

We must point out that as Sonshet was made a party to Suit No. 158 of 1890 the Court should have decided as to his title. The suit was not brought within six months of the alleged dispossession, and, therefore, the plaintiff was not entitled to a decree until after adjudication on Sonshet's plea that he was not the owner. If the plaintiff was not the owner, he could not be awarded possession from defendants Nos. 1 to 10; and there was no authority for refusing to determine the issue of the title raised by defendant No. 11, and thus rendering necessary a second suit.

We now reverse the decrees of the Assistant Judge in both appeals and that of the Subordinate Judge in Suit No. 158 of 1890, and we restore that of the Subordinate Judge in Suit No. 254 of 1891, and direct that plaintiff do pay all Sonshet's costs in both suits throughout.

Decrees reversed.

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Ránade.

IN *RE* GULÁBDA'S BHÁIDA'S.*

*District Municipal Act (Bombay Act VI of 1873), Sec. 54—“Offensive liquid”
—Does not include mere waste or dirty water.*

A person does not render himself liable to a penalty under section 54 of Bombay Act VI of 1873 for allowing mere waste or dirty water to run from his premises on to a public street, unless the water is “offensive.”

REFERENCE by T. S. Hamilton, Sessions Judge at Surat, under section 438 of the Code of Criminal Procedure (Act X of 1882).

The reference was in the following terms:—

“Under the provisions of section 438 of the Code of Criminal Procedure, I have the honour to forward, for the consideration of their Lordships, the papers and proceedings in a criminal case, wherein Gulábdás Bháidás was convicted on the 8th August last by A. Wood, Magistrate, First Class, of this district, of an

* Criminal Reference, No. 121 of 1894.

1894.

SONSHET
ANTUSHET
TELI
v.
VISHNU
BA'BA'JI
JOHA'BI.

1894.

November 14.

1894.

IN RE
GULÁBDÁS
BHÁTÁ'S.

offence punishable under sections 54, 74 of the Bombay District Municipal Act VI of 1873, and sentenced to pay a fine of Rs. 25, which was paid.

"2. I am of opinion that the offence was not proved against the accused, and I beg to recommend that the conviction should be set aside for the following reasons.

"3. Section 54 runs thus:—'Whoever causes or allows the water of any sink or sewer or any other offensive liquid, or other matter from his premises, or from his land, to run, drain, or be thrown or put upon any road shall be liable to the penalty hereinafter provided.'

"4. In the present case the offence held proved against the accused was that of allowing foul water to run out of his drain on to a public street. The first two issues, therefore, as laid down by the Magistrate, First Class, were the following:—

"(1) Did foul water flow from the drain in question?

"(2) Did it flow on to a public road?

"These he decided in the affirmative for the reasons stated, viz.:—

"'The first question must be answered in the affirmative. I cannot doubt the existence of the nuisance as testified to by the Sanitary Superintendent and Inspector, and the neighbours; and 'the mouth of the drain is under the threshold of the back door of the accused's compound. The ownership of some of the ground within that doorway is under dispute, but up to it the public unquestionably have access, for it is the only approach to the house abutting on Mr. Gulábdás' premises.'

"5. I beg to submit that these are not sufficient reasons for finding on the two issues in the affirmative. In the first place, I can find no evidence that any nuisance was caused by the alleged flow of water. From the wording of the section, it would seem that the water must be 'offensive' or, as the Magistrate puts it, 'foul,' that is to say, it must be something more than mere dirty water, or water which is not quite clear. It must have an offensive smell, as indeed water from a sink or sewer generally has.

"6. Now the witnesses for the prosecution mostly speak of the water issuing from the hole in question as being 'dirty'—nothing more. One says it was dirty like 'bathing water.' Another says it was 'clear rather than muddy.' Not a single witness says it came from a sink or a sewer, or was offensive. One witness goes into detail, and says it was water 'which ran from the body of the accused man's little son, who was being washed by a groom.' I submit, therefore, that the finding on the first issue was wrong.

"7. As to the road on to which the water was flowing, there is ample evidence that it was a private lane, and not a public road. To cite only prosecution witnesses:—

"*Sanitary Inspector* :—'The lane is open on one side only. The gully or lane is 5 feet broad.'

"*Rangildás Rámdás* :—'It is a blind alley. It is known as Gulábdás Vakil's lane.'

"*Wallabhdás Kalyándás* :—'It is a blind alley.'

"*Vithaldás Pránjivándás* :—'I live next door to Mr. Gulábdás. The ground is not either Government or municipal. There is only the right of way of accused and myself over it. No one else has a right of way. It is not a public road.'

"8. I am unable, in face of this evidence for the Crown, to understand how the Magistrate could have held it to be a public street."

The reference was heard by a Division Bench (Jardine and Ránade, JJ.).

Jardine (with him *Goverdhanrám M. Tripati*) for the accused :—Section 54 of Bombay Act VI of 1873 has no application to the present case. There is no evidence that the waste water which the accused allowed to run out of his drain was "offensive"; and unless it is offensive, the section does not apply. Besides, the waste water did not run on to a public street. It was a blind alley used by the accused and his neighbours. What is a "street" is explained in *Káldás v. The Municipality of Dhan-dhuka*⁽¹⁾.

(1) I. L. R., 6 Bom., 686.

1894.

IN RE
GULA'BDA'S
BHA'IDA'S.

There was no appearance for the complainant.

PER CURIAM.—We concur with the Sessions Judge in holding that neither the evidence nor the findings justify a conviction under section 54 of Bombay Act VI of 1873. The Magistrate was satisfied that the water complained of was foul. But there is no finding on evidence that it was “offensive,” and the Courts may not enlarge the meaning of that word so as to include mere waste or dirty water. As regards the definition of “street” in Bombay Act II of 1884, we think the Magistrate should have considered the judgment in *Kálidás v. The Municipality of Dhandhuka*⁽¹⁾, interpreting the older definition.

The Court annuls the conviction and sentence.

(1) I. L. R., 6 Bom., 686.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1894.

November 26.

RANCHOD MORA'R (ORIGINAL PLAINTIFF), APPELLANT, v. BEZANJI EDULJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), Secs. 409, 413—Application for leave to sue in forma pauperis—Refusal of such application a bar to subsequent application in the same right—Jurisdiction—Plea of jurisdiction.

The plaintiff applied for leave to sue as a pauper for the redemption of a mortgage. As he did not proceed with the application, it was rejected with costs on 29th November, 1888.

On the 4th February, 1890, plaintiff again applied for leave to sue as a pauper for the redemption of the same mortgage. There being no opposition, the application was granted, and was registered as a suit.

On the 20th September, 1893, when the suit had been heard nearly to the end, the Government Pleader intervened, and applied that it should not be allowed to proceed further until the plaintiff had paid the costs incurred by Government in opposing the first application, which had been rejected. But the plaintiff refused to do so, and thereupon the Subordinate Judge dismissed the suit with costs under section 413 of the Code of Civil Procedure (Act XIV of 1882), and ordered the plaintiff to pay the court-fees under section 412.

Held, on appeal, (1) that the order rejecting plaintiff's first application was an order under section 409 of the Code of Civil Procedure; (2) that both the applications

* Appeal No. 161 of 1893.