Privy Council Appeal No. 60 of 1944

Shankar Dattatraya Prabhavalkar and others - - *Appellants*

v.

The Municipal Corporation of the City of Bombay and another - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER, 1945

Present at the Hearing:

LORD THANKERTON
LORD SIMONDS
LORD GODDARD

[*Delivered by* LORD THANKERTON]

This is an appeal from a judgment and decree of the High Court of Judicature at Bombay, in its civil appellate jurisdiction, dated the 1st April, 1934, which affirmed a judgment and decree of that Court in its original jurisdiction, dated the 16th October, 1942, whereby the suit of the appellants against the respondents was dismissed.

In the suit the appellants challenged the actions of the second respondent, who is the Municipal Commissioner for the City of Bombay, purporting to be taken under the City of Bombay Municipal Act, 1888 (Bombay Act No. III of 1888) in the course of development of the Mahim district of the City, and, in particular, of an area, which included the land now occupied by the Shivaji Park, and the surrounding land, which included the plot of land now owned by the appellants. The appellants originally challenged the *bona fides* of the second respondent, who may be referred to as the Municipal Commissioner, as well as the validity of his actions, but the former ground was no longer maintained before this Board.

In 1918 the Municipal Corporation of Bombay, who are the first respondents in this appeal, resolved to proceed with a scheme for the development of the Mahim district, which provided for an open space or park for recreational purposes to be known as Shivaji Park, abutting on the sea on its western boundary and to be otherwise surrounded by a residential area. Among the lands, the acquisition of which was rendered necessary by the scheme, was a plot of land containing 4,428 square yards, owned by one Mantri, and lying to the north of the proposed park. An agreement was made in 1921 between the Municipal Corporation and Mantri, under which Mantri agreed to surrender the major portion of his plot, in consideration of the retention by him of the remaining portion, and the conveyance to him by the Municipal Corporation of an adjoining plot. As the result of this agreement Mantri became the owner of a rectangular plot containing 1,400 square yards, with a frontage to the north on the 60 feet road which was to be constructed as a part of the scheme, and this plot became Plot No. 141 of the Shivaji Park Scheme. In 1923 the special engineer in charge of the development works asked Mantri to agree to certain restrictions on building, including a restriction on building within 15 feet of a public street, but Mantri did not agree. Mantri died in 1926, and his legal representatives sold his plot to Shamrao Raghunath Raote, the contract being completed by two deeds of convey-

ance, in favour of the purchaser, both dated the 9th September, 1932, the first deed being a conveyance from Mantri's representatives, and the second from the Municipal Corporation. Under these conveyances the purchaser acquired a freehold estate in the plot, no restrictions being imposed by the terms of the deeds on the user of the property. In 1940 Raote sold the plot to the plaintiffs in the present suit, which raises questions as to the power of the Municipal Commissioner to impose building restrictions in respect of the plot.

In 1935, the Municipal Corporation approved of the construction of a 40 feet road, and the lay-out of plots near the Park, and the application to the plots of certain restrictions, for which purpose the plots were not to be sold outright, but were to be leased subject to restrictions which would thereby be legally enforceable. The 40 feet road was to run parallel to and to the south of the 60 feet road already approved of, and would adjoin the appellants' plot on its southern boundary. The other plots in the district were leased subject to covenants restricting the height of the buildings, and requiring the lessee to leave 15 feet open space between the building and the roads.

In March, 1939, Raote gave notice as required by section 337 of the Act of his intention to build upon his plot, accompanied by a plan which showed a space of 10 feet between the proposed building and each of the 60 feet and 40 feet roads. Raote did not proceed with his application, but sold the plot to the appellants in 1940, and completed the agreement by conveying the plot to them by deed dated the 19th December, 1940.

On the 12th August, 1940, the first appellant gave notice under section 337 of the Act of an intention to build on the plot, accompanied by plans, which showed four proposed buildings, two of which were to be constructed right up to the 60 feet road, and two right up to the 40 feet road. At first the Municipal Commissioner and his staff seem to have proceeded on the view that, in the light of the freedom from restrictions of the appellants' plot, they were unable to insist on the proposed buildings being set back from the two roads, and, on the 3rd September, 1940, intimation of disapproval under section 346 of the Act was sent to the first appellant by the City Engineer, in which, after setting out the grounds of disapproval, which related to details not concerned with the present question, the notice stated,

> " Subject to your so modifying your intentions as to obviate the before-mentioned objections, and meeting my requirements, and not otherwise, you will be at liberty to proceed with the said building at any time before the 3rd day of September, 1941, but not so as to contravene any of the provisions of the said Act, as amended as aforesaid, or any rule, regulation or bye-law made under that Act at the time in force."

On the 7th September, 1940, the City Engineer, to whom a method of securing that the appellants should conform to the building lines that had been imposed in the case of the neighbouring plots had now occurred, wrote to the Municipal Commissioner in reference to the appellants' building proposals a letter, in which he said, " we can compel the owner to leave open spaces in the front and rear by prescribing lines as shewn on the plan, under section 297 (1) (*a*) of the Act. This is the first time that lines are to be prescribed on these newly constructed roads. Your sanction is requested to prescribe the lines. A letter will be sent to-day in continuation of the previous intimation stating that M.C. has been pleased to prescribe regular lines and no work can be allowed within the prescribed lines." On consideration of this letter and the plan referred to, on which the lines proposed to be prescribed were shewn in red, the Municipal Commissioner approved of the proposal, and, in accordance with his usual procedure under section 297 (1) (*a*), endorsed his approval on the City Engineer's letter. On the 9th September, 1940, the City Engineer wrote to the first appellant stating that the Municipal Commissioner had been pleased to prescribe regular lines of street on the 40 and 60 feet roads, and requesting him to ascertain from his Office

Assistant Engineer Survey the new lines prescribed and to modify his work accordingly, which should be clear of these lines, as also that no work would be allowed to be constructed within the sanctioned lines of the street. It may be added that the regular lines of street thus prescribed required an open space of 15 feet to be left between the building and the roads, the construction of which was practically complete by this time. After some correspondence and interviews between the parties, the present suit was filed by the appellants on the 8th March, 1941.

The appellants, whose suit has been dismissed in both Courts, rested their appeal before this Board on two alternative grounds. In the first place they maintained that, on a proper construction of the relevant sections of the City of Bombay Municipal Act, the regular line of a public street, which may be prescribed under section 297 (1) (*a*) of the Act, means the boundary line of a street, or the intended boundary line of a street as ultimately to be constructed and that it does not contemplate what is commonly known as a building line, which may, but more probably will not, correspond with such boundary line of the street, but will lie within the adjoining plots of land at a prescribed distance from the boundary line of the street. This contention presents a question of statutory construction. If the contention succeeds, it is clear that the regular lines prescribed by the Municipal Commissioner in September 1940 do not conform to the boundary lines of the 60 feet and 40 feet roads. In the event of their failure in their first contention, the appellants alternatively maintained, that the regular line of street for these two roads had already been prescribed at the time when the construction of the roads was approved of by the Municipal Corporation long before 1940, and that under section 297 (1) (*b*) the Municipal Commissioner was not entitled to prescribe a fresh line in 1940 without the authority of the Corporation as therein provided. This contention mainly raises a question of fact.

On the first contention of the appellants the material sections of the Act are as follows:

"3 (w). 'street' includes any highway and any causeway, bridge, viaduct, arch, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years; and, when there is a footway as well as a carriageway in any street, the said term includes both;

3 (x). 'public street' means any street heretofore levelled, paved, metalled, channelled, sewered or repaired by the corporation and any street which becomes a public street under any of the provisions of this Act;

289. (1) All streets within the city, being or which at any time become public streets, and the pavements, stones and other materials thereof shall vest in the corporation and be under the control of the Commissioner.

(2) The Commissioner shall from time to time cause all such streets to be levelled, metalled or paved, channelled, altered and repaired, as occasion shall require; he may also from time to time widen, extend or otherwise improve any such street or cause the soil thereof to be raised, lowered or altered and may place and keep in repair fences and posts for the safety of foot-passengers:

Provided that no widening, extension or other improvement of a public street, the aggregate cost of which will exceed five thousand rupees, shall be undertaken by the Commissioner unless or until such undertaking has been authorised by the corporation.

291. The Commissioner, when authorized by the corporation in this behalf, may at any time—

(*a*) lay out and make a new public street;

(*b*) agree with any person for the making of a street for public use through the land of such person, either entirely at the expense of such person or partly at the expense of such person and partly at the expense of the corporation, and that such street shall

become, on completion, a public street.

(*c*) declare any street made under an improvement scheme duly executed in pursuance of the provisions of the City of Bombay Improvement Act, 1898, or the City of Bombay Improvement Trust Transfer Act, 1925, to be a public street.

296. (1) The Commissioner may, subject to the provision of sections 90, 91, and 92—

(*a*) acquire any land required for the purpose of opening, widening, extending or otherwise improving any public street or of making any new public street, and the buildings, if any, standing upon such land;

(*b*) acquire, in addition to the said land and the buildings, if any, standing thereupon, all such land with the buildings, if any, standing thereupon, as it shall seem expedient for the corporation to acquire outside of the regular line, or of the intended regular line, of such street;

(*c*) lease, sell or otherwise dispose of any land or building purchased under clause (*b*).

PRESERVATION OF REGULAR LINE IN PUBLIC STREETS.

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 prescribed, 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 Official 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 prescribed, 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 prescribed 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.

298. (1) If any part of a building abutting on a public street is within the regular line of such street, the Commissioner may, whenever it is proposed—

(*a*) to rebuild such building or to take down such building to an extent exceeding one-half thereof above the ground level, such half to be measured in cubic feet; or

(*b*) to remove, re-construct or make any addition to any portion of such building which is within the regular line of the street, in any order which he issues, under section 345 or 346, concerning the rebuilding, alteration or repair of such building require such building to be set back to the regular line of the street.

(2) When any building, or any part thereof within the regular line of a public street, falls down, or is burnt down, or is taken down whether under the provisions of section 351 or 354 or otherwise, the Commissioners may at once take possession on behalf of the corporation of the portion of land within the regular line of the street theretofore occupied by the said building, and, if necessary, clear the same.

(3) Land acquired under this section shall thenceforward be deemed a part of the public street and shall vest, as such, in the corporation.

299. (1) If any land not vesting in the corporation, whether open or enclosed, lies within the regular line of a public street, and is not occupied by a building, or if a platform, verandah, step or some other structure external to a building abutting on a public street, or a portion of a platform, verandah, step or other such structure, is within the regular line of such street.

the Commissioner may, after giving to the owner of the land or building not less than seven clear days' written notice of his intention so to do, take possession on behalf of the corporation of the said land with its enclosing wall, hedge or fence, if any, or of the said platform, verandah, step or other such structure as aforesaid, or of the portion of the said platform, verandah, step or other such structure aforesaid which is within the regular line of the street, and, if necessary, clear the same and the land so acquired shall thenceforward be deemed a part of the public street."

Their Lordships agree with the opinion of all the learned Judges of the High Court that a consideration of the terms of section 297, and of its setting in the Act, shews conclusively that section 297 is dealing with the building line of a public street, as distinguished from the boundary line or intended boundary line of a public street. In the first place the definition of " public street " in section 3 (x) relates to a street that is already in existence, and this definition applies in section 297; this may be contrasted with section 296 (1) (*b*), which shews that the expression " intended " is used when appropriate. In short, the boundary line of a street is fixed prior to actual construction, and the regular line of the street is prescribed after it has come into existence. In the second place, all public streets are vested by section 289 (1) in the corporation, and no-one is entitled to build upon them; therefore section 297 (3) would be mere surplusage, unless it relates to building on land outwith the boundary line of the street, but within the regular line of the street, and the same comment applies to section 298 (1), and sub-section (3) of that section must apply to the vesting of land acquired outside the boundary line of the street, as, otherwise, it must have been acquired under section 296 (1), subject to compensation. Section 299 (1) must also apply to land outside the boundary line of a public street. These reasons appear to be sufficient for the rejection of the appellants' contention, but their Lordships may add that they are in agreement with the reasons stated by the learned Judges of the High Court.

As regards the alternative contention of the appellants, the proposed 60 feet road was shewn on the plans submitted and its construction was sanctioned by the Municipal Corporation by its resolution of the 25th November, 1918, and the proposed 40 feet road was similarly sanctioned by the resolution of the Municipal Corporation dated the 19th September, 1935. A perusal of these resolutions and the reports upon which they proceeded makes clear that, while the boundary line of the proposed roads is approved of as shewn on the plans, there is no reference at all to the " regular line of the street " in relation to these roads, either in the reports or on the plans. Indeed, the only reference to this matter is to be found in a sentence in the report of the Roads Committee dated the 10th August, 1918, which states, " In the case of existing public roads, which are proposed to be widened or altered under the scheme, the lines will be prescribed as the revised regular lines." These cases would clearly fall under section 297 (1) (*b*), and would not include the proposed 60 feet road. Accordingly, it is clear that regular lines of the street had not been already prescribed for the 60 feet and 40 feet roads prior to the action of the Municipal Commissioner in September, 1940, which is challenged by the appellants, and the alternative contention of the appellants also fails.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed and that the Judgments appealed against should be affirmed. The appellants will pay the respondents' costs of the appeal.

(47039) Wt. 8077—36 170 1/46 D.L. G.338

In the Privy Council

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PRABHAVALKAR AND OTHERS

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CITY OF BOMBAY AND ANOTHER

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