and 49—Contract with Municipality for building a vegetable market—Under oral directions from President additional buildings constructed for a beef market and a slaughter house—Contractor's claim for additional work done—Liability of Municipality to pay.

The Lonavla City Municipality entered into a contract in writing with the plaintiff for constructing a new vegetable market. While the building was under construction, the President of the Municipality gave oral directions to construct, in addition, other buildings for a beef market and a slaughter house. The plaintiff sued to recover the costs of the latter buildings on the Municipality taking possession of the same. The Municipality contended that as the provisions of sections 48 and 49 of the Bombay Municipal Boroughs Act, 1925, had not been followed, the Municipality was not bound by the oral contract and therefore was not liable. The trial Judge dismissed the plaintiff's suit. On appeal to the High Court,

Held, decreasing the suit, that for the purposes of his claim, the plaintiff could rely upon section 70 of the Indian Contract Act, 1872, as there was delivery of the

*First Appeal No. 143 of 1933.