

a final settlement of all disputes, then the particular claim put forward by the present suit must be taken to be included, unless it was non-existent at the time. But, as I have already said, it was a present right dependent on a contingency, and did then exist just as much as a right contingent on a death exists. Remarriage clearly, in Fatmabai's opinion, obtains in her community, as she bases her claim on a custom by which Aishabai forfeits the estate of her husband whenever she takes to herself a second.

I think, therefore, the terms used must be held to cover, and to have been intended to cover, Fatmabai's rights in case of Aishabai's remarriage. It was argued that this question is concluded [473] by the decision of the Privy Council (1), and that I am bound to hold that Fatmabai only waived her right on the property so far as it was a widow's estate in the hands of Aishabai. In that case by a family arrangement a childless Hindu widow was given Rs. 55,000 "for her sole absolute use and benefit." Yet in spite of these words she was held to have taken, with reference to her husband's representatives, only a widow's estate, and not an estate to her separate use in the English sense. But their lordships say the money was given for her absolute use as against the parties to the deed, and that the deed was intended to settle all accounts between the parties. Applying that decision to the present matter, I should say that as against Fatmabai, a party to the release, Aishabai held absolutely, although, as against other members of the husband's family, Aishabai may only hold a widow's estate. If I were to follow the case cited in *Bolye Chand Dutt v. Khetterpaul Bysack* (2) there would be no difficulty in saying that Fatmabai intended to convey an absolute estate, as the words here are as strong, if not stronger, than the words which the Court had to construe in that case.

I think, on the whole, the award and release must be held to constitute a binding agreement by which Fatmabai, for the sum of 55,000 rupees, waived all her rights against Aishabai, including the present claim. I, therefore, decide the preliminary issue in favour of the defendant. The suit must be dismissed with costs.

Attorneys for the plaintiffs :—Messrs. *Tyabji and Dayabhai*.

Attorneys for the defendant :—Messrs. *Bhaishankar, Nanabhai and Dinsha*.

12 B. 474.

[474] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Scott.

E. C. K. OLLIVANT (*Original Defendant*), Appellant v. RAHIMTULA NUR MAHOMED AND ANOTHER (*Original Plaintiffs*), Respondents.*
[30th March and 6th April, 1888.]

Municipal Act (Bombay) III of 1872, s. 198—Obstruction—Power given in Act for public benefit—Construction.

The eaves of certain buildings belonging to the plaintiff projected over the public road. On the 17th May, 1886, the Municipal Commissioner of Bombay gave notice to the plaintiff requiring him within thirty days to remove the said eaves as being "a projection, encroachment or obstruction" within the meaning

* Suit No. 293 of 1886.

(1) 6 M.I.A. 1.

(2) 11 B.L.R. 450.

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of s. 195 of Acts III of 1872 and IV of 1873. The plaintiff thereupon filed this suit, praying for an injunction against the Municipal Commissioner. The eaves in question projected to the extent of one foot eight inches. The width of the road in front of the buildings was about forty feet, and the length of the eaves varied from seven feet to nine feet two inches above the roadway. At the time this suit was filed there was an open drain or gutter, one foot three inches wide, running along by the side of the plaintiff's buildings and between them and the road. That gutter, however, subsequently to the filing of this suit, but before the hearing, was covered over, and so much additional width was thereby added to the road.

Held, that the eaves constituted an obstruction within the meaning of the above section, and that the Municipal Commissioner was entitled to remove them.

Under the above section the question to be decided is not whether there is a real practical inconvenience to the public traffic in the street. Those are not the words used in the section, and if that was the intention of the Legislature it would have been expressed.

Where an Act gives power to a Municipality or Corporation for the public benefit, a more liberal construction should be given to it than where powers are to be exercised merely for private gain or other advantage.

[R., 19 B. 212 (215); 27 B. 221 (226); 27 P.R. 1901.]

SUIT against the Municipal Commissioner of Bombay for an injunction to restrain him from removing certain eaves from two buildings belonging to the plaintiff alleged by the defendant to project over the public road.

On the 17th May, 1886, the Municipal Commissioner sent a notice to the plaintiff, requiring him within thirty days to remove the said eaves erected in front of his buildings on Parel Road, Bombay, as being "a projection, encroachment, or obstruction within the meaning of s. 195 of Acts III of 1872 and [475] IV of 1878" (1); and stating that, in default of the said eaves not being removed by the plaintiff, he (the Municipal Commissioner) would cause the work to be done as directed by the said Acts. The plaintiff thereupon (*viz.*, on the 19th July, 1886), filed this suit praying for an injunction.

The plaint stated that the buildings in question had been erected more than fifty years previously, and that the roofs, which the defendant now alleged to be an encroachment or obstruction, had existed in the same position ever since the said buildings were erected.

In his written statement the defendant (the Municipal Commissioner) contended that he was entitled to remove such portion of the plaintiff's roofs as projected over the public street as being an obstruction to the safe and convenient passage along the street. He alleged that the eaves of the roofs of one of the plaintiff's buildings projected one foot eight inches

(1) "Section 195.—The Commissioner may give notice, in writing, to the owner or occupier of any house or building to remove or alter any projection, encroachment, or obstruction which, although erected before this Act comes into operation, shall have been erected or placed against, or in front of, such house or building, if the same overhangs or juts into, or in any way projects or encroaches upon, any public street, so as to be an obstruction to the safe and convenient passage along such street, or if the same projects or encroaches into or upon any uncovered aqueduct, drain, or sewer in such street so as to obstruct or interfere with such aqueduct, drain, or sewer, or the proper working thereof, and such owner or occupier shall, within thirty days after the service of such notice, remove such projection, encroachment, or obstruction, or alter the same in such manner as shall have been directed by the Commissioner; and in default thereof the Commissioner may remove such projection, encroachment, or obstruction; and if such projection, encroachment or obstruction shall have been lawfully made, the Commissioner shall make reasonable compensation to every person who suffers damage by such removal or alteration; and if any dispute shall arise touching the amount of such compensation, the same shall be ascertained and determined in the manner hereinafter provided."

over the street beyond the wall of the building, and descended to about seven feet above the level of the roadway; that the eaves of the other building projected over the street for a distance of one foot ten inches, and descended to about nine feet two inches above the level of the roadway. The following paragraphs of the written statement are material:—

[476] "The defendant says that the public street on which the plaintiff's premises are situate is known as the Parel Road. The tramway has been recently laid along the said street. The traffic along the said street is very heavy, as, in addition to the ordinary traffic of the town, all the country traffic from Salsette into Bombay passes along that street, and large numbers of heavily laden hay and other carts daily pass along the said street. The width of the said street from the New Byculla Bridge as far as the premises to the south of and adjoining the plaintiff's said premises No. 642 is nowhere less than sixty feet; but this having been found to be insufficient, the said street is being gradually widened to a width of seventy-five feet.

"Opposite the plaintiff's said premises No. 642 the width of the said street is much contracted, and is at one point not more than about forty feet.

"The defendant says that at present a side gutter runs along the side of the plaintiff's premises which the defendant is covering over with stone slabs so as to widen the road-space. Carts laden with country produce which pass along the said street are so loaded as to project considerably beyond the wheels of the carts. If the projections of the plaintiff's eaves are allowed to remain, it will be impossible for traffic to use a portion of the said street with safety or convenience."

The suit was heard before Hart, J., on the 28th March, 1887. He passed a decree in favour of the plaintiff, and granted the injunction prayed for, on the ground that the eaves of the plaintiff's building did not constitute any obstruction to the safe and convenient passage along the street.

The defendant appealed. The appeal was heard by SARGENT, C.J., and SCOTT, J.

Farran and Inverarity, appeared for the appellant.

Lang and Telang, for the respondent.

JUDGMENT.

SARGENT, C.J.—In this case the plaintiffs sue to restrain the Municipal Commissioner from putting in force against them the powers vested in the Commissioner by s. 195 of Bombay Act III of 1872, by which he is empowered to remove any [477] projection or encroachment which forms an obstruction to the safe and convenient passage along any public street. It appears that the eaves of certain buildings belonging to the plaintiffs project over the public road to the extent of one foot eight inches, and form the alleged obstruction which the Commissioner desires to have removed. The width of the road in front of these buildings is about forty feet, and the height of the eaves in question varies from seven feet to nine feet two inches above the road way. At the time this suit was filed there was an open drain or gutter, one foot three inches wide, running along by the side of the plaintiffs' buildings and between them and the road. This gutter, however, has since been covered over, and so much additional width has thereby been added to the road.

The learned Judge in the Court below seems to have based his judgment mainly on the observations which he made himself when

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visiting the locality. In his judgment he discusses the case with reference to the state of things existing at the date of the hearing at which time the gutter had been covered over. As to this point he says: "I should, I think; be assured that the addition, under such circumstances, of a foot or two to the width of a forty-foot road at its extreme edge, where it is abutted on by a row of open shop fronts, made such a difference in the ordinary existing traffic that the projection of the plaintiffs' eaves, at a height admittedly too great to incommode any ordinary foot passenger, became a source of danger or inconvenience to others. As to this, there was a remarkable dearth of positive evidence on both sides. Not a single witness was called to prove that, as a fact, any one had been or had not been incommoded by the projection. I was simply invited to draw inferences, either way, from evidence of measurements and the state of the traffic on the road." Then he goes on to speak of the traffic in the street, and says: "Such a traffic seemed to me not likely to suffer any appreciable obstruction on a forty-foot road from a twenty-inches' projection at one edge of it seven feet from the ground;" and he concludes by saying: "In regard to the traffic at this point, as I have already stated, it was distinctly sparse, and while I was there no one was in any way obstructed or incommoded by the projection of the plaintiffs' eaves, nor do I think it is likely that [478] any one could be in the present state of the road and condition of the traffic."

It is plain, from these remarks, that the learned Judge was of opinion that the question in the case was whether the eaves of the plaintiffs' house constituted a real practical inconvenience to the public traffic in the street. We do not, however, think that that is the question which arises on the proper construction of s. 195. If, however, it was material to consider this point, we should think it hardly safe for a Judge to attach much value to what he may himself observe during a short visit to the locality. The amount of traffic may vary greatly from time to time. A good deal of evidence was given upon this matter, and it is upon the recorded evidence that the Court's decision must rest.

It is no doubt a well-recognised general rule, that where powers are given by the Legislature to interfere with private property these powers are to be exercised strictly and exclusively for the purposes and objects for which they were given; and unless it can be shown that such interference is necessary for the furtherance of those objects it will not be permitted. That is the general rule which is applied, in the case of railway and other companies authorised to take compulsorily the lands of others. But in applying this rule, the powers conferred on municipalities and corporations for the purpose of making improvements in large towns or doing other similar acts for the public benefit have always been liberally construed—*Galloway v. The Mayor and Commonalty of London* (1) and *Quinton v. Corporation of Bristol* (2).

What, then, are the provisions of s. 195? They empower the Commissioner to effect the removal of "any projection, encroachment, or obstruction.....if the same overhangs or juts into, or in any way projects or encroaches upon any public street as to be an obstruction to the safe and convenient passage along such street." The learned Judge in the Court below read those words as intended to apply only to such an obstruction as would interfere with the traffic along such street. But the words in their plain and obvious meaning, import "passage along

(1) L.R. 1 Eng. & Ir. Ap. 34.

(2) L.R. 17 Eq. 524.

[479] the whole of the street ; " and if the intention of the Legislature had been as contended for the plaintiffs, we should have expected to find it clearly expressed. The question, however, is not clear of authority.

In the case of *Bagshaw v. Buxton Local Board of Health* (1) a question was raised upon precisely similar words in an English statute. In that case the defendants objected to a small enclosed garden in front of the plaintiff's house in which plants and shrubs were growing as "an obstruction to the safe and convenient passage" along the street. The plaintiff sued to restrain the defendants from removing the alleged obstruction or interfering the plaintiff's enjoyment of his garden. The street was thirty-six feet wide. Jessel, M.R., said ; " I have no doubt that the wall and shrubs have obstructed, and that they are obstructions; so that the only question remaining is whether they are obstructions 'to the safe and convenient passage along any street.' The words 'along a street' mean along the whole of the street ; and if you take and enclose a portion of the street itself, how can it be said that that is not an obstruction to the safe and convenient passage along the street? It appears to me that I should be cutting down this Act of Parliament and making it almost meaningless if I so held, and I am of opinion, therefore, that the defendants are entitled, under the section in question, to remove this, being, as it is, in front of the house."

We think, therefore, that upon the proper construction of s. 195, the question to be considered is merely whether the eaves were an obstruction ; and as to this it is not denied they are an obstruction to the convenient passage along that part of the street. We do not consider that the fact of the gutter having been covered over after the filing of the suit affects this question. It is the eaves which constitute the obstruction. They, of course, prevent loaded carts from passing as near to the wall of the plaintiffs' house as it would be possible for them to do if the eaves were not there, so that the result is the same whether we have regard to the state of things at the date of the filing of the suit or the date of hearing.

[480] We must hold that the Commissioner was entitled to have the eaves of the plaintiffs' buildings removed, and we reverse the decree with costs.

Attorneys for the appellant :—Messrs. *Crawford and Buckland*.

Attorneys for the respondents :—Messrs. *Payne, Gilbert, and Sayani*.

12 B. 480.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

SHRIDHAR AND ANOTHER (*Original Opponents*), *Appellants v.*
HIRALAL VITHAL AND ANOTHER (*Original Applicants*), *Respondents.**
[4th October, 1887.]

Hindu law—Marriage—Guardianship—Paternal relatives—Their authority to give a girl in marriage—Civil Court's jurisdiction to interfere with this authority.

The general authority, failing the father, of the paternal relatives to dispose of a girl in marriage is recognized by the Hindu law as a part of the guardianship which is correlative as a right and a duty to her dependence both as a

* Appeal, No. 94 of 1886.

(1) L.R. 1 Ch. Div. 220 (223, 224).