

## Emperor Vs Vishvanath Nana Karpe and Others

**Court:** Bombay High Court

**Date of Decision:** June 4, 1926

**Acts Referred:** Bombay District Municipal Act, 1901 " Section 90

**Citation:** AIR 1926 Bom 535

**Hon'ble Judges:** Madgavkar, J; Fawcett, J

**Bench:** Full Bench

### Judgement

Fawcett, J.

This is a reference by the Sessions Judge of Poona, regarding the conviction of three persons of an offence u/s 61, Clause (f),

of the Bombay District Police Act. The offence in question is that of having kept log of timber on a public street and causing obstruction thereby,

though warned to remove the logs. This would fall under the words of the clause,

causes obstruction in any street by leaving any box, bale, package or other thing whatsoever in or upon a street for an unreasonable length of time.

2. And, in so far as these logs of timber were admittedly put out for sale, that would also fall within the words,

by exposing anything for sale or setting out anything for sale in any way whatsoever that causes obstruction.

3. The defence raised is that the Municipality had authorized timber dealers to use a strip of the street for the purpose of exposing timber for sale,

and we are assured by the learned Counsel for the accused that this has been done for forty years. The question, however, that has to be decided

is, whether the Municipality had any proper statutory authority to divert a portion of a public street for the purpose of exposing timber for sale in

the way that has been done. The learned Government Pleader supports the order of the Magistrate, and contends that the Municipality has no

power to pass any such order. This point was considered by the Magistrate in his judgment, and he has given reasons in paras. 4 and 5 of his

judgment for holding that the Municipality had no proper grounds for allowing an obstruction of this kind.

4. The contention that has been put before us, as also before the Magistrate and the Sessions Judge, is that, u/s 90 of the Bombay District

Municipal Act the Municipality has authority to discontinue or stop up any public street, and, therefore, they have power to discontinue or stop up

a part of such street; accordingly, it is contended that there is no objection to their allowing a strip of a street to be used as a market for the sale of

timber. I think that, in considering this argument, it is important to remember that public streets are vested in the Municipality for the purpose of

being maintained as public streets, u/s SO of the Bombay District Municipal Act, and that section expressly declares that public streets so vested in

them shall be applied by them as trustees, subject to the provisions and for the purposes of the Act. Therefore, it rests upon anyone who supports

the action of the Municipality to show that it had statutory authority to divert a portion of a public street in the manner that has been done. I also

think that the Act contains clear provisions, which show that ordinarily a Municipality should not allow a permanent obstruction upon any public

street vested in the Municipality. Section 122 of the Bombay District Municipal Act is a very plain enactment to that effect. Sub-section (4) of that

section refers to the piling of fuel in by streets, but says the Municipality only has authority to allow such piling of fuel for not more than four days,

and in such manner as not to inconvenience the public or any individual. Therefore a strong presumption arises that the Legislature did not intend,

by the general power it gives to the Municipality to discontinue or stop up public streets, that they should use that power for a purpose which

contravenes the intention shown by Section 122 of the Bombay District Municipal Act.

5. So far as the question of licensing markets is concerned, there are the provisions of Sections 139 and 140 of the Bombay District Municipal

Act, which contemplate the Municipality constructing or opening markets. But those provisions would ordinarily apply to the erection or other

provision of some place as a market, not in a public street, but in a proper locality. And it would entail a contravention of the intention shown by

Section 122 of the Bombay District Municipal Act to hold that those sections are meant to cover the licensing of a market in a public street.

6. Then, coming to Section 90 of the Bombay District Municipal Act, it obviously is dealing with the question of providing proper highways and

thoroughfares in the Municipal area, and since power is given to widen, open or enlarge or otherwise improve streets, a corresponding power is

given to turn, divert, discontinue or stop up streets. That power would ordinarily be meant to enable the Municipality to provide a substituted street

which would be an improvement on an old street, and then to stop or discontinue that old street. It seems to me that it is perverting the proper

meaning of the section to say that it contemplates a case of stopping up a portion of a street, so as to provide a market, as has been done in this

case. I am quite aware that it is a common practice in this country to use portions of the public streets as temporary markets, and no doubt it is

very difficult to stop that practice. But, at the same time, when we are considering whether there is authority for the Municipality to allow a portion

of a street to be kept for the use of a market, that practice does not discharge the onus I have mentioned. In my opinion, the Act contains

provisions which go against any such supposition. Therefore, it seems to me that the Magistrate is quite correct in his reasoning in paras. 4, 5 and 6

of his judgment, and I can see no sufficient reason for our interfering with the convictions. I would, therefore, order the record and proceedings to

be returned.

7. As regards the question of sentence, Mr. Binning for the accused asks us to reduce the sentence of fine of Rs. 50 in each case, as this was a test

case. Certainly, it does appear that they did not wilfully obstruct in the sense of doing something that had not been done before, and they had the

authority of the Municipality for placing the timber in the way they did. Therefore, we reduce the fines to one of Rs. 10 in each case, without

prejudice to enhanced punishment in the event of the obstructions continuing and there being further convictions of the same kind. The amounts in

excess to be refunded.

Madgavkar, J.

8. I agree.