

1871.
June 24.

CHABILDÁS LALLUBHÁI.....Plaintiff.

THE MUNICIPAL COMMISSIONER OF BOMBAY... Defendant

Injunction—Acts of Trespass committed by Public Functionaries—Municipal Act, Secs. 131 and 160—Setting back Houses—Continuing Trespass—Unfounded Apprehension of Plaintiff.

Principles upon which the court will interfere by injunction to restrain acts of public functionaries in excess of their statutory powers considered.

If the Municipal Commissioner of Bombay is desirous of putting in force the provisions of Sec. 131 of the Municipal Act Bombay Act II of 1865) and compelling a householder (whose house has been taken down) to set the foundations back to the general level of the street, he must exercise his powers when, or within fourteen days after, the householder gives notice, under Sec. 160 of the Act, of his intention to rebuild.

Where a trespass of a continuing nature has been committed by the defendant, but has been discontinued before suit brought, the Court will not interfere by injunction to restrain the defendant from continuing such trespass merely because the plaintiff entertains vague apprehensions that trespass may be recommenced.

THE plaintiff in this case was the owner (subject to certain reversionary rights on the part of Government, immaterial for the purpose of this report*) of a piece of land at the corner of Chinná Butcher Street leading to the Nal-Bazár markets.

In 1866 the Collector of Bombay issued a notice, under Act VI of 1857, that the land in question was required for public purposes, namely, to enlarge the Nal Bazár markets, but no further proceeding were taken under this notice. A similar notification (dated 3rd February 1868) was published in the *Bombay Government Gazette* of the 6th of February 1868, but the purpose for which the land was required was not specified in it. The fact of the lastmentioned

* NOTE.—The grant to the predecessor in title of the plaintiff, which bore date 8th September 1840, was in the form of a written permission to him by Governor to occupy the premises upon payment of six pies per annum per square yard, "the said ground to be at any time resumable by Government without any compensation whatever being given, and the materials of the buildings or improvements to be removed at the grantee's expense." The plaintiff contended that the provision of this permission has been waived or altered by the subsequent conduct of Government.

1871. notification having been made was expressly brought to
 Chabildas the notice of the plaintiff by a letter sent him to by the
 Lallubhai Collector on the 26th of July 1869, in reply to a request on
 v. the part of the plaintiff to be allowed to purchase the fee
 Municipal simple in the land.
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On the 5th of August 1869, and again on the 15th of September 1869 (no steps having then been taken under the notification of February 1868), the plaintiff, being then about to purchase the land, wrote through his solicitors to the defendant asking to be informed whether it was still required for public purposes.

The defendant, on the 25th of September 1869, wrote in reply to say that the land was not required for a public purpose.

In November 1870 (the exact date was not in evidence) the buildings that had therefore stood upon the land were almost completely destroyed by fire.

The plaintiff thereupon, in accordance with Sec. 158 of Bombay Act II. of 1865, on the 25th of November, sent in a building-application to the defendant with a plan. On the 30th of November the application and plan were returned to the plaintiff on account of their not bearing the proper stamps (one anna each). They were then resubmitted, properly stamped, and on the 12th of December 1870 the following reply was received by the plaintiff:—

"To CHABILDAS LALLUBHAI, Esq.

"SIR—In reference to your building-application of the 25th ultimo, I regret to have to inform you that the permission to rebuild your *chals* at Chinná Butcher Street cannot be granted, since the property is required for public purposes.

"A duplicate of your application is herewith returned. The original is kept in this office for record, as usual.

"I have the honour to be, &c.:

"RINKI WALTON,

"Deputy Executive Engineer, Municipality.

"Bombay, the Public Engineer's Office,

"12th December 1870."

ORIGINAL COPY DESTROYED

After some further correspondence, the plaintiff, on the 21st of February 1871, received the following letter:—

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"From THE DEPUTY EXECUTIVE ENGINEER, MUNICIPALITY,
TO CHABILDA'S LALLUBHAI, Esq. Plaintiff

"SIR,—With reference to your letter of the 7th instant, I have to inform you that the Commissioner has refused to alter his original refusal. I notice that your friend, RIENZI WALTON, C.E."

On the 19th of March, and which project, commenced and very rapidly proceeded, being taken down for the land in question in accordance with the order and by virtue of the Municipal Act of 1862, the Deputy Executive Engineer in Bombay, Sec. 131 of Bombay Act No. 11 of 1862, to set back the same to or towards the line indicated by the line staked out on the 19th of March, and take notice that should you build on the site of the plaintiff's property, as of the said Act. I will, as empowered by the Municipal Act, order the work of rebuilding the building to be altered or demolished, and on the same day the Commissioner will proceed to recover from you the expenses incurred in the said Act. I will also order for any damage you may sustain by a competent authority to be assessed, and the amount of such compensation, if any, to be determined by the Court of petty Sessions in the manner provided in the Municipal Act. The action that Superintendent Brown took in this matter was detailed in his affidavit.

On the 20th of March, by the direction of the Commissioner of Police requesting the site of the plaintiff's property, the work of rebuilding the building to be altered or demolished, and on the same day the Commissioner will proceed to recover from you the expenses incurred in the said Act. I will also order for any damage you may sustain by a competent authority to be assessed, and the amount of such compensation, if any, to be determined by the Court of petty Sessions in the manner provided in the Municipal Act. The action that Superintendent Brown took in this matter was detailed in his affidavit.

"ARTHUR GRAY

"On the 20th of March, by the direction of the Commissioner of Police requesting the site of the plaintiff's property, the work of rebuilding the building to be altered or demolished, and on the same day the Commissioner will proceed to recover from you the expenses incurred in the said Act. I will also order for any damage you may sustain by a competent authority to be assessed, and the amount of such compensation, if any, to be determined by the Court of petty Sessions in the manner provided in the Municipal Act. The action that Superintendent Brown took in this matter was detailed in his affidavit.

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ting and going on with the chals, which my Native subordinate reported to me: and I, after reporting the matter to the Deputy Commissioner of Police and the Municipal Commissioner, under instructions from the latter, withdrew the surveillance of the police and neither I nor any of my subordinates have since that time in any way hindered the plaintiff or his men from the work, and the chals are now, and was soon after it was built occupied by a number of tenants of the plaintiff, who have shops therein. Neither I nor any of the police have again interfered in possession other than for the purpose of keeping such persons from the work in which they were not interfered with, neither have the police been in possession even to that extent through his solicitor.

The defendant made an application whether it was to be stated that the property was almost destroyed by fire in the month of November 1870, and that the same had been very much in the way of the approach to the markets then already existing, and, in his opinion, came within the scope of Act II. of 1865, and as it was proved that such market approaches to such market places had been determined not to be sanctioned in accordance with Sec. 153 of the Act of 1865, and as it was proved that such improvements were destroyed by fire in the month of November, sent in a plan. On the 1st of January 1870, the defendant submitted, proposing that the plaintiff should be allowed to carry out the proper works, under the sanction of the Municipal Commissioners, and that he should not wish to be disturbed in more of the same, and that he had already been estimated, as empowered by Sec. 153 of 1865, caused the Municipal Executive Engineer to prepare a plan for the widening of the street and approaches to the market; and that throughout he acted with perfect bona fides, and was acting bona fides.

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That he was ready and willing to pay the plaintiff compensation for the value of all material upon the ground taken for the widening of the street and approaches to the market; and that throughout he acted with perfect bona fides, and was acting bona fides.

by no other motive than to carry out the provision of the Act for these purposes and in the public interest.

In addition to the several letters before referred to, the defendant on the 21st of March 1871 wrote to the plaintiff the following letter, which the plaintiff alleged that he did not receive until the 24th of March:—

To CHABILDAS LALLUBHAI.

"SIR,—I hereby give you notice that your *chal* No.—in Mutton Row and Chimmá Butcher Street, and which projected beyond the regular line of the said street, having been taken down for the purpose of being rebuilt or altered, I, under and by virtue of the powers and authorities given to and vested in me by Sec. 131 of Bombay Act II. of 1865, hereby require you to set back the same to or towards the line of the street in the manner indicated by the line staked out by the *mistri* of this department. And take notice that should you build beyond the line of the street so indicated as aforesaid, or in any other respect contrary to the provisions of the said Act. I will, as empowered by Sec. 169 of the said Act, cause the building to be altered or demolished, as the case may require, and will proceed to recover from you the expense thereby incurred in the manner in the said Act provided. I will make full compensation to you for any damage you may sustain by a compliance with the terms of this notice the amount of such compensation, in case of dispute, to be settled by the Court of petty Sessions in the manner in the said Act provided.

"ARTHUR CRAWFORD,

"Municipal Commissioner."

"Bombay, March 25th. 1871.

To ARTHUR CRAWFORD, Esq.,

Municipal Commissioner.

The plaintiff, on the 25th of March 1871, wrote, through solicitors, in reply, as follows:—

"SIR,—Your notice of the 21st of March instant delivered to our client Mr. Chabildas Lallubhái on the morning of yesterday has been placed in our hands and in reply we are instructed to state that due notice of our client's intention to rebuild the *chal* was given to you, and as it was seen that the rebuilding was completed, our client is advised that you cannot now call upon him to set back the building which he has erected on the old foundation.

"Yours obediently,

"JEFFERSON & PAYNE"

On the 3rd of April 1871 the Collector of Bombay wrote to the Plaintiff requiring him to vacate the land in accordance with the terms under which it was held, as the Government required the land. No steps were taken to enforce this requisition.

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On the 4th of April 1871 a month's notice of action in respect of the premises was given to the defendant.

On the 9th day of June a plaint was, accordingly, filed, in which the plaintiff prayed—(1) That he might be declared to be entitled, as against the defendant, to the peaceful possession and enjoyment of the premises, and of all his, the plaintiff's, rights and equities into or out of the same; and that the defendant should be ordered and directed to clear the said possession and to yield it up to the plaintiff forthwith. (2) That the defendant, his subordinate officers, agents, and servants should be restrained by injunction from continuing or allowing any other person or persons under their control or authority respectively from continuing or remaining in the possession or occupation, or resuming or retaking the possession or occupation, of the purchased premises respectively, or from preventing or impeding the rebuilding by the defendant of the destroyed portion thereof, or the work of the plaintiff in or towards such rebuilding, without the order or sanction of the court first obtained in that behalf. (3) That the defendant should be decreed to pay unto the plaintiff the sum of Rs. 30,000 (or such other sum as the court should direct) as and for his damages sustained or incurred in the premises through the wrongful actings, doings, and defaults of the defendant, and also the costs of the suit.

On the 10th of June, *Anstey* obtained a *rule nisi* for an injunction in the terms of the second part of the prayer of the plaint.

Green now shewed cause, and contended—(I.) that the act sought to be restrained was a mere act of trespass and that it was not the practice of Courts of Equity to restrain such acts by interlocutory injunction, unless in cases where the apprehended injury was irremediable, and was of such nature as to be incapable of being compensated by damages. (II.) That the defendant was justified in what he had done, under the provisions of Act II. of 1865 (Bombay), Secs. 131 and 160. (III.) That the alleged trespasses and injuries had ceased before action brought, and there was nothing to show an intention on the part of the

defendant to continue them. He cited on the first point, *The Attorney General v. Cambridge Consumers Gas Co.* (a), *The Attorney General v. Sheffield Gas Co.* (b); on the last *North Union Rail Co v. Bolton and Preston Rail. Co.* (c). 1871.
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Anstey (with him *Marriott*), in support of the rule cited on the last point *Inchbald v. Robinson* (d). He also relied on the case of *The Queen v. Lord Mayor of London* (e); Gale on Easements, pp. 430, 432; Kerr on Injunctions, P. 199.

Cur. adv. ult.

24th June 1871. SARGENT, J. (after reading the plaint and referring to the affidavits, continued):—The justification of the acts of the Commissioner, the defendant in this case is based upon the powers given to him by Act 11. of 1865, and more particularly upon the provisions of the 131st and 160th sections. It will, therefore, be necessary to refer somewhat in detail to the provisions of the Act; but before doing so I must notice an objection that was taken *in limine* by Mr. Green—that even assuming the facts to be as stated by the plaintiff, and his contention to be correct, the act complained of was a simple act of trespass, and that it is contrary of the practice of Courts of Equity to restrain acts of trespass, unless the injury apprehended from them is of such nature as that its repetition would cause irreparable loss to the plaintiff. That may be true when the trespass complained of is the act of a private individual, but the rule does not apply I apprehend, when the act, as here, is the act of a public functionary. For the correct exposition of the law applicable to public companies, and persons in a similar position, I cannot do better than refer to Mr. Kerr's work on injunctions at page 295, where he says: "The principles upon which the Court acts in restraining trespass on the part of companies or bodies of functionaries incorporated by Act of Parliament, and having compulsory powers to take or enter lands, differ in some respects from those upon which it acts in restraining trespass by individuals. A private person who applies for an injunction to restrain a public incorporated company or body of functionaries from entering

(a) Law Rep. 5 Ch. App. 71. (b) 3 De G., M & G. 304.
(c) 3 R. Ca. 345. (d) 17 W. Rep. 272. • (e) 2 Q. B. 292.

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illegally on his land is not required to make out a case of destructive trespass or irreparable damage. The inability of private persons to contend with these powerful bodies, which have often large sums of money at their disposal, and are of ten too prone to act in an arbitrary and oppressive manner, raises an equity for the prompt interference of the Court to keep them within the strict limits of their statutory powers, and prevent them from deviating in the smallest degree from the terms prescribed by the statute which gives them authority. If they enter upon a man's land without taking the steps required by the statute, the Court will at once interfere. A man has a right to say that they shall not affect his land by stirring one step out of the exact limits prescribed by the statute. The principle upon which the Court interferes in such cases is, not so much the nature of the trespass, as the necessity of keeping them within control. It is incumbent on them to prove clearly and distinctly from the statute the existence of the power which they claim a right to exercise. If there is any doubt with regard to the extent of the power claimed by them, that doubt must undoubtedly be for the benefit of the landowner, and should not be solved in a manner to give to the company any power that is not clearly and expressly defined in the statute. The Court has not only jurisdiction to interfere to restrain a company from affecting a man's land by stirring out of the exact limits prescribed by the statute which gives them authority, but is almost bound to interfere, and will, as a matter of course, interfere unless the damage is so slight that no injury has arisen or is likely to arise, or unless the injury, if any has arisen is so small as to be hardly capable of being appreciated by damages or unless the remedy by damages at law is adequate and sufficient, or is, under the circumstances of the case, the proper remedy, or unless the trespass is one merely of a temporary nature."

I now turn to a consideration of the sections relied on in justification of the acts that have been committed by the defendant. These sections are to be found, under the heading "General Conservancy of the City." This part of the Act

confers very extensive powers upon the Commissioner. Sec. 107 gives him power, in laying out new streets or in improving existing ones (with the sanction of the Justices,) to purchase land necessary for the formation or improvement of such streets. Under Sec. 108 he may agree with the owners of such land for the purchase of it: if that can be done, well and good but if no such agreement is come to Sec. 109 points out the course that is to be pursued. The Commissioner is to apply to the Governor in Council, and the Governor in Council, after making inquiries, may declare that the land is needed for a public purpose, and may order proceedings to be taken for obtaining possession of the same for Government and for determining the compensation to be paid to the owner. What these proceedings were in October 1870 is pointed out in Act VI. of 1857. The commissioner is not given any power to acquire land otherwise than by agreement with the owner. If he does not enter into such agreement, he must apply to the Governor, and the Governor, not the Commissioner, then is to proceed under Act VI. of 1857. The next section I refer to is Sec. 131, which enacts that when any house or building (any part of which projects beyond the regular line of a public street) has either entirely or in greater part been taken down, burned down, or fallen down, the Commissioner may require the same, when being rebuilt, to be set back to the line of the street; and there is then a proviso that the commissioner shall make full compensation to the owner for the damage he may sustain in consequence. The question then arises, when is that power to be exercised by the Commissioner. Now Sec. 153 enacts that before beginning in or near any street to build any house, the person intending to build such house shall give to the commissioner notice thereof in writing, which notice is to be accompanied with a plan containing certain particulars prescribed by the section. and, by Sec. 159, the Commissioner may, within fourteen days after the receipt of the notice, require the house to be set forward or back. But if he allows the fourteen days to elapse, then, by Sec. 161, the person giving such notice may proceed to build, provided such building be otherwise in accordance with the Act—that is

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does not contravene any of its express enactments. I think the Commissioner must, if he wishes to exercise the power given him under Sec. 131, exercise it within the fourteen days prescribed by Sec. 159 and that omitting to do so he cannot afterwards exercise it.

To apply these sections to the facts of this case, we find that the plaintiff's buildings having been destroyed by fire, he gave notice of his intention to build on the 24th of November. That notice was returned to him, but was resubmitted properly stamped, on the 30th of November, together with a plan. Within fourteen days the Municipal Commissioner, did send a letter, but not one contemplated by Sec. 159; it was simply a notice that the land was required for public purposes—a notice with, as I have pointed out, the defendant had no authority to issue. Such a notice could only be given in the usual course by Government. I consider, therefore, that the notice which the Municipal Commissioner did give was not a notice which would prevent the plaintiff from proceeding to build. No other notice was given.

That being so, the plaintiff found himself in a position to act according to the power given by Sec. 161 to a person to whom no approval or disapproval had been signified, namely to proceed at once to build. It is true there was a subsequent notice given on the 21st of March, but that, being after the fourteen days, could not prevent the plaintiff from building, unless it can be held that Sec. 131 is one which can be put in force at any time, and that I have decided cannot be done.

Now there can be no doubt upon the affidavits that the police did compel the plaintiff to desist from proceeding with the building; and if that state of things had existed up to the time when this injunction was applied for it would be the duty of the court to restrain the Municipal Commissioner from continuing the acts in question. The Municipal Commissioner had stated that what he did he did according to his view of the Act, and there is not any reason to suppose that he was actuated by any other motive. But that does not affect the question before the court, for, whatever the motive it would be the duty of the court to restrain the Commis-

sioner if his acts are in excess of his powers. It appears however, that in the middle of may the police withdrew altogether from the building, and that since that time there has been no interference whatever, except what the plaintiff calls surveillance. From the time that the police withdrew from the premises the unlawful exercise of power ceased: and the question, therefore, which arises is, whether the plaintiff had any reasonable apprehension that these unlawful acts would be resumed before the cause came on for hearing.

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I think he could not have been under any such apprehension. The acts here had ceased more than a fortnight before the plaint was filed. I cannot find any case in which the Courts of Equity have interfered by injunction where the act complained of had entirely ceased at the time of the injunction being applied for. There was a case cited by Mr. Austey, *Inchbold v. Robinson (a)*, but it does not apply to the facts before me. That was the case of a nuisance, and the court thought that the plaintiff was justified in apprehending there would be a repetition of it, from his experience of what had occurred the year before. Here the acts complained of had *entirely ceased* at the time this suit was filed. The police, in the Middle of May, withdrew from the premises and they have not since then interfered with the building operations of the plaintiff further than to exercise what the plaintiff calls a surveillance over the property—a vague term, upon which I do not think that the court is called upon to act.

In a case like this I must look, moreover, to the public convenience, and seeing that the defendant is the person charged with the general sanitary arrangements of this town, having various functions to discharge in respect of its streets and buildings, injury might, under certain circumstances, be caused to the public by any granting this injunction in the very general and somewhat indefinite terms in which it is prayed. On this ground, therefore, as well as on the ground that the plaintiff, at the time the rule *nisi* was

(a) 17 W. Rep. 272.

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granted, could not have had any reasonable apprehension that the acts complained of would be recontinued, the rule nisi must be discharged, but, under all the circumstances of the case, without costs.

Rule nisi discharged without costs.

Attorneys for the plaintiff : *Jefferson & Payne.*

Attorneys for the defendant : *Leathes & Crawford.*

June 15.

Suit No. 655 of 1868.

VAKHATCHAND LAKHMICHAND.....*Plaintiff.*

THE ADVOCATE GENERAL *et al.*..... *Defendants*

*Practice—Hearing of Suit—Joinder of new Parties—Civ. Proc. Code,
Sec 73—Proceedings in Commissioner's Office*

After a decree has been made whereby a suit has been referred to the Commissioner's office to have accounts taken and property sold, the Court has still power (if it should be found necessary) to add, as fresh parties to the suit, persons who are interested in its subject-matter and are likely to be affected by its results.

THIS suit was instituted by the plaintiff, Vakatchand Lakhnichand, as executor of the will of one Párvatibái who had devised and bequeathed one-half of her estate for certain charitable purposes. The estate of Párvatibái consisted amongst other things of a house (No. 66) in Boráh Bazar Street and a house (No. 51) in Bazar Gate Street.

The house (No. 66) in Boráh Bazar Street had been mortgaged by the plaintiff, in his capacity of executor, to the defendant Vailabhái Lalubhai, who, in the pretended exercise of a power of sale contained in his deed of mortgage had sold the house to the defendant Vrijál Gokaldáa.

The object of the suit was to have the lastmentioned sale declared void and set aside; to have the house, the subject of that sale, and also the house (No. 51) in Bazar Gate Street, sold under the order of the court; and to have it referred to the commissioner of the court to ascertain and report how much of the proceeds of the houses was appli-