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run from that date though it must not be inferred from this that the plaintiffs would not, in our opinion, be entitled to succeed but for the Proclamation of December. Subject to this variation, we affirm the decree and dismiss the appeal with costs.

Solicitors for appellants: Messrs. *Daphtary, Fareira & Diwan.*

Solicitors for respondents: Messrs. *Crawford, Brown & Co.*

Appeal dismissed.

G. G. N.

CRIMINAL REVISION.

Before Mr. Justice Batchelor and Mr. Justice Shah.

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March 14.

IN RE JIVRAJ DHANJI.*

City of Bombay Municipal Act (Bombay Act III of 1888), sections 418 and 461, clause (o)†—Bye-law for weights and measures—Validity of the bye-law—Recognition of certain measures only, for standardization—All measures in use should be recognised—Measures of phara *and* pyli*—New measures of* maplo *and* mapli.

* Criminal Reference No. 5 of 1917.

† The material portions of the sections run as follows :—

SECTION 418. (1) The Commissioner shall from time to time provide such local standards of measure and weight as he deems requisite for the purpose of verification of weights and measures in use in the City, and shall make such arrangement as he shall think fit for the safe keeping of the said standards.

(2) The Commissioner shall also provide from time to time proper means for verifying weights and measures by comparison with the said standards and for stamping the weights and measures so verified.

SECTION 461. The corporation may from time to time make bye-laws, not inconsistent with this Act, with respect to the following matters, namely :—

* * * * *

(*o*) preventing the use in any market of false or defective weights, scales or measures, and publishing a price current.

* * * * *

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The Municipal Corporation of the City of Bombay framed the following bye-law under the powers vested in them by section 461, clause (*o*) of the City of Bombay Municipal Act (Bombay Act III of 1888):—

"No tenant or occupier of a shop, stall or go-down or standing in a private market shall keep at such shop, stall, go-down or standing any weight or measure which has not been duly verified by comparison with the standard weight or measure and stamped in accordance with the provisions of sections 418 and 419 of the Act."

Held, that the bye-law was invalid under the Municipal Act, in so far as it prohibited the keeping, for use in a private market, of a measure which had been in use in the City but of which no standard had been kept by the Commissioner as required by section 418 of the Act.

THIS was a reference made under section 432 of the Criminal Procedure Code, 1898, by G. R. Khairaz, Acting Third Presidency Magistrate of Bombay.

The facts of the case as stated in the reference were as follows:—

Under section 418 of the Bombay District Municipalities Act the Municipal Commissioner is bound to provide local standards of measure in use in the city for the purpose of verification. In pursuance of this provision the Municipal Commissioner has provided standard measures known as the "*phara*" and the "*pyli*." The standard *phara* contains 17 "*pylis*." But in the year 1893 misled by the Times of India Directory the Mint Authorities made a "*phara*" containing 16 "*pylis*" only. This led to complaints and eventually after thorough investigation it was decided that the local "*phara*" contained 17 "*pylis*" and a standard "*phara*" of 17 "*pylis*" was thereafter kept by the Commissioner in the Municipal Markets (Crawford Markets) for purposes of verification. But unfortunately the "*phara*" of 16 "*pylis*" was not destroyed. The two standards were kept together in the Crawford Markets. When Mr. Michael, the new Superintendent, took charge of the Crawford Markets he was not aware of this controversy and by mistake a

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few "*pharas*" of 16 "*pylis*" were verified. This led to complaints from retail grain-dealers and the public who used to get 17 "*pylis*" to the "*phara*" under the standard measure in use, but now got only 16 "*pylis*" to the "*phara.*" The mistake was rectified and the Commissioner issued orders that only "*pharas*" of 17 "*pylis*" would be verified and recognised and further notified that the Police would take action against any one who used "*phara*" of 16 "*pylis*" only. The wholesale grain merchants were, however, not deterred by this notice. They invented a new measure which they called "16 *pyli* measure." It was discovered that under the existing state of the law neither the Corporation nor the Police could enforce the use of the standard "*phara*" of 17 "*pylis*" nor could prohibit the use of the new measure outside the Municipal Markets. Obtaining no redress for their grievances from the Municipal Commissioner the Retail Grain-dealers' Association consulted counsel (Messrs. Strangman and Desai) and under their advice invented new measures which they designated "*mapli*" and sub-division of "*mapli.*" The "*mapli*" was and purported to be smaller than the standard "*pyli*" being only 15/16 of a standard "*pyli.*" The object was to compensate for the loss of the "*pyli*" in a "*phara*" which befell them under the new measure of the wholesale grain merchants. The intended use of these new measures was advertised in the local dailies, both English and Vernacular, and handbills were also issued. Furthermore the shop contained a board explaining the new measures in terms of a "*pyli*" and fractions thereof. The new measures were brought into use on *the 1st of August 1915* and were in use for *over 14 months* at the date when the complaint was filed in this Court. All the members of the Retail Grain-dealers' Association have been using these new measures. There are nearly 1,500 members. In fact all retail grain-dealers except

a few occupying stalls in Municipal Markets are members of the Association. It is conceded that no action can be taken against the use of these "*maplo*" and "*mapli*" measures outside the markets. It is also conceded that no action could be taken against the use of the same in private markets for over a year because the bye-law in question did not exist. But at the time counsel were consulted a bye-law in almost identical terms did exist so far as the Municipal Markets were concerned: vide bye-law No. 18. The bye-law in question, therefore, applies to 10 or 12 grain-dealers occupying stalls in private markets. The *bona fide* of the accused is not impeached. The measures are what they purport to be. It is not alleged that any attempt is made to pass off "*mapli*" for "*pyli*."

On these facts, the learned Magistrate referred to the High Court certain questions for determination. One of the questions so referred was "whether the bye-law is valid?" His opinion on the question was as follows:—

I am of opinion that it is not. Under section 461, clause (*o*), the Corporation have power to make bye-laws preventing the "use" of "false" or "defective" measures. The bye-law in question prevents the keeping measures "not verified" by the Commissioner. Under the bye-law a stall-holder in a market could not keep an unverified "*phara*" of 17 "*pylis*", i.e., he could not keep a measure that is neither "false" nor "defective" in any sense of the word. The "*maplo*" and "*mapli*" and the other measures in question are what they purport to be. They are, therefore, neither "false" nor "defective." A bye-law that prevents the use of measures that are neither "false" nor "defective" appears to be *ultra vires* of the Corporation. It would amount to this, that the Corporation have power to prevent the use of any measure other than that verified by the Commissioner. There is no law in Bombay forbidding any person inventing the using any new measure he pleases. Section 461, clause (*o*), cannot be held to have empowered the Commissioner to prohibit in the markets what no law at present prohibits in India. If this was intended, very different language would have been used in the Acts. Moreover, the prohibition is as to keeping. *Using is quite distinct from keeping.* There is no power given to make bye-laws preventing

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the keeping of false measures but only using. For these reasons I am of opinion that the bye-law is not valid.

The reference was heard.

Setalvad, instructed by *Crawford & Co.*, for the Municipality :—The accused has committed a breach of the bye-law by keeping and using a measure which has not been verified.

The question referred is: whether the bye-law is valid. The contention of the other side is that it is not, first, because clause (*o*) of section 461 of the City of Bombay Municipal Act (Bombay Act III of 1888) speaks of the *use*, and not of the *keeping*, of the false or defective measure. Secondly, the clause gives powers to deal with *false or defective* measures alone. But, I submit, that the clause gives powers to make bye-laws to prevent the use of false or defective measures. One of the ways of preventing the use is to forbid the keeping of objectionable measures. The result can be achieved by requiring that only verified measures can be kept. The Commissioner has the power to select any standard measure; and has also the power to require that no trader shall keep or use any unverified measure.

It is not correct to say that *maplo* and *mapli* were measures in use in the City of Bombay within the contemplation of section 418 of the Act. They were brought into use after the 1st of August 1915. The Commissioner is not bound to recognise new measures.

Inverarity and *Baptista*, instructed by *Ardeshir, Hormasji, Dinshaw & Co.*, for the accused:—The Municipal Commissioner should have acted under section 418 and standardized the new measure that had come into being. He is bound to recognise all existing measures. He cannot select any one of them. The Act does not prevent a dealer from adopting any new measure he likes. He can sell by the English pint

or pound. The measure used here is not dishonest. Clause (*o*) of section 461 does not empower the Commissioner to prevent the use of any honest measure. The bye-law goes beyond the scope of the clause, in so far as it prevents a dealer from keeping in his shop any pint-pot or other measure which is not verified by the Commissioner.

Setalvad, in reply :—The question of validity of the bye-law stands by itself. It does not depend on the Commissioner having or not having acted under section 418.

Inverarity asked for costs of the reference under section 433 of the Criminal Procedure Code.

BATCHELOR, J. :—This is a reference by the learned Third Presidency Magistrate before whom the Municipal Commissioner of Bombay had lodged a complaint against the accused to the effect that the accused was guilty of infringing the 4th bye-law in Chapter III of the bye-laws, framed by the Bombay Municipal Corporation.

The facts are not in dispute and are very clearly set out at the beginning of the learned Magistrate's reference. There is, therefore, no need to recapitulate them. On the facts stated and admitted the learned Magistrate was of opinion that the prosecution must fail on several points of law. But as these points seemed to the learned Magistrate to be involved in some obscurity, a reference to this Court was made.

After argument on both sides I agree with the learned Magistrate that the prosecution must fail on one of the points of law to which the Magistrate has adverted. It is, therefore, unnecessary for me to consider the other points raised in the reference.

In my opinion the prosecution must fail, because the bye-law under which this prosecution was instituted is

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beyond the powers vested in the Municipal Corporation under section 461 of the City of Bombay Municipal Act. We are concerned in the present case with a certain measure known as *maplo*. It is admitted that this measure is a perfectly honest measure which has been current in the City since August 1915. Now the bye-law of which the infringement has been alleged against the accused runs as follows: I quote only the words which are immediately applicable to the present case: "No tenant of a shop shall keep at such shop any measure which has not been duly verified by comparison with the standard measure." That bye-law which affects the keepers of shops in private markets, purports to be enacted under section 461, clause (*o*) of the Municipal Act. This clause empowers the Corporation to make bye-laws not inconsistent with the Act with respect to the matter of preventing the use in any market of false or defective measures. Under section 418 of the Act it is provided that the Commissioner shall from time to time provide such local standards of measure as he deems requisite for the purpose of verification of measures in use in the city and shall make arrangement for the safe-keeping of the said standards. It is also directed that the Commissioner shall provide from time to time proper means for verifying measures by comparison with the said standards. It is clear, as it seems to me, that under section 418 a duty is cast upon the Commissioner of recognizing the measures actually current in the city, and his means of ensuring that such measures shall be faithfully followed are limited to the methods set out in that section. The bye-law, however, purports to give the Municipal Corporation or the Commissioner far wider power than that conferred by section 418. For it purports to empower these authorities to prohibit the use in a private market of any measure, honest or dishonest, provided only that it is a measure which has not been verified. Nor can the bye-law in my

opinion be brought within the ambit of clause (*o*) of section 461. For that clause, as I construe it, means no more than that the Corporation shall have power to pass bye-laws to prevent the practice of fraud by the use of measures which are false or defective with reference to the standard measures assumed to have been verified by the Commissioner as directed in section 418. But neither under section 418 nor under section 461 has the Corporation any such power as they claim to exercise by this bye-law, the power, namely, to say that in the private markets of the City no measure shall be brought into use unless it has already been verified by the Commissioner. Rather the provisions of the Act import that if the Commissioner has reason to suspect any particular measure which is current, his method of controlling it is to verify it as directed under section 418, and thereafter to secure that the measures of that denomination in use shall correspond with the verified measure. I can find nothing in section 418 or section 461, clause (*o*) which would justify the Municipality in prohibiting the use of an honest measure in a private market merely on the plea that if the use of that measure were prohibited, it might be easier for the Municipality to ensure that the measures actually in use should not be false or defective with reference to the verified and standard measures. The use of an honest measure of one description cannot be said to facilitate the commission of fraud by the use of false or defective measures of a wholly different name and description.

On this ground I agree with the learned Magistrate that the bye-law of which the infringement is alleged against this accused is invalid under the Municipal Act, in so far as it prohibits the keeping, for use in a private market, of a measure which has been in use in the City but of which no standard has been kept by the

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Commissioner as required by section 418. Therefore the prosecution must on this ground fail.

Under section 433 of the Criminal Procedure Code it is open to us to direct by whom the costs of this reference should be paid. But having regard to all the circumstances we make no order as to costs.

SHAH, J.:—I am of the same opinion.

R. R.

APPELLATE CIVIL.

FULL BENCH.

1917, *March* 30.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Batchelor, Mr. Justice Beaman, Mr. Justice Heaton, Mr. Justice Macleod, Mr. Justice Shah and Mr. Justice Marten.

ISAP AHMED MOGRARIA AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 3) APPELLANTS *v.* ABHRAMJI AHMADJI MOGRARIA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 4 AND 5), RESPONDENTS.*

Limitation Act (IX of 1908), Schedule I, Article 127—Applicability of the Article to Mahomedans—Suit to recover share in joint family property.

The following question was referred to a Full Bench :—"Whether Article 127 of the Second Schedule of Act XV of 1877 can apply to the property of a Mahomedan (or any other person not being a Hindu), and not having been proved to have adopted as a custom the Hindu law of the joint family."

Held (*Shah J.* dissenting), that it did not.

THIS was an appeal under the Letters Patent from the decision of Batchelor J., in appeal from the decision of P. J. Taleyarkhan, District Judge of Broach, amending the decree passed by the Subordinate Judge at Ankleshvar.

Suit for partition.

* Appeal No. 41 of 1913 under the Letters Patent.