

## ORIGINAL CIVIL.

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

THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY  
AND ANOTHER (APPELLANTS AND DEFENDANTS) v. MUNCHERJI  
PESTONJI CHOKSEY (RESPONDENT AND PLAINTIFF).\*

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August 31.

*The City of Bombay Municipal Act (Bom. Act III of 1888 as amended by Act V of 1905), section 297 (1) (b)†—Powers of the Municipal Commissioner to prescribe a fresh line on either side of a street in substitution for any line previously prescribed by him—Power to prescribe a line of the street with the view to widening the street, sections 297-301—Significance of heading to clauses.*

In 1903 the Municipal Commissioner of Bombay prescribed the regular line of a certain public street in Bombay, in accordance with the provisions of section 297 of the Municipal Act (Bom. Act III of 1888). No record was kept of the said line.

\* Suit No. 2 of 1910; Appeal No. 13 of 1911.

† Section 297 of the City of Bombay Municipal Act III of 1888 as amended by Bom. Act V of 1905 runs as follows:—

Section 297. (1) The Commissioner may—

(a) prescribe a line on each side of any public street;  
(b) from time to time, but subject in each case to his receiving the authority of the Corporation in that behalf, prescribe a fresh line in substitution for any line so proscribed, or for any part thereof, provided that such authority shall not be accorded—

(i) unless, at least one month before the meeting of the Corporation at which the matter is decided, public notice of the proposal has been given by the Commissioner by advertisement in local newspapers as well as in the *Bombay Government Gazette*, and special notice thereof, signed by the Commissioner, has also been put up in the street or part of the street for which such fresh line is proposed to be proscribed, and

(ii) until the Corporation have considered all objections to the said proposal made in writing and delivered at the office of the Municipal Secretary not less than three clear days before the day of such meeting.

(2) The line for the time being proscribed shall be called "the regular line of the street."

(3) No person shall construct any portion of any building within the regular line of the street except with the written permission of the Commissioner, who shall, in every case in which he gives such permission, at the same time report his reasons in writing to the standing committee.

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In 1909, in ignorance of the said line previously prescribed, the Municipal Commissioner prescribed a fresh line for the same street, without obtaining authority from the Corporation, and entered upon the land of the plaintiff which lay within the said fresh line. Subsequently, having been informed of the previous line, the Commissioner obtained authority to prescribe a fresh line as previously irregularly prescribed and subsequently again entered on the part of the plaintiff's land within that line.

Both the said line prescribed in 1903 and the subsequent line prescribed in 1909 were prescribed for the purpose of widening the said street for the purpose of enabling an overbridge to be built on it.

The plaintiff contended that, as the object of the Commissioner in prescribing the line of the street in both cases was to widen the street, his action was illegal and that the lines prescribed were not made the regular lines of the street. Further, that in any event the Commissioner should be ordered to take up the plaintiff's land and pay for it up to the line prescribed in 1903, the only legal line of the street at the date when the Commissioner first entered the plaintiff's land.

*Held*, that subject to the provisions of section 297 of the Municipal Act the Commissioner might prescribe a line of a street, whether in substitution for a previous line or not, and that his action would not be invalid merely because it had for its object the widening of the street. *Held* also that the headings of clauses are not to be relied on.

*Held*, further, that *Essa Jacob v. Municipal Commissioner of Bombay*<sup>(1)</sup> is no longer an authority since the amendment of the Act in 1905.

THE plaintiff was the owner of a house and compound on the north side of Elphinstone Road. In 1902 it was decided by the Corporation to build an overbridge over the G. I. P. and B. B. & C. I. Railways where the same are crossed by Elphinstone Road and with that purpose to widen that road. The Municipal Commissioner therefore on the 4th of March 1903 under section 297 of the Municipal Act as then in force prescribed a regular line on the north side of the said street about 50 feet distant from the existing north side of that street. Owing to an oversight, however, this line was not recorded in the Municipal office and was lost sight of. On the 19th of March 1909 the Commissioner, who was not aware of the regular line prescribed in 1903, purported to prescribe a regular line on the north side of the said street at the distance of about 20 feet only from the existing north side of the street. The Commissioner issued notices to the various owners part of whose property lay within the line so prescribed

(1) (1900) 25 Bom. 107.

including the plaintiff and afterwards took possession of so much of the plaintiff's compound as lay within the said line. Subsequently the attention of the Commissioner was drawn to the line previously prescribed in 1903.

On the 4th of November 1909 the Commissioner having then received authority as required by section 297 (1) (b) of the Municipal Act prescribed a fresh regular line of the street in the same position as that previously irregularly prescribed by him in March 1909 and a fresh notice was served on the plaintiff under sections 299 and 488 of the Municipal Act and possession was again formally taken of the plaintiff's land within the regular line of the street as so prescribed.

The plaintiff sued the Commissioner and the Corporation of Bombay for recovery of the said land and other relief. The plaintiff contended that as the object of the Commissioner in prescribing the said lines of the street was to widen the said street to facilitate the construction of an overbridge the prescribing of the said line was *ultra vires* of the Commissioner and that the said lines did not become the regular lines of the street.

The lower Court held that it was bound by the decision given in *Essa Jacob v. Municipal Commissioner of Bombay*<sup>(1)</sup> passed before the amendment of the Municipal Act in 1905, that the object of section 297 was not to enable the Commissioner to widen a public street, and accordingly gave judgment for the plaintiff.

The defendants appealed.

*Strangman* (Advocate General), with him *Jardine* and *Setahwad*, for the defendants and appellants.

*Tarapurwalla* with *Desai* for the plaintiffs and respondents relied on the Judgment of *Essa Jacob v. Municipal Commissioner of Bombay*<sup>(1)</sup> and referred to the heading to the clauses 297 to 301 "Preservation of regular line in public streets" to show the intention of section 297 (1) (b).

Scorr, C. J. :—The plaintiff is the owner of a house and compound abutting on Elphinstone Road near the point

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where it is intersected by two lines of Railway. In 1902 it was decided that an overbridge should be built carrying the Elphinstone Road over the railways. On the 4th of March 1903 the then Municipal Commissioner Mr. Harvey, in order to provide for the changed conditions which would result from the building of the overbridge, prescribed on the northern side of the Elphinstone Road a line as the regular line of the street, purporting to act under the power conferred by section 297 of the City of Bombay Municipal Act, 1888, which ran as follows: "The Commissioner shall prescribe a line on each side of any public street within which except under the provisions of section 310 no portion of any building abutting on the said street shall after such line has been prescribed be constructed."

The line so prescribed was not recorded on the usual plan in the Municipal office and was not generally known.

In 1909 the Railway Companies proposed alterations in the position of the overbridge which even then had not been commenced. In consequence of those proposals the then Municipal Commissioner Mr. Sheppard prescribed a line on each side of the road. The northern line so prescribed lay to the south of that prescribed by Mr. Harvey. Some time later in the year it was discovered that Mr. Harvey had prescribed a regular line and accordingly steps were taken in conformity with section 297 as amended by Bombay Act V of 1905 to legalise the substitution of the new line by following the procedure specified in section 297 (1) (b). When everything was in order formal possession of such part of the plaintiff's compound as lay within the new line was taken under section 299.

That section provides that if any land not vesting in the Corporation whether open or enclosed lies within the regular line of the street and is not occupied by a building the Court may take possession on behalf of the Corporations and clear the same and the land so acquired shall thereafter be deemed a part of the street. The power of the Commissioner to prescribe a line enables him (a) to prescribe a line on each side of any public street, (b) from time to time, with the special authority of the Corporation, to prescribe a fresh line in sub.

stitution for any line so prescribed or for any part thereof. The action of the Commissioner therefore, in taking possession of the plaintiff's land falls within the words of sections 297 and 299. It is, however, challenged by the plaintiff on the ground that the plain words of section 297 are controlled by the heading prefixed to the fasciculus of sections 297 to 301. The words of the heading are "Preservation of regular line in public streets." It is contended that although a regular line may be substituted from time to time for the old line, it will be vitiated by illegality of the motive for the substitution if that motive is not simply preservation of a regular line but the securing of a wider street. The argument is based upon a passage in the judgment of Sir Lawrence Jenkins in *Essa Jacob v. Municipal Commissioner of Bombay*<sup>(1)</sup>, a case decided in 1900 on appeal from a decision of Mr. Justice Crowe. The sole point in the case was, as is apparent from the pleadings and the explicit statements of Mr. Justice Crowe and the Judges of the appellate Court, whether after a regular line had once been prescribed by the Commissioner it could subsequently be altered by the prescription of a fresh line. Mr. Justice Crowe thought it was open to the Commissioner if the exigencies of traffic so required to widen the street by setting back the prescribed line. This liberal construction of the Commissioner's powers under the unamended section 297 was dissented from by the appellate Court. Sir Lawrence Jenkins referred to the sections 289 and 296 which expressly conferred upon the Commissioner power to widen streets subject to certain restrictions and he drew the conclusion from those sections and the heading of the group of sections that the prescription of a regular line was the object of section 297 and not the widening of the street and that, therefore, the liberal construction of the lower Court was not called for. The Chief Justice then deals with the argument that the action of the Commissioner should not be interfered with merely because it might indirectly have a result for the attainment of which other provision was made; the answer of the Chief Justice was that the argument overlooked the admissions, from which it

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(1) (1900) 25 Bom. 107 at p. 110.

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

The *ratio* of the judgment, therefore, is that if a line has already been prescribed the condition requiring and justifying the exercise of the power in section 297 does not exist. It is certainly no authority for the proposition that if the motive of the prescription of the line is the desire to widen the street the power conferred by the section cannot be exercised. Under the amended section the power of the Commissioner to prescribe a line no longer depends on the same condition as before, namely, the absence of a line already prescribed. The substitution of a fresh regular line for a street or part of a street under the present section 297 (1) (b) will in all probability in a progressive city like Bombay have for its object the widening of the street.

It was nevertheless argued that the heading of the group of clauses must still confine the action of the Commissioner to cases where no line has yet been prescribed for the preservation of the regular line of the street. This argument loses sight of the warning "that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and defeat the general intention of the Legislature": see *Powell v. Kempton Park Racecourse Company*<sup>(1)</sup>.

A reference to Bombay Act V of 1905, which amended section 297, will show that the existing heading of the clauses 290-301 was not specifically brought before the Legislature. It is an illustration of the truth of the criticism of Lord Cairns "that the headings of these clauses are not to be relied upon . . . showing, just in the same way that an Act of Parliament often goes beyond the preamble, that provisions have been introduced in the progress of the clauses going somewhat beyond the short and summary definition in the

<sup>(1)</sup> [1899] A. C. 143 at p. 185.

heading of the clauses": see *Hammersmith, &c., Railway Co. v. Brand*<sup>(1)</sup>.

We vary the decree of the lower Court by deleting the prayer for possession and decreeing that the plaintiff do pay the costs throughout.

BACHELOR, J. :—In this suit the plaintiff complained of the action of the Municipal Commissioner, who, purporting to act under section 299 of the City of Bombay Municipal Act, 1888, took possession, on behalf of the Corporation, of certain open land belonging to the plaintiff. As stated in the notice served on the plaintiff, Ex. A to the plaint, this action of the Commissioner was based upon the ground that the land in question was within the regular line of the public street, as that line had been prescribed by the Commissioner under section 297 of the Municipal Act of 1888, as amended by the City of Bombay Municipal (Amendment) Act, 1905. The question in controversy between the parties is whether the Commissioner was competent under section 297 to prescribe the line within which the land in suit falls: if he had that power, then it would follow under section 299 that in the circumstances of this case he was entitled to take possession of the land. I propose to limit myself to the consideration of this question, and, with that object, I pass unnoticed certain independent matters which were disputed before the lower Court but are not disputed before us.

The sole question in this Court is whether, under the amended section 297 of the Act, the Commissioner has power to prescribe what is called in the Act "the regular line of the street" when he affects to prescribe such a line for the purpose of merely widening an existing street. The learned trial Judge has answered this question in the negative, being of opinion that the case fell within the decision of this Court in *Essa Jacob v. Municipal Commissioner of Bombay*<sup>(2)</sup>. That was a decision of 1900, and the amendment of section 297 was made by an Act of 1905, but Mr. Justice Robertson came to the conclusion that, so far as the present question is concerned, the

(1) (1869) L. R. 4 H. L. 171 at p. 217.

(2) (1900) 25 Bom. 107.

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amendment of the section leaves the appellate Court's decision unaffected. The real question in this appeal is whether this conclusion of the learned Judge is the right conclusion, and, to answer it, it is necessary to see what *Essa Jacob's* case<sup>(1)</sup> decided and what was effected by the subsequent amendment of the section.

In *Essa Jacob's* case the Commissioner had prescribed one line shortly after the passing of the Act of 1888, and Jenkins, C. J., observes that "the only question is, whether it was open to the Commissioner to prescribe a different line in 1893, setting back the regular line of his predecessor." This point is made still clearer on reference to the pleadings, which are quoted in the report. The plaintiff's case was "that, under the provisions of section 297 of the City of Bombay Municipal Act, a lien can only once be prescribed as the regular line of the street, and that it is not competent for the Municipal Commissioner from time to time to alter the lines once prescribed." The Municipal Commissioner, on the other hand, contended that his action in prescribing the later line was within his powers, he "having determined that it would be for the public interest to have the said street widened to a width greater" than that prescribed by the earlier line. The question between the parties, therefore, was clearly this: the Commissioner having once prescribed a line under section 297, was it competent to him to prescribe a different line later? The Court answered this question in the negative, and the leading judgment was delivered by Jenkins, C. J. It is upon the terms of this judgment that the respondent places his main reliance, but I think that, if the judgment be read carefully in the light of the pleadings and the issue, it will be recognized that the subsequent amendment of the section deprives the decision of any present authority and is fatal to the respondent's contention.

The Chief Justice begins his judgment by noticing two separate groups of sections, those dealing with "the construction, maintenance and improvement of public streets," and those dealing with the "preservation of regular line in public streets." After observing that section 297 falls within this

(1) (1900) 25 Bom. 107.

latter group, he points out that the purpose of setting back the regular line of the street was to widen it, not to preserve the regular line of that street for, he says, "that *ex concessis* was already secured by the line which in 1888 was proscribed by the Commissioner under section 297." Then follows the passage in which it is stated that the purpose of section 297 is not to enable the Commissioner to widen a public street; and this passage, as I understand it, is the answer to the Commissioner's plea that he was empowered to prescribe the second line by reason of his determination that it would be for the public good to widen the street beyond the limit of the earlier line. That this is the meaning of the passage appears clear from the concluding words: the purpose of the section, says Sir Lawrence Jenkins, is not to empower the Commissioner to widen the street, but is "to empower him to secure a regular line of street, an end already secured by the line proscribed in 1888." So in the next following words, in dealing with Mr. Starling's argument that the Court should not interfere with the Commissioner's action under section 297 merely because it may indirectly have a result for the attainment of which other provision is made, the Chief Justice says: "This argument appears to me to overlook the admissions; for from them it logically follows that the conditions requiring and justifying the exercise of the power contained in section 297 have no existence." This plainly refers to the admissions that a line for the purpose of regularity had already been proscribed, and that the object of prescribing the now line was, not to attain regularity, but to widen the street. The judgment decides that this action was unauthorised, not because its motive was to widen the street, but because, the object aimed at by the section having already been secured by the first line, no second line could be proscribed, whatever might be the motive for the attempt to prescribe it.

Then comes the amendment, which is an addition to the section, and enacts that, with the authority of the Corporation, the Commissioner may "from time to time prescribe a fresh line in substitution for any line so proscribed or for any part thereof." This, it would seem, goes to the root of the earlier

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decision, which allowed the then plaintiff's plea that "it is not competent to the Municipal Commissioner from time to time to alter the line so prescribed." In terms, therefore, unless there be some concealed difficulty, the amendment authorises precisely what has here been done with the authority of the Corporation, namely the substitution of a fresh line for a line already prescribed. What, then, is the difficulty suggested? It is that the Legislature has not altered the wording of the heading of this group of sections, "Preservation of regular line in public streets," nor has it expressly said that the prescription of the fresh line should be valid even though the object of it be to widen the street. But it has said generally that a fresh line may be prescribed from time to time and this authority is not in any way limited by reference to the motive or the result with which it may be exercised; we cannot, therefore, read into the section a limitation or restriction which the Legislature has not imposed. As to the phraseology of the heading of the sections, it is plain that that cannot control the wording of section 297. The heading stands on the same footing as a preamble, and may be referred to for guidance if the meaning of the section is obscure: see *Eastern Counties, &c., Companies v. Marriage*<sup>(1)</sup> and the judgment of Collins, M. R., in *Fletcher v. Bikkenhead Corporation*<sup>(2)</sup>.

But in this case there is, I think, no obscurity in the section itself, and, if that is so, the appeal to the headings is beside the point. If fresh lines may from time to time be prescribed, it is certain that, at least in the great majority of cases, the effect of a new line will be to increase the width of the street in comparison with the earlier line, and a result so directly flowing from the amended section may be safely taken to have been contemplated and approved by the Legislature.

For these reasons I think that the decision in *Essa Jacob's case*<sup>(3)</sup> cannot, since the amendment of section 297, be regarded as authoritative, and that the Municipal Commissioner was empowered by the amended section to take the action of which

(1) (1860) 9 H. L. C. 32 at p. 41.

(2) [1907] 1 K. B. 205.

(3) (1900) 25 Bom. 107.

the plaintiff complains. I argee, therefore, that the appeal must be allowed.

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

Attorneys for the defendant: *Messrs. Ardshir, Hormasji Dinshaw & Co.*

*Appeal allowed.*

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*Before Mr. Justice Macleod.*

BAI LAXMI, PLAINTIFF, v. HARJIVAN NATHU AND OTHERS,  
DEFENDANTS.\*

1911  
September 9.

*Civil Procedure Code (Act V of 1908), Schedule I, Order XXV, rule 1, and Order XXXIII, rule 1—Order for security for costs—Leave granted to continue suit as a pauper—Practice.*

An order to give security for costs obtained in a suit filed in the ordinary course must cease to operate as regards antecedent costs if leave is given to continue the suit as a pauper, provided the leave is granted before the time limited for giving security has expired.

### PROCEEDINGS in Chambers.

This was a suit filed by one Bai Laxmi on 12th April 1911 against the executors of the will of her deceased husband Jamnadas Vallabhdas, praying (*inter alia*) that the will should be declared void, and that the estate of the said Jamnadas should be administered by and under the directions of the Court.

On the 8th July an order was obtained that the plaintiff should within one month deposit Rs. 500 as security for the defendants' costs, and that in default the suit should be set down for dismissal. On 14th August, the plaintiff having failed to deposit security, the suit was set down for dismissal. The plaintiff, however, applied for an extension of time, on the ground that she had filed an application on 31st July for leave to continue the suit as a pauper. An extension was granted, and within

\* Suit No. 311 of 1911.