

rules, the provisions of sections 304 to 319 of the Code of Civil Procedure expressly apply to all sales of immoveable property. The mortgagors and persons claiming under them are the very persons who need most the relief intended to be conferred on judgment-debtors, and any other construction will defeat the main object of the legislation, which permits redemption even after sale in the case of those who are prepared to make full compensation to the creditor.

Agreeing, therefore, with the rulings of the Madras and Allahabad High Courts, we are of opinion that the Court of first instance was right in the view it took of the applicability of section 310A to sales in execution of mortgage decrees. We, therefore, discharge the rule with costs.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Russell.

ESSA JACOB HAJI JAMAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE MUNICIPAL COMMISSIONER OF BOMBAY AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Municipality—City of Bombay Municipal Act (Bom. Act III of 1888), Sec. 297—Provision to make public street—Regular line of street.

In 1888 the Municipal Commissioner of Bombay prescribed the regular line of a certain public street in Bombay, in accordance with the provisions of section 297 of the Municipal Act (Bom. Act III of 1888).

Held, that it was not open to the Municipal Commissioner in 1893 to prescribe a different line setting back the line prescribed by his predecessor.

THE plaintiff was the owner of a house in Chunam Kiln road near the Bhendy Bazar outside the Fort of Bombay. He sued for a declaration that the regular line of the said street was the line prescribed in 1888 by the then Municipal Commissioner, and that the present Municipal Commissioner had no power to alter this line, and he prayed for an injunction restraining the defendants from compelling him to set back his house beyond the said line.

The plaintiff complained that, in obedience to notices served on him on various occasions in 1899, he had been obliged to pull

* Suit No. 694 of 1899; Appeal No. 1100.

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down parts of his house. By a further notice, dated the 8th June, 1899, the Municipal Commissioner required the plaintiff to set back his house to "the regular line of the street" as marked upon a certain plan.

The following paragraphs of the plaint set forth the plaintiff's case :—

"4. The plaintiff says that the line referred to by the said Municipal Commissioner is not the regular line of the street, but that the regular line of the street is shown by the red line upon the said plan, and that the same was prescribed by the Municipal Commissioner, Mr. Ollivant, shortly after the passing of the Bombay Act III of 1888. The said line, shown in blue upon the said plan, was purported to be prescribed by the subsequent Municipal Commissioner on or about the 13th of December, 1893, and the plaintiff submits that, under the provisions of section 297 of the City of Bombay Municipal Act, a line can only once be prescribed as the regular line of the street, and that it is not competent for the Municipal Commissioner from time to time to alter the line once prescribed.

"5. The plaintiff says that if he is obliged to set back his building to the line prescribed in December, 1893, and indicated by the said blue line, a large portion of his property will be lost to him, and his house will be far less valuable than formerly."

The defendants' written statement was as follows :—

"1. The defendants say that the line shown in blue upon the plan annexed to the plaint if it corresponds with the line prescribed by the Municipal Commissioner in 1893 is the regular line of the street. The line shown in red on the said plan was a line prescribed previously by the Municipal Commissioner, but the Municipal Commissioner having determined that it would be for the public interest to have the said street widened to a width greater than at one time intended, prescribed and laid down the line shown in blue as the regular line of the street. The defendants say that such action was *intra vires* of the Municipal Commissioner, and that the allegations to the contrary made in the plaint are incorrect."

The lower Court held that the Commissioner had acted within his powers, and rejected the plaintiff's claim. The following judgment was given :—

Crowe, J. :—The question in this case is whether it is competent to the Municipal Commissioner to alter what is termed the regular line of the street after it has been once fixed. There is no dispute that in the street in question the line was prescribed after the passing of the Act in 1888, and that a new line for the

purposes of widening the street has been prescribed in 1893. The plaintiff's counsel relies on the wording of section 297 of the Act, which does not specify that the Commissioner may prescribe such line from time to time. But no power to widen a street is conferred by section 297. That power is given by section 289 of the Act, which vests the public streets in the Corporation, and provides that the Commissioner may from time to time widen, extend, or otherwise improve any such street. The putting back of the regular line of a street is obviously one method of widening the street, and it is apparently open to the Commissioner to take up the land required either under the provisions of section 296 or proceed under section 299. It seems clear that, in the absence of any restriction of his powers under section 297, he must be guided by the exigencies of traffic. As Mr. Inverarity put it in the case of transfer of the Cotton Green or any other crowded mart from one part of the city to another, it is obvious that certain streets might require widening, and to effect that, the regular line would require alteration. The object of that section, moreover, is not for the purpose of enabling the Commissioner to widen the street, but to ensure that the buildings shall be constructed in a regular line. I hold that it was competent to the Commissioner to lay down the new line and direct that the claim of the plaintiff be rejected with costs.

The plaintiff appealed.

Lang (Advocate General) and *Raikes* for the appellant (plaintiff).

Starling and *Jardine* for the respondents (defendants).

JENKINS, C. J.:—There is no dispute as to the facts in this case; for it is conceded that shortly after the passing of the City of Bombay Municipal Act (Bombay Act III of 1888) a line on each side of this public street was prescribed by the Commissioner in accordance with the provisions of section 297 of the Act. The only question is, whether it was open to the Commissioner to prescribe a different line in 1893, setting back the regular line of his predecessor. Mr. Justice Cröwe has determined this in the affirmative, and from this decree the present appeal is preferred.

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The 297th section is part of Chapter XI of the Act, which is concerned with the "regulation of streets," and the several aspects of this topic are dealt with by separate and successive groups of sections. Thus sections 289 to 296 treat of the "construction, maintenance and improvement of public streets"; sections 297 to 301 with the "preservation of regular line in public streets"; and so on throughout the chapter.

Now in the first group we find the following powers vested in the Commissioner (His Lordship read section 289, clause (2), and continued :—) So that we find a check placed upon the exercise by the Commissioner of his powers of widening where the aggregate cost will exceed Rs. 5,000. We have no materials before us on which we can form an opinion as to what the adequate cost of the contemplated widening will be. Nor is this the only check which the section prescribes; for the joint effect of sections 296, 297 is that the Commissioner cannot acquire the land needed for the proposed widening except through Government, who have an absolute discretion in the matter.

It is not concealed in this case that the purpose of setting back the regular line of the street is to widen it: it is not for the purpose of preserving the "regular line of that street", for that *ex concessis* was already ensured by the line which in 1888 was prescribed by the Commissioner under section 297. Moreover, this evidently was the view presented to the first Court, for in his judgment Mr. Justice Crowe says: "There is no dispute that in the street in question the line was prescribed after the passing of the Act in 1888 and that a new line *for the purpose of widening the street*, has been prescribed in 1893." But clearly the purpose of section 297 is not to enable the Commissioner to widen a public street—that power was expressly vested, as I have shown, in the Commissioner by the earlier group of sections, subject to the checks I have mentioned—it is to empower him to secure a regular line of street, an end already secured by the line prescribed in 1888. It has been argued by Mr. Starling that we should not interfere with the action of the Commissioner under section 297, merely because it may indirectly have a result for the attainment of which other provision is made; but this argument appears to me to overlook the admissions; for from them it

logically follows that the conditions requiring and justifying the exercise of the power contained in section 297 have no existence and that the power is simply exercised in order to attain the indirect result.

It appears to me, therefore, that, on the true construction of the Act, the Commissioner's action in the light of the admitted facts is unauthorised. I come to this conclusion without having recourse to the suggested canon of construction, under which a power once exercised is exhausted, and the application of which in this country has been supported by reference to the terms of the General Clauses Act.

For these reasons I am of opinion that the decree of Mr. Justice Crowe must be reversed, and the injunction sought must be awarded. The Corporation must pay the plaintiff's costs throughout.

RUSSELL, J. :—The plaintiff, it appears, has a house in Chunam Kiln Road, near Bhendy Bázár, which bears the municipal street Nos. 15 to 19. During the year 1899 the plaintiff in consequence of various notices served on him by the defendants was obliged to pull down a part of his house adjoining Chunam Kiln Road and will be obliged to pull down more in order to rebuild his house. By a notice, dated 8th June, 1899, the first defendant (the Municipal Commissioner) required the plaintiff to set back the building to the regular line of the street, meaning thereby a line shown in blue upon the plan A to the plaintiff. The plaintiff, however, says that this blue line is not the regular line of the street, but the regular line of the street is the one shown in red on the said plan, which was prescribed by Mr. Ollivant, the then Municipal Commissioner, shortly after the passing of Bombay Act III of 1888. The blue line on the plan purported to be prescribed by the then Municipal Commissioner on or about the 13th of December, 1893. The effect of the alteration from the red to the blue line will be that the plaintiff will be compelled to set back his house to a considerably greater extent.

The plaintiff contends, and this is the only question before us, that under the provisions of section 297 of the City of Bombay Municipal Act (Bombay Act III of 1888) a line can only once be

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prescribed as the regular line of the street, and that it is not competent to the Municipal Commissioner from time to time to alter the line once prescribed.

Section 297 of the City of Bombay Municipal Act, 1888, provides as follows:—“(1) The Commissioner shall prescribe a line on each side of any public street within which, except under the provisions of section 310, no portion of any building abutting on the said street shall, after such line has been prescribed, be constructed.”

“(2) A line so prescribed shall be called the regular line of the street.”

Reading paragraphs (1) and (2) of the section together, it would run as follows:—“The Commissioner shall prescribe the regular line of the street on each side of any public street within which no portion of any building abutting on the said street shall, after such regular line of the street has been prescribed, be constructed.” No option is left to the Commissioner to prescribe the line such as you find in section 296 as to his acquiring premises. The word “prescribe” implies, as it seems to me, a certain immutability. The word “regular” carries the same implication. In Johnson’s dictionary to “prescribe” is “to set down authoritatively.” “Regular” is “agreeable to rule; consistent with the mode prescribed.” If the framer of this section really intended to empower the Commissioner from time to time to draw the regular line of a street, I cannot think that he would have framed it in such terms.

In the former Act (Bombay Act III of 1872, section 163) the words used are: “the line of the street or the line of the adjoining houses or buildings.” This was evidently taken from section 68 of 10 and 11 Vict., cap. 34, “Town Improvement Clauses Act, 1847”, where the words are: “the line of the street or the line of the adjoining houses or buildings.” In the Metropolis Management Amendment Act, 25 and 26 Vict., cap. 102, sec. 64, the words are: “It shall be lawful for the Metropolitan Board of Works to require the same (building) to be set back to such a line or in such a manner for the improvement of any street as the said Board shall direct.” Sec-

tion 75 of that Act provides that no building, &c., shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, &c. Section 155 of the Public Health Act, 1875 (38 and 39 Vict., cap. 55), provides (*inter alia*) that when any house, &c., has been taken down in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building or front thereof is to be built or rebuilt. In section 162 of the Police and Improvement Act (Scotland), 1862 (24 and 25 Vict., cap. 101), it is provided: "The Commissioner may require the house or building to be set backwards on or towards the line of the street or the line of the adjoining houses or buildings." The words in the present section are stronger (and I must presume were intended to be so) than those in the sections I have above referred to.

The next question to consider is whether section 297 and the following sections down to section 301 inclusive should be construed as coming within the powers given to the Commissioner by section 289, clause 2, under the words "He may also from time to time widen, extend, or otherwise improve any such street, &c.?" I do not think they do. The scheme of the section 289 and the following would seem to be this: the Commissioner may from time to time widen or otherwise improve streets, &c. From time to time he may acquire lands having regard to sections 90, 91 and 92. For this purpose he shall have what an engineer would call a working line to go by: section 297 *et seq.* provide for it. The heading "preservation of regular line in public streets" of that section may be looked at in case of a difficulty of construction: see *Hammersmith, &c., Railway Company v. Brand*⁽¹⁾; *Lang v. Kerr Anderson & Co.*⁽²⁾; and *Queen v. Local Government Board*⁽³⁾. I cannot think that the framer of these sections (297, &c.) intended that the line of streets in Bombay should depend on the idiosyncracies of the individual Commissioner.

It is obvious that it was intended that the powers to acquire land under section 296 are very different to the powers to set

(1) (1868-69) L. R., 4 H. L., 171 at p. 203. (2) (1878) 3 Ap. Ca., 529, at p. 533.

(3) (1882) 10 Q. B. D., 309 at p. 321.

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back under section 297 and the following sections; and it appears to me that the draughtsman intended to use apt words to bring out that difference. I have been unable to find any case which directly bears upon this point, but I would mention that in *Tear v. Freebody*⁽¹⁾ the regular line of buildings in the street in section 143 of 18 and 19 Vict., cap. 120, was held not to mean a strict-mathematical line, but a substantially regular line; and in *Schulze v. Corporation of Gallashields*⁽²⁾ the expression "regular line of the street" in section 162 of the Police and Improvement Scotland Act, 1862, above referred to was held to mean the line of the buildings forming the street, and not a line indicating that part of the street which is dedicated to the public as a highway. If the Commissioner has power from time to time to alter the regular line of the street, it appears to me that grave cases of hardship might arise. For instance, suppose a man buys a building abutting on a public street, which is within the regular line thereof and he buys it on the supposition that one regular line of the street has already been fixed; after the purchase circumstances may arise under section 298 which empowers the Commissioner to set back the building. If the defendant's argument is correct, the Commissioner might, by a stroke of the pen on the map, deprive the purchaser of part or even the whole of the building he bought. Again, a man might purchase a building in rear of the regular line of the street intending to rebuild it on the supposition that that regular line was fixed. Could the Commissioner alter that regular line so as to compel the purchaser to set forward his building as far as the Commissioner, by his new line, might determine? Other practical objections to the construction sought to be placed on section 297 by the defendants may, no doubt, suggest themselves.

I am of opinion this appeal must be allowed with costs.

Appeal allowed.

Attorneys for plaintiff:—Messrs. *Little & Co.*

Attorneys for defendants:—Messrs. *Crawford, Brown & Co.*

(1) (1858) 4 C. B. (N. S.), 228.

(2) (1895) Ap. Ca., 666.