

1909.

GUNNAJI
BHAWAJI
v.
MAKANJI
KHUSAL-
CHAND.

allegation. We think, therefore, that the amendment should be allowed as shown in paragraph 1 of the memorandum of appeal, but as the controversy has arisen entirely through the negligence of the plaintiffs we direct that they must pay the costs of the appeal and of the first hearing in the Court below including the costs, if any, of the hearing of the judgment. Leave granted to defendants to file a supplemental written statement, if so advised.

Attorneys for the appellants:—*Messrs. Mehta and Dalpatram.*

Attorneys for the respondents:—*Mr. N. M. Cama.*

B. N. L.

APPELLATE CRIMINAL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

1909.

August 4.

MUNICIPAL COMMISSIONER OF BOMBAY, COMPLAINANT, v.
—THE AGENT, G. I. P. RAILWAY COMPANY, ACCUSED.*

Indian Railways Act (IX of 1890), sec. 7—City of Bombay Municipal Act (Bom. Act III of 1888), sec. 394—Use by Railway Company of its premises for storing timber—License from the Municipal Commissioner for the use not necessary.

The Agent of the G. I. P. Railway Company having been charged in the Presidency Magistrate's Court at the instance of the Bombay Municipality under section 394 (1) (d) of the City of Bombay Municipal Act (Bom. Act III of 1888) with having used the Company's premises for storing timber without a license granted by the Municipal Commissioner, the Presidency Magistrate recorded evidence and referred the following question under section 432 of the Criminal Procedure Code (Act V of 1898) :—

“Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner, to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the ‘Railway?’”

Held, that no such license was necessary. Section 7 (1) of the Indian Railways Act (IX of 1890) authorizes the Railway Administration to do all acts necessary for the convenient making, maintaining, altering, repairing and

* Criminal Reference No. 67 of 1909.

using the Railway notwithstanding anything in any other enactment for the time being in force.

The storing of timber was necessary for the convenient making, &c., of the Railway line.

Under section 7, sub-section 2 of the Indian Railways Act (IX of 1890) the Governor General in Council and not the Municipal Commissioner has the control of the Railway Administration in the exercise of its powers under sub-section 1.

REFERENCE by A. H. S. Aston, Chief Presidency Magistrate of Bombay, under section 432 of the Criminal Procedure Code (Act V of 1898).

The accused, the Agent of G. I. P. Railway Company, was charged under section 394 (1) (d) of the City of Bombay Municipal Act (Bom. Act III of 1888) with having on or about the 25th March 1909 used certain premises, namely, two plots of ground, the property of the G. I. P. Railway Company at Bombay, for the purpose of storing timber without a license granted by the Municipal Commissioner of Bombay.

The timber in question consisted of about 15,000 Railway sleepers and it was admitted that no license was obtained and that the sleepers were timber and they were stored. The accused, however, contended on the strength of the ruling in *Emperor v. Wallace Flour Mill Company*⁽¹⁾ that as the Railway Company was not trading in timber and as the purpose for which the premises were used was entirely accessory and necessary for their business, the real purpose was not in fact to store.

The evidence recorded by the Magistrate also showed that the G. I. P. Railway Company for some years past had "stacked" sleepers on the said premises for the use of their whole line. The maximum of the sleepers stacked was estimated at about 36,000 sleepers and the minimum at about 7,000 and 8,000.

Under these circumstances the Chief Presidency Magistrate referred the following questions to the High Court for an authoritative decision under section 432 of the Criminal Procedure Code (Act V of 1898):—

(1) (1904) 29 Bom. 193.

1069.

MUNICIPAL
COMMISSIONER
OF
BOMBAY
v.
G. I. P.
RAILWAY
COMPANY.

1909.
 MUNICIPAL
 COMMISSIONER OF
 BOMBAY
 v.
 G. I. P.
 RAILWAY
 COMPANY.

1. Does the fact that the Railway are not trading in timber and that the purpose for which the premises are used is necessary for the convenient carrying on of their business as a Railway over their whole system negative the intention to store within the meaning of section 394 (1) (d) of the City of Bombay Municipal Act?

2. Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?

3. Is the fee payable for a license contemplated by section 394 (1) (d) of the Municipal Act a tax within the meaning of section 135 of the Indian Railways Act IX of 1890?

4. Is the Government of India Notification No. 9977, dated the 29th November 1907, a valid notification within the meaning of section 135 (1) of the Indian Railways Act and does it render the Railway Company liable to pay the license fee in question?

5. Can an obligation to obtain a license be separated from a liability to pay the fee?

6. Do license fees come within the Notification?

In making the reference the Magistrate observed as follows:—

In this connection it may be pointed out that the Railway system worked by the G. I. P. Railway is about 2,900 miles in extent and sleepers were stacked for the use of the whole system. Mr. Batty, J., in *Emperor v. Wallace Flour Mill Company*⁽¹⁾ laid down the principle that an intention to store is negatived if the quantity retained is only reasonably sufficient for the varying exigencies of consumption but it does not, I think, follow that the intention would be negatived if a Company having mills in various parts of India were to accumulate in one place a quantity sufficient for the varying exigencies of consumption of all its mills. In the case of *Emperor v. Wallace Flour Mill Company*⁽¹⁾, the supply of oil in hand would only have sufficed for about twelve days' use in the particular mill, in the present case the 15,000 sleepers which were stacked by the Railway would have sufficed according to the consumption in 1908 for about five months' use over the whole area worked by the Railway and according to the same rate the quantity of sleepers actually received and stacked in 1908 would have sufficed for nearly two years' use. It is true that the average for 1907 and 1908 together works out at a somewhat higher rate of consumption, viz., 39,739, but this is counterbalanced by the fact that on the 1st January 1908 there was a balance in hand of about 8,000 sleepers.

(1) (1904) 29 Bom, 193.

It is however contended by Mr. Yorke Smith that the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the Municipal Commissioner from insisting on a license.

Under section 7 clause (f) statutory powers have been conferred on the Railway to "do all other acts necessary for making, maintaining, altering or repairing and using the railway," and in my opinion on the evidence it is necessary for the convenient making, maintaining, altering or repairing the railway, that the Railway Company should be at liberty to store Railway sleepers on the premises in question from time to time. As the sleepers are obtained by shiploads from Australia, it inevitably follows that at certain periods there is a large accession to the stock.

Mr. Crawford however contends that even if the need for storing is conceded the obligation to obtain a license from the Commissioner is not thereby extinguished.

The Railway have a right to store subject to the necessity of obtaining a license. But the necessity of obtaining a license restricts to that extent the statutory power conferred by the Railway Act and implies a power in the Municipal Commissioner of refusing to grant a license and I am of opinion on reading the authorities relied on by the defence, viz., *London and Brighton Railway Company v. Truman*⁽¹⁾; *City and South London Railway Company v. London County Council*⁽²⁾; *London County Council v. School Board for London*⁽³⁾; *Emsley v. North Eastern Railway Company*⁽⁴⁾, that such a power is inconsistent with the statutory powers given to the Railway.

I think Mr. Yorke Smith is also right in his contention that a license fee is a tax within the meaning of section 135 of the Railway Act and that the Notification by the Government of India, Department of Commerce and Industry, No. 9977, dated 29th November 1907, which is relied on as rendering the Railway administration liable to pay the tax, is not such a notification as was intended by the section and inoperative. The case of the *Brewers and Maltsters Association of Ontario v. Attorney General for Ontario*⁽⁵⁾ and section 3 (p) of the City of Bombay Municipal Act, 1888, have been cited with reference to the first contention while with reference to the second contention the validity of the Notification has been attacked firstly on the ground that its wording shows that the discretion necessary in framing a Notification under the section has not been exercised; *The Queen v. Bommayya*⁽⁶⁾, *Macbeth v. Ashley*⁽⁷⁾, *Sharp v. Wakefield*⁽⁸⁾, *Sprigg v. Sigoan*⁽⁹⁾; Maxwell on Interpretation of Statutes (third edition, pp. 175 to 177) and secondly on the ground that the Notification is not consistent with the Act under which it purports to have been made; *Macbeth v. Ashley*⁽⁷⁾ and *Rajam Chetti v. Seshayya*⁽¹⁰⁾. If the wording of the Notification is considered, I think it can

(1) (1885) 11 App. Cas. 45.

(2) [1891] 2 Q. B. 513.

(3) [1892] 2 Q. B. 606.

(4) [1896] 1 Ch. 418.

(5) [1897] A. C. 231.

(6) (1882) 5 Mad. 26.

(7) (1874) L. R. 2 S. & D. 352-337.

(8) [1891] A. C. 173-179.

(9) [1897] A. C. 238.

(10) (1895) 18 Mad. 236 at p. 245.

1909.

MUNICIPAL
COMMISSIONER OF
BOMBAY
v.
G. I. P.
RAILWAY
COMPANY.

1909.

MUNICIPAL
COMMISSIONER OF
BOMBAY

G. I. P.
RAILWAY
COMPANY.

be reasonably contended that the Notification is so worded as to affect not only existing but even future Railway administrations, not only existing but also future taxes and that its effect is virtually to repeal the provisions of the section from which it derives its authority."

The reference was heard by Scott, C. J., and Batchelor, J.

Cohen (instructed by *Crawford, Brown and Co.*) for the Municipal Commissioner.

Robertson (instructed by *Little & Co.*) for the Railway Company.

SCOTT, C. J.—The Agent of the G. I. P. Railway Company was charged in the Presidency Magistrate's Court under section 394 (1) (d) of the City of Bombay Municipal Act with having used certain premises for the purpose of storing timber without a license granted by the Municipal Commissioner.

The Chief Presidency Magistrate having taken evidence has referred for the opinion of this Court certain questions specified at the end of the case stated by him.

The first question is, in our opinion, one of fact and not of law, and, therefore, cannot be stated under section 432 of the Criminal Procedure Code, under which this reference is made.

As regards the other questions, if the second question is answered in the affirmative no answer need be given to the remaining questions, for the case will in that event have to be decided in favour of the respondent.

The second question is in these terms :

"Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?"

Section 7 of the Indian Railways Act IX of 1890, to the provisions of which the G. I. P. Railway is subject, provides as follows :—

(1) "Subject to the provisions of this Act and, in the case of immoveable property not belonging to the Railway administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for companies, and subject also, in the case

of a Railway company, to the provisions of any contract between the company and the Government, a Railway administration may for the purpose of constructing a Railway or the accommodation or other works connected therewith and notwithstanding anything in any other enactment for the time being in force ...

“(f) do all other acts necessary for making, maintaining, altering or repairing and using the Railway.

(2) “The exercise of the powers conferred on a Railway administration by sub-section (1) shall be subject to the control of the Governor General in Council.”

In stating the case the Magistrate finds as a fact on the evidence that it is necessary for the convenient making, maintaining, altering or repairing the Railway that the Railway Company should be at liberty to store Railway sleepers on the premises in question from time to time and that as the sleepers are obtained by ship-loads from Australia it inevitably follows that at certain periods there is a large accession to the stock. Upon this finding it would appear *prima facie* that the Railway administration is authorised to store Railway sleepers upon the premises in question notwithstanding anything in any other enactment for the time being in force.

It is, however, argued on behalf of the Municipal Commissioner that notwithstanding the statutory authority and notwithstanding the finding of the Magistrate it is still necessary for the Railway Company to obtain a license under section 394 of the Bombay Act III of 1888 for storing sleepers upon the premises.

It will be convenient at this point to set out the portions of the sections of the Municipal Act, which have been referred to in argument :—

Section 394 (1), (b) and (d) provide :—

(1) “No person shall use any premises for any of the purposes hereinbelow mentioned, without, or otherwise than in conformity with the terms of, a license granted by the Commissioner in this behalf, namely ...

(b) any purpose which is, in the opinion of the Commissioner, dangerous to life, health or property, or likely to create a nuisance, ...

(d) storing for other than domestic use or selling timber, firewood, charcoal, coal, coke, ashes, hay, grass, straw or any other combustible thing.”

1909.

MUNICIPAL
COMMISSIONER OF
BOMBAY
G. I. P.
RAILWAY
COMPANY.

1909.

MUNICIPAL
COMMISSIONER OF
BOMBAY
G. I. P.
RAILWAY
COMPANY.

Section 479 (1) provides :—

(d) " Whenever it is provided in this Act that a license or a written permission may be given for any purpose, such license or written permission shall specify the period for which, and the restrictions and conditions subject to which, the same is granted, and shall be given under the signature of the Commissioner or of a municipal officer empowered under section 68 to grant the same."

Section 479 (3) provides :—

" Subject to the provisions of clause (d) of section 403, any license or written permission granted under this Act may at any time be suspended or revoked by the Commissioner, if any of its restrictions or conditions is infringed or evaded by the person to whom the same has been granted, or if the said person is convicted of an infringement of any of the provisions of this Act or of any regulation or by-law made hereunder in any matter to which such license or permission relates."

It is not disputed that the unrestricted provisions of section 394 would empower the Commissioner to refuse in his discretion to grant a license. This view has the authority of a ruling of this Court in its favour: see *Haji Esmail v. Municipal Commissioner of Bombay* (1).

It was at first contended by counsel for the Commissioner that the power of refusal extended to such a case as the present but being pressed by the words of section 7 of the Railways Act " notwithstanding anything in any other enactment for the time being in force " and by the consideration that such a contention if upheld would give to the Commissioner, under section 394 (b), the power, if he thought fit, to prohibit the working of the Railway in parts of the city, he modified and reduced the argument to this, that although by reason of the terms of section 7 of the Railways Act the Commissioner could not prohibit the use of any premises, the use of which was authorised by the terms of section 7, yet he still had reserved to him under section 394 (1) (d) a power of regulating the method in which the Railway Company should store timber upon its premises even though such storing was authorised by section 7 (1) (f); and authorities were cited to the Court in support of the general proposition that an implied repeal of one Act by a later Act will not be

(1) (1903) 28 Bom. 253; 5 Bom. L. R. 1001.

inferred if it is possible even partially to harmonise the provisions of the two Acts. While we recognise this as a general rule of construction, we do not think that there is any scope for its application in the present case; in the first place, it would involve an almost complete rewriting of section 394, part of it being left to stand, another part being restricted without any precise guidance as to the limits of the restriction and yet another part being altogether deleted. It seems to us very doubtful whether such a recasting of the section would be warranted by any recognised principles of construction. In the second place we have not only the provision that the words of section 7 shall be read notwithstanding anything in any other enactment for the time being in force, but we have an express declaration in sub-section (2) of the authority which shall have control of the Railway administration in the exercise of its powers under sub-section (1). That authority is the Governor General in Council and not the Municipal Commissioner.

The provisions of the Railways Act to which we have referred provide, we think, for an undivided and exclusive control of Railway administrations by the Supreme Government.

Considerations of convenience and the safety of the public and security of property have been pressed upon us in argument. But we do not think there is any practical force in any of these suggestions, for, if the Municipal Commissioner is really of opinion that the Railway Company is exercising its statutory powers in a manner inconsistent with the health of the inhabitants of Bombay or the safety of property therein, it is always open to him to make a representation to that effect to the Governor General in Council in order that the state of affairs complained of may be inquired into and if necessary remedied by the proper authority.

For these reasons we answer the second question in the affirmative and we return the case to the Presidency Magistrate to be disposed of in accordance with this finding.

Order accordingly.

G. B. R.

1909.
MUNICIPAL
COMMISSIONER OF
BOMBAY
G. I. P.
RAILWAY
COMPANY.