

and in remanding the case we direct it to ascertain if there has been any decision by the Collector under section 121 and decide the case accordingly. If there has been no such decision, it should require the plaintiff-appellant to apply to the Collector, and secure a decision of that officer, and then the lower Appellate Court should dispose of the case. The costs will depend upon the final decision, and must be settled by the lower Appellate Court.

*Decree reversed and case remanded.*

1900.

LAKSHMAN

ANTAJI.

## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

THE ANKLESVAR MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT, v. RIKHAVCHAND KAPURCHAND (ORIGINAL PLAINTIFF), RESPONDENT.\*

1900.

November 19.

*Municipality—Bombay District Municipal Act (VI of 1873), secs. 17, 48 and 64—Street—Public street—Street lighted and swept by Municipality.*

The mere circumstance that a street is lighted and swept by a Municipality is not of itself sufficient to convert a private into a public street.

SECOND appeal from the decision of Ráo Bahádur Krishnamukh A. Mehta, Acting First Class Subordinate Judge, A.P., of Broach, reversing the decree of Khán Sáheb J. E. Modi, Second Class Subordinate Judge at Anklesvar.

Plaintiff Rikhavchand Karpurchand was owner of a house situate in the Mewára Falia Street at Anklesvar. In front of this house he had an *otla* abutting on the street.

The street contained about fifty houses. It was open at one end only. At this end there was a gate which was closed at night by the residents of the street.

The street, however, was lighted and swept by the Municipality.

On the 26th of March, 1896, the Municipality removed the *otla* from the front of the plaintiff's house, on the ground that it was an encroachment on a public street.

\* Second Appeal, No. 139 of 1900.

1900.

ANKLESVAR  
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v.  
RIKHAV-  
CHAND.

The plaintiff thereupon sued for damages and for an injunction restraining the Municipality from obstructing him in rebuilding the *olla*. He alleged that the street was a private street; that the land underneath the *olla* belonged to him; and that the Municipality had no authority to remove the *olla*.

The Municipality contended (*inter alia*) that the street was a public street and that they were justified in removing the *olla* as it was an encroachment.

The Court of first instance held that the land on which the *olla* stood did not belong to the plaintiff, but was part of a public street. The suit was therefore dismissed.

In appeal this decree was reversed by the First Class Subordinate Judge, A.P., who held that the street was a private street and that the Municipality had no authority to remove the *olla*.

Against this decision the Municipality preferred a second appeal to the High Court.

*H. C. Coyaji* for appellant (defendant).

*K. M. Jhaveri* for respondent (plaintiff).

RANADE, J. :—The principal contention in this case is whether the street in question is a public or a private street, and whether the piece of land on which the *chora* stood, and from which it was removed by the order of the appellant-defendant, belonged to the plaintiff or was public land.

The respondent-plaintiff's case was that in the Mewára Falia Street in Anklesvar he had a house of his own. Near that house there was a piece of land on which he had built a *chora* or *olla*, and this *olla* was removed by order of the Municipality of Anklesvar in March, 1896. The Municipality contended that the plot of land was public property, being part of a public street on which plaintiff had no right to build an *olla*, which was therefore removed as an encroachment. The Court of first instance held that the land did not belong to the plaintiff and that it was a part of a public street. It accordingly disallowed plaintiff's claim. In appeal these findings were reversed, and it was held that the land belonged to the plaintiff and did not form part of a public street.

In second appeal the principal point before us is whether the street was public or private, for if it was a public street, the land in dispute would not belong to the plaintiff. For the appellant-Municipality it was contended that the street was public, because though it was a *pol* which did not open on the other side, municipal sweepers were employed in sweeping the street, which contained some fifty houses in all, and that the Municipality kept up lamps in that street, and that the permission of the Municipality was asked for the erection of *mandawas*. It was further contended that the public generally had a right to pass and re-pass in that street, and a step put up by the plaintiff was removed by the order of the Municipality so far back as 1878.

On the other hand it was contended for the respondent that the sweepers were paid by the residents of the houses and that fixing lamps in the street did not make it public property. As it was a *pol* shut up at the other end it was not public property, but belonged to the residents. It was further urged that in 1887 a complaint was made to the Municipality in respect of this *olla*, and inquiries were made, and the Municipality declined to interfere.

Looking at this conflict of evidence it is clear that the lower Appellate Court had ample justification for the view it took that the street in dispute was a private and not a public street. The circumstances of the case resemble those in *The Ahmedabad Municipality v. Manilal Udenath*<sup>(1)</sup> and *Maneklal Motilal v. The Municipal Commissioner for the City of Bombay*,<sup>(2)</sup> except that no paid watchman is kept by the residents at the gate, which is, however, closed at night by the last comer. The mere circumstance that the street is lighted or swept by the Municipality is not of itself sufficient to convert a private into a public street. The number of instances where a permission was asked for the erection of a *mandava* are few and far between. There is no record as to where the step, ordered to be removed in 1878, stood. The Municipal Act makes a clear distinction between "street" and "public street." Sections 45, 46, 50, 51, 53, 54 refer to streets generally, while sections 47, 48, 64, 17 refer to public streets.

(1) (1895) 20 Bom. 146.

(2) (1894) 19 Bom. 407.

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It is only public streets which are vested in the Municipality, while over private streets the Municipality may exercise certain powers, but the property in land in those streets does not necessarily belong to the Municipality.

The fact that the Municipality declined to take any action to remove the *otla* in 1887 strengthens the view taken by the lower Appellate Court. We have arrived at this conclusion independently of the evidence of the alleged mortgage and release. The Court of first instance held that the mortgage was proved, but that the land was not identified. The lower Appellate Court held the identification proved. If it was necessary for us, in the view taken above, to find on this point we should be inclined to think that these documents were not altogether free from suspicion, and the identification was not satisfactory. It is, however, not necessary to come to any finding on these points to support the decision of the lower Appellate Court. The street is not proved to be a public street and plaintiff-respondent has been in possession of the *chora* from 1887 as his own property with the knowledge of the appellant-defendant. The burden of proof lay on the appellant under the circumstances, and it failed to justify its conduct in removing the *otla*. We must therefore dismiss the appeal with costs.

*Appeal dismissed.*

### FULL BENCH.

### APPELLATE CIVIL.

*Before Mr. Justice Candy, Mr. Justice Ranade, Mr. Justice Crowe and  
Mr. Justice Whitworth.*

1900,  
November 21.

DEORAV AND OTHERS (ORIGINAL DEFENDANTS), APPELLANT, vs. NARAYAN-  
DAS HARAKCHAND (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Land Revenue Code (Bombay Act V of 1879), secs. 4, 13, 15, 18, 19 and 20—  
Mámlatdárs' Courts Act (Bombay Act III of 1876), sec. 3—Mámlatdár—Substi-  
tute designated under the Land Revenue Code—Exercise of the powers of  
Mámlatdár.*

A substitute designated under section 15 of the Land Revenue Code (Bombay

\* Application No. 119 of 1900 under Extraordinary Jurisdiction.