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TAMDA'S
v.
ISA'BHA'I
DA'UD-
KHAN.

SARGENT, C. J.:—We agree with the decisions in *Koylasti Chandra v. C. Christophoridi*⁽¹⁾ and *Ramzan v. Gerard*⁽²⁾ that the person standing surety for the judgment-debtor under section 336 of the Civil Procedure Code, is released from his obligation when the judgment-debtor has applied to be declared an insolvent.

Order accordingly.

(1) I. L. R., 15 Calc., 171.

(2) I. L. R., 13 All., 100.

APPELLATE CIVIL.

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

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February 17.

THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT,
v. MANILA'L UDENÁTH (ORIGINAL PLAINTIFF), RESPONDENT*.

Municipality—District Municipal Act (Bom. Act VI of 1873), Secs. 42, Cl. (1), 48 and 75†—Public street—Obstruction—Removal—Notice—Corporate bodies.

Under the District Municipal Act (Bom. Act VI of 1873), a Municipality has power to have all obstructions in a public street removed, whether the obstructions were placed

* Second Appeal, No. 479 of 1892.

† Sections 42 (clause 1), 48 and 75 of the District Municipal Act (Bom. Act VI of 1873):—

42. *Clause 1.*—The Municipality may by written notice require 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 in the place, 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 and 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: Provided always that if such projection, encroachment or obstruction shall have been lawfully made, the Municipality 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.

48. Whoever, after this Act comes into operation in any place, shall build any wall, or erect or set up any fence, rail, post, step, stall, or any erection or thing or other obstruction or encroachment in any public street, or shall deposit or cause to be placed or deposited any box, bale, package of 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 liable to the penalty hereinafter provided; and the Municipality shall have

there lawfully or not. The only distinction which the Act draws is between obstructions erected or placed before the Act came into operation and those which have been erected or placed since it came into operation. As to the former, section 42, clause (1) of the Act provides that notice should be given, and if legally placed on the street, compensation should be awarded for their removal. As to the latter, the Municipality can remove them under section 48 even without giving any notice.

The public have a right of passing over the whole of a street if it is a public street.

It is not the practice of the Court to interfere with corporate bodies "unless they are manifestly abusing their power."

SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad, confirming the decree of Ráo Sáheb Mánek-lál Narotamdás, Joint Second Class Subordinate Judge of Ahmedabad.

The plaintiff sued the Municipality of Ahmedabad for an injunction restraining the defendants from removing a bench standing upon the ground in front of the plaintiff's *ota* (verandah), alleging that the bench in dispute has been in existence for more than twenty years.

The defendants pleaded (*inter alia*) that the ground on which the bench stood did not belong to the plaintiff; that it was part of a public street, and that the bench was only erected in 1889.

The Subordinate Judge found (1) that the bench had been standing upon the ground in front of the plaintiff's *ota* (verandah) for upwards of twenty years, (2) that the ground on which the

power to remove any such obstruction or encroachment, and the expense of such removal shall be paid by the person erecting or depositing the same, and shall be recoverable as hereinafter provided. Nothing herein contained shall prevent the Municipality from allowing any temporary erections in any public street on occasions of festivals and ceremonies or the piling of fuel in bye streets and spaces for not more than four days, and in such manner as not to inconvenience the public or any individual.

75. All written notices which may be issued by the Municipality under sections 33 to 39, 41 to 43, 46, 58, 62 and 69 shall prescribe a time, which shall at the discretion of the Municipality be not less than three days or more than one month, within which the action prescribed in the notice should be taken by the person upon whom the notice is served. In the event of non-compliance with the terms of the notice it shall be lawful for the Municipality to take such action, or such steps as may be necessary for the completion thereof, and all the expenses incurred by them shall be paid by the person or persons upon whom the notice was served, and shall be recoverable in the manner hereinafter provided.

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bench stood formed part of a street, but not of a public street, and (3) that the Municipality had no power to order the removal of the bench. He, therefore, allowed the claim,

The defendants appealed, urging (*inter alia*) that as there had been no issue raised as to whether the ground on which the bench stood formed part of a public street they had called no evidence to prove that it did, and they contended that they should be given an opportunity of calling such evidence. The Judge confirmed the decree.

The defendants preferred a second appeal.

L. M. Wadia (with *Gangaram B. Rele*) for the appellants (defendants):—In the first Court no distinct issue was raised as to whether the street in which the plaintiff's house stands was a public or a private street. We, therefore, adduced no evidence to prove that it was a public street vested in the Municipality. The Court decided it to be a private street without any evidence. The plaintiff has admitted that the street belongs to Government, and that being so we contend that it vests in the Municipality.

Govardhanram M. Tripathi for the respondent (plaintiff):—It was for the defendants to raise issues. If they failed to raise the proper issues they cannot ask for them in second appeal. Even if the street be found to be a public street, still we contend that the right of the Municipality to remove the bench is time-barred.

[SARGENT, C.J.:—The erection of the bench is a recurring nuisance, and, therefore, the plea of limitation cannot arise.]

We submit that section 28 of the Limitation Act (XV of 1877) is applicable to the case. Further, the defendants gave us notice to remove the bench in dispute. That notice was given under section 48 of the District Municipal Act (Bom. Act VI of 1873), which applies to obstructions that have come into existence after the passing of the Act. The bench has been standing, as we alleged in our written statement, since the time of our ancestors, and both the Courts have found that the obstruction existed before the Act came into operation; therefore, that section is not applicable to the present case. The bench cannot be said to be

a nuisance, because it is at one side of the road, and it does not cause any obstruction to the passers by.

Wádia, in reply:—The objection as to the illegality of the notice is taken for the first time at the hearing of the second appeal. It was enough for our purpose that we informed the plaintiff to remove the bench. See section 42, clause I of the District Municipal Act.

SARGENT, C. J.:—A Municipality has power under the Act (Bombay Act VI of 1873) to have all obstructions in a public street removed, whether the obstructions were placed there lawfully or not. The only distinction which the Act draws is between obstructions erected or placed before the Act came into operation and those which have been erected or placed since it came into operation. As to the former, it is provided by section 42, clause I, that notice should be given, and if legally placed on the street, that compensation should be awarded for their removal. In the event of such notice not being complied with, then under section 75 the Municipality can remove them. As to the latter, the Municipality can remove them under section 48 even without giving notice.

The Courts have found that the obstruction in question existed before the Act came into operation. The plaintiff received notice to remove the obstruction under section 48, which was, strictly speaking, the wrong section, as the obstruction had existed before the Act, but no objection was taken to this informality in the notice. It was said, however, that the obstruction in question was not an obstruction to "the safe and convenient passage" along the alleged street. The obstruction in this case is a seat permanently fixed into the street, and although it may be close to the verandah of the plaintiff's house, it was none the less in the street, over the whole of which, as pointed out by Sir G. Jessell in *Bagshaw v. Buxton Local Board of Health*⁽¹⁾, the public would have the right of passing if it is a public street. The remarks of this Court in *E. C. K. Ollivant v. Rahimtula Nur Mahomed*⁽²⁾ show that the circumstance of the obstruction being near to the plaintiff's house cannot affect the question, the public having the

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(1) 1 Ch. Div., 220. (2) I. L. R., 12 Bom., 474 at p. 479.

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right to go as near as they like to it. Moreover, in the dark, it is plain, that such an obstruction would be distinctly unsafe. We may also add that it is not the practice of the Court to interfere with corporate bodies "unless they are manifestly abusing their powers"—*Duke of Bedford v. Dawson*⁽¹⁾.

The only question, therefore, remaining for decision was, whether the land in question formed part of a public street. As to this the lower Courts have found that it did not. It was, however, objected in the lower Court of appeal by the defendants, and that objection has been renewed before us, that they did not know that it was disputed that it was a public street as alleged in their written statement, and that they were taken by surprise. The second issue raised by the first Court certainly does not in the vernacular distinctly raise this question, and we think, therefore, that we ought not to accept the finding of the lower Courts without giving the defendants an opportunity of giving evidence. We must, therefore, send back the case to the lower appellate Court for a finding on the following issue:—

Whether the land in question forms part of a public street vested in the Municipality?

The finding to be sent to this Court in three months. Both parties to be allowed to give fresh evidence.

Issue sent back.

(1) L. R., 20 Eq., 353.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

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February 19.

MATHURA'DA'S (ORIGINAL DEFENDANT No. 1), APPELLANT, v.
PANHA'LA'L (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), Secs. 312 and 320—Transfer of execution of a decree to Collector—Court sale—Collector's order setting aside the sale—Suit by auction-purchaser to set aside the Collector's order and to have his purchase confirmed.

Certain property was sold in execution of a decree by the Collector, to whom the execution had been transferred under section 320 of the Code of Civil Procedure

* Second Appeal, No. 678 of 1892.