

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

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August 23.

KALIDAS (ORIGINAL PLAINTIFF), APPELLANT, v. THE MUNICIPALITY
OF DHANDHUKA (ORIGINAL DEFENDANT), RESPONDENT.*

*Bombay District Municipal Act VI of 1873, Sections 3 and 17—Street—Court
—Mehela—Khadki—Ota.*

The plaintiff was the owner of two houses and mortgagee of a third house out of a set of six which surrounded an open court in the town of Dhandhuka, and which, including the court, originally belonged to a single individual. The plaintiff built an "ota" or verandah, and put up a wooden bench in front of his house, which the Municipality of the town ordered to be removed. In a suit by the plaintiff to have this order set aside the District Court found that the occupant of each house had the right of way across the court, which was used as a means of access to the houses which surrounded it by persons having business with the householders.

Held that such limited access by the public was not sufficient to show that the court ceased to be private property, and was converted into a "street" vesting in the Municipality within the meaning of sections 3 and 17 of Bombay District Municipality Act VI of 1873; and that the Municipality had not any right to interfere with the plaintiff's erection, whatever liability he might have incurred to an action by any of the other householders who occupied the court.

THIS was a second appeal from the decision of M. B. Baker, District Judge of Ahmedabad, confirming the decree of A. H. Unwin, Assistant Judge of Ahmedabad.

In the town of Dhandhuka of the Ahmedabad District there is what is locally known as a "khadki",—that is, a range of buildings round an open court locally called "chok". This court formerly belonged to a single individual, but at the date of suit the plaintiff was the owner of two and mortgagee in possession of third out of a set of six houses. The plaintiff in front of his houses put up a wooden bench, and erected a mud ota or verandah which he wished to convert into a substantial verandah of chunam. The town of Dhandhuka is one to which the Municipal Act VI of 1873 applies, and the Municipality at first by their managing committee admitted the plaintiff's right to the ota and the bench, but afterwards under the presidency of the chairman made an order directing the plaintiff to remove them as encroachments on the public street. The Municipality, amongst

*Second Appeal, No. 644 of 1881.

other things, contended that the claim made in this suit was barred by Bombay Act VI of 1873; that the public had free access to the court; and that the court was, therefore, a public street which had vested in the Municipality.

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The Assistant Judge in disposing of the case said: "The real questions involved are, (1st) whether the "mehela" or "khadki," or (as I translate either word) *court* is a street as defined in section 3 of Bombay Act VI of 1873; and (2nd) "if so, whether the plaintiff has proved his title to the "parthas" or "ota" in the first instance, and secondly to the court or user of the court upon which the plaintiff claims to keep the bench. As to whether the court is a 'street' it is admitted that there is no thoroughfare through it, but that it is rendered *cul de sac* by the position of the six houses and the line of back walls opposed by neighbouring houses. It appears highly probable from the evidence of the plaintiff's witness, Manor, corroborated by Tribhovan, for the defendant, that all the six houses in the court once belonged to a single Hindu family, of whom Manor is a representative, and that consequently the court was once private property. * * * * The question arises, how and when the court ceased to be private property? In the opinion of the municipal secretary it became public property or street as soon as ever Manor or any member of the proprietary family had alienated one of the six houses and admitted a single separate householder. The defendant's pleader has not wholly adopted this argument, but he has urged that because any one of the outside public might have access, if he chose, to the doors of the separate householders within the court, and because the owners of the houses whose back walls bound the court on the north, must have access at times in order to repair their back walls, therefore the 'public' have access: *ergo* the court is a street. It appears to me that these arguments are fallacious; that the houses of the court and the back walls in question might have five hundred owners or more, and that individuals to any extent from outside might have access to the doors, and yet the court might be private property. The *onus* lies, I think, on the plaintiff to show that, at some time during the past twenty years, access to the court has been barred against the public in the exercise of his right of private ownership. As neither the testimony of

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Manor, the plaintiff's maternal uncle, nor of any other witness goes so far as to establish this, I must hold that the court has become a 'street' as defined in section 3 of the Act."

The Assistant Judge then discussed the evidence adduced on either side, and held that the plaintiff succeeded in proving his claim as regards the "ota", and failed in establishing that as regards the bench.

The plaintiff appealed to the District Judge as regards the latter part of his claim. The District Judge confirmed the decree of the Assistant Judge. He said: "Had the whole of the *mehela* remained the property of a single individual, I do not think that the Municipality could have interfered; but when the *mehela* became the property of several owners, the case would be different. For, naturally, each person inhabiting a house would be entitled to a right of way, and would also have a right to enjoy the open space in front of the houses. * * * The *mehela* certainly is not a thoroughfare; but considering that others have a right of way there, I think that the court is an open space, such as would vest in the Municipality under section 17 of the Municipal Act."

The plaintiff appealed to the High Court.

Nagindás Tulsidás for the appellant was not called on to support the appeal.

Nanābhāi Haridās for the defendant in support of the judgments of the lower Courts contended that the parties should have asked for an issue as to the ownership of the court in question.

MELVILL, J.--The piece of ground, to which this suit relates, is an open square surrounded by houses, and with a narrow entrance, to which it is stated that there was originally a door. The houses formerly belonged to a single owner, and there can be no doubt that the square court was then the property of that owner. The houses are now held by different proprietors, and the District Judge has found that, because the occupant of each house has a right of way across the court, therefore the court vests in the Municipality as a public street or space. To this reasoning we are unable to assent. The Assistant Judge has based his judgment on different grounds. He says: "The ques-

arises, how and when the court ceased to be private property? In the opinion of the municipal secretary (No. 10) it became public property or street as soon as ever Manor or any member of the proprietary family had alienated one of the six houses, and admitted a single separate householder. The defendant's pleader has not wholly adopted this argument, but he has urged that because any one of the outside public might have access, if he chose, to the doors of the separate householders within the court, and because the owners of houses whose back walls bound the court on the north must have access at times in order to repair their back walls, therefore the 'public' have access: *ergo*, the court is a street. It appears to me that these arguments are fallacious; that the houses of the court and the back walls in question might have five hundred owners or more; and that individuals to any extent from outside might have access to the doors, and yet the court be private property." In this opinion we agree. But the Assistant Judge then goes on to say: "The *onus*, I think, lies on the plaintiff to show that, at some time during the past twenty years, access to the court has been barred against the public in the exercise of the right of private ownership. As neither the testimony of Manor, plaintiff's maternal uncle, nor of any other witness goes so far as to establish this, I must hold that the court has become a street, as defined in section 3 of the Act." It appears to us, however, that this final conclusion and the reason on which it is based are erroneous. It is proved that the property was originally private property; it is not shown that it ever ceased to be so; and the court in question is evidently not used as a thoroughfare, but only as a means of access to the houses which surround it by persons who have business with the house holders. No one's rights of property would be safe if the Municipality could take advantage of such limited access by members of the public in order to make out a claim to hold the land in question as public property. We think that the plaintiff, if the *onus* of proof is upon him, has made out a case which, even as it is stated by the Court below, is sufficient to entitle him to relief against the interference of the Municipality, whatever liability he may have incurred to an action by any of the other householders who occupy the square.

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The decrees of the Courts below are accordingly amended, and the claim allowed in full, with costs on defendant throughout.

Decree amended.

APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

September 7.

EMPRESS AGAINST MAHADU.*

*Indian Penal Code, Act (XLV of 1860), Section 75—Enhanced Punishment—
Transportation for life—Imprisonment.*

The accused having been previously convicted of offences punishable, under Chapter XII or Chapter XVII of the Indian Penal Code, with imprisonment for a term of three years or upwards, was subsequently convicted of an offence under one of these chapters punishable with imprisonment which may extend to three years, and sentenced to imprisonment for seven years.

Held that a sentence of transportation for seven years was illegal. Under section 75 of the Indian Penal Code the accused might be transported for life, but he could not be imprisoned for a longer period than six years.

THIS was an appeal against the sentence of imprisonment for seven years passed by C. E. G. Crawford, Assistant Judge, Ratnagiri, on a conviction of theft.

The accused pleaded guilty to a charge of theft and to a number of previous convictions of offences falling under Chapter XII or Chapter XVII of the Indian Penal Code punishable with imprisonment of either description for a term of three years or upwards.

No one appeared on behalf of the accused or the Crown.

The judgment of the Court was delivered by

MELVILL, J.—The sentence is illegal. Under section 75, Indian Penal Code, the prisoner might have been sentenced to transportation for life, but not to imprisonment for more than six years. The prisoner has not yet been sentenced to any long term of imprisonment, and the Court considers a sentence of three years' imprisonment to be sufficient. See *Reg. v. Gopala Santu*, Criminal Rulings, 21st November, 1871.

* Criminal Appeal, No. 120 of 1882.
