

APPELLATE CRIMINAL.

1905

August 9.

Before Mr. Justice Russell and Mr. Justice Aston.

EMPEROR v. BUDHOOBAL.*

City of Bombay Municipal Act (Bombay Act III of 1888), sections 410, 24, Sch. D. (4)†—Prohibition of sale of fish except in a market—Sale from a

* Criminal Appeal No. 75 of 1905.

† The provisions of the City of Bombay Municipal Act (Bom. Act III of 1888) referred to run as under :—

410. (1) Except as hereinafter provided, no person shall, without a license from the Commissioner, sell or expose for sale any four-footed animal or any meat or fish intended for human food, in any place other than a municipal or private market.

(2) Provided that nothing in sub-section (1) shall apply to fresh fish sold from, or exposed for sale in a vessel in which it has been brought direct to the seashore after being caught at sea.

Section 24 (3). Unless and until they are so altered or re-apportioned, the number and respective boundaries of the wards and the number of councillors to be elected for each ward shall be as specified in Schedule B.

Consecutive Number.	Name of Ward.	Boundaries.				Number of members of the Corporation to be elected for each Ward.
		On the North.	On the South.	On the East.	On the West.	
4	Girgaon Ward.	A line starting from the north-west corner of Trimbak Parashram Street and extending along the south side of Grant Road as far as the B. B. & C. I. Railway, and again from the B. B. & C. I. Railway level crossing on Clerk Road along the south side of Clerk Road as far as the south end of Hornby Vellard.	Back Bay from a point opposite to Thakurdwar Street to Malabar Point.	A line starting from Back Bay at a point opposite Thakurdwar Street, and extending along the north side of Thakurdwar Street; south-west side of part of Bhuleshwar Street as far as the southern end of Ardesir Dady Street; thence along the west side of the latter and Trimbak Parashram Street as far as Grant Road; again from the Grant Road Railway Bridge along the west side of the B. B. & C. I. Railway Line as far as the Clerk Road level crossing.	The sea from Malabar Point to the south end of Hornby Vellard.	Five.

*basket placed on the Chowpatti foreshore—Sale from a vessel—Private market—Onus of proof—City of Bombay, limits of—Bombay General Clauses Act (Bom. Act I of 1904), section 3 (10).**

The accused, a fisherwoman, was charged under section 410 (1) of the Bombay City Municipal Act (Bom. Act III of 1888), with selling or exposing for sale, without a license from the Municipal Commissioner, fish intended for human food, on the Chowpatti foreshore, in the City of Bombay. The sale was from a basket, which the accused had placed on the sand, at some distance from the water, between the high and low water mark. The fish sold was fresh fish and was brought from one of the boats then in Back Bay. The Presidency Magistrate acquitted the accused on the grounds that (1) the Bombay City Municipal Act did not apply as the place of sale was outside the limits of the City of Bombay as laid down in the City of Bombay Municipal Act; (2) section 410 of the Act had no application because the place was a private market established from time immemorial; and (3) the sale fell within section 410 (2) of the Act. On appeal, against this order of acquittal, by the Government of Bombay:—

Held, reversing the order of acquittal and convicting the accused, that the accused was not protected by section 410 (2) of the Bombay City Municipal Act (Bom. Act III of 1888), since it was impossible in the present case to say that the fish had been sold from a vessel, when as a matter of fact it had been sold from the basket on the shore, it having been brought from the vessel which was in the water.

Held, also, that the onus of proving that the place in question was a "private market" lay upon the accused.

Held, further, that the Bombay City Municipal Act (Bom. Act III of 1888) applied to the spot in question, because it came within the expression "City of Bombay" as defined by the Bombay General Clauses Act (Bom. Act I of 1904).

APPEAL under section 417 of the Criminal Procedure Code (Act V of 1898), from an order of acquittal passed by Chunilal H. Setalvad, Acting Fourth Presidency Magistrate of Bombay.

The accused was charged under section 410 of the City of Bombay Municipal Act (Bombay Act III of 1888), with selling or exposing for sale without license from the Municipal Commissioner fish intended for human food, on the Chowpatti foreshore on the 5th October 1904 at 8 A.M.

On the morning in question, two Municipal officers accompanied by a Sub-Inspector Ramchandra went to the Chowpatti foreshore and there the Sub-Inspector purchased one pamphlet for one anna

* 3. (10) "City of Bombay" shall mean the area within the local limits for the time being of the ordinary Original Civil Jurisdiction of the Bombay High Court of Judicature.

1905.

EMPEROR
v.
BUDHOOBAL.

from the accused. It was sold by the accused from a basket which she had placed on the sand at some distance from the water. At this time, there were at the place half a dozen persons similarly selling fish and some customers buying them. The fish sold was fresh and was brought from a vessel which was lying in the Back Bay.

It was stated on behalf of the prosecution that the place where the fish was sold not being either a Municipal or a private market the accused could not sell it there without a license from the Municipal Commissioner, and that, inasmuch as the fish in question was sold from a basket and not from a vessel in which it had been brought direct to the seashore after having been caught at sea, the accused was not protected by clause 2 of section 410 of the City of Bombay Municipal Act (Bom. Act III of 1888).

The accused, in defence, contended that the provisions of the City of Bombay Municipal Act, 1888, did not apply to the place of sale, which was below the ordinary high water line of the sea; that the place in question was a market, the rights of which had been acquired by prescription; and that it was a private market (section 398 of the Act) to which the provisions of section 410 of the Act did not apply; and that the accused was protected by clause 2 of section 410, since the fish sold was transferred into the basket from the vessel which was lying in the Back Bay.

The Magistrate held that the City of Bombay Municipal Act (Bom. Act III of 1888) did not apply as the place of sale was outside the limits of the City of Bombay as laid down in the Act; that section 410 of the Act did not apply as the place was a private market established from time immemorial; and that the sale in question fell within clause (2) of section 410 of the Act. In the result, he acquitted the accused under section 245 of the Criminal Procedure Code (Act V of 1898).

Against this order of acquittal the Government of Bombay appealed to the High Court.

Raike, acting Advocate General, (with him *E. F. Nicholson*, Public Prosecutor), for the Crown:—The prosecution was brought by the Bombay Municipality for breach of the provisions of section 410 of the City of Bombay Municipal Act (Bombay Act III of 1888). The accused was found selling fish on the

Chaupati beach between high and low water mark. As to the exact distance of the place of sale from the sea-water there is some discrepancy in the evidence.

We submit that the provisions of the City of Bombay Municipal Act (Bombay Act III of 1888), apply to the place in question. The Act applies in so many words to the "City of Bombay" (section 1). The expression "City of Bombay" as defined by the Bombay General Clauses Act (Bombay Act I of 1904) means "the area within the local limits for the time being of the ordinary original civil jurisdiction of the Bombay High Court of Judicature." This signifies that "City of Bombay" bears this meaning, whenever it is used in the City of Bombay Municipal Act, unless there be anything repugnant in the latter Act. And there is nothing repugnant to it in the City of Bombay Municipal Act. Now, the place in question is indisputably within the limits of the ordinary original civil jurisdiction of the Bombay High Court.

[ASTON, J.—Do you refer us to any authority by which the local limits of the ordinary original civil jurisdiction of the Bombay High Court are defined?]

The local limits of the ordinary original civil jurisdiction of the Bombay High Court are defined in the Amended Letters Patent, section 11 (High Court Rule Book, p. 122). There is no law passed by the Governor General of India in Council as indicated in that section. So one has to go from that to the original Letters Patent of the Bombay High Court, section 11 (High Court Rule Book, p. 100). This again refers back to the Supreme Court Charter (High Court Rule Book, p. 23); which again refers to the Charter of the Mayor's Court, which mentions "Towns, Factories or places called Bombay."

Section 24 of the City of Bombay Municipal Act (Bombay Act III of 1888) enacts that for the purposes of election, the City shall be divided into wards: and the limits of these wards are defined in schedule B to the Act. This, however, cannot constitute a definition of "City of Bombay." The wards simply exist for the purposes of elections, and the Act does not say that every part of the City is included in the wards.

1905.

EMPEROR
v.
BUDHOORAI.

[RUSSELL, J.—The definition of “City of Bombay” enacted in the Bombay General Clauses Act (Bombay Act I of 1904), applies to all Acts passed by the Bombay Legislature, unless there be anything repugnant in an Act.]

The City of Bombay Municipal Act takes the City as defined by the General Clauses Act and divides it into wards temporarily for purposes of election. The fact that the wards and the city limits are not coincident appears from the fact that the corporation has power to alter the boundaries of the wards with the sanction of Government.

If schedule B of the Act be referred to, the place in question seems to lie within the boundaries of the City of Bombay, according to accepted principles of construction. The Magistrate says the beginning of Back Bay must be the high tide. The fallacy in the reasoning of the Magistrate is that you must include in the Back Bay every part of land uncovered by tide. I am not able to understand the reasons which led the Magistrate to that conclusion. He simply postulates. Again, in the same schedule, in No. 1 the whole of the harbour is included in Ward No. 1. If the reasoning of the Magistrate is carried further, the whole of the Colaba reclamation would be outside the ordinary original civil jurisdiction of the Bombay High Court. Refers also to sections 386, 387, 388 and 389 of the City of Bombay Municipal Act (Bombay Act III of 1888).

The next point is whether the place in question is a private market. Under the City of Bombay Municipal Act (Bombay Act III of 1888), a private market is a non-municipal market. But it remains to be seen whether it is a market at all; and then the question arises upon whom does the burden of proving it rest. If the accused protects herself from this prosecution on the ground that she sells fish in a market, then obviously she must prove it. Suppose the woman had been convicted of the offence, could the conviction be set aside by the fact that the Municipality had not proved that the sale was not in a market? The land as a rule is not a market. And the evidence in the case upon the point is all vague and is evidence of repute. The evidence is technically inadmissible; and apart from that, such evidence is absolutely worthless. See also, Ameer Ali and

Woodroffe's Evidence Act, 3rd Edition, p. 352; *Patel Vandravan v. Patel Manilal*⁽¹⁾; and *Musammat Shafiq-un-Nisa v. Khan Bahadur Raja Shaban Ali Khan*⁽²⁾.

The last point turns upon the construction of section 410, clause (2) of the City of Bombay Municipal Act (Bombay Act III of 1888). The term 'vessel' according to the Bombay General Clauses Act (Bombay Act I of 1904) means and includes any ship or boat or any other description of vessel used in navigation. The proviso, therefore, does not apply to this case. The fish was sold and exposed for sale in a basket on the shore. The sale in question was begun, continued and ended on the foreshore, and the person who purchased the fish did not know that they were brought from the vessel. The proviso to the section was only intended to protect the wholesale sale of a particular catch to a dealer.

Strangman (instructed by *Smetham, Byrne and Noble*) for the accused:—Taking the last point urged by the learned Advocate General first, we submit that the proviso to section 410 of the City of Bombay Municipal Act (Bombay Act III of 1888) affords a complete protection to the accused. In this case the accused brought the fish from the vessel in a basket on the shore and there sold them. The basket is merely a means of carriage and the sale is really from the 'vessel.'

As to the second point, we contend that the area over which a Municipal Corporation has ordinary jurisdiction are the portions which are described in schedule B to the City of Bombay Municipal Act. There the Girgaon ward is described as bounded on the west by the sea from Malabar point to the south end of Hornby Vellard. The construction to be placed on 'sea' is the sea which forms the Back Bay: and the sea includes the portion of land covered by the high-water mark: see Hall on Seashore (2nd Edn.), p. 17.

Section 24 of the City of Bombay Municipal Act shows the ordinary Municipal limits. And, therefore, we are not concerned with the limits of the "City of Bombay" as defined in any other Act.

(1) (1890) 15 Bom. 565.

(2) (1904) 31 I. A. 217.

1905.

EMPEROR
v.
BUDHOBAI.

1905.

EMPEROR
v.
BUDHOOBAL.

Turning, then, to the only remaining point whether the place is a private market, we find, on referring to Stroud's Judicial Dictionary, Wharton's Law Lexicon and Webster's Dictionary of the English Language, that market ordinarily means a place of sale. According to Webster, the market must be by grant or by immemorial user; and there is ample evidence in this case to show that the fish are sold at the place in question from time immemorial. It is for the prosecution to show that the place is a private market. Market is either an appointed place of sale or at an appointed time and place of sale. Time is not of the essence in its meaning. The ordinary dictionary meaning of the term is an appointed place for the purposes of sale.

[ASTON, J.—Is the market owned by any body?]

The site belongs to the Collector of Bombay.

Raikes was heard in reply.

Cur. adv. vult.

RUSSELL, J. :—The accused herein Budhoobai, widow of a fisherman Rama Kamla, was charged before Mr. Setalvad, Acting Presidency Magistrate, with selling and exposing for sale, without license from the Municipal Commissioner, fish intended for human food on the Chaupati foreshore on the 5th October 1904, at 8 A. M. contrary to the provisions of section 410 (1) of the Bombay Municipal Act III of 1888. It appears that on the morning in question two Municipal Officers, accompanied by a Sub-Inspector named Ramchandra Lagu, went to the Chaupati foreshore and there the said Sub-Inspector bought one pomfret for one anna from the accused. It was sold by the accused from a basket which she had placed on the sand at some distance from the water. The witnesses are not agreed as to the exact distance, but it may be taken that the fish was sold between the high and low water mark. At the time this fish was sold there were several other fisher people selling fish and other people were buying from them. It is proved, we think, that the fish sold was fresh fish and that it had been recently brought from one of the boats then in the Back Bay. The deceased husband of the accused was a fisherman owning two tonies, a large and a small one, and she is now the owner of them. It would appear,

although it is not quite clear, that the fish that was sold to the Sub-Inspector was taken out of one of her tonies.

The first question we shall discuss is, is the accused protected by the provisions of section 410 of the Municipal Act which runs as follows:—

“(1) Except as hereinafter provided, no person shall, without a license from the Commissioner, sell or expose for sale any four-footed animal or any meat or fish intended for human food, in any place other than a municipal or private market :

“(2) Provided that nothing in sub-section (1) shall apply to fresh fish sold from, or exposed for sale in, a vessel in which it has been brought direct to the sea-shore after being caught at sea.”

The proviso is very ungrammatical and by no means easy to construe. The relative “which” refers to “vessel” whereas the words “caught at sea” refer to “fish” and the whole sentence from “in which” to “sea” is intended to be what in German grammar is known as a compound adjective. Treating this whole sentence in that way the proviso is, we think, worded so as not to interfere with the exposing or selling of fish in and from vessels coming direct from the sea. The allocation of the prepositions “in” and “from” seems to show this. Three processes seem to be aimed at and the proviso should then run as follows:—Nothing in sub-section 1 shall apply to fresh fish (1) caught at sea; and (2) brought direct to the sea-shore and (3) sold from or exposed for sale in a vessel. The draftsman of the proviso, however, thought fit to put the processes in their reverse order and thereby has given occasion for this difficulty. Directly any fresh fish is brought on to the shore the prohibition of clause 1 attaches, but the prohibition is not intended to apply to anything which has not been actually brought on to the shore. It would be impossible in the present case to say that this fresh fish had been sold from a vessel, when as a matter of fact it had been sold from the basket on the shore, it having been brought from the vessel which was in the water. We have been unable to find any direct authority on this point but the case of *Playford v. Mercer*⁽¹⁾ supports our conclusion. In that case a cargo

1905.

 EMPEROR
 &
 BUDHOBAI.

(1) (1870) 22 L. T. N. S. 41.

1905.

EMPEROR
v.
BUDHOOBAL

of ice was consigned to the plaintiff, and before the ship came into the harbour the defendants bought the cargo with a condition that the ice was to be taken from the ship's deck by them. It was held that the contract "from the deck" meant that the vendor should pay all that was necessary to enable the purchaser to remove the cargo from the deck, and that harbour dues charged to be paid before the goods could be removed, were payable by the vendor. Applying that case to the present—suppose here Budhoobai had agreed to sell the pomfret "from the tony," and then had paid a charge for putting it into the basket and taking it to shore surely the purchaser would have had to pay that charge.

The next question to consider is whether it can be said that the place where this fish was sold is a "private market" and upon whom does the burden lie to prove it to be such. Now no attempt has been made to show that there are any limits to be placed upon the foreshore in question so as to constitute a fixed market. It was suggested that a space of some 100 yards in width and length might be considered as the limit, but there is really no evidence whatever to support that suggestion. Therefore the whole foreshore of Chaupati must, according to the argument of the accused, be taken to be "private market." "Private market" is defined by section 398 of the Act which says:—"All markets which belong to or are maintained by the Corporation shall be called 'Municipal markets.' All other markets shall be deemed to be private." It is difficult to see how a place like the whole of the foreshore of Chaupati could be held to be a "private market." Even however if this were not so, we must next consider upon whom in this case lay the onus of proving that the place in question was a "private market." Now upon that point the Municipality started their case by showing that the place in question was the foreshore of Chaupati. That therefore was sufficient to throw the onus upon the defendants to prove that the foreshore of Chaupati was a "private market" within the meaning of the Act. Now upon this point a certain amount of evidence was given and a great deal was made of the admission by Mr. C. B. Shroff in cross-examination that the fishermen in general have been in the habit of using the

Chaupati foreshore for fishing from time immemorial and also for selling fish there. Afterwards he said he could not say that the fishermen were selling fish there from time immemorial and his own knowledge had been only for 10 years. Certain other evidence was given by the witnesses for the accused but the conclusion we have come to upon that point is that the accused has not discharged the burden which we find was laid upon her by the evidence that she has called. To legally prove immemorial custom for selling fish on the Chaupáti foreshore would require very much better and further evidence than has been given in this case: *e.g.*, *Mercer v. Denne*⁽¹⁾ shows what evidence was necessary to prove a valid and good custom for fishermen to dry their nets upon the shore of the land of a private owner. As we have said the evidence in this case falls far short of the evidence which was given in support of the custom in that case. Of course this judgment will not prevent the fishermen who are interested in this alleged custom from filing a civil suit to prove the custom and to protect their rights if any. Whether it is worth their while to do so is for them to consider, for in order to avoid any penalty hereafter all they need do is to haul their tonies a little higher on to the sea-shore and expose their fish in and sell them from them direct.

The last question is, whether the Municipal Act applies to the spot in question. We have no doubt whatever that it does. *Prima facie* the foreshore between high and low water marks belongs to the crown: see *Attorney-General v. Richards*⁽²⁾ and *Attorney-General v. Emerson*⁽³⁾. The same law applies in India. *Doe d. Rajah Seebkristo v. The East India Co.*⁽⁴⁾. The Municipal Act, sections 387—389, certainly contemplate parts of the sea-shore being vested in and parts not being vested in the Municipality. But there is nothing to show that the Chaupáti foreshore is so vested. The Presidency Magistrate seems to have considered that the City of Bombay is defined in detail in the Municipal Act, because the boundaries of the wards are set out in schedule B into which the city is divided. But it is clear from section 24 that these boundaries are given for electoral

1905.

EMPEROR
v.
BUDHOBAI.

(1) [1904] 2 Ch. 534.

(2) (1795) 3 R. R. 632.

(3) [1891] A. C. 649.

(4) (1856) 6 Moo. I. A. 267.

1935.

EMPEROR
v.
BUDHOORAI.

purposes only; and further "City" in section 24 must be read subject to the qualification in section 3, at the beginning "unless there is something repugnant in the subject or context," wherefrom it appears that in section 24 "City" is not equivalent to the City of Bombay or the whole area to which the Municipal Act applies. The word "City of Bombay" under the General Clauses Act I of 1904 means the area within the local limits for the time being of the Ordinary Original Civil Jurisdiction of the Bombay High Court of Judicature: see clause 10; and by section 4 the word "City of Bombay" as defined in section 3 of that Act applies also, unless there is anything repugnant in the subject or context of Bombay Acts passed before the commencement of Act I of 1904. We do not find anything repugnant in the subject or context in the Bombay Municipal Act. There is no doubt therefore the foreshore in question is within the Ordinary Original Civil Jurisdiction of the Bombay High Court of Judicature, consequently this point also fails the accused.

The result is that in our opinion the order of the Acting Presidency Magistrate was wrong, the accused ought to have been convicted of the offence with which she was charged.

We accordingly reverse the order of acquittal and direct that she do pay a fine of two annas, or, as section 26 of the Bombay General Clauses Act I of 1904 applies, by which section 67 *inter alia* of the Indian Penal Code is rendered applicable in the case of fines imposed under any Bombay Act, we order the accused do suffer simple imprisonment for one day in default.

ASTON, J.—I concur in the order proposed. The evidence establishes that the accused exposed for sale and sold the fish in question after it had been removed, unsold, from a boat and had been taken to the shore and had been placed on the shore in the basket in which it was exposed for sale on the shore. This is prohibited by section 410 of the City of Bombay Municipal Act unless the place of sale or exposure is a market.

The spot where this exposure and sale took place is part of the Chaupáti foreshore, between high and low water mark, which *primá facie* belongs to the Government and in which no proprietary rights are claimed by the accused for herself or any private individuals. It is *primá facie* not a market place and the evidence

to which we were referred to show that this foreshore or any part of it is a market is too indefinite as to place, time and circumstance to show that the Chaupáti foreshore is in whole or in part a market place.

I also concur in the view that in applying the provisions of section 410 of the City of Bombay Municipal Act, the decision whether the Chaupáti foreshore between high and low watermark is within the City of Bombay is governed by the definition of "City of Bombay" contained in the Bombay General Clauses Act and not by certain provisions of the City of Bombay Municipal Act which divide "the City" into wards for electoral purposes. On this view of the case the accused has committed an offence punishable under the section cited, but the prosecution being avowedly instituted merely as a test case, a nominal fine is sufficient.

R. R.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1905.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), APPELLANT, *v.* VAMANRAV NARAYAN CHIPLUNKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

August 16.

Cantonment property—Grant—Notice of resumption—Offer of compensation—Condition precedent—Notice to one of three executors—Joint occupants.

A certain plot known as No. 1, Queen's Gardens, situate within the limits of the Poona Cantonment, was in the year 1862 granted by the Commander-in-Chief of the Bombay Army to one Edalji Nasarvanji Colabavala under the terms of a General Order, dated the 31st July 1856. The 14th clause of the said General Order was in these terms:—

"Permission to occupy such ground in a military cantonment confers no proprietary right, it continues the property of the State.

"It is resumable at the pleasure of Government, but

"In all practicable cases one month's notice of resumption will be given, and

"The value of the buildings which may have been erected thereon, as estimated by a committee, will be paid to the owner."

* Appeal No. 27 of 1905.