APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

ABAJI RAGHO MHALAS (ORIGINAL PLAINTIFF), APPELLANT *v.* THE MUNICIPALITY OF JALGAON (ORIGINAL DEFENDANT), RESPONDENT*. 1921. *July* 27.

Bombay District Municipal Act (Bombay Act III of 1901), section 122†—Obstruction in a public street—Adverse possession of the obstructed land for 30 years—Municipality cannot order removal of the obstruction.

The plaintiff encroached upon a portion of a public street by building upon it in 1886. He was called upon in 1917 by the defendant Municipality to remove the obstruction, under section 122 of the Bombay District Municipal Act, 1901. The plaintiff having sued the Municipality to restrain it from removing the obstruction :—

Held, that the defendant Municipality could take no action under section 122 of the Bombay District Municipal Act, 1901, because as the Municipality was barred from filing a suit for the possession of the site encroached

* Second Appeal No. 756 of 1920.

† Section 122 of the Bombay District Municipal Act (Bom. Act III of 1901) runs as follows :—

122. (*1*) Whoever in any place after it has become a Municipal district, shall have built or set up, or shall build or set up, any wall or any fence, rail, post, stall, verandah, platform, plinth, step, or any projecting structure or thing, or other encroachment or obstruction, in any public street, or shall deposit or cause to be placed or deposited any box, bale, package or merchandise, or any other thing in such street, or in or over or upon, any open drain, gutter, sewer or aqueduct in such street, shall be punished with fine which may extend to twenty-five rupees.

(*2*) The Municipality shall have power to remove any such obstruction or encroachment, and shall have the like power to remove any unauthorised obstruction or encroachment of the like nature in any open space not being private property, whether such space is vested in the Municipality or not, provided that if the space be vested in His Majesty the permission of the Collector shall have first been obtained, and the expense of such removal shall be paid by the person who has caused the said obstruction or encroachment, and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under Chapter VII.

(*3*) Whoever, not being duly authorized in that behalf, removes earth, sand or other material from, or makes any encroachment in or upon

1921.

ABAJI RAGHO v. MUNICIPALITY OF JALGAON.

upon, the site was no longer a part of the public street but belonged to the plaintiff.

Tayaballi v. *Dohad Municipality*[1], followed.

SECOND appeal from the decision of N. B. Deshmukh Assistant Judge of Khandesh, confirming the decree passed by S. A. Gupte, Subordinate Judge at Jalgaon.

Suit for injunction.

In 1886 the plaintiff built a house and encroached upon a public street in its front by constructing pucca steps. The steps remained in their position ever since they were built.

In 1917, the defendant Municipality asked the plaintiff to pay rent for the land encroached upon; and in default threatened to remove the steps under section 122 of the Bombay District Municipal Act, 1901.

The plaintiff filed the present suit to restrain the Municipality from removing the steps and to recover the amount of rent that he had paid under protest.

The lower Courts dismissed the suit following I. L. R. 38 Bom. 15.

The plaintiff appealed to the High Court.

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any open space which is not private property, shall be punished with fine which may extend to fifty rupees, and, in the case of an encroachment, with further fine which may extend to ten rupees for every day on which the encroachment continues after the date of first conviction for such offence.

(4) Nothing contained in this section shall prevent the Municipality from allowing any temporary occupation of or erections in any public street on occasions of festivals and ceremonies, or the piling of fuel in by-streets and spaces for not more than four days, and in such manner as not to inconvenience the public or any individual.

(5) Nothing contained in this section shall apply to any projection duly authorized under sub-section (1) of section 113, or in any case where permission has been given under sub-section (4).

[1] (1920) 22 Bom. L. R. 951.

Pendse, with *H. G. Kulkarni*, for the appellant:—Both the lower Courts have found that the appellant built the flight of steps in 1886, i.e., more than thirty years ago. Before Article 146A of the Indian Limitation Act was passed, the period for acquiring title by adverse possession against Municipalities was only twelve years. Before 1900 appellant's title to the land under the rows of steps was complete. Even if Article 146A be applied the appellant's title is complete as he was over thirty years in possession before the Municipality took steps against him. In *Dakore Town Municipality* v. *Travedi Anupram*[1], on which the lower Courts rely, the facts were different. There is a recent decision, *Tayaballi* v. *The Dohad Municipality*[2], the facts of which are on all fours with those of the present case. Therefore under Article 146A and section 28 of the Indian Limitation Act appellant's title to that part of the street on which the steps stand has become absolute and the Municipality cannot call upon him to remove the steps.

P. V. Kane, for the respondent:—Under section 54 (*f*) of the District Municipal Act it is obligatory on Municipalities to make reasonable provision for removing obstructions and projections in public streets. Under section 113, sub-section (3) the law gives Municipalities powers to require by written notice the removal of obstructions in public streets or encroachments on them. Similarly, section 92, sub-section 1 (*a*) authorises Municipalities to remove *at any time* any projection or steps external to the building that project beyond the regular line of a public street. The words in section 92, 'at any time' are important. They do not recognise any rule of limitation. Section 122 penalises obstructions of public streets

(1) (1913) 38 Bom. 15. (2) (1920) 22 Bom. L. R. 951.

1921.

ABAJI RAGHO v. MUNICIPALITY OF JALGAON.

and authorises the Municipality to remove unauthorised obstructions. If in all these sections it had been intended that the powers conferred upon the Municipalities for the benefit of the public were subject to the law of limitation, the Legislature would have said so and would not have employed very general language.

The principles enumerated in the case of *The Dakore Town Municipality* v. *Travedi*[1] are applicable to the facts of the present case. The decision in *Tayaballi* v. *Dohad Municipality*[2] is in direct conflict with the decision in the earlier case. In both cases nothing turns on the facts. The propositions of law are laid down independently of the facts. In this conflict of decisions, a reference may be made to a Full Bench.

In the present case appellant was a councillor of the Municipality for twenty-five years and also its president for some years. Injunction is a relief granted at the discretion of the Court. As President and councillor it was his duty to prevent obstruction in public streets and to safeguard the interests of the Municipality. But now he comes into Court saying during all those years he was asserting a claim adverse to the Municipality. Under section 56 (*j*) of the Specific Relief Act the Court should refuse the injunction.

Under section 167 of the District Municipal Act this suit is barred as it is brought more than six months after the cause of action arose. This point was not taken in the lower Courts, but as it is a question of law it may be allowed to be taken in second appeal.

MACLEOD, C. J.:—The plaintiff sued for an injunction against the Municipality of Jalgaon not to remove the eastern two rows of steps leading to his house. The suit was dismissed in the trial Court, and an

(1) (1913) 38 Bom. 15. (2) (1920) 22 Bom. L. R. 951.

appeal against that decision was dismissed on the 30th July 1920. Since the appeal was dismissed the decision of this Court in *Tayaballi* v. *Dohad Municipality*[1] was reported. This case is on all fours with that case, and therefore, we must follow that decision unless we refer the matter to a Full Bench.

It was argued that that decision was in conflict with a prior decision of this Court in *Dakore Town Municipality* v. *Travedi Anupram*[2]. But Mr. Justice Heaton was a party to both the decisions, and when the latter case was decided the prior case was before us, and I do not think that Mr. Justice Heaton could have concurred in my decision in the *Dohad Municipality case*[1] unless he was satisfied that the two cases could be differentiated. However, there is no doubt that the facts of this case are very similar to the facts in the latter case, and we are bound by that decision. The basis of that decision is that after thirty years' adverse possession, an owner of a house who has encroached on the public street obtains a good title, therefore section 122 which deals with encroachments on streets no longer applies.

It is argued to the contrary on the merits of the case, that section 122 of the Bombay District Municipal Act gives the Municipality power to remove an encroachment which has been set up in any place after it has become a Municipal district, and to fine a person who has so encroached, and also to remove the encroachment, and that that power continues, however long the party who has encroached has been in possession of the site of the encroachment. That of course is a perfectly legitimate argument. It does not follow that the opposite argument is wrong, that as the Municipality is barred from filing a suit for the possession

[1] (1920) 22 Bom. L. R. 951. [2] (1913) 38 Bom. 15.

1921.

ABAJI RAGHO v. MUNICIPALITY OF JALGAON.

of the site encroached upon after thirty years, the site after that period no longer forms part of the street, but belongs to the party who has been in adverse possession. The appeal, therefore, must be allowed and the plaintiff must be granted the injunction which he has asked for and the refund of Rs. 2 paid under protest with costs throughout.

SHAH, J. :—I agree that this case is not distinguishable from the case of *Tayaballi* v. *Dohad Municipality*[1], and that on the authority of that case the plaintiff is entitled to a decree, which he prays for. I desire to add, however, that apart from that decision, I feel some difficulty in holding that the powers conferred upon the Municipality under section 122 for the removal of encroachments upon public streets are subject to the rule of limitation to be deduced from the combined operation of section 29 and Article 146A of the Indian Limitation Act, as regards the acquisition of title by adverse possession. It seems to me that there is a good deal to be said in favour of the view that under section 54 of the District Municipal Act, it is obligatory on the Municipality to see that encroachments on public streets are removed and that the necessary powers are conferred upon the Municipality under section 122 without any limitation in the interests of the public. At the same time it is clear that there is no express provision for a case of this kind where for thirty years the Municipality has taken no action, and the party encroaching on the public street claims to have acquired a title under the Indian Limitation Act by continuing the encroachment for a period exceeding thirty years. In this conflict of considerations I am not prepared to dissent from the view taken in *Tayaballi's case*[1]. The question no doubt is one of practical importance. To my mind there is an

[1] (1920) 22 Bom. L. R. 951.

apparent conflict between the decision in *Tayaballi's case*[1] and the *ratio decidendi* in *Dakore Town Municipality* v. *Travedi Anupram*[2]. But Mr. Justice Heaton, who was a party to both the decisions, agreed in the later case that the earlier decision was distinguishable. Under the circumstances I think that the decision in *Tayaballi's case*[1] should be followed. If that view is not in consonance with the true intention of the Legislature on this point, the Bombay District Municipal Act can be amended by the Legislature so as to give effect to its real intention.

Appeal allowed.

R. R.

[1] (1920) 22 Bom. L. R. 951. [2] (1913) 38 Bom. 15.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

KHANDERAO DATTATRAYA WAKDE (ORIGINAL DEFENDANT), APPELLANT *v.* BALKRISHNA MAHADEV PHULAMBRIKAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS*

AND VICE VERSA.

1921. *July* 28.

Partition Act (IV of 1893), section 4—Suit for partition of a dwelling house—Transferee of a sharer suing for partition—Section applies only to the plaintiff transferees—Other transferees of shares not affected by the section.

Two out of the three sharers in an undivided dwelling house sold their shares to different persons. The transferee of the one sharer having obtained a decree for partition of the house against the remaining sharer and the other transferee, the sharer applied, under section 4 of the Partition Act, to have the shares of both transferees valued :—

Held, that the sharer was entitled to have a valuation made of the share of the plaintiff-transferee ; but that he could not similarly proceed against the share of the other transferee who was one of the defendants in the suit for partition.

* Cross Appeals Nos. 851 of 1920 and 1 of 1921.