

1880  
 NILKAN-  
 THAPA  
 MALKAPA  
 v.  
 THE  
 MAGISTRATE  
 (F. C.) IN  
 CHARGE OF  
 THE SHOLA-  
 PUR TALUKA.

Council (see Civil Procedure Code, Act X of 1877, section 416, and Bombay Act V of 1879, section 37), reverses the decree of the Senior Assistant Judge, and remands this suit for retrial on the merits, after making such an amendment as aforesaid, which this Court hereby permits, and due service of process on the local Government Pleader on behalf of the said Secretary of State pursuant to section 419 of Act X of 1877, and such other proceedings as may be necessary. The plaintiff must pay all costs of the suit and appeal up to the present time.

*Decree reversed and case remanded.*

### APPELLATE CIVIL.

*Before Mr. Justice Melvill and Mr. Justice West.*

1880  
 June 20.

BALARAM CHATRUKALAL (ORIGINAL PLAINTIFF), APPELLANT, v. THE FIRST CLASS MAGISTRATE IN CHARGE OF TALUKA IGATPURI (ORIGINAL DEFENDANT) RESPONDENT.\*

*Civil Procedure Code (Act X of 1877), Section 416—Practice—Procedure—Amendment of plaintiff—Substitution of parties—Act X of 1872, sections 523 and 526—Order by Magistrate for removal of obstruction from public thoroughfare—suit to establish right.*

On the 11th August, 1879, the defendant, as a Magistrate in charge of a taluka, made an order under sections 523 and 526 of the Criminal Procedure Code (Act X of 1872), directing the plaintiff to remove a certain "ota", on the ground that it had been built upon a public thoroughfare. The plaintiff thereupon sued the Magistrate for a declaration that the "ota" and site belonged to him, and prayed for a reversal of the Magistrate's order. The Assistant Judge, who tried the suit, dismissed it, holding that it did not lie against the defendant.

On appeal, the High Court, following the decision in *Nilkanthapa Malkapa v. The Magistrate (First Class) in charge of Sholapur Taluka* (1), reversed the decree of the Assistant Judge, and remanded the case, in order that the plaintiff might amend his suit by striking out the name of the First Class Magistrate as defendant, and substituting in that capacity the Secretary of State for India in Council, and directing the lower Court to determine the suit upon its merits after the above amendment and due service of process.

THIS was an appeal against the decision of H. F. Aston, Assistant Judge at Nasik, in the District of Thana.

\* Appeal, No. 56 of 1881, from original decree.  
 (1) *Supra*, p. 670.

The plaintiff sued for a declaration of his right to a certain "ota" and site, alleging that they belonged to him; that the "ota" had been built on the site of an old "ota" belonged to the house of one Dhondi, who had sold the house and open ground to the plaintiff for Rs. 100 on the 13th October, 1878. The plaintiff prayed for reversal of the order made by the defendant on the 11th August, 1879, for the removal of the "ota", on the ground that it had been built upon a public thoroughfare.

The defendant answered (*inter alia*) that he ordered the "ota" to be removed under sections 523 and 526 of Act X of 1872, on decision of *panch* (jury) that it caused obstruction to a public road; that plaintiff had no cause of action against the defendant; that the site of the "ota" did not belong to the plaintiff.

One of the issues raised by the Assistant Judge was, whether the suit could be maintained against the defendant. He found this issue in the negative, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

*Daji Abaji Khare* for the appellant referred to *Nilkhanthapa Malkapa v. The Magistrate (First Class) in charge of Sholapur Taluka*(1), and prayed that the plaintiff might be allowed to amend his suit, as in that case.

*Nanabhai Haridas*, Government Pleader, for the respondent.

MELVILL, J.—Following the course adopted by this Court in *Nilkhanthapa Malkapa v. The Magistrate (First Class) in charge of Sholapur Taluka* (1), the Court reverses the decree of the Assistant Judge, and remands this case, in order that the plaintiff may amend his suit by striking out the name of the First Class Magistrate in charge of the Igatpuri Taluka as defendant, and may substitute in that capacity the Secretary of State for India in Council. Upon this amendment being made, and after due service of process on the local Government pleader on behalf of the said Secretary of State, the Court below should proceed to determine the suit upon its merits. The plaintiff must bear the costs of this appeal. The question of other costs will be disposed of in the final decision of the Court below.

*Decree reversed and case remanded.*

(1) *Supra*, p. 670.