

**Emperor Vs. Vadilal Devchand**

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**Court :** Mumbai

**Decided On :** Mar-18-1931

**Reported in :** (1931)33BOMLR663

**Judge :** Madgavkar and ;Murphy, JJ.

**Appeal No. :** Criminal Appeal No. 504 of 1930

**Appellant :** Emperor

**Respondent :** Vadilal Devchand

**Disposition :** Appeal allowed

**Judgement :**

**Madgavkar, J.**

1. This is an appeal by the Government of Bombay against the acquittal of Vadilal who was charged under Section 61 (f) of the Bombay District Police Act, IV of 1890.

2. The facts are short and simple. In the city of Ahmedabad, there is a public street and a highway along which, on the south, Vadilal and other dealers in brass and copper utensils have their shops. On the first five days of the new year at Divali it has been customary for him and for other shopkeepers there to bring out their wares on to the public road, and we are informed by the learned counsel for

Vadilal, that it is considered auspicious by Hindus to purchase new vessels on these days. The result is a crowd which caused detriment to the traffic on the southern side of the street. There had been general notices by the District Magistrate; Ahmedabad, against the user of streets for fairs and such purposes. Years ago, the Municipality instituted prosecutions similar to the present but subsequently withdrew them. In the present case the evidence of the Sub-Inspector is that he warned the shopkeepers and others that if they followed the usual custom on these days they would render themselves liable to prosecution, and actually for the first two days they did not use the road. But on the last three days they followed the old custom, and the present prosecutions are the result.

3. The judgment of the learned Magistrate is largely based on what he supposes the English common law to be in respect of markets and fairs. The judgment also contains a reference to Bombay Act IV of 1862. The general reasoning appears to be that the shopkeepers in this locality have acquired a prescriptive right to use the road on these days in this manner and the exercise of it is not illegal. In this Court the judgment of the learned Magistrate is supported on grounds, firstly, that there was no obstruction inasmuch as the northern side of the road was still free and open to traffic. Secondly, on the analogy of English decisions such as *Goldsmid v. Great Eastern Railway Company* (1882) 25 Ch D, 511, on appeal (1884) 9 App. Cas. 927 and *Attorney General v. Horner* (1884) 14 Q.B.D. 245, on appeal (1885) 11 App. Cas. 66, Section 61(f) and Section 39(g) of the Bombay District Police Act, IV of 1890, should be construed without prejudice to such customary right of user on these particular days as the ones now in question. The Bombay Market and Fairs Act, IV of 1862, has no application inasmuch as it merely renders permission by the Magistrate necessary before any new markets or fairs are opened.

4. Both the English decisions relied upon dealt with entirely different sets of facts. In *Goldsmid v. Great Eastern Railway Company* a charter of Charles II under the Letters Patent was granted to the plaintiffs giving them the right of holding a market 'in or next to Spital Square'. It was held that the charter of Edward III against markets near the city of London did not render illegal the holding of the market near Spital Square, but that as far as possible the latter Act should be

construed as though it did not confiscate without compensation the rights of the grantee under the Letters Patent of Charles II, In the present case there is no question of pecuniary right and no question of confiscation, and, therefore, no such question of interpretation arises. We are bound to give effect to Sections 39 and 61 of the Bombay District Police Act in their plain meaning. The statutory powers of the Municipality are also not now in question, and it is not, therefore, necessary to consider the decision of Fawcett J., to which I was a party, in *Emperor v. Vishvanath* : (1926)28BOMLR1033 . But if at all, this decision is against the contention for the opponent Vadilal inasmuch as it clearly lays down that under the Bombay District Municipal Act the powers of the Municipality do not extend to diverting a portion of the public street for the purpose of exposing a timber for sale and thus benefitting the municipal revenue. It is a plain principle both in England and in India that an encroachment made by an adjacent land owner on the space occupied by the highway cannot be legalised by possession for any length of time: *Harvey v. Truro Rural Council* [1903] 2 Ch. 638. The right of the public to the free use of any portion of the highway is laid down by their Lordships of the Privy Council in *Manzur Hasan v. Muhammad Zaman* (1224) 27 Bom. L.R. 170, P.O., and there is no authority for the proposition that occupation for any length of time or obstruction can prejudice free use by the public for the purpose of passage for which the highway is meant. Accordingly the onus in the present case is clearly on the opponent to show how he can justify the use of the highway for the purpose of exposing his wares. Such a customary use, for the reasons stated above, can never ripen into a legal right and in fact it is impossible to define such a right. In whom can such a right be said to vest Does it vest only when the property is used for the purpose of a shop or is it confined to shops used for such utensils, or to other shops, or only to the owners or their descendants To formulate such questions is to disprove such a right, impossible as it is to define.

5. In this view, the only question remaining is whether the obstruction is proved, The sections of the Bombay District Police Act referred to do not distinguish partial obstruction from total obstruction. Nor is it open to the accused by exposing their wares to attract a crowd and cause obstruction and to disclaim the responsibility for the latter. It is perfectly true that the total width of the street at either end is about sixty-two feet. But towards the middle, apparently, there are shops and a

motor garage, with the result that on each side of these a space varying from twenty to twenty-three feet only is left. There is definite evidence, which is not rejected by the trial Court, that this space when occupied by the wares of the accused and by their customers causes obstruction falling within the sections. It is no answer to say that it is open to the public to go by the northern side or that this obstruction has been permitted for a great many years- it may be for a hundred years, or it might have been permitted on certain other days in certain other streets or to certain other communities.

6. For these reasons the appeal of Government must, in my opinion, be allowed and the order of acquittal set aside, These are test cases and a nominal fine of one rupee will suffice.

### **Murphy, J.**

7. The only point is whether the respondents have a right to occupy the roadway in a certain street in Ahmedabad in front of some of their shops by a display of their wares on the five auspicious days of the new Hindu year. Such an occupation of the roadway is contrary to the provisions of Section 39(g) of the Bombay District Police Act and is punishable under Section 61(f) of that Act, where a Magistrate has made an order on such conduct. The defence was that the Kansaras had a customary right so to occupy this street, on the days in question, and the learned Magistrate has dismissed the complaint. Government have appealed. Much of the argument as well as the learned Magistrate's judgment has been taken up with the citation of cases from the English law on the subject of markets and fairs. These have been dealt with in my learned brother's judgment, and I agree that these authorities are really beside the point, for the English markets and fairs are mostly matters of private property and enjoyed by means of a franchise. The defence really is that because other people have in the past appropriated a portion of the public road here to similar purposes, they have established a right to do so. Though the accused has a shop in the neighbourhood, as have some other persons similarly guilty, it seems from the evidence that others not selling such goods in the neighbourhood, also do the same thing. The defence has failed to make out any prescriptive right, to override at this place and on these dates the

provisions of the Bombay District Police Act and to allow their wares to encroach on the public road. On the facts it is amply proved that the respondent did appropriate twenty-four square feet of the public road for his shop extension, and that he, in common with others, has as a consequence restricted the passage in front of his shop so as entirely to prevent vehicular traffic and make passenger traffic extremely difficult. I, therefore, agree that the acquittal order was wrong, and that the respondent should have been convicted. I also agree in the order of fine proposed by my learned brother.

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