(1924) 08 BOM CK 0029

Bombay High Court

Case No: None

Alimahomed Salemahomed		APPELLANT
	Vs	
Municipal Commissioner of Bombay		RESPONDENT

Date of Decision: Aug. 15, 1924

Acts Referred:

- Specific Relief Act, 1877 - Section 45

Citation: AIR 1925 Bom 458 : (1925) 27 BOMLR 581 : 87 Ind. Cas. 771

Hon'ble Judges: Taraporewala, J

Bench: Single Bench

Judgement

Taraporewala, J.

This is an application under the Specific Relief Act, ﷺ. 45, for an order on the Municipal Commissioner to grant the applicant a license for stables for hack victorias erected by him at Love Lane, Mazagaon, u/s 394 (1) (c) of the City of Bombay Municipal Act III of 1888. The Municipal Commissioner has declined to issue a license in this case on the ground that he was prevented from doing so by the order of the Appeal Court: Bombay Municipality v. Mallandaine (1928) 25 Bom. L.R. 1321 . The Municipal Commissioner has put in an affidavit in reply to the application in which he concedes that but for the judgment of the Appeal Court he is quite willing to exercise his discretion in favour of the applicant and to issue a license to him as applied for by him. In the opinion of the Commissioner, who has a discretion in the matter, the applicant is entitled to the license and he says that if he had not been advised by his legal advisers that the Appeal Court judgment prevented him from exercising his discretion in the matter he would have issued the license to the applicant.

2. The question of the jurisdiction of this Court to order the Municipal Commissioner to exercise his discretion under certain circumstances u/s 45 of the Specific Relief Act has not been disputed, but I should like to refer to the judgments of this Court

on the point which make it quite clear under what circumstances this Court has jurisdiction to interfere with the discretion of the Commissioner u/s 45 of the Specific Belief Act. As to the interference with the discretion of the Municipal Commissioner there is a decision of the Appeal Court in Haji Ismail v. The Municipal Commissioner of Bombay ILR (1903) 28 Bom. 253 : 5 Bom. L.R. 1001. That was also a case of refusal to grant a license to the applicant u/s 394 of the City of Bombay Municipal Act. The learned Judges of the Appeal Court lay down at page 260 as follows:-" The power, then, to grant licenses vested in the Municipal Commissioner u/s 394 being purely discretion, are the only limit to its exercise is that it should not be arbitrary, vague and fanciful; but it must be legal and regular." Then, on the facts of the case the Appeal Court found that they were not satisfied that the Commissioner had exercised his discretion arbitrarily and without any regard to the sanitary interests of the City for which the power is vested in him and accordingly dismissed the application of the applicant.

3. There is another decision of this Court in Gell v. Taja Noora ILR (1903) 27 Bom. 307 : 5 Bom. L.R. 133 where the question was of the exercise of discretion by the Commissioner of Police in refusing to grant a license for the conveyance of the applicant on the ground that the Commissioner had approved a certain pattern of victoria as a public conveyance and had refused a license to the Victoria of the applicant on the ground that it did not conform to the pattern. That case also went up to the Appeal Court and both the Judge of the first instance Mr. Justice Russell and the Appeal Court held that the ground on which the Police Commissioner had refused to grant the license was illegal and that, therefore, the Court had jurisdiction u/s 45 of the Specific Relief Act to order him to issue the license asked for. The observations of Mr. Justice Batty at page 320 and Mr. Justice Starling at page 321 show that where the Commissioner has acted illegally in refusing to exercise his discretion this Court would interfere, and order him to exercise his discretion and issue the license.

4. The ground in this case on which the Municipal Commissioner has declined to grant the license to the applicant is that he is prevented by the decision of the Appeal Court referred to by me from doing so. If, therefore, the Appeal Court judgment does not bear the construction which is put upon it by the legal advisers of the Municipal Commissioner, clearly the action of the Municipal Commissioner in declining to grant the license would be illegal.

5. The sole question, therefore, before me is whether the judgment of the Appeal Court bears the construction which is put upon it by the legal advisers of the Municipal Commissioner and whether that judgment covers the altered circumstances of the case as now existing and therefore prevents the Municipal Commissioner from granting the license. I have very carefully considered this question, as I find from the proceedings that the matter was fought out in the Court of the Chief Presidency Magistrate and before the Appeal Court in the most

acrimonious spirit and as found both by the Magistrate and by the Appeal Court the parties concerned refused to consider any compromise or any middle way out of the difficulty created by the action of the Municipal Commissioner in then proposing to grant a license to the applicant. It further appears that long before the Municipal Commissioner decided to grant a license the residents of the locality had made complaints to the Municipality and the Municipal Sanitary Committee had examined the locality and made a report and the matter had again come before the Corporation, and ultimately the Corporation having decided to support the action of the Municipal Commissioner in his proposal to grant a license to the applicant, proceedings were taken, u/s 515 of the Municipal Act, by one L. R. Mallandaiue, who lived in a bungalow belonging to the applicant and which bungalow was on throe Hides surrounded by the stables, before the Chief Presidency Magistrate. This was the first case of its kind in Bombay It appears to me that by reason of its being the first case neither the parties nor the Chief Presidency Magistrate were quite clear in their minds as to what was exactly the issue before the Court and what was exactly the relief as bearing on that issue asked for by the complainant. I make case observations advisedly after very carefully going through the proceedings and the judgment of the Magistrate, as I find, as pointed out by Mr. Campbell in his very fair and able argument on the point, that there are stray observations in the judgment of the chief Presidency Magistrate and indications in the evidence led before the Chief Presidency Magistrate on behalf of the complainant that the complainant was fighting not only his own battle but the battle of the other residents in the locality, who, it appears, had also financed him. The learned Magistrate has, however, based bin decision mainly on the evidence which showed that the stables would cause a nuisance to the residents of the house in which the complainant resided. That the point as to whether the nuisance complained of affected the public was before the minds of the parties and the Magistrate appears to me to be clear from the fact that from the very first Mr. Campbell, who appeared for the Municipal Commissioner in that case, raised the point that the Magistrate had no jurisdiction u/s 515 of the Municipal Act to entertain the complaint as the complaint was in respect of a private nuisance and not a public nuisance. The question as to the nature of the nuisance complained of and whether it came within the terms of Section 515 had to be and was considered by the Magistrate. Moreover, the scope of the order, which he ultimately made, was bound to be circumscribed by the finding as to the nature of the nuisance with regard to which the Magistrate found action "n his part was necessary u/s 515 of the Municipal Act. Here it is important to bear in mind that H. 515 of the Municipal Act is designed to empower the Magistrate to give summary relief by way of prevention or otherwise not only in respect of a public nuisance but any nuiance as defined by Section 3 (z) of the Municipal Act. Section 3 (a) makes it clear that " nuisance " under the Municipal Act includes both private nuisances and public nuisances. The definition runs as follows:-""Nuisance'' includes any act, omission, place or tiling which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smelling or hearing, or which is or may be

dangerous to life or injurious to health or property." The point taken in the very first instance by counsel for the Municipal Commissioner was that notwithstanding the wide terms of the definition of " nuisance" in the Municipal Act, the words should be read as confining the definition to public nuisance only. That is to say the argument was that unless the community or large part of the community or a street or locality was affected by the nuisance the Magistrate was not to exercise the summary jurisdiction u/s 515. That point was considered at some length by the learned Chief Presidency Magistrate and although he does not quite clearly find that the nuisance complained of was not a public nuisance, he impliedly holds that it was not. Otherwise one would have found in the very forefront of his judgment that the nuisance complained of was a public nuisance and that, therefore, there was no force in the contention that it was not coveretd by Section 515. He might then have further held that even if he was wrong in holding that it was a public nuisance, the nuisance complained of was covered by the definition- given in Section 3 (z). But he does not do so, and to my mind advisedly. There was no case of public nuisance which was either seriously pun forward or which was seriously advanced in the evidence or which was seriously considered by the Chief Presidency Magistrate. There are indications of an attempt on the part of the complainant to bring this nuisance within the definition of a public nuisance by adducing evidence of people in the locality to the effect that since the user of these stables malaria had prevailed in their houses and that malaria was due, if not solely, to a great extent to the fact of the user of the stables. There was nothing to prevent the Chief Presidency Magistrate from holding on the evidence before him that not merely the residents in this house but the residents of the locality were affected by the user of these stables and that, therefore, it was not merely a private nuisance but a public nuisance which he wanted to abate under the powers given to him u/s 515, If one looks at the whole of the judgment, notwithstanding stray remarks here and there which might indicate that the Chief Presidency Magistrate had some doubts as to whether romotely there might not be some danger of malaria to the coming to his particular the residents of the locality and the public, in conclusion he definitely confines himself to house and the residents in that particular house. I need not quote passages from the judgment of the Chief Presidency Magistrate to show that throughout he was considering the question as if it was a fight between the complainant, as representing the residents of the bungalow in which he was living, and the Municipal Commissioner. I may here refer particularly to the appreciation by the Chief Presidency Magistrate of the evidence of Mr. .Niblett, Mr. Masani and Mr. Daruwalla, who all stated that although the stables were not a public nuisance, they might result in a certain amount of nuisance to the occupants of the bungalow on the ground of noise caused by the syces talking and shouting and of insanitary conditions which might result by the washing of the horses and the victories in the stables; and particularly on the evidence of these three gentlemen the learned Chief Presidency Magistrate holds that the stables were proved to be a nuisance within Section 3 (z) of the Municipal Act. He then also refers to the judgment of Mr. Justice

Beaman in Bai Bhicaiji v. Perojshaw Jivanji ILR (1915) 40 Bom. 401 : 17 Bom. L.R. 1040 which case also was a case of a private nuisance. In the final conclusion the learned Magistrate does bring in the occupants of the neighbourhood, but considering the judgment as a whole, I am of opinion that the learned Magistrate did not find that there was a public nuisance likely to be created by the user of the stables but a private'' nuisance which he had jurisdiction to abate u/s 515.

6. Coming to the judgments of the Appeal Court, although, particularly in the Acting Chief Justice''s judgment there are certain remarks which might be construed as referring to the residents of the locality, the judgments as a whole are devoted to the consideration of the question whether the user of the stables would result in a nuisance to the residents of the bungalow of whom the complainant was one. The words in which the learned Chief Justice finds on the question of nuisance are these (p. 1326):-" I hold that it is a nuisance with reference to the residents of this house in relation to the particular circumstances of the case. I do not say generally that any stables properly licensed, and kept according to the terms of the license, would necessarily be a nuisance. My finding has relation to the particular facts of the case including the situation of the stables and the extent to which the stabling accommodation is allowed on this land." This conclusion to which the leimed Judges of the Appeal Court came is further made quite'' clear from their appreciation of the evidence on the complainant''s behalf to the effect that the danger of malaria was increased in the locality. There was a divergence of medical evidence on the point, but so far as I can Bee the Judges of the Appeal Court were inclined to hold that the evidence did not prove the contention of the complainant and of the other residents of the locality that malaria was increased in the locality by reason of the user of these stables. If the ground of malaria was eliminated no other ground remained for holding that it was a public nuisance. I have gone through the whole evidence in that case. One Niblett, who resided in the house of Ismailji, and Nazir who occupied another house whom two houses are the nearest to the stables next to the bungalow in question, say that they suffered discomfort on account of stnell and noise. Their evidence, however, was very perfunctory, and the Judges of the Appeal Court do not specifically refer to it at all and have not brought their mind to bear upon those statements. It is a very doubtful question whether, assuming two or three houses were affected, it would be a case of public nuisance. I. find in Halsbury''s Laws of England Vol. XXI, at page 611, where public and private nuisances are defined, in the note (k), that where a noise caused by a tinman plying his trade affected three houses only, it was held that there was a private nuisance and not an indictable one. The case referred to is R. v. Lloud (1902) 4 Esp 200 Therefore, even if these two houses were affected practically by this nuisance, it might not amount to a public nuisance The Judges of the Appeal Court did not particularly consider the case from the point of nuisance being created in respect of the residents of the locality. As I stated, the question of the residents of the locality appears to me to have been dismissed from consideration by the Appeal Court on

the ground that the evidence did not show that there was increase of malaria or that there was likelihood of increase of malaria. The judgment of Mr. Justice Crump, the other Judge of the Appeal Court, is to my mind equally clear on the question of the stables not affecting the other residents of the locality. He considers at some length the question of increase of malaria and he discards the evidence of the other residents of the locality as evidence of no value at all.

7. There are further indications given in the judgments of both the Appeal Court Judges that they were merely considering the case of the residents of the particular bungalow. It appears from the judgments that they tried to bring about a compromise and find a middle way of solving the dispute between the residents of the house in question and the owner of the stables and they express their regret that both the parties were fighting the matter so bitterly that they would not consider the suggestion of a middle way. One party insisted on the issue of the license while the; other wanted to prevent it absolutely and neither was willing to give up its extreme contention. Now to my mind if the nuisance was considered by the Court to be a public nuisance there would have been no ground at all for a compromise between the complainant and the owner of these stables.

8. As observed by Mr. Justice Holmwood in Khagendra Nath Mitter v. Bhupendra Narain Dutt ILR (1910) Cal. 296 the Court ought most strongly to deprecate the use of the Municipal Act for the purpose of interfering in any way with the rights of private ownership beyond those limited powers which the Corporation had obtained by statute for the necessary protection of the public and the enforcement of proper sanitation. I entirely agree with those observations, as after all in a big city like Bombay one cannot omit the consideration of the rights of ownership which might be affected to a very large extent by any hasty and improper action of the Commissioner or the Corporation or the Court. No doubt, if the user of the stables was in fact found to be a nuisance in respect of houses other than the bungalow, it was open to the Court and it would have been right for the Court, to find that the nuisance did not relate merely to the particular bungalow but to other houses also. If they thought that the nuisance related to the whole locality it was a public nuisance but if it related to the bungalow in question it was a private nuisance. The relief which the Court can give in both oases u/s 515 is inter alia abatement of the nuisance by ordering the Commissioner not to grant the license for the stables. But it does not follow from the Court''s making an order on the Commissioner that he should not grant a license that that order is to govern all circumstances and all oases at all times. Mr. Desai argued that if the order was meant to cover any larger area than the bungalow, such area ought to have been defined in the judgment of the Magistrate and the Appeal Court. I have looked through a good many cases of nuisance and I do not find anywhere that any limitation as suggested by Mr. Desai has been put and for the obvious reason because it would be very difficult in particular cases to demarcate any particular line. The law has, therefore, provided two very proper demarcating lines which are clear and on which there can be no

discussion, and that is, dividing nuisances into private and public nuisances With regard to a private nuisance, each individual has his remedy in civil law by way of injunction and damages. He has further his remedy u/s 515 of the Municipal Act as interpreted by the Appeal Court and by the Calcutta High Court in two cases arising under a similar provision in the Calcutta Municipal Act: Bhagwan Das v. Rash Behari Mullick (1909) 14 C.W.N. 637 and Khagendra Nath Mitter v. Bhupendra Narain Dutt (I.L.R 1910) Cal. 296 . It is necessary for the protection of the health and comfort of the inhabitants of a big city like Bombay or Calcutta that any resident, who is affected by a nuisance in the manner mentioned in Section 3 (z) of the Municipal Act, should have a right to go to a Magistrate over the head of the Commissioner or the Corporation and ask that the Commissioner should be restrained from exercising his powers so as to affect the complainant''s individual right as resident by the creation of a private nuisance. If private nuisance affects two or three houses, the inhabitants of the two or three houses might either join in a civil suit or they might file separate suits, or they might join in a complaint before the Magistrate and ask the Magistrate to decide specifically that the particular nuisance is a private nuisance affecting the residents of houses A, B and C. With regard to a public nuisance also, any resident of Bombay can ask for an order u/s 515, and if the Court finds a public nuisance proved, the order of the Court would give relief to the public of the locality as against the nuisance and vacating of any one or more houses would not mean an abatement of the nuisance in respect of the public, In the case of a public nuisance, no particular limits need be defined.

9. I have looked through various cases of public nuisance and I find that carrying on of obnoxious trades has been held in some oases to be a public nuisance. As to keeping of animals, under which the user of stables would come, I also find observations in Halsbury''s Laws of England, Vol. XXI, at page 513 to the following effect:-

The keeping of any animals in such a position or in such circumstances aa to cause material discomfort or annoyance to the public in general or to a particular person is ft nuisance. If it affects the public generally, it is a public nuisance, and may he punished by indictment or restrained by proceedings taken by the Attorney-General; if it violates private rights only, it is actionable by the individual who is thereby injured.

10. I have gone through all the cases I could find on the question of nuisance created by stables and I do not find a single case where it has been held that the keeping of animals in a stable was a public nuisance. It may be that if a person keeps a very large number of horses and the locality is very thickly populated it may cause discomfort, annoyance and injury to health, not only to the residents of two or three houses but of a much larger number of houses. In that case it would be a public nuisance.

11. But I particularly wish to emphasise the fact that it was open to the Appeal Court, if it carne to that conclusion, to hold that there was a public nuisance It does not do so. The Appeal Court held that a private nuisance was created which affected the residents of the bungalow only. The private nuisance to the residents of the bungalow no longer exists as the bungalow is not tenanted and is not to be used any more for purposes other than those connected with the stables,

12. That being the case, to my mind, the applicant is entitled to the relief claimed by him.

13. I need not go in detail into the various decisions, but the decisions as to stables which are referred to by Mr. Justice Crump in his judgment all relate to private nuisances, and the case in point as regards public nuisance created by the carrying on of an obnoxious trade is Attorney-General v. Cole & Son [1901] 1 Ch. 205 . I may mention here that in the English Public Health Acts there are similar provisions for the abatement of nuisances and the provisions apply both to public and private nuisances. There also, therefore, the order passed under summary jurisdiction would be interpreted on the basis of the finding of the Court as to whether the nuisance was a private nuisance or a public nuisance.

14. In the case of a public nuisance there is a special remedy provided in the Civil Procedure Code. u/s 91 of the Civil Procedure Code, the Advocate General or two or more persons having obtained his consent in writing may institute proceedings for abatement of a public nuisance. There is, further, a provision in Section 268 of the Indian Penal Code in respect of a public nuisance. There "public nuisance" is defined as an act or an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right I refer to these provisions, because I find from what Mr. Campbell very properly brought to my notice that the inhabitants of the locality have been under the impression, the same impression aa conveyed by the Municipal Commissioner to the applicant and which necessitated these proceedings, that the order of the Appeal Court protected all the inhabitants of the locality in respect of this nuisance. Probably they financed that litigation and backed up the complainant Mr. Mallandaine in the belief that if he succeeded, there would be an end of the matter. They did not count upon the ingenuity of the landlord, who got the particular house vacated and got the nuisance in respect of that particular house abated in a manner which was not contemplated by the other residents of the locality. I have looked at the plans put in in that case and I find that the two nearest houses next, to the bungalow in that case are the houses of Ismailji and of Nazir.

15. I express no opinion whatsoever as to whether the user of these staples will result in discomfort or annoyance amounting to a nuisance as defined in Section 3 (z) of the Municipal Act, or whether there will be a nuisance at law actionable in this

Court as a private nuisance in respect of any house or houses other than the bungalow or whether it will result in a public nuisance which would be indictable u/s 268 of the Indian Penal Code or actionable u/s 91 of the Civil Procedure Code. It may be that the residents of the locality may make a fresh effort and succeed perhaps so as to lay the matter at rest for all time. But unfortunately for them the Courts which considered that case confined their orders to the bungalow and did not hold there that a case of public nuisance was made out. The result is that if these parties are so advised there will be possibly further litigation in this matter. I do not want in any way to debar any resident or residents of the city of Bombay from taking proceedings cinder Section 515 of the Municipal Act or under the civil law, or u/s 91, by moving the Advocate Genera], or u/s 268 of the Indian Penal Code.

16. At one time I proposed to order the Municipal Commissioner not to issue the license for a period of one month : but, as pointed out both by Mr. Campbell and Mr. Desai, such an order will really serve nobody''s purpose. If the other residents of the locality, or whoever may be affected by the user of these stables, are so advised, they will have ample time to move the Magistrate, or file a suit in this Court and move for an injunction and obtain adequate relief. The applicant had these stables on his land for a long time and he has asked for a license again with his eyes open that other residents may have a cause for complaint and may again drag him to the Presidency Magistrate''s Court under e, 515 of the Municipal Act. I trust that the Municipal Commissioner will not unduly hasten the grant of the license. The app] cant will have no ground to complain if the issue of the license is delayed for a fortnight or any time which the Municipal Commissioner may think proper so as to give the other parties an opportunity of asserting their rights if they have any. I must say that the Municipal Commissioner has adopted a very proper attitude in bringing to my notice the letters addressed to him by the residents of the locality. Under the circumstances of the case, to my mind, he did right in getting this question brought before the Court and decided by the Court, more particularly as ho was advised by eminent counsel who are the retained counsel of the Municipality, that there would be a contempt of Court if he issued the license in face of the Appeal Court''s decision. It is unfortunate that the matter may have to be re-litigated but that cannot be helped in view of the judgments of the Appeal Court. I have not considered the question whether the stables might be a nuibance with regard to the other houses or other residents of the locality and I express no opinion on the question. I wish to make this point quite clear NO that it may not be said that the Commissioner uses his discretion under my orders and that therefore the other parties are debarred from moving u/s 515 of the Municipal Act or taking proceeding under the CPC or taking criminal proceedings. My order is based entirely on the view I have taken that the Commissioner illegally declined to use his discretion on the ground that he was restrained by the Appeal Court''s order. 1 hold that he is not so restrained; therefore the refusal to exercise his discretion was on an illegal ground. That is all that I decide on this application.

17. As to whether he hag otherwise rightly exercised his discretion or not, is a matter for the Municipal Commissioner and persons affected by the exercise of the discretion, I have not exercised any discretion in the matter. 1 have not gone into the merits of the question whether apart from the decision of the Appeal Court the Commissioner would be right in exercising his discretion and issuing a license to the applicant. What I mean is this, in exercising his discretion the Commissioner has to consider whether this would be a nuisance to the other residents of the locality and whether under the circumstances he should grant the license or not. On that point his opinion as expressed in his affidavit before me is clear that there would be no nuisance and that he is willing in the exercise of his discretion to grant a license. I am not exercising that discretion at all. I leave open the remedies u/s 515 of the Municipal Act and. under the civil and criminal law to any party who may feel aggrieved by the exercise of the discretion by the Commissioner.

18. The order will he on the Municipal Commissioner in terms of prayer (a). I direct the Municipal Commissioner in the exercise of his discretion to grant the applicant a license u/s 394 (1) (c) of the Municipal Act,

19. In my opinion the Municipal Corporation has been wrongly made a party to this application.

20. The applicant shall pay the costs of the respondents.