

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1908.

July 9.

LALBHAI TRICAMLAL AND OTHERS, PLAINTIFFS, v. THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY, DEFENDANT.*

City of Bombay Municipal Act (Bom. Act III of 1888), section 354 †—Construction—Municipal Commissioner—Power to remove dangerous structures—Exercise of the power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house.

The primary object of section 354 of the City of Bombay Municipal Act (Bom. Act III of 1888), is the safety of the public to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers can be exercised arbitrarily and without due consideration to the provisions of the section and the right of individuals.

The word 'appear' in the section does not involve 'appear to the eye.' It is sufficient if it appears to the Commissioner on the representation of a competent officer whose duty it is to make such representations. But the Commissioner's action when 'it appears' is judicial, so that he must exercise his discretion in determining what action should be taken. It is not sufficient that he should merely sign a notice which was sent to him by the Executive

* Suit No. 166 of 1908.

† Section 354 of the City of Bombay Municipal Act (Bom. Act III of 1888)—
Dangerous Structures.

354. (1) If it shall at any time appear to the Commissioner that any structure (including under this expression any building, wall or other structure and anything affixed to or projecting from any building, wall or other structure) is in a ruinous condition, or likely to fall, or in any way dangerous to any person occupying, resorting to, or passing by such structure or any other structure or place in the neighbourhood thereof, the Commissioner may, by written notice, require the owner or occupier of such structure, to pull down, secure or repair such structure, and to prevent all cause of danger therefrom.

(2) The Commissioner may also, if he thinks fit, require the said owner or occupier, by the said notice, either forthwith or before proceeding to pull down, secure or repair the said structure, to set up a proper and sufficient hoard or fence for the protection of passers-by and other persons, with a convenient platform and handrail, if there be room enough for the same and the Commissioner shall think the same desirable, to serve as a footway for passengers outside of such hoard or fence.

Engineer because it had previously been signed by that officer. It should be considered as a notice to show cause. It is not invalid, at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right.

Danger means peril, risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. Section 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first, the degree of danger must be ascertained, and then the appropriate precautionary measure prescribed. Where it is not suggested that the danger is imminent, a duty is imposed on the Commissioner to decide judicially what should be done to assure the safety of the public having due regard to the interest of the owner of the structure.

The discretion must not be arbitrary: *Paskall v. Passmore*⁽¹⁾; *Gangjibhoy v. The Municipal Corporation of Bombay*⁽²⁾. But the Court is in the first instance entitled to inquire whether the discretion has been exercised. Discretion has to be exercised, first, in coming to the conclusion as to the state of the structure, and, then in fixing upon the appropriate remedy. It is sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued, based on the representation of such a person, it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken.

If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be *prima facie* evidence that the person appointed by the Commissioner has not exercised his discretion. The Commissioner can exercise his discretion through an agent, but it follows that if the agent has not exercised his discretion, nor has the Commissioner, the Commissioner has the opportunity to remedy this when the owner complains.

Under certain circumstances the safety of the public must be considered in priority to the right of private individuals, as in the case of imminent danger, but where there is no suggestion of imminent danger, the person affected is entitled to be heard as a matter of common justice.

SUIT for an injunction restraining the Municipal Commissioner of Bombay, his servants and agents, etc., from pulling down the plaintiffs' house under sections 354 and 488 of the City of Bombay Municipal Act (Bom: Act III of 1888), as being in a dangerous and ruinous condition.

(1) 15 Fa. St. D. 304.

(2) (1899) 1 Bom. L. R. 754 at p. 764.

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The house in question consisted of a ground floor and one upper floor and was situated in Chakla Street in Bombay and faced to the west. It ran back towards the east for more than a hundred feet and on its north side was a narrow street or lane only seven or eight feet wide called Cumbharwada Cross Lane. Ten shops on the ground floor of the house opened in this lane which was a busy thoroughfare. The front of the house opening on Chakla Street only afforded a space for two shops on the ground floor. These shops, as also those opening on the lane, were used for the sale of grain and spices. The rooms on the upper floor were used for storage except four rooms which were occupied by tenants who lived in them. The whole height of the house was only fourteen or fifteen feet. The house was said to be fifty or sixty years old and was a wooden framed building, the space between the posts of the framework being filled in with masonry, chunam, etc.

The plaintiffs who were the trustees of Godiji Maharaj's temple in Bombay had purchased the said house in 1904 and they applied the rents to the maintenance of the temple.

On the 6th January 1908 the plaintiffs were served with a notice under section 354 of the City of Bombay Municipal Act which stated that a portion of their said house "was in a ruinous condition, likely to fall and dangerous to any persons occupying, resorting to, or passing by the same," and required them to pull down the whole of the first floor including the flooring and the roof. This notice came from the Municipal Executive Engineer's office and was signed by the Municipal Commissioner (the defendant).

On receipt of the said notice the plaintiffs had the house examined by their engineer who after examination reported that the house was in a sound condition and not at all ruinous or likely to fall. Thereupon the plaintiffs' solicitors, on the 1st February 1908, wrote to the Municipal Commissioner stating the result of the engineer's examination of the house and saying that they believed some mistake had been made in sending the notice. They requested that the house should be examined by the Engineering Department of the Municipality in order to ascertain its real condition. Their letter concluded as follows:—

Our clients' engineer will be glad to meet the officer of the Executive Engineer's Department, who may be deputed to inspect the house and discuss the subject with him on any day which may be appointed for the purpose.

The plaintiffs received no reply to the said letter, but on the 19th February 1908 a further notice of that date was received by them signed by an officer (an Inspector) in the Executive Engineer's Department purporting to be issued under section 488 of the City of Bombay Municipal Act and stating that on the 27th February 1908 pursuant to that section he would enter the said house with workmen in order to pull down the whole of the first floor thereof including the flooring and roof as required by the previous notice of the 6th January 1908.

The plaintiffs then had the house again examined by another surveyor who also reported it to be in a sound condition. Thereupon the plaintiffs on the 25th February 1908 filed the present suit praying for an injunction restraining the Municipal Commissioner, his servants and agents from proceeding under the aforesaid notices. An *interim* injunction pending the hearing of the suit was granted on the application of the plaintiffs.

After the plaint was filed the plaintiffs obtained inspection of the Municipal documents and discovered that for a considerable time there had been a desire on the part of the Municipal Engineering Department to remove the plaintiffs' house in order to widen Cumbharwada Cross Lane which was *much too* narrow for the traffic. The plaintiffs thereupon obtained leave to amend the plaint by adding two paragraphs, alleging that the notices of the 6th January and the 19th February 1908 had been issued capriciously and oppressively without giving the plaintiffs an opportunity of satisfying the defendant that the house was not in a dangerous condition, and that they were not issued in good faith but were really issued in order to widen the Cumbharwada Cross Lane.

The case came on for hearing in June 1908.

Issues were framed raising the following points, *viz.*:—

1. Whether the actual condition of the house on the 6th January 1908 justified the issue of the notice of that date "to

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"*pu'l down*" part of the house as being ruinous, etc., under section 354?

2. Whether under the said section the Commissioner's order was not final and conclusive, and whether it could be questioned in a suit?

3. Whether the notices were issued in good faith?

On the second point it was contended for the plaintiffs that in any case both the orders were bad as both were made by the Commissioner without first giving the plaintiffs the opportunity of being heard.

Kirkpatrick (with *Setalvad* and *Bhandarkar*) for the plaintiffs:— Section 354 allows a notice to pull down only in cases of urgent and immediate danger. In other cases the notice issued under this section should be to secure or to repair. It is now six months since notices complained of were issued and the house is still standing and is occupied and used just as it always has been. This is conclusive proof that there was no urgent danger in January and February last and therefore there was no justification for the notices. The evidence given now at the hearing shows that the house though possibly needing some slight repair is quite sound and not dangerous or ruinous. The principles laid down in *Metropolitan Asylum District v. Hill* ⁽¹⁾ are applicable here.

No doubt the Commissioner under section 354 may issue a notice if it appear to him that a building is dangerous. But there is nothing in the statute which takes away the right to question the propriety of his action by a suit. Section 471 recognizes that right for it speaks of any requisition *lawfully* made. How can the legality of a requisition be ascertained except by a suit? That point, however, has been decided by *Jardine, J., in Hajee Essa Hajee Fudla v. Charles* ⁽²⁾ which was a case on the corresponding section of the previous Municipal Act.

It is, of course, impossible for the Commissioner to have personal knowledge of all the matters arising in all the depart-

(1) (1881) 6 App. Cas. 193.

(2) Suit No. 225 of 1887 (unreported) referred to in *Scott and Robertson on the Bombay Municipal Act, 1888*, p. 122.

ments of the Municipality. He must rely on his subordinates. In their zeal to improve the City by widening the street they have misled him. The documents in evidence show their designs on the plaintiffs' house for several years previous to the notice of the 6th January 1908. The Commissioner signed that notice on the reports laid before him. In so doing he acted judicially and both sides should have been heard. But plaintiffs had no opportunity of stating their case: *Cooper v. Wandsworth District Board of Works* ⁽¹⁾; *Hopkins v. Smethwick Local Board of Health* ⁽²⁾; *Attorney-General v. Hooper* ⁽³⁾. Judicial authority cannot be delegated to subordinates, see Broom's Legal Maxims, page 639, 7th edition.

Jardine (with *Weldon*) for the defendant:—Under section 354 of the City of Bombay Municipal Act the Commissioner's opinion is final and the notice issued by him in accordance with that opinion cannot be questioned in a suit unless bad faith can be shown: *Gangjibhoj v. Municipal Corporation of Bombay* ⁽⁴⁾; *Cheetham v. Mayor, &c., of Manchester* ⁽⁵⁾. So also in cases arising under section 231 of the Act, the Commissioner's opinion is conclusive: *Goverdhundas Gokuldas Tejpal v. The Municipal Commissioner* ⁽⁶⁾. Section 354 does not require that the person on whom notice is served shall be called on to show cause against it if he has any. Some sections of the Act do prescribe that procedure, e. g., 357 clause (1), sub-clause (b), but no similar words appear in section 354. The omission must be intentional. See also Maxwell on Statutes, page 335, 7th edition.

The case of the Managers of the *Metropolitan Asylum District v. Hill* ⁽⁷⁾ only applies where the Act authorized by the statute can be done without injury to property. It is not applicable here for the acts authorized by sections 354 and 488 necessarily involve injury to property and loss to the owner of it.

We contend that the evidence shows that the condition of the house justified the issue of the notice. It was and is in a dangerous condition and ought to be pulled down.

(1) (1863) 14 C. B. N. S. 180.

(2) (1890) 24 Q. B. D. 712.

(3) [1893] 3 Ch. 483.

(4) (1899) 1 Bom. L. R. 754.

(5) (1875) L. R. 10, C. P. 249.

(6) (1890) Chitty and Patell's Small Cause Court cases, p. 281.

(7) (1881) 6 App. Cas. 193.

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The following sections of the City of Bombay Municipal Act were referred to and commented upon:—Sections 298, 326, 342, 438, 471, 489, 491 and 503.

MACLEOD, J.:—The plaintiffs as trustees of Godiji Maharaj's temple in Bombay are the owners of a house at the corner of Chakla Street and Cumbharwada Cross Lane, consisting of a ground floor and one upper floor. The rooms on the ground floor are used for shops and the rooms on the upper floor are partly used for living purposes and partly for storing goods. The gross rental is Rs. 316.

On the 6th January 1908 the plaintiffs were served with a notice from the defendant, the Municipal Commissioner for the City of Bombay (Exhibit A), requiring them, under section 354 of the City of Bombay Municipal Act, 1888, to pull down the whole of the first floor of the said house including the flooring and the roof and pull down or secure the remainder of the said structure, on the ground that the structure was in a ruinous condition, likely to fall and dangerous to any person occupying, resorting to or passing by the same. The plaintiffs in consequence of this above notice instructed their Engineer Mr. N. D. Kanga to inspect the building and he expressed the opinion that no portion of the building was dangerous or in a ruinous condition or likely to fall. The plaintiffs through their solicitors Messrs. Bhaishankar and Kanga then wrote to the defendant on the 1st February a letter (Exhibit A 3):—

Our clients, the Trustees of the Godiji temple, in whom is vested the house No. 145 situate at Chakla Street have placed in our hands Notice No. 293 of 1907-08, dated the 6th ultimo, issued under section 354 of the City of Bombay Municipal Act, 1888, and we are instructed to state in reply that on receipt of your said notice our clients showed the same house to their engineer who after careful examination found that the said house was in quite a sound condition and was not in a ruinous condition or likely to fall down or dangerous to any person occupying, resorting to or passing by the same, and we believe that some mistake has been committed in issuing the said notice in regard to the said house.

We therefore request that you will be good enough to have the house examined by the Engineering Department of the Municipality with the view of ascertaining its real condition and our clients are satisfied that it will be found quite unnecessary to pull down the whole of the first floor

including the flooring and the roof and in the meantime oblige our clients by suspending action on the said notice.

Our clients' engineer will be glad to meet the officer of the Executive Engineer's Department who may be deputed to inspect the house and discuss the subject with him on any day which may be appointed for the purpose.

On the 17th February the defendant wrote to the plaintiffs' solicitors (Exhibit A5) forwarding the memo of the Executive Engineer. It was as follows:—

The house in question has been examined by this department and certain portions of the same having been found in an unsafe condition, a notice under section 354 of the Municipal Act has been issued for the removal of the same.

The solicitors may be informed that a month's time was given to comply with the notice which time has already expired and as their clients have done nothing in the subject, Municipality will now take further steps in the matter.

On the 19th February 1908 notice was given to the plaintiffs under the signature of Mr. A. B. Vaidya, Inspector of Streets and Buildings, B. Ward South, that he would enter on the premises at 8-30 on the 27th February to pull down the first floor as required by the notice of the 6th January. This notice is Exhibit B. The history of the notice is as follows: Mr. Katrak, Superintendent of Streets and Buildings, sent A 3 to Mr. Vaidya with a memo A 17 asking him to report. Mr. Vaidya returned it with his remarks A 4. He says: "The building was examined by the Engineering Department and the notice was issued after careful inspection." No further inspection was made by Mr. Vaidya before he reported. Mr. Katrak on getting Exhibit A 4 prepared a draft (Exhibit A 18) for Mr. Hall's, the Executive Engineer's approval. Mr. Hall approved the draft on 11th February and on the 14th Mr. Katrak gave instructions on his own responsibility to issue the notice B. It was drawn up and signed by Mr. Vaidya before the defendant replied on the 17th February by Exhibit A 5 to plaintiffs' solicitors' letter A 3, though it was not served until the 19th February. The plaintiffs then asked Mr. Chambers, the well known Architect and Surveyor, to inspect the building. He did so on the 24th February and made a report on the same day (Exhibit A 6), in which he expressed the opinion that the building was not

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dangerous or in a ruinous condition or likely to fall. The plaintiffs' solicitors then wrote to defendant on the 24th February (Exhibit A 7) forwarding a copy of Mr. Chambers' report and asking defendant to reconsider the matter, otherwise they would be obliged to file a suit for an injunction. No answer being received this suit was filed on the 25th February. On the 15th April, plaintiffs obtained an *interim* injunction restraining the defendant from pulling down or trespassing upon the premises in the plaint mentioned until the 8th May, on their undertaking not to do any work to their building. Clearly there was no imminent danger then. On the 6th May the injunction was extended for a fortnight and was finally, on the 22nd May, after considerable argument, extended to the hearing of the suit. The defendant filed his written statement on the 9th April. He says that when Exhibit A was issued it appeared to him and it still appeared to him that the condition of the upper story of plaintiffs' house was such that the said structure was dangerous to persons occupying, resorting to or passing by it, that the danger would be enhanced if the said structure were not removed before heavy rain fell, and under the above circumstances the plaintiffs were not entitled to the injunction prayed for. By an order of the 14th April 1908 the plaintiffs were allowed to amend their plaint by adding clauses 11a and 11b in which they alleged the defendant in issuing the said notice did not exercise his powers in a proper, reasonable or considerate manner and that his object was not a *bona fide* one, his real object being to acquire the property for widening Cumbharwada Cross Lane. The defendant replied to these allegations by an affidavit of the 5th May.

Before dealing with the circumstances under which the notice of the 6th January 1908 came to be issued I must refer to the previous history of the plaintiffs' house and the correspondence between the owners and the Municipality relied upon by the plaintiffs as showing the real object of the defendant in issuing the notice under section 354. The plaintiffs bought the house on the 6th October 1904. On the 8th October 1901 the previous owner had applied to the Executive Engineer of the Municipality to add a story (Exhibit C). On the 7th November 1901 the

Executive Engineer disapproved by Exhibit D on the ground that the whole of the proposed work was within the regular line of the street as shown in the plan sent therewith. On the 17th November the owner's Engineer wrote Exhibit E asking that his client should either be allowed to build or the property should be acquired by the Municipality. On the 25th March 1902 the Executive Engineer declined to entertain the proposal (Exhibit G). There was also a further objection that the building was not strong enough to bear another story. In 1905 the plaintiffs executed certain repairs within the regular line of the street without Municipal approval, and were fined Rs. 5 in the Police Court. Thereafter a notice was served on them (Exhibit H) of the 22nd July to remove the alterations. Proceedings to enforce the notice, however, were not taken as according to a minute appearing on Exhibit J the work done had been very trifling. On the 13th July 1905 the Divisional Health Officer issued a notice (Exhibit K) requiring plaintiffs to provide a privy of two seats and as plaintiffs did not comply with the requisition a summons was taken out on the 7th December (Exhibit L). On the 3rd February 1906 plaintiffs' Engineer wrote to the Health Officer (Exhibit N) stating that they had submitted plans for the privies to the Executive Engineer and asking for the summons to be withdrawn. The same day the plaintiffs submitted plans to the Executive Engineer (Exhibit O). On the 24th February 1906 the Executive Engineer wrote Exhibit Q to the Municipal Commissioner stating that as the works intended to be constructed according to the said plan were within the regular line of the street he proposed to require the building to be set back. On the same day the Executive Engineer sent a notice of disapproval (Exhibit R) to the plaintiffs. On the 19th March 1906 the Divisional Health Officer wrote Exhibit S to the Executive Engineer in respect of the summons taken out against the plaintiffs for not building the privies. By the memorandum of the 29th March (Exhibit P) prepared by Mr. Vaidya for the Executive Engineer the Divisional Health Officer was to be informed that the plaintiffs' plans for the privies could not be approved, as the whole property was intended to be acquired for the improvements of the road and

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the question of compensation was under consideration. On the 24th March the Executive Engineer reported to the Commissioner (Exhibit V) advising that the whole property should be acquired and the Commissioner's sanction was solicited. On the 29th March the Divisional Health Officer was informed that the question of set back was under consideration. The question of obtaining the set back seems to have remained in abeyance in the Commissioner's office in spite of reminders from the Executive Engineer. That Officer wrote again on the 14th November 1906 (Exhibit Z) asking for the Commissioner's early instructions. On the 29th November the Commissioner wrote Exhibit A1, in reply to Z, saying that the acquisition of the set back may be allowed to stand over until the owner of the property gives the Municipality an opportunity of taking it, and in the meantime the Health Department were to take no further action in the matter of privy accommodation. While this correspondence was going on there was no suggestion whatever that plaintiffs' house was in a dangerous condition. On the 29th November 1907 Mr. Vaidya, Inspector, and Mr. Katrak, Superintendent of Streets and Buildings for this ward, were on a round of inspection. To the north of plaintiffs' house one Harichand Kapurchand was erecting a building with a ground floor and three upper floors, and the erection of this building had to be supervised by the Municipal officers. Mr. Vaidya said that he and Mr. Katrak were passing down Coombharwada Cross Lane when he drew Mr. Katrak's attention to the way in which plaintiffs' house leaned over towards the north. Thereupon they both went into plaintiffs' house and after inspecting it Mr. Katrak gave the witness instructions to examine the house more in detail and report to him. Mr. Katrak said that he and the Inspector while looking out from Harichand's house noticed the lean over of plaintiffs' house, but it is not very material from where the lean over was first noticed, though I do not think that Mr. Katrak could have seen anything more than the roof of plaintiffs' house from Harichand's window. Mr. Vaidya examined the plaintiffs house on the 6th and 9th December making rough notes of the result of his inspections (Exhibit 5). He reported to Mr. Katrak and they both visited the house on the 11th December.

Mr. Vaidya brought his rough notes and a form of report marked A2 in which he had filled in the Inspector's remark column with a summary of his rough notes. Mr. Katrak then filled in the Superintendent's remark column in pencil and also the directions on the second sheet for the Notice Clerk. The two sheets were then returned to Mr. Vaidya to get the notice drawn up. The report and the notice were afterwards sent by Mr. Vaidya to Mr. Katrak who initialled the notice and forwarded the papers to Mr. Hall, the Executive Engineer. Mr. Hall signed the notice and sent it alone to the defendant. Defendant signed the notice and a duplicate copy was served on the plaintiffs on the 6th January. Before that they had no notice that their house was being inspected by the Municipal Officers. It is not suggested that either the defendant or Mr. Hall had seen the house or formed any opinion of their own regarding its condition before the suit was filed. Defendant signed the notice because he relied on Mr. Hall's signature and Mr. Hall signed it because he relied on Mr. Katrak's initials.

The third issue deals with the defendant's contention that this notice is conclusive unless the plaintiffs can prove *mala fides*. It is not suggested by the plaintiffs that there is any *mala fides* on the part of the defendant personally but they contended in their plaint as originally framed that they were entitled to show that the condition of their house was not such as to warrant the issue of the notice, and that if they succeeded in doing that they were entitled to the injunction, as it could not possibly have appeared to the defendant that the house was in a dangerous condition or likely to fall. It could well be implied from this that plaintiffs had raised the question whether the defendant had exercised the powers vested in him under the said section in a proper, reasonable and considerate manner or whether he had acted capriciously or arbitrarily. After inspection of the defendant's documents it seemed probable to the plaintiffs that the notice was issued owing to a desire on the part of the defendant to acquire their property for the purpose of widening Coombharwada Cross Lane. They therefore applied for and obtained leave to amend their plaint by adding two clauses definitely raising these questions:

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(1) Whether the defendant had exercised his powers in a proper, reasonable and considerate manner and not capriciously or arbitrarily?

(2) Whether the defendant had been actuated by an improper motive?

Section 354 of the Municipal Act of 1888 is the only section under which the Commissioner can act in respect of buildings in a ruinous and dangerous condition. It is headed—“*Dangerous structures.*”

Sub-section (1) is as follows:—

If it shall at any time appear to the Commissioner that any structure (including under this expression any building, wall or other structure and anything affixed to, or projecting from, any building, wall or other structure) is in a ruinous condition, or likely to fall, or in any way dangerous to any person occupying, resorting to, or passing by such structure or any other structure or place in the neighbourhood thereof, the Commissioner may, by written notice, require the owner or occupier of such structure, to pull down, secure or repair such structure, and to prevent all cause of danger therefrom.

The primary object of the section is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers can be exercised arbitrarily and without due consideration to the provisions of the section and the rights of individuals.

In the first place it must appear to the Commissioner that a structure is in a ruinous condition or likely to fall or in any way dangerous to any person occupying, resorting to, or passing by such structure. Then the Commissioner may by written notice require the owner or occupier to pull down, secure or repair. It is admitted that the word ‘appear’ need not involve ‘appear to the eye’. It is sufficient if it appears to the Commissioner on the representations of a competent officer whose duty it is to make such representations. But the Commissioner’s action when ‘it appears’ is judicial, so that he must exercise his discretion in determining what action should be taken. In this case the Commissioner merely signed the notice which was sent to him by the Executive Engineer because it had previously been signed by that officer. The Commissioner on the strength of that signature concluded that a proper decision had been arrived at as regards the house. From 400 to 500 of these notices are issued

every year and it is obviously impossible for the Commissioner to do more than trust to the discretion of his subordinates, but it is only by aid of a fiction that it can be said a notice signed in this way by the Commissioner complies with the section. It should be considered as a notice to show cause. It is not invalid; at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right. The Executive Engineer signed the notice because it was initialled by Mr. Katrak. It is not contended that Mr. Hall ever considered whether the requisition in the notice was the proper one under the circumstances. Neither the defendant nor Mr. Hall had seen the premises before the suit was filed. It is further admitted that Mr. Katrak was alone responsible for the framing of the notice and that he never considered whether the injury apprehended from the dangerous condition of the structure might not be prevented by securing or repairing the structure instead of pulling it down. There may of course be cases in which the danger is so imminent that the only obvious requisition to make on the owner is to pull down, in others the danger may be averted by less stringent measures.

Now danger means peril, risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. Section 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first the degree of danger must be ascertained; and then the appropriate precautionary measure prescribed. It is not suggested in this case that the danger was imminent; up to the end of the hearing no hoarding has been put up round the building, nor have the tenants been warned to vacate, and therefore a duty was imposed on the defendant to decide judicially what should be done to assure the safety of the public, having due regard to the interests of the owner. The time for exercising his discretion personally arrived when the plaintiffs complained against the notice. It was certainly very unfortunate that no attempt was made to meet the very reasonable request made in the last two paragraphs of plaintiffs' solicitors' letter of the 1st February 1908 (Exhibit A3). The letter

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came down to Mr. Vaidya for report. He did not go to examine the house again; the only question he considered was whether the notice was issued against the plaintiffs' house by mistake instead of against some other house, and he reported there was no mistake. That may have been all that was necessary for Mr. Vaidya to do, but nothing can excuse the neglect of the defendant to deal with plaintiffs' request for an opportunity to be heard on the question whether the notice to pull down was necessary. I do not imagine the defendant was personally to blame for this, as from the endorsement on A3 it appears to have been dealt with by his assistant; the fault lay with the Executive Engineer's Department. Legally, however, it affects the discretion of the defendant.

Discretion must not be arbitrary. "The very term itself standing and unsupported by circumstances imports the exercise of judgment, wisdom and skill as contradistinguished from unthinking folly, heady violence or rash injustice." See *Paskall v. Passmore* ⁽¹⁾. Mr. Jardine relied on the remarks of Jenkins, C. J., in *Gangjibhoy v. The Municipal Corporation of Bombay* ⁽²⁾. "The Legislature has in the view I take of the Act vested in the Municipal Commissioner a discretion in this matter and the Court would not interfere in his exercise merely because the object in view might be carried out in some other way nor would it lightly impute to him bad faith." I entirely agree; but in the first instance the Court is entitled to inquire whether the discretion has been exercised. This brings me to the question raised by Mr. Kirkpatrick whether the Commissioner having to exercise his discretion can do so through an agent. Discretion has to be exercised, first, in coming to a conclusion as to the state of the structure, and then in fixing upon the appropriate remedy. It is obviously impossible for the Commissioner to inspect all structures that are suspected of being dangerous. Therefore in my opinion it is a sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued based on the representation of such a person it is open to the

(1) 15 Pa. St. D. 304.

(2) (1899) 1 Bom. L. R. 754 at p. 764.

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owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken. Otherwise the owner has no remedy. The Commissioner has only to say: "I have appointed a competent person to report to me; that person reported the structure was dangerous and must be pulled down. I issued a notice accordingly and you cannot dispute it."

If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be *prima facie* evidence that the person appointed by the Commissioner had not exercised his discretion. When the Commissioner has perforce to act on advice of his expert advisers it must be proved that they decided judicially what advise they should offer. If they did not, the provisions of the section have not been complied with. In other words, the Commissioner can exercise his discretion through an agent, but it follows that if the agent has not exercised his discretion, nor has the Commissioner, the Commissioner has the opportunity to remedy this when the owner complains.

The case of *Cheetkam v. Mayor, &c., of Manchester*⁽¹⁾ does not assist the defendant. In that case the defendant acted in alleged execution of powers given them by an Act of Parliament 30 Vict. c. 36. Under section 38 of that Act if the City Surveyor certified in writing that there was imminent danger from any building the Corporation was bound without notice to cause the same to be taken down or repaired or secured. The City Surveyor certified that there was imminent danger from plaintiff's building. The Corporation directed the surveyor to pull down, secure or repair the building as he should think fit. The Surveyor then informed the plaintiff of the directions given to him and proposed that the plaintiff should pull down his front wall. The plaintiff refused. The Surveyor then did the work himself. It was held that the certificate of the Surveyor was conclusive. Keating, J., says:—

"The provision in s. 33 is, no doubt, a very stringent one, vesting in the surveyor, as it does, absolute power to say that a man's house shall be

(1) (1875) L. R. 10 C. P. 249.

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pulled down. The legislature, however, appears to have thought it necessary to confer upon him the power; and it is our business to see that their intention is carried out."

It will be seen that section 38 of 30 Vict. c. 36 only dealt with cases of imminent danger. Sections 58 and 59 of the Manchester Police Act of 1844 prescribed the measures to be taken by the Council of the Borough in the case of ruinous and dangerous houses. Such premises had to be regularly and lawfully proceeded against by presentment of the grand jury at the Sessions. On presentment the Council could have the premises surveyed and a notice served on the owner. The powers given by the Legislature in section 38 of 30 Vict. c. 36 being of a totally different nature to the powers given by section 354 of the Municipal Act, the decision in the case referred to cannot be considered as an authority in this case.

On the other hand, Mr. Kirkpatrick relied on *Cooper v. The Wandsworth Board of Works*⁽¹⁾. The 76th section of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, empowered the District Board to alter or demolish a house where a builder had neglected to give notice of his intention to build. Plaintiff began to build without giving notice. The defendants then entered and pulled down the building. It was held the defendants were bound to give the plaintiff an opportunity of being heard before demolishing the building. Willes, J., says (at p. 190):—

"I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice."

Byles, J., says (at p. 194):—

"It seems to me that the Board are wrong, whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with *Dr. Bentley's case*⁽²⁾ and ending with some very recent cases, establish, that, although there are no positive words in a statute requiring that the party should be heard, yet the justice of the common law will supply the omission of the legislature."

(1) (1863) 14 C. B. N. S. 180.

(2) *The King v. The Chancellor, &c., of Cambridge*, 1 Stra. 567.

Though the facts were different the above principles seem to be of present application. No doubt under certain circumstances the safety of the public must be considered in priority to the right of private individuals, as in the case of imminent danger, but in the case before me where there is no suggestion of imminent danger, the plaintiffs were entitled to be heard as a matter of common justice.

In *Vestry of St. James and St. John, Clerkenwell v. Feary*⁽¹⁾ Lord Coleridge, C. J., agreed that *Cooper v. Wandsworth Board of Works*⁽²⁾ was an authority for the proposition that an opportunity should be given of questioning the propriety of the order made by the vestry.

The case of *Hajee Essa Hajee Fudla v. Oharles*⁽³⁾ was a suit filed in this Court against the Municipal Commissioner of Bombay for acting under the powers vested in him by section 200 of the Bombay Municipal Act, 1872. That section, which corresponded with section 354 of the present Act, enacted :

“If any house be deemed by the Commissioner to be dangerous he shall immediately if it appears to him necessary cause a fence to be put up and cause notice to be given to pull down, secure or repair, etc.”

The Court came to the conclusion that the plaintiffs' house was in a dangerous condition, but it was argued the notice was bad since the Commissioner should have exercised a judgment of his own instead of relying on a report of a subordinate. Jardine, J., in an unreported judgment held that the Municipal Act did not deprive any person injured by an improper exercise of authority under section 200 of the ordinary remedy by suit. The Commissioner had to appear and plead his authority and it might be had to justify his act. The Commissioner should examine the circumstances of the particular case in order to see whether the defence was made out. The Commissioner was entitled to act under section 200 on the report of an Inspector of Buildings and did not act indiscreetly in relying on the Inspector's statement about plaintiff's building, *although it was easy to imagine cases of greater complexity when an officer entrusted with those great powers*

(1) (1890) 24 Q. B. D. 703 at p. 709.

(2) (1863) 14 C. B. N. S. 180.

(3) O. C. J. Suit No. 225 of 1887

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would, if he used proper discretion, take other and more experienced advice, or make further inquiry or hear the owner of the property more fully, unless the emergency admitted of no delay whatever.

The remarks of the learned Judge which I have italicized above can well be applied to this case. In the first place the words 'hear the owner more fully' imply that the owner had a right to be heard in any case. Even then the owner should have in cases of greater complexity a further opportunity of being heard, and a failure by the Commissioner to hear him would be a failure to exercise proper discretion.

There was no doubt, however, in that case that the Inspector's report was correct, the plaintiff had had a previous notice to pull down ten months before he had been heard, the Municipal authorities had been willing to allow him to adopt preventive measures, and it was only when those had failed that a second notice was served.

Mr. Kirkpatrick further relied on section 471 of the Municipal Act 1888 which provides for the penalties to be executed against anyone who fails to comply with any requisition lawfully made under the sections therein referred to, as showing that a person on whom such a requisition is made is entitled to prove that requisition was not made lawfully, *i. e.*, in accordance with the conditions prescribed by the legislature and that therefore the notice could not be conclusive. Mr. Jardine, on the other hand, wished to confine the word 'lawfully' to procedure in drawing up and issuing the notice. Nothing regarding procedure appears in section 354 and the notice to enter under section 488 stands on a different footing. I think that Mr. Kirkpatrick's argument is correct, and that a person proceeded against under section 471 would be entitled to show that the provisions of the Act had not been complied with, otherwise the word 'lawfully' is without meaning and unnecessary. I do not think anything that I have said is calculated to hamper the action of the Commissioner under section 354. The legislature has not given him absolute powers, and whether the danger is imminent or not it is impossible to dispute the justice of allowing an owner to be

heard on the question as to what steps should be taken to secure the safety of the public. In cases where the danger is certified as imminent, there would be little chance of his getting an injunction, but in a case like the present if he can get an injunction he may succeed in saving his property, otherwise he can only assert his claim to damages.

The actual condition of the plaintiffs' house at the date of the notice is then a question of fact which must be decided. In dealing with this it is necessary to distinguish between the evidence of examination made before and after suit filed, namely, the 25th February. After the 11th December 1907 no one examined it on behalf of the defendant till the 27th February. Between the 6th January and 25th February Mr. Kanga and Mr. Chambers examined it on plaintiffs' behalf. It is admitted that the whole of the upper floor leans over from the south to north. Nearly all the posts have been plumbed by both parties and the results obtained by the plaintiffs and defendants' Engineers respectively appear in Exhibit A13 in parallel columns. I have no hesitation in placing more reliance on the results obtained by Messrs. Chambers, Stevens and Kanga for the plaintiffs. There have been too many indications throughout the case of the inclination of Mr. Vaidya and Mr. Katrak to exaggerate, to enable me to place implicit reliance on their calculations. In plumbing, nothing can be easier than to miscalculate half an inch or so, and it is certain that most of the wood in the building was put in undressed so that accurate plumbing would be in some cases impossible. Mr. Chambers refers to some of these in Exhibit A13. Mr. Vaidya and Mr. Katrak have not allowed for this. Then it appeared that the plan to be annexed to Mr. Hall's affidavit of the 16th March (Exhibit 9) was prepared by Mr. Vaidya and passed by Mr. Katrak. Defendant strenuously opposed the granting of the *interim* injunction and Mr. Vaidya knew the plan was wanted to support the defendant's case in Court. It is always difficult to come to a satisfactory conclusion on questions of fact when all the evidence is on affidavits, but a drawing carries far more conviction than pages of affidavit, and the section appearing on the plan must have been intended to give the Court a correct idea of the dangerous

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condition of the building. The ground plan by itself could not give that idea. If the injunction had not been granted, the house would have been pulled down and the relief sought by the suit would have become unobtainable. The plaintiffs' case thus hanging in the balance, the Executive Engineer, whose opinion would necessarily carry very great weight with the Court, advising the pulling down of the first floor, there is shown to the Court a section of the building which can only be described as most misleading. Yet in Exhibit 6 dated the 6th March Mr. Vaidya affirms that the plan was correct and the figures therein showing the extent of the lean over were correct. In Exhibit 2 of the same date Mr. Katrak swears he has satisfied himself of the correctness of the plan. Mr. Hall also says in his affidavit on the 16th March he believes the plan to be correct. Whether or not it was intentionally prepared in order to mislead the Court, there was certainly culpable negligence. No reasonable man comparing the correct and false sections could possibly come to any other conclusion. Nor is it clear why the plan was annexed to Mr. Hall's affidavit instead of to the affidavit of Mr. Vaidya who prepared it, unless it was considered that it would thereby carry more weight. The verandah post is said to be $4\frac{1}{2}$ " out of plumb $1\frac{1}{2}$ " more than any other post on that line and 2" more than the posts to the east and west of it. Mr. Chambers plumbed it 3" out and remarked in A 13:—"This post is roughly squared out of a bent piece of timber of the shape in which it grew and therefore it is almost impossible to plumb it accurately." This is confirmed by reference to two of the photographs annexed to Exhibit 3. The post is clearly visible, and appears to incline outwards more from the top of the railing than from the floor level. The scale of the section is very small, 8' to an inch, and the lean over is much exaggerated. How much it is difficult to say, but Mr. Chambers and Mr. Stevens in Exhibit A 12, para 4, say that the posts said to be leaning about 3" towards the north are plotted as if they were 6" towards that side. The answer to this in Exhibit 3, para 4, is somewhat ingenuous though practically admitting the exaggeration:—

In answer to para 4 of the joint affidavit of Messrs. Chambers and Stevens we refer to the plan itself (plan A) which in every case clearly

shows in figures the actual extent of "lean over" of the posts and wall, when plumbed, and the section shows the height in which such "lean over" occurs so that even if the slope is not plotted with strict accuracy no one who understands a plan can possibly be misled by plan A as to facts.

The centre post on the ground floor is omitted and also the post on the first floor between the south wall and the centre post. Apart from omissions and exaggeration it is not a fair average section. The attempts made by Mr. Vaidya and Mr. Katrak in their affidavit of the 5th May (Exhibit 3) to justify that section only aggravated the offence, especially as correct sections appeared in the plan annexed to the same affidavit. It was suggested the post on the ground floor was omitted because it was only necessary to show the condition of the upper floor but the plaintiffs were required to remove the joists which, it was alleged, had sagged and those would rest on the beams. Obviously these beams would afford more support to the joists if there were centre posts on the ground floor. They say the post is left out on the upper floor because it had not been plumbed—a very insufficient reason. Again, the plan showed one post, Gf, leaning over 10". I am satisfied that though there was a slight lean over to the north the lean over of 10" was in the same direction as the ridge of the roof in order to meet a joint in the ridge which did not correspond with the posts in the partition. Afterwards it was discovered that this post was fixed in the ground and came through the floor. Mr. Hall then admitted it was a source of strength and not a sign of danger. Lastly, the allegation that in one room there was a separation between the south wall and the floor proved to be absolutely without foundation.

I have dealt with the matter at considerable length, first, because on the strength of those affidavits of the 16th March the Court was asked to decline to take the responsibility of ordering the building to remain standing, and thereby in effect to dismiss the suit, and secondly, because to swear a plan as correct which as a matter of fact is incorrect in a very material way seems perilously near to giving false evidence. In any event it must have a bearing on the evidence of Mr. Vaidya and Mr. Katrak given in Court, and the attitude adopted by the Executive

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Engineer's Department throughout the case. But all discussion regarding the lean over, whether it was original, or began subsequent to the completion of the building, or was caused by the thrust of the roof, and whether it was due to the lean over that the building should be considered, in a dangerous condition, became unnecessary when Mr. Hall admitted that the building as it existed might continue to exist for years in spite of the lean over if the timbers were sound. The main question therefore is whether the timber was reasonably sound, that is to say, so sound that there could be no danger of its being likely to give way and so carry the whole of the upper floor with it. On the 29th November 1907 when Mr. Katrak first visited the building he came to no conclusion about its condition, he only instructed Mr. Vaidya to examine it. It is certainly remarkable that Mr. Katrak had entirely forgotten this visit until reminded of it by Mr. Vaidya after his examination by Mr. Jardine had been closed. In para 2 of his affidavit (Exhibit 2) Mr. Katrak says nothing about this visit and in para 2 of his affidavit (Exhibit 6) Mr. Vaidya says he has read para 2 of Mr. Katrak's affidavit and it was correct. Mr. Vaidya visited the house on the 6th and 9th December owing to Mr. Katrak's instructions and made very full notes of his inspection (Exhibit 5) and yet nothing is said in the affidavit about these visits nor were those notes disclosed. Mr. Vaidya said his remarks on A 2 were a summary of his notes. As regards the condition of the timber he says in those notes (Exhibit 5)—"*ground floor*—rotten joists are marked on spot as also the portion of beams. *First floor*—the rotten rafters are marked on spot and are unsound." This is summarized in A2 as follows—"The joists of flooring are rotten in places as also the rafters."

No doubt in Exhibit 5 there is a rough ground plan with some posts marked as decayed, but nothing is said about them in the remarks, so their condition could not have been considered as affecting the stability of the structure.

Mr. Katrak's remarks are as follows:—"Many rafters are rotten. The joists of flooring of the room of the first floor

have sagged". In the evidence before me, there is nothing to show the joists are rotten. Mr. Katrak said he noticed decay in a few places, but nothing sufficient to cause a remark to be recorded, so he only said they had sagged. The notice to pull down was issued therefore because the walls had become out of plumb, many rafters were rotten and the joists had sagged. I may remark here it is difficult to imagine how Mr. Katrak came to record in A2 the south wall was 3 or 4 inches out of plumb in 4 feet height when the wall was 5' 6" high.

It has not been suggested that Mr. Katrak ever considered whether the building could not be repaired. For the above reasons he practically condemned the whole structure, as the ground floor was useless without the joists and flooring and nothing could be done in the way of reconstruction without the leave of the defendant. It is clear that this need not have been given and that defendant might have acquired the whole property under section 298. If therefore plaintiff had complied with the notice they would have lost the whole of their building and would only have been paid the value of the land. The rents they were getting from the building were extremely profitable and there would be a great difference between the value of the property as a rent-bearing concern and the value of the land vacant as estimated by Mr. Hall in his memo to the Commissioner. Before the suit was filed Mr. Chambers, Mr. Stevens and Mr. Kanga examined the building. They reported generally that the building in their opinion was in a sound condition. It must be remembered that they had before them only the notice of the 6th January and they could not know for what particular reasons the notice had been issued. With regard to the evidence given of examinations made of the building in general and the timber in particular after suit filed it is necessary to remember that has only an indirect bearing on the question whether the notice of the 6th January was properly issued. Such evidence of defects proved to exist at the date of the notice is only relevant so far as it proves that the grounds for which Mr. Katrak condemned the building were correct; evidence of defects discovered since the suit was filed and not

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patent to Mr. Katrak when he issued the notice is irrelevant to the question whether Mr. Katrak exercised a proper discretion. On the 16th March 1907 Mr. Hall, Mr. Katrak and Mr. Vaidya made affidavits (Exhibits 9, 2 and 6) for the purpose of opposing the plaintiffs' application for injunction which I have already referred to. Mr. Hall says in para 1 of his affidavit "Much of the wood work of the said building is in a very decayed condition." Mr. Katrak says in para 2 of his affidavit "Many rafters and some of the posts and post plates were rotten." Mr. Vaidya in his affidavit merely says para 2 of Mr. Katrak's affidavit is correct. On the 1st May Mr. Chambers and Mr. Stevens reply to these affidavits. They point out the misleading nature of the section in defendant's plan and refer to a correct section on their plan annexed. In para 8 they say—"there is nothing to show that the posts supporting the roof are leaning over to a considerable extent or that the south wall leans over considerably towards the north or that the wood work of the said building is in a decayed condition." Then in para 11 they give a general opinion that the building is sound and not in a dangerous condition. This affidavit embodies practically the whole of Exhibit A 9 which is a report made by the plaintiffs' three Engineers on the 4th April. In para 10 they say: "The wood-work on the whole is sound and some of it is quite new." Messrs. Katrak and Vaidya reply to this in their affidavit of the 5th May (Exhibit 3). In para 3 they say regarding the posts, post plates and purlins, "we examined them carefully on the 15th April and found two of the post plates and two of the purlins in the gallery on the north, two of the post plates on the south wall and six of the purlins on the row of posts the subject of sub-clause (d) to be in a decayed condition." In para 8 (3) they say—"Finally we say as regards the wood-work seven of the posts are decayed, twelve of the purlins and post plates are decayed and upwards of eighty of the rafters are decayed." Four photos of the building taken from various positions are annexed to the affidavit.

Mr. Hall in his affidavit of the 5th May (Exhibit 10) says in para 2 that the danger due to the absence of ties between

the posts in the south wall and those in the gallery to the north was very greatly aggravated by the fact that some of the posts on which the roof rested and many of the post plates were in a decayed condition. At the hearing Mr. Chambers said in cross-examination:—"I found no decayed wood anywhere. I tried to find if there was any decayed timber as I was told the timber was rotten. If the posts and post plates were decayed that would be a source of danger; green timber has been put in, the bark has gone but the heart is sound. That was what I referred to when I said the timber was on the whole sound." On the 18th March Mr. Stevens was examined. He had visited the house the previous day and had found the post plate in the south west room had been considerably eaten by white ants. But he thought that did not affect the stability of the building. The centre of the post plate was sound. In cross-examination he admitted that he had noticed that post plate was ant-eaten on the 25th February but did not refer to it until he came into the witness box because the defendant had made no remarks about this post plate at any time during the proceedings. Further on he said—"I found no decay anywhere except in the post plate eaten by white ants and in one rafter".

Mr. Kanga was not questioned in detail about the condition of the wood. Though Mr. Katrak was examined at considerable length about the condition of the wood-work in order to reply to the evidence of plaintiffs' witness, I need only refer to the evidence of Mr. Hall who visited the premises on the 19th June with defendant's Solicitor, Mr. Crawford, with the express purpose of taking careful notes of the condition of the woodwork. These notes are Exhibit 11; and Exhibit 12 is a plan showing the timber referred to there. It is clear that the 7 posts and 12 purlins and post plates referred to in para 3 of the affidavit of Messrs. Katrak and Vaidya (Exhibit 3) as decayed do not all appear in Exhibit 12. Only two posts Bc and Fc are marked as unsound and 8 post plates.

It would have been better if the Court had first been consulted so that directions might have been given regarding the desirability of the plaintiffs having notice of Mr. Hall's visit.

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As a matter of fact they had no notice and it was therefore necessary for Mr. Chambers to inspect the building again and to give evidence in rebuttal. The notes made by Mr. Chambers appear parallel with Mr. Hall's notes in Exhibit A22. Mr. Chambers admitted he found defects on the last visit which he had not noticed on previous visits. One rafter in the verandah 5th from the east end he found absolutely rotten and had it cut away. Part of three rafters condemned by Mr. Hall had been cut off and brought into Court. These were marked A23, A24 and A25. From these Exhibits it was easy to determine where Mr. Hall and Mr. Chambers were at issue. All wood which showed signs of decay or of having been eaten by weevils or white ants was condemned by Mr. Hall as decayed or rotten without reference to the extent of the decay or the work required to be done by each particular piece condemned. Mr. Chambers admitted in most cases that the pieces referred to in Exhibit 11 are decayed to a certain extent, but in most cases he considers there is sufficient strength left in the wood to do what is required and in the case of the worst rafters, if they went the roof would still exist without them. In considering what work was required of the rafters it must be remembered that they are from 7" to 8" centre with a bearing of about 4' only. Exhibits A23 and A25 apparently had been a little eaten away on the surface by weevils, but apart from that I am satisfied they were perfectly sound. A24 was considerably decayed but still quite capable of bearing all the work that was required of it. I think therefore there was no danger to be apprehended from the condition of the rafters. As regards Bc and Fc the only two posts which Mr. Hall condemned, Mr. Chambers and Mr. Stevens said that Bc was tested by a chisel and was not decayed, the outer skin of Fc, had gone, otherwise that post was sound. If all the posts were sound, there could not be any danger of a general collapse. Mr. Chambers admitted two post plates should be replaced, namely C. D. on line A and the one in the S. W. corner. A new post plate would cost Rs. 8. Mr. Stevens said he would only replace the S. W. post plate. The objections to the other six post plates condemned by Mr. Hall were I think hypercritical.

It was also stated by defendant's witnesses that the joints of the post plates at post Gb had shifted and the joint at post Ha had opened showing that a movement was going on. Mr. Chambers in Exhibit A22 explains that what was considered by Mr. Hall to be a shifting and opening was due to the post plates being of unequal width. He did not think the joints had moved and I think his opinion must be accepted as correct.

The building is undoubtedly an old one and it could not be expected that the woodwork had not suffered from various causes. The question is had it suffered to such extent as to cause the first floor to be in such a dangerous condition when the notice was served so that plaintiffs should be compelled to pull it down. No doubt I must take into consideration that Mr. Chambers and Mr. Stevens would naturally be biased in favour of the plaintiffs, but if they thought the building was in a dangerous condition (and from their experience they must be able to form a very reliable opinion on its condition) I am quite sure no bias would hold them from saying so. On the other hand, Messrs. Katrak and Vaidya depended mainly on the lean over when they reported the building was in a dangerous condition, and since the defendant decided to contest the suit, that report had to be supported. Evidence of every possible defect that the minutest examination could bring to light has been brought before the Court to show that the opinion formed by Mr. Katrak was correct, but I remain quite unconvinced on the evidence that on the 6th January 1908 the plaintiffs' building was in a ruinous and dangerous condition and likely to fall. Further, I fail to understand how Mr. Katrak with his experience came to the conclusion that the house was a fit subject for a notice under section 354. However, he did come to that conclusion, but I am quite satisfied that he never exercised a proper discretion in considering what form the notice should take. Fifty to hundred rupees would have covered the cost of replacing all the woodwork condemned by Mr. Hall and there was no reason whatever for issuing a notice which if executed would have caused a loss to the plaintiffs of several thousands of rupees. That can only be characterized as rank injustice. But besides contending that

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Mr. Katrak did not exercise a proper discretion, the plaintiffs have suggested that he and therefore the defendant was actuated by improper motives. Neither Mr. Sheppard nor Mr. Hall had in their minds when they signed the notice the particular structure to which it referred, but as they have adopted the decision of Mr. Katrak, the notice must stand or fall by the conduct of Mr. Katrak. It is difficult to imagine that Mr. Katrak was not perfectly well aware that plaintiffs' house was nearly all within the regular line of the street, and it is not an unreasonable inference for the plaintiffs to suggest that Mr. Katrak thought he had found a good opportunity for getting rid of a building which stood in the way of a desirable street improvement. The fact that the plaintiffs' request for a further examination in the presence of their Engineers was ignored lends further strength to their suggestion. Reading Exhibit A3 it should have occurred to Mr. Katrak that the request was a reasonable one and he ought to have advised the Executive Engineer to pay some attention to it. Mr. Sheppard said in cross-examination the plaintiffs had an opportunity of showing him there was no cause for the notice, but he had to admit in answer to the Court that his reply (Exhibit A5) gave no such opportunity to the plaintiffs.

Further, it was suggested by the plaintiffs that the projecting beams of Harichand's house were intended to support a verandah which could only be added when plaintiffs' house had been removed and that Messrs. Vaidya and Katrak were acting in collusion with Harichand in order to enable him to build his verandah. A very reasonable explanation of the projections was forthcoming, namely, that the scaffolding had to start from the plinth of the building owing to the narrowness of the street and it was necessary to have projections to which the scaffolding could be attached. The plan showing the projection of beams at the terrace to the east where no verandah could have been required supports this explanation. On the other hand, no doubt some of the projections could have been used to support a verandah and it was a curious coincidence that they should have only recently been cut away, but all this remains conjecture and nothing more. It would require very

strong evidence to satisfy me that the defendant had made up his mind several months before the notice to acquire the plaintiff's property, and that Mr. Katrak had in consequence expressly permitted Harichand to project the beams over the street for the purpose of a verandah. There are no doubt many facts in the case which strongly support the plaintiffs' suggestion of *mala fides*. At the same time the facts from which the inference of *mala fides* is sought to be drawn must be so irresistible as to admit of no other conclusion. I cannot therefore find the charge of *mala fides* proved.

A very heavy responsibility is laid upon the Court in dealing with a case of this nature but I am thankful to say that the grant of the *interim* injunction has been justified by events.

There will be a decree for the plaintiffs restraining the defendant from pulling down or attempting to pull down or trespassing upon the premises referred to in the plaint or in any way taking action under the notices of the 6th January 1908 or 19th February 1908.

The defendant must pay the plaintiffs' costs. The plaintiffs to be entitled to have the costs of one Engineer taxed as between attorney and client, the other Engineers will be entitled to a fee for preparing themselves for giving evidence and the usual charges.

Attorneys for the plaintiffs: *Messrs. Bhaishankar, Kanga and Girdharlal.*

Attorneys for the defendant: *Messrs. Crawford, Brown & Co.*

G. P. R.

1908.

LALBHAI
v.
THE
MUNICIPAL
COMMISSIONER OF
BOMBAY.