1887.

KRISHNÁJI LAKSHMAN v. VITHAL RÁVJI RENGE.

should be assigned to R. B. Renge for *jeshtbhág* at the time of making the partition." The decree of the High Court (Exhibit 188) in the previous suit (Sp. A. 526 of 1865) also provided that the four fields claimed should be divided after an assignment had been made of an extra share for *jeshtbhág*, as stipulated in para. 2 of the agreement, Exhibit 12, (Exhibit 163 in the present case). It is, therefore, clear that the defendants are entitled to have an assignment of land from those four fields, yielding a net profit of Rs. 30 a year as *jeshtbhág*. We cannot, however, hold that they are entitled to more than that. The claim to hold the whole of these lands as *jeshtbhág* cannot be sustained. Exhibit 160, under which the claim is made, has been superseded by the decree, which alone now determines the rights of the parties *inter se* (Cf. *Rámchandra* v. *Abáji*[1]).

We, therefore, modify the decree of the lower Court by declaring that, before making the partition, land yielding a net profit of Rs. 30 a year, out of the *thikáns* Holiche Kate, Wada Maine, Dagad Kate, Khalil Khajan and Panchbhai Khajan Katuban, be divided off and assigned to the defendants Nos. 1 to 6 if no such assignment has already been made by virtue of the decrees obtained by defendants Nos. 14 to 18 for partition. In all other respects we confirm the decree.

We order that each party bear its own costs in the appeals in this Court.

*Decree varied.*

(1) Printed Judgments for 1886, p. 15.

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.*

1888. *August* 30.

SAYAD JAFIR SA'HEB, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SAYAD KADIR RAHIMAN AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Municipal (Bombay) Act VI of* 1873, *Sec.* 36, *orders under—Privy, power of Municipality to order to be built by owner of a house—Such order not imperative, but permissive—Construction.*

The terms of section 36 of Bombay Act VI of 1873 are not imperative in requiring a Municipality to call on the owner of a house to build a privy, but are

* Second Appeal, No. 415 of 1886.

1888.

SAYAD JAFIR SÁHEB v. SAYAD KADIR RAHIMAN.

permissive, leaving it to the discretion of the Municipality to determine when the power conferred on them shall be exercised.

Accordingly, where the plaintiff complained that the defendants had erected a privy so close to his house as to be a nuisance and the lower Appellate Court found it to be as such, but rejected the plaintiff's claim on the ground that the defendants had erected the same under the orders of the Municipality issued under section 31 of the Act,

*Held*, reversing the decree of the lower Appellate Court, that the Municipality had no authority to order the defendants to erect the privy regardless of the plaintiff's right, and that the defendants, therefore, could not plead that they acted under the orders of the Municipality.

The High Court directed an injunction to remove the privy within three months from the date of its decision.

THIS was a second appeal from a decision of E. M. H. Fulton, Acting District Judge of Belgaum, confirming the decree of Ráv Bahádur Jayasatyabodhráo Trimulráo, First Class Subordinate Judge of the same place.

The plaintiff complained that the defendants had erected a privy in 1884, within the distance of five cubits from the house belonging to the plaintiff, which was a nuisance to whosoever might occupy the same. He, therefore, prayed that an order directing the removal of the privy might be made, and a perpetual injunction granted against building any privy, in future, on the same spot. He also claimed Rs. 10 as loss of rent for the house.

The defendants contended *(inter alia)* that the spot on which the privy was erected, belonged to them; that by an order of the local Municipality a pit privy attached to their house had been removed, and the present *bhangy* privy erected, and that the plaintiff had twice similarly complained to the Municipality, but his appeals to that body had been rejected by the Committee and its President.

The Court of first instance rejected the plaintiff's claim. He appealed to the District Judge, who confirmed the lower Court's decree. The following is a portion of his judgment:—

"* * * I find that the privy is a nuisance to the plaintiff such as to entitle him to sue for its removal, unless defendant can show he acted under legal obligation in constructing it in its

1888.

SAYAD JAFIR SÁHEB v. SAYAD KADIR RAHIMAN.

present position. I have visited the place, and I think there can be little doubt that the value of the plaintiff's house is permanently impaired to some extent by the proximity of this privy. * * * Had defendant acted spontaneously in locating a new privy in this situation, I should have given the injunction applied for, as it seems to be a case where there exists no standard for ascertaining the actual damage caused or likely to be caused by the nuisance. * * * I do not think the defendant is liable to be ordered to remove the privy. Section 36, clause 1, of Bombay Act VI of 1873 provides that 'in case the Municipality shall be of opinion that any privy * * * should be provided for any house * * * they may, by written notice, call upon the owner of such house * * * to provide the same in such manner as the Municipality shall deem proper.' Although the Act does not appear to prescribe any fine for disobedience to such notice, it is none the less obligatory, for section 75 provides that, in case of non-compliance, certain steps may be taken which, as a rule, would be far more costly to the owner than those which he would have to take himself if he obeyed the notice. I think, then, that the order conveyed to the defendant imposed on him a statutory obligation to construct a privy which could be cleaned out by a sweeper, and consequently obliged him to make it in such a position as would be accessible to a sweeper. Now, of course, it may be argued that by pulling down a portion of his own house or completely altering it he might have found some other site for his privy, but I think it would be unreasonable to hold that he was bound to adopt this course. The Municipal Secretary and Mr. Anandráo appear to have carefully inspected the premises, and their evidence shows that, in the existing state of the buildings, there was no other place for this privy so as to enable it to be visited by a sweeper. I have considered whether defendant ought to have left it where the pit privy formerly stood and where he first built it, and allowed the sweeper to approach by the path in front of his zenana by the passage, to indicate which I have drawn on the map a pencil line. But to have done so would have brought the sweeper very much nearer the plaintiff's back door than he will have to go at present, and would probably have occasioned a nuisance to the latter quite

1888.

SAYAD JAFIR SÁHEB v. SAYED KADIR RAHIMAN.

as great as the one from which he now suffers. On the whole I think the position selected for this privy is the least objectionable which could have been chosen * * * * *."

From this decision the plaintiff preferred a second appeal to the High Court.

*Ghanashám Nilkanth Nádkarni* for the appellant:—The lower appellate Court has found that the privy is a nuisance, and it is not, therefore, right to reject the plaintiff's claim. The defendants ought to have constructed the privy in a way and place which would not have interfered with the plaintiff's comfort. The order of the Municipality was not such a statutory order as justified the nuisance.

*Gokuldás Káhándás* for the respondents:—The lower Court has considered very well in rejecting the plaintiff's claim. The ground on which the privy was built, belongs to the respondents. They had to erect a privy in suppression of the old pit-privy, and no other site was available. The duty of erecting this privy was imposed on them by the Municipality under section 36 of Bombay Act VI of 1873. It was an imperative order, and justified the nuisance. See *Metropolitan Asylum District* v. *Hill*[1].

SARGENT, C. J.:—The District Judge has found that the privy is a nuisance, but has held that the defendants have established the two propositions laid down by Lord Watson in *Metropolitan Asylum District* v. *Hill*[1] as requisite to justify such a nuisance; firstly, that he was acting under the imperative orders of the Legislature, and secondly, that he could not possibly obey those orders without injuring private rights. The defendant may have acted under the orders of the Municipality. But the terms of the Statute, Bombay Act VI of 1873, sec. 36, under which those orders were given, were not imperative in requiring the Municipality to call on the owner of the particular house inhabited by the defendants or any houses within a particular area in which the defendants' house was situated, to build a privy, but are simply permissive, leaving it to the discretion of the Municipality to determine when the power conferred on them shall be exercised. In such a case Lord Watson says: "The

(1) 6 H. L. App. Cas. 193 at p. 213.

1888.

SAYAD JAFIR SÁHEB v. SAYAD KADIR RAHIMAN.

fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights." Again, there is nothing in the Act which necessarily requires privies to be erected, although their being so erected would create a nuisance, or to lead to the inference that the Legislature supposed that they could not be erected without creating a nuisance, from which it might be concluded that the Legislature intended they should be made regardless of other persons' rights. The absence of these indications in the Act under which the power is exercised is relied on by Lord Selborne and Lord Blackburn in the case above referred to as distinguishing it from *The Directors, &c., of the Hammersmith and City Railway Company* v. *G. H. Brand*[1]. As the Municipality had, therefore, in our opinion on the proper construction of the Act, Bombay Act VI of 1873, no authority to order the defendants to erect a privy regardless of the plaintiff's rights, they cannot plead that they acted under their orders. We must, therefore, reverse the decree and direct an injunction to issue, directing the defendants to remove the privy within three months from the date hereof. Plaintiff to have his costs throughout.

*Decree reversed.*

(1) L. R., 4 H. L., 171.

## ORIGINAL CIVIL.

*Before Mr. Justice Scott.*

1888. *April* 23.

IN *RE* LAKSHMIBÁI, WIDOW AND ADMINISTRATRIX OF VINÁYAKRÁV JAGANNÁTH SHANKARSHET, DECEASED, (PETITIONER).

*Trustees' and Mortgagees' Powers Act XXVIII of* 1866, *Sec.* 43, *powers of Court under.*

J. S., a Hindu, died in 1865 possessed of a temple and of a piece of land near it which he bought in his lifetime. By his will he directed his executors to apply the income arising from the land in defraying the expenses connected with the temple. This was accordingly done by his son, whom he had appointed his executor. His son died in 1873, and in 1879 the petitioner, who was the son's widow, took out letters of administration, with the will annexed, to the estate of J. S., still unadministered. As administratrix she continued to apply the income of the said land as directed in the will. She now filed the present petition, alleging that the said income, which amounted to about Rs. 900 *per annum*, was