practice of other people, all I can say is that he should go to proper authorities, and I have not the smallest doubt that if he makes a proper representation in the proper quarter his representation will be considered by the proper authorities. The mere fact that I do not entertain his suit does not debar the Government from taking such action as in the interests of public service, and having regard to the circumstances of this case, it may think it right and expedient to adopt. I can give no opinion on that point. All I say is that the plaintiff is mistaken in coming before me. He must address the proper authorities for redress, and redress will be given to him if he deserves it.

This suit is dismissed with costs. I leave it to Government whether they will enforce the costs or not.

Suit dismissed.

Plaintiff in person.

Attorney for defendant—*Mr. E. F. Nicholson*, Solicitor to Government.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Aston; and, on reference, before Mr. Justice Chandavarkar.

TRIBHOVAN CHUNILAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANT), RESPONDENT.*

1902. December 9.

Municipality—Bombay District Municipal Act (Bombay Act VI of 1873), sections 33, 42—Private street—Balcony projecting over private street—Notice to Municipality—Disobedience of the permission granted by Municipality.

Held, by *Chandavarkar* and *Aston*, JJ. (Batty, J., dissenting), that under the District Municipal Act (Bombay Act VI of 1873) a Municipality has power to regulate or control the construction of balconies projecting over private streets.

* Second Appeal No. 258 of 1902.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

SECOND appeal from the decision of Ráo Bahádur Lalshankar Umiashankar, Additional First Class Subordinate Judge, A. P., at Ahmedabad, confirming the decree passed by Ráo Bahádur Chandulal Mathuradas, First Class Subordinate Judge at Ahmedabad.

Suit for an injunction restraining the Municipality of Ahmedabad from removing a balcony erected by the plaintiff.

The plaintiff owned a house in Ahmedabad facing towards the north and abutting on a private street. Along the front of the house from east to west was a verandah. To the east of the house was a passage four and a half feet wide, at the other side of which was a house occupied by a neighbour. The plaintiff obtained permission from the Municipality of Ahmedabad to construct a projecting balcony above his verandah "two feet wide, twelve feet from the ground, and leaving off five feet of space on the east." The plaintiff thereupon built the balcony, leaving a distance of five feet between the east end of it and his neighbour's house at the other side of the abovementioned passage. The Municipality, however, contended that the balcony they intended to allow was one not extending along the whole front of the plaintiff's house, but stopping short at a point five feet from the eastern corner of his house; that the "five feet of space" mentioned in their permission was to be measured from the north-east corner of the plaintiff's own house, and not from the other side of the passage. They accordingly served the plaintiff with notice requiring him to remove so much of the new balcony as was not in accordance with the permission.

The plaintiff thereupon filed this suit praying for a perpetual injunction restraining the Municipality from removing the portion of the balcony. He contended that he was justified in construing the permission granted by the Municipality as allowing him to build the balcony as he had built it, and he further contended that inasmuch as the balcony did not overhang a public street, the Municipality had no authority to prevent his building it as he had done or to require him now to remove any part of it.

The Municipality contended that the plaintiff had misconstrued their permission, and that under section 33, clause 3, of the District Municipal Act (Bombay Act VI of 1873), they could

insist on the removal of such part of the balcony as was built in contravention of their permission. They also relied on their bye-law No. 7.(1)

The Subordinate Judge dismissed the plaintiff's suit. He held that the street in which the plaintiff's house was situate was not a public street, but he held also that the Municipality was entitled to order the removal of part of the balcony.

On appeal this decree was confirmed by the lower Appellate Court.

The plaintiff appealed to the High Court.

The following are the sections of the Bombay District Municipal Act (Bombay Act VI of 1873) referred to in the case:

33. *Clause 1.*—Before beginning to erect any building, or to alter externally or add to any existing building, the person intending so to build, alter or add shall give to the Municipality notice thereof in writing, and shall furnish to them, if required to do so, a plan showing the levels at which the foundation and lowest floor of such building are proposed to be laid by reference to some level known to the Municipality, and all information they may require regarding the limits, design and materials of the proposed building and the intended situation and construction of the drains, sewers, privies and cesspools (if any) to be used in connection therewith.

Clause 2.—Within one month after receiving such notice the Municipality may in writing issue such orders not inconsistent with this Act as they think proper with reference to such building.

If the Municipality fail to issue written orders, whether of approval or otherwise, with reference to such building within the said period, the person originally giving notice may proceed to erect the building in question in the manner proposed by him to the Municipality, provided that such building be in accordance with the provisions of this Act.

Clause 3.—If such building be begun or made without the notice or without affording the information above prescribed, or in any manner contrary to the legal orders of the Municipality issued within the period aforesaid, or in any other respect contrary to the provisions of this Act, the person so building shall be liable to the penalty hereinafter provided, and the Municipality may, by

(1) Bye-laws of the Ahmedabad Municipality under section 42, clause 3:

7. Permission to put up projecting balconies or *dakhlees* or weather frames (*khaperas*) may be given without restriction, provided that the projection be not less than twelve feet from above the ground below, and provided that a clear space of eight feet measured horizontally is left between the eaves of the house opposite and those of the houses to which a *dakhlee* or weather frame is to be attached.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

written notice, require such building to be altered or demolished as they may deem necessary.

42. *Clause 1.*—The Municipality may by written notice require the owner or occupier of any house or building to remove or alter any projection, or encroachment or obstruction, which, although erected before this Act comes into operation in the place, shall have been erected or placed against or in front of such house or building, if the same overhangs or juts into, or in any way projects or encroaches upon, any public street, so as to be an obstruction to the safe and convenient passage along such street, or if the same projects and encroaches into or upon any uncovered aqueduct, drain or sewer in such street so as to obstruct or interfere with such aqueduct, drain or sewer, or the proper working thereof: Provided always that, if such projection, encroachment or obstruction shall have been lawfully made, the Municipality shall make reasonable compensation to every person who suffers damage by such removal or alteration; and if any dispute shall arise touching the amount of such compensation, the same shall be ascertained and determined in the manner hereinafter provided.

Clause 2.—The Municipality shall possess similar power, but shall not be under obligation, of making compensation with respect to all such projections, encroachments or obstructions which shall be erected or placed after this Act comes into operation in the place.

Clause 3.—The Municipality may give written permission to the owners or occupiers of houses or buildings in public streets to put up open verandahs, balconies or rooms, to project from any upper storey thereof to an extent not exceeding four feet beyond the line of the plinth or basement wall, and any person putting up such verandahs, balconies or rooms without such permission shall be liable to the penalty hereinafter provided.

Ratanlal Ranchhoddas for the appellant (plaintiff).

L. A. Shah for the respondents (defendants).

BATTY, J.:—In this case the plaintiff sued to obtain a perpetual injunction restraining the Ahmedabad Municipality, the defendant in the suit, from removing a *dakhlee* or balcony with overhanging eaves which the plaintiff had constructed over the *ota* of his house.

The defendant Municipality contended that the plaintiff had obtained permission from them to construct a balcony in the position described in the plaint, subject to the condition that it should not extend to the east beyond a point five feet from the northern extremity of the eastern wall of the plaintiff's house; that the plaintiff had disregarded this condition, and that therefore under sub-clause 3 of section 33 of the late Bombay District

Municipal Act (Bombay Act VI of 1873), and by a bye-law No. 7 framed by the Municipality, the Municipality were entitled to require the removal of the structure completed in contravention of their orders. The Court of first instance held that the street on which the plaintiff's house abuts was not a public street, but that, whether the Municipality had authority to make the order or not, they were justified, by the circumstances of the case and the bye-law above referred to, in passing the order as to the construction of the balcony, in the exercise of their discretion, and that the plaintiff having constructed the balcony in defiance of that order, was not entitled to the injunction sought.

The lower Appellate Court, on further finding that the balcony in question had not been constructed under the direction of the defendant's Inspector, held that as the structure contravened the terms of the permission granted by the defendant Municipality, the plaintiff was entitled to no relief. From that decision the plaintiff now appeals.

In appeal to the lower Appellate Court as well as to this Court the plaintiff objected that the defendant Municipality had no power to order that the balcony should not be constructed over the space to which the Municipality referred in its prohibiting order, and the plaintiff alleged that as that space was not a public street, he was legally entitled to build the balcony over that space. To this contention the lower Appellate Court appears to have given no consideration. The finding of the Court of first instance that the space on which the plaintiff's house abuts and which the balcony in question overhangs is not a public street, was not questioned in the lower Appellate Court and is not now disputed.

The only question then that remains is one of law. The provisions on which the defendant Municipality rely are those contained in section 33 of Bombay Act VI of 1873. Sub-clause 1 of the section requires notice in writing and certain information to be given to a Municipality before a building is commenced, altered or added to. Neither that nor any other clause in the section contains anything requiring that the permission of the Municipality should be obtained. If such permission be necessary, therefore, the power to require it must be sought in some other provision of the Act.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

Clause 2 empowers a Municipality, on receipt of such notice, to issue such orders, *not inconsistent with the Act*, as they think proper with respect to such building, and authorizes the person giving notice, in case no such orders are issued, to proceed with the building, provided it be in accordance with the provisions of the Act.

Clause 3 attaches a penalty and the liability to a requisition by the Municipality for the alteration or demolition of the building in the following conditions, viz., if the building is begun or made—

(*a*) without the notice or information required by clause 1;

(*b*) in any manner contrary to the legal orders of the Municipality; or

(*c*) in any other respect contrary to the provisions of the Act.

Thus to justify the requisition of the Municipality for the demolition of the building, one of these three conditions must be established. There is no contention that the first or the last of these conditions exists.

The only question is, then, whether the orders of the Municipality were legal and not inconsistent with the Act. The suggestion for the respondent Municipality appears to be that no orders would be inconsistent with the Act which were not in direct conflict with any of its provisions. This contention, if true, would practically leave a Municipality an unlimited discretionary power to issue any orders not expressly prohibited. No doubt, if a corporation have been duly invested with such discretionary power, it would follow that the Courts could not interfere with the *bonâ fide* exercise of such discretion: Brice on Ultra Vires, pages 500, 514-518; *Ollivant* v. *Rahimtula Nur Mahomed*,[1] *Nagar Valab Narsi* v. *Municipality of Dhandhuka*[2] and cases there cited, and compare *Reg.* v. *Collins*.[3] But it is not enough that there has been a *bonâ fide* exercise of discretion. It must necessarily further appear that the action was taken or the order was passed in the exercise of powers conferred: *London County Council* v. *Attorney General*[4]; *Ashbury Railway*

(1) (1888) 12 Bom. 474 at p. 478.
(2) (1887) 12 Bom. 490 at p. 495.
(3) (1876) 2 Q. B. D. 30 at p. 35.
(4) (1902) A. C. 165.

Carriage and Iron Co. v. *Riche*.[1] For, obviously, the mere *bond fide* belief that the order might from certain points of view be desirable, will not make the order legal if the person or public body issuing it had no authority or power in that behalf. And, in the present instance, the Municipality, being the creature of the Act under which it is incorporated, has no inherent powers or any authority, except such as may have been conferred by the constating enactments. The Acts define their powers, and any order in excess of those powers, and not authorized by the ordinary law, must be inconsistent with those Acts. For as the Act defines the powers they are to exercise, those powers are thereby limited to what is expressly, or by necessary implication, conferred. And enactments trenching on general rights or delegating subordinate legislative or other powers are subject to the principle of strict construction: Maxwell on Interpretation of Statutes, pages 356-357 (2nd Edition). No doubt greater latitude of construction is allowable in respect of discretion in the exercise of powers conferred on public bodies for essentially public purposes, than in the case of bodies incorporated with privileges for their own benefit and profit (Maxwell, 363 and 365, and Brice on Ultra Vires, pages 19, 519). But the Legislature must be understood "in granting away, in effect, the ordinary rights of the subject as granting no more than passes by necessary and unavoidable construction," and "it has been on many occasions and most emphatically decided that private persons must be protected if they possess rights which are being infringed without legislative authority, however disastrous the results of such protection may be to the corporations thus for public purposes injuring private persons": Brice's Treatise on the Doctrine of Ultra Vires, page 518.

The power which the Municipality claimed to exercise in this case is one which they certainly could not exercise independently of the Municipal Acts. For they have no proprietary interests in the site of the building or the space affected by it. Their orders, therefore, if justifiable, must be shown to be consistent with the powers conferred by the Act; otherwise they are neither within the meaning of clause 2 of section 33, nor legal orders

(1) (1875) L.R. 7 Eng. & Ir., App. 653.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

within the meaning of clause 3 of that section. The land affected not being a public street is not vested in the Municipality by section 17 of the Act, and no general power to interfere with buildings on private property is conferred by any section of that enactment. Such interference would necessarily involve an encroachment on the ordinary rights of the subject. And wherever the Legislature intended to authorize such interference, it conferred the power by apt words. Thus special provision is made in section 25 for the compulsory acquisition of land. Power to interfere in the laying out of the streets was conferred by sections 27 to 29. Section 30, as amended by clause 9 of section 49 of Bombay Act II of 1884, authorized a Municipality to insist on set-backs to the regular line of a public street in the case of houses being rebuilt. Section 31 enabled the Municipality to enforce compliance with a requisition as to the use of non-combustible materials in erecting or renewing buildings. Section 32 enabled them similarly to insist on new buildings being built upon a proper level. Sections 35 and 36 give special powers to regulate the erection of huts. And these sections 35 and 36, relating to merely temporary structures easily removeable and of little value, present a remarkable contrast to the powers conferred in respect of buildings of a more permanent and costly nature. For in the case of huts and sheds the Municipality can interfere with the exercise of private proprietary rights so as to prevent overcrowding and other risks—a power of interference not conceded in respect of the ordinary use of building sites. Sections 36 to 40 enable the Municipality to control private rights in connection with the drainage system, and under section 41 the Municipality may insist on certain provisions being made by owners in public streets for the carrying off of rain-water. Section 42 merits special notice in connection with the present case. For the power which it confers for the removal of projections is expressly limited to the case of projections over-hanging or jutting into or in any way projecting into or upon any *public street* so as to be an obstruction to the safe and convenient passage along such streets or affecting an aqueduct, drain or sewer. And clause 3 of the same section, while enabling the Municipality to give or withhold permission for verandahs and balconies to houses or buildings in public streets, and

penalising the erection thereof without such permission, makes no provision either for permission or penalty in the case of verandahs or balconies to houses not so situated. *Expressio unius est exclusio alterius*—and it seems sufficiently clear that no such interference with ordinary proprietary rights was contemplated by the Legislature as desirable, in cases where it was not called for by the necessity of securing the *public streets* from objectionable structures. Section 43 indicates a similar anxiety on the part of the Legislature to abstain from interference with the ordinary rights of property where there was no necessity arising from the possibility of obstruction or danger to a public road or street or well or tank. Section 48 is a conspicuous instance in which the powers of removal are limited to cases of obstructions, &c., in public streets.

No provision of the Act has been cited to show that the Municipality have a general authority, independently of these carefully limited powers, to prevent any person from building on or over any private site. It is urged that the Municipality may have deemed interference necessary in this case, in order to obviate possible danger from fire, and therefore desired to place an interval between the house of the plaintiff and his next-door neighbour to the east. But, apart from the consideration that in almost every city long rows of contiguous houses are constantly to be found with projecting verandahs, this suggestion as to the good intentions of the Municipality cannot be accepted as a legal justification of their order. For, although the Municipality may have deemed such a power desirable, the Legislature has not deemed it so. And though the Municipality, in any particular case to which any powers conferred on them extend, may use their own discretion as to whether they should or should not exercise those powers, they cannot usurp the functions of the Legislature and take it on themselves to decide what their powers shall be. Had their power been limited, as contended, by their own discretion alone, there could be nothing to prevent their prohibiting building altogether, and thus depriving owners of the use of their private property. This is certainly not left to their discretion. There must evidently be some limit to their discretionary powers. And no suggestion has been offered as to where that limit is to be found if it is not determined by the

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

extent of the powers conferred by the Legislature. It may be noted that in section 149 of the present Act (III of 1901) the Legislature, in conferring wider powers to restrict overcrowding, has provided special safeguards, which require special notifications as to the areas in which and the conditions on which authority to interfere with private rights shall be exerciseable. The case has, however, been treated in the lower Courts as if the Municipality had unrestricted authority to give or withhold permission to build, though as already observed there is nothing throughout section 33 requiring that the permission of the then Municipality should be obtained before building.

Then it is argued that there is no object in requiring notice to be given to a Municipality before building is commenced, if the Municipality cannot withhold permission. But what section 33 authorizes a Municipality to do, is to issue orders not inconsistent with the Act. That is to say, the Municipality cannot prohibit the exercise of a private right which the Act does not empower a Municipality to prohibit, nor can the Municipality permit what the Act does not authorize a Municipality to permit. As already shown, a Municipality is authorized, by section 30 of the Act, to prohibit building beyond the regular line of a street, by section 31 to require the removal of inflammable materials, and by section 32 to determine the level if necessary for drainage. And thus, on the three points of limits, design and materials, as to which clause 1 of section 33 requires information to be furnished, a Municipality can exercise discretionary control, as it can under section 42 and other provisions enabling that body to permit what without such permission would be punishable. All prohibitions and permissions, therefore, issued in accordance with such provisions as are above referred to, are orders not inconsistent with the Act. But orders, proposing to impose such restrictions on private rights as neither the ordinary law nor the special enactment contemplates, would be inconsistent with the Act within the meaning of clause 2 of section 33, and would not be legal orders within the meaning of clause 3 of that section 33.

But it is suggested that the Municipality could rely on what is referred to in the judgments as bye-law No. 7, which purports

to have been framed under section 42 of the Act. It is manifest, however, that a bye-law cannot enlarge the powers given by or flowing from the Act, the power to frame bye-laws being subject to the condition that they be consistent with the Act (section 32 of Bombay Act II of 1884). And no bye-law or rule could fulfil that condition if it purported to exercise a power which is opposed to the private rights of individuals under the ordinary law and which is not within the limits prescribed by the Act. If it were competent to the Municipality to frame any bye-law not expressly prohibited by the Act, their power would be almost unlimited, and there would be nothing to prevent a Municipality from framing bye-laws or issuing orders in restraint of trade (which would be manifestly illegal: Brice on Ultra Vires, page 56), or from otherwise annihilating private rights. But the powers of Municipalities in this respect are most stringently defined by the Legislature, and therefore a bye-law, though it may restrict, cannot enlarge the scope of Municipal action. But the so-called bye-law purporting to be framed under section 42 of the Act of 1873 (a section which confers no power to make bye-laws at all), is at most a resolution of the Municipality as to the conditions on which and the extent to which it proposes to exercise the powers by that section conferred. Whether it be competent to a Municipality thus to fetter the discretion of its members or successors by self-imposed rules, in lieu of exercising such discretion, as contemplated by the Act, in each case as it arises, may be open to question: *The Queen* v. *Justices of Merionethshire*.[1] But in no case could a Municipality take to itself a power by a bye-law, and least of all a power to invade the private rights of individuals under the ordinary law.

Of the cases cited in argument, that of *Godhra Municipality* v. *Heptulabhai*[2] appears to be at first blush most nearly on all fours with the present. In that case Parsons, J., took the view that the Courts could and should examine the reasons given by a Municipality for an order issued by them under the section now in question, and that if the order proved not to be within the powers conferred by the Act, it would be inconsistent with

(1) (1844) 6 Q. B. 163.

(2) (1900) 2 Bom. Law Reporter 572; P. J. for 1900 p. 213.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

the Act and not a legal order, and would be liable as such to be set aside. The head-note to the case, it may be observed, is somewhat misleading, for it represents, as the result of the decision, certain propositions contained in the judgment of Ranade, J., in which neither Parsons, J., nor Candy, J., concurred. The ground of Candy, J.'s judgment was, it would seem, that the plaintiff's original and reiterated allegation was that the *nejwas* were placed on the road, that no evidence was adduced on the issue subsequently raised as to whether they were or were not on the road, and the fact, that they were an encroachment on the road, having been admitted in the Court of first instance, the lower Appellate Court had, notwithstanding all this, improperly allowed the new contention that they were not on the road to be set up for the purpose of showing that the order was illegal and should be restrained by injunction. Thus the judgment of Candy, J., implies assent to the view of Parsons, J., that the order would have been *ultra vires* had it been issued on a notice of a building to be erected on private land. And the concurrence with Ranade, J., was passed expressly on the ground that the order was not *ultra vires*, because the notice admitted that the building was an encroachment on the public road. Of the other cases cited in argument that of *Bhawanishankar* v. *The Surat City Municipality*[1] turned, not on the contravention of orders issued by the Municipality, but on the failure to give notice as to a building on one part of the land actually built upon (see pages 376, 378), a ground of liability which under section 33 (3) is complete in itself and distinct from that which arises from building contrary to legal orders. The case of *Dave Harishankar* v. *The Town Municipality of Umreth*,[2] also cited in argument, is for the same reasons irrelevant in the present case. In *Nagar Valab Narsi* v. *The Municipality of Dhandhuka*[3] the judgment rested, so far as concerned the building across the passage of the *khadki*, on the principle that a Municipality is not precluded from exercising its powers by the fact that the protection of the rights of the neighbouring householders might

(1) (1895) P. J. p. 375; 21 Bom. 187.
(2) (1893) 19 Bom. 27.
(3) (1887) 12 Bom. 490.

have been left to these householders themselves. The Act contemplates that irrespective of all other remedies available to individuals the Municipality may step in to abate nuisances in certain circumstances, and the judgment in question decides only that the possibility of other remedies does not deprive it of such power. It did not consider or determine the question whether the order complained of was on other grounds beyond the powers conferred by the Act, and there was no discussion in the judgment or in the reported arguments as to what were the powers conferred by the Act. It was indeed laid down in the judgment, citing *Geddis* v. *Proprietors of Bann Reservoir*,(1) that "a public body must keep within its powers." But none of the sections conferring powers were referred to, and the only objection considered was whether a power not disputed would be in abeyance merely by reason of the fact that the rights infringed might have been adequately protected by private persons availing themselves of remedies afforded by the ordinary law. But when the existence or extent of a power claimed is distinctly challenged, the strictness with which the Courts will construe the provisions of the Act appears from the following cases: *Kalidas* v. *The Municipality of Dhandhuka*,(2) *Ahmedabad Municipality* v. *Manilal Udenath*(3) and the same case after remand,(4) *Ankleshvar Municipality* v. *Rikhavchand*(5); *cf. Essa Jacob* v. *Municipal Commissioner of Bombay*,(6) and *Queen Empress* v. *Harilal*,(7) and *Queen Empress* v. *Veerammal*.(8) Lastly, it is to be noted that in the case of *Patel Panachand Girdhar* v. *Ahmedabad Municipality*,(9) cited for the respondent, the liability of a building to removal under section 33 of the Act of 1873 was considered with regard to two of the three grounds specified in that section, viz., first, with reference to the general power of the Municipality at discretion to forbid building, and secondly, with reference to the allegation that building had been commenced without previous notice given as

(1) (1878) 3 A. C. 430.
(2) (1882) 6 Bom. 686.
(3) (1894) 19 Bom. 212.
(4) (1894) 20 Bom. 146.
(5) (1900) 25 Bom. 315.
(6) (1900) 25 Bom. 107.
(7) (1889) 14 Bom. 180.
(8) (1892) 16 Mad. 230.
(9) (1896) P. J. p. 296; 22 Bom. 230.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

required by clause 1 of section 33. And the judgment shows that while the discretion of the Municipality to order removal of a building erected *without notice* cannot be questioned by the Courts, because *that* power is expressly vested in the Municipality by clause 3 of section 33, the power to require removal in any other case must depend on whether the orders contravened were legal, and in that case depended on whether the site built on was vested in the Municipality as a public street, and issues were framed accordingly. Of course, if the building had been erected in any manner contrary to the express provisions of the Act or contrary to the orders of the Municipality on any matter in which the Act expressly leaves it to the Municipality to issue orders of prohibition or permission, then the power to require removal would have been equally exerciseable by the Municipality as the third of the three conditions specified in clause 3 of section 33 would then have been satisfied. It is not alleged here that the building in question was erected either without notice required by clause 1 or contrary to the provisions of the Act, or contrary to any orders on any matter as to which the Municipality was empowered by the provisions of the Act to give or withhold permission at discretion. And as it is not denied that the land is private property, the Municipality cannot interfere on the ground that the land affected is vested in them. The orders issued were, in my opinion, therefore inconsistent with the provisions of the Act, as being in excess of the powers which it authorized the Municipality to exercise.

In the view I take of the case, the decree of the lower Appellate Court should therefore be reversed and the plaintiff's claim should be allowed with costs throughout. My learned colleague, however, differs from me, and procedure under section 575 of the Code of Civil Procedure is therefore necessary.

ASTON, J.:—The order in respect of which the appellant has sued for a perpetual injunction restraining the Ahmedabad Municipality from removing a *dakhlee* or projecting balcony two feet wide (and five feet long) attached to his house and one foot six inches from the width of eaves of his house, is an order of 26th April, 1899, of the Ahmedabad Municipality made under clause 3, section 33, following one under section 33, clause 2, of

the District Municipal Act (Bombay Act VI of 1873), giving permission to the plaintiff to construct his *dakhlee* on the north, two feet wide, after leaving five feet of space commencing with the extremity of the plaintiff's eastern wall.

The plaintiff in contravention of this order constructed a *dakhlee* two feet wide without leaving five feet of space required by the order, and made eaves 1½ feet wide further overhanging the ground of the *khadki* below, and was required by the Municipality by notice under clause 3 of section 33 of the Act to remove the projection including the *dakhlee* two feet wide and eaves 1½ feet wide, in all 3½ feet, constructed without leaving the five feet of space from the east on the north. There is no contention that the ground under this projection belongs to the plaintiff.

The plaintiff has so constructed his *dakhlee* as to leave only 1½ feet space between it and a house of a neighbour to the east.

The Municipality have made under section 42 of the Act a standing rule that permission will not be granted to make a new *dakhlee* within eight feet of an opposite house.

The contention in the plaint was that the *dakhlee* has not been made so as to *overhang* a street or a public street. Later on the plea was set up that the *dakhlee* was made under the direction of defendants' servant Motilal, and when this was held untrue, a plea of acquiescence by defendant was set up in the lower Appellate Court.

At the hearing of the present second appeal, a point not mentioned in the grounds of second appeal was raised, that the order of the defendant Municipality is *ultra vires* because it is an invasion of private proprietary rights and is therefore not a legal order within the view of clause 3 of section 33 of the Act even though it may be an order not inconsistent with the Act.

Section 33 of the Bombay District Municipal Act (Bombay Act VI of 1873) refers to new buildings without any mention in the section of public streets. And clause 2 of the section says "within one month after receiving such notice the Municipality may in writing issue such orders not inconsistent with this Act as they think proper with reference to such building." The words "may in writing issue such orders *not inconsistent with this Act* as they think proper *with reference to*

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

such building" are very wide, and read, as they exist in this section, give elastic powers to the Municipality in the matter of regulation of new buildings on private property, and there is no reference to a street, public or private, in the section.

In the very next section 34 which deals with the regulation of huts, a Municipality is authorized to require new huts or sheds to be built with a free passage or way in front of and between every two lines of such width as the Municipality may think proper *for ventilation* and to facilitate scavenging. This and other provisions of the Act show that ventilation is one of the matters which the Act makes the care and concern of a District Municipality and a matter to secure which the public authority of a public body constituted under the Act may be properly invoked even though a private neighbour may have a civil remedy in the Civil Court.

It has not been contended that the order complained of is inconsistent with the Act.

But it is contended that the words "may issue such orders not inconsistent with this Act as they think proper with reference to such building" in clause 2 of section 33 are so wide that they would, if taken too literally, authorize unlimited interference with private rights of property, which would be an unreasonable intention to impute to the Legislature, and therefore the actual words of the clause should be read as if this clause said "may issue orders to enforce the provisions of *any other* section of this Act, if applicable under any *other* section, to such new building." To support this contention the introduction of the word "*legal*" before "orders of the Municipality" in clause 3 of the same section is relied upon. This argument raises two serious difficulties. The first is that it begs the question, for it is impossible to contend that an order *legal* under clause 2 of section 33 can be less legal than an order legal under any other section of the Act. The second difficulty is that if the order referred to in clause 2 can only be legal if it repeats some express provision made applicable to such new building by some *other* section of the Act, then the greater portion of section 33 is wholly superfluous, for the Municipality may under the last part of section 33 require the building to be altered or demolished

if made contrary to the provisions of the Act, and therefore we should not expect to find the first part of clause 3 of section 33 worded as it is if the only legal order a Municipality can pass under clause 2 of section 33 is an order repeating the prohibitions in express provisions elsewhere contained in the Act, for instance, as to combustible materials, level, drainage and discharge of sewage—provisions which can be enforced without invoking the aid of section 33 of the Act.

I am not aware of any recognized canon of interpretation which would justify the construction that whilst clause 2 gives legal power to a District Municipality to "issue such orders *not inconsistent with this Act* as they think proper with reference to such building," the introduction of the word "legal" before "orders of the Municipality" in clause 3 constitutes an invitation to the builder to disobey a statutory order passed under clause 2 if such order infringes any private right subsisting when the Act came into force.

It appears improbable that the Legislature would in clear terms invite a Municipality to make orders supplementing the express provisions of the Act but not inconsistent with the Act, and at the same time invite disobedience of such orders and encourage litigation at the cost of rate-payers, if by going outside the Act such orders made under the statutory power explicitly conferred can be contested as illegal.

In the *Godhra Municipality* case (*The Godhra Municipality* v. *Heptulabhai*[1]) it was remarked by Ranade, J. (at page 582): "It is obvious that Municipal Government would be impossible if a man acts on his own view of matters in regard to which the Municipality has a full discretion," under section 33 as decided in *Nagar* v. *The Municipality of Dhandhuka*[2]; and Candy, J., in the same *Godhra Municipality* case[3] observed: "To borrow the language used by Mr. Justice Ranade, it is obvious that the Municipal Government would be impossible, if a man can say, 'Give me permission to put up balconies projecting on a public road,' and then when permission is refused, he can ignore the orders and put up the balconies, because in his view the

(1) (1900) 2 Bom. L. R. 572. (2) (1887) 12 Bom. 490.
(3) (1900) 2 Bom. L. R. at p. 585.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

Municipality had acted arbitrarily." If an order made under clause 2 is "*not inconsistent with this Act*" according to the proper construction to be put upon those words, when the recognised canons of interpretation are followed, then in the view I take of the matter the order so made is a legal order.

The question then is, what is the proper interpretation to be put on the words "*not inconsistent with this Act*"?

"General words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the Act and as not altering the general principles of the law": Maxwell on Interpretation of Statutes, page 96, 2nd Edition. "Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction. It is presumed that the Legislature does not desire to confiscate the property or to encroach upon the rights of persons, and it is therefore expected that if such be its intention it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt" (*ibid*, page 346). "The same principle of construction is applied to enactments which create new jurisdictions or delegate subordinate legislative or other powers" (*ibid*, page 357).

Nevertheless, "the effect of the rule of strict construction might almost be summed up in the remark that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the Legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to the intent of them that made it, and that all cases within the mischiefs aimed at are held to fall within its remedial influence" (*ibid*, page 345).

"It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy, and the widest operation is therefore to be given to the enactment so long as it does not go beyond its real scope and object" (*ibid*, page 84).

Again, "the words of a statute are to be understood in the sense in which they best harmonize with the subject of the

enactment and the object which the Legislature has in view" (*ibid*, page 67).

"It is to be taken as a fundamental principle, standing as it were at the threshold of the whole subject of interpretation, that the intention of the Legislature is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter of its wisdom or justice" (*ibid*, page 65). "It is an elementary rule that construction is to be made of all the parts together and not of one part only by itself" (*ibid*, page 35).

"In the interpretation of statutes, the interpreter, in order to understand the subject-matter and the scope and object of the enactment, must, in Coke's words, ascertain what was the mischief or defect for which the law had not provided" (*ibid*, page 30).

"To arrive at the real meaning it is always necessary to take a broad general view of the Act, so as to get an exact conception of its aim, scope and object..... The true meaning of any passage is to be found not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing in those circumstances which the Legislature had in view" (*ibid*, page 27). But "to give it a construction contrary to or different from that which the words impart or can possibly impart is not to interpret the law but to make it" (page 7), for "statute law is the will of the Legislature, and the object of all judicial interpretation of it is to determine what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it" (page 1). And "though vested rights are divested, and acts which are perfectly lawful when done are subsequently unlawful by a statute, those who have to interpret the law must give effect to it" (*ibid*, page 5).

In the case of *Ollivant* v. *Rahimtula* [1] it was pointed out that where an Act gives power to a Municipality or corporation for the public benefit, a more liberal construction should be

[1] (1888) 12 Bom. 474.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

given to it than where powers are to be exercised merely for private gain or other advantage.

Now the public health is a matter which must be the concern of a Municipality, and bearing in mind the recognized canons of interpretation above quoted, and reading the whole Act, I think that the Legislature has in explicit terms indicated its intention to provide a remedy against fresh obstructions to proper ventilation in municipal areas. This plainly comes within the scope and object of the Act. In the case of new huts and sheds this is specially provided against (section 34), but as to more pretentious new buildings the evil is provided against by the more elastic method of conferring statutory power on a District Municipality to make orders "not inconsistent with the Act," and supplementing the provisions elsewhere enacted in the Act.

The words "*not inconsistent with this Act*" therefore appear to me to mean *not inconsistent with the aim, scope and object of this Act* as shown by its provisions. The order complained of seems to be aimed against an evil which the Act has intended to remedy and to fall within the scope and object of the Act and within its remedial purpose.

The view that the Legislature has given a Municipality statutory power as regards new buildings on private sites to *supplement* the provisions elsewhere contained in the Act, and intended so to do, is supported by a careful examination of section 33. Such examination will show that even if a builder give all the requisite information to the Municipality and receive no reply, he proceeds with the building at his own risk of having it demolished if he contravenes any of the provisions in other sections of the Act. Therefore section 33 does not mean that a builder must receive warning before the step is resorted to of demolishing a new building which contravenes some provision elsewhere enacted in the Act. The deduction seems obvious that the legal order of the Municipality for which section 33 provides, a contravention of which may also lead to a demolition of the new building, may be an order supplementing the provisions elsewhere enacted in the Act, though such order must be not inconsistent with the Act.

That bye-laws legally made by a Municipality may be used for the purposes of section 33 to supplement the express provisions

of the Act is pointed out in the *Godhra Municipality* case (*The Godhra Municipality* v. *Heptulabhai* [1]) by Parsons, J., who considered that the first clause of section 33 "shows some of the matters in respect of which orders can be passed," that "there are other sections which mention other matters," and that the orders that can be legally issued by a Municipality under section 33 are intended only to ensure that the new building shall not offend against the requirements of the Act "or such bye-laws as the Municipality may have legally made."

Further, as to the argument that the authority given to a Municipality by clause 2 of section 33 to "issue such orders not inconsistent with this Act as they think proper with reference to such building" should be read as authority "to issue legal orders in accordance with the provisions of any other sections of the Act as to such building." I may remark that our attention has not been invited to any other express provisions of the Act covering such a case as the present, namely, making a new balcony projecting over a street not a public street, or over ground outside the builder's premises, though, if the new balcony and eaves overhang a public street, they would come under another section (42) and could be dealt with under sections 74, 75 and 77 without invoking the provisions of section 33.

The District Municipal Act is a Code of District Municipalities' law, and it is to be remembered that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction.

If a Municipality cannot ascertain by examining the Municipal Act itself whether it has authority to issue a proposed order regarding such a new structure as this one, where is it to look for the law on the matter? If that authority is conferred by some law other than the Municipal Act itself, then clause 2 of section 33 is superfluous. If that authority is conferred by the Municipal Act as to new buildings not in a public street, then it is conferred by section 33 and in the words used by the Legislature in clause 2 of section 33. And if the order issued

(1) (1900) 2 Bom. Law Reporter 572.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

comes within the authority conferred by those words of the Legislature properly interpreted, then the order must be a legal order even though it may restrict, in a populous area for which general conservancy regulations have been enacted by the Legislature and within the limits imposed by the terms in which such statutory authority is conferred, the exercise of proprietary rights which outside municipal areas may be unfettered.

In the case before us, however, it is to be noted that the plaintiff's balcony is described as projecting beyond the line of his premises so as to overhang ground decided to be a street, and to leave 1½ feet of space between the balcony and the neighbour's house to its east.

As to the argument that because section 42 makes provision for removal of projections over public streets, therefore it was intended by the Legislature that new projections over streets not public must be allowed, I think that section 33 deals with a different set of circumstances, and the maxim *expressio unius est exclusio alterius* cannot apply. On the contrary, it seems to me that section 42 affords a suggestion how the statutory power conferred by section 33 can be exercised in respect of new projections over streets not public.

The locality where the plaintiff's site is situated is a "*khadki*" which comes under the definition of a street (section 3 of the Act) if the public use it as a means of access, though not a public street. I am far from convinced that the decision in *Nagar* v. *The Municipality of Dhandhuka* (1) does not bind us in the present case. But even if it does not bind us, it, in my opinion, fortifies the conclusion at which I have arrived, that the words "not inconsistent with this Act" in clause 2 of section 33 constitute a restriction that the orders under clause 2 must conform to the scope of the Act and to its specified objects, but need not be necessarily confined to a prohibition contained in a specific provision in some other section of the Act. It is sufficient if the circumstances are within a mischief aimed at by the Act and the order under clause 2 of section 33 does not go beyond its remedial purpose, and does not contravene any express provision of the Act. Under this view, if correct, section 33 is in itself an elastic

(1) (1887) 12 Bom. 490.

provision supplying a remedy for evils aimed at in other sections of the Act but not provided against elsewhere in the Act in respect of new buildings not in a public street, but of the nature under consideration. So that the statutory power conferred by section 33 may be exercised to supplement the explicit provisions elsewhere enacted in the Act, but not in a manner inconsistent with the Act.

In *Nagar's case* (1) the plaintiff was the owner of two houses on each side of the passage of a *khadki* or open square (not a public street) containing three or four other houses. He proposed to connect the two houses by building a storey across the passage at such a height as not to interfere with the passage of those who were entitled to go to and fro. He applied to the Municipality for permission to build in the manner he proposed. The Municipality refused on the ground that the proposed structure above the passage was likely to interfere with the access of light and air to the neighbouring houses (in the *khadki*) and that the balcony would be an encroachment on a public street (outside).

The Judges who decided that case (West and Birdwood, JJ.) held, so far as the structure over the passage was concerned, that the authority of the commissioners to refuse permission because the proposed structure was calculated to interfere with the access of light and air to the houses inside the *khadki* was not in any way affected by the circumstance that the proposed erection might be an encroachment on private rights, subjecting the plaintiff to an action by the persons injured: and that the suit against the Municipality would not lie as the order under the circumstances of the case was not an unreasonable one. It was further decided that section 33 of the Bombay District Municipal Act (Bombay Act VI of 1875) gives the Municipality a discretion to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion unless it is exercised in a capricious, wanton and oppressive manner.

It may be said that the above construction is very wide. It is, however, sufficient for my purpose to observe that the interpretation which I have already suggested, and the one I would prefer

(1) (1887) 12 Bom. 490.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

if the above decision (I. L. R. 12 Bom. 490) leaves the matter still open, is a far narrower one, but nevertheless covers the circumstances of the case before us.

It is necessary to emphasize the dual character of the structure which was not allowed by the decision in *Nagar* v. *The Municipality of Dhandhuka*.[1] Part of the structure projected over a public street, but part did not, and was a flying structure over the ground of a *khadki* (or court) made to connect two different premises of the plaintiff between which the *khadki* ground intervened. The order of the Municipality that *both* were to be removed was upheld by this Court for the reasons given in that decision. This feature was not mentioned by Parsons, J., when he cited this decision in the later case of the *Godhra Municipality* v. *Heptulabhai*,[2] and is omitted from the *résumé* of the case given by Candy, J., at page 584 of the same case, where he said the Municipality refused permission to erect "the encroachment on the public road."

The head-note in the report of the *Godhra case* does not accurately state the ground on which Candy, J., agreed with Ranade, J., in refusing to interfere with an order of the Godhra Municipality objecting to the erection of a balcony which in fact did not project beyond the defendant's own land. The case appears to have actually been decided on a side issue, not arising in the present case. It is true that in the *Godhra Municipality case* Parsons, J., said as to section 33, "the orders that legally can be issued by a Municipality under that section nowhere extend to the issue of a prohibition to a person not to build on his own land, but are strictly limited to the issue of orders in accordance with the provisions of the Act," but the learned Judge qualified these words by adding the words I have already quoted: "and are intended to ensure that he shall so build as not to offend against the requirements of the Act or such bye-laws as the Municipality may have legally made," thereby showing that he did not exclude clause 2 of section 33 from the provisions of the Act and recognized that an order made by a Municipality under the statutory power conferred by clause 2 of section 33 can legally supplement the provisions elsewhere contained in the

(1) (1887) 12 Bom. 490. (2) (1900) 2 Bom. Law Reporter 572.

Act. Otherwise the words of Parsons, J., "or such bye-laws as the Municipality may have legally made" would be meaningless.

What appears specially to be noticed in the *Godhra Municipality case*[1] is, that the construction to be placed on clause 2 of section 33 was considered by the three Judges who decided that case, that all the three learned Judges took the words of the clause as they stand without suggesting that the word "*legal*" should be introduced before the words "orders not inconsistent with this Act as they think proper with reference to such buildings," and that in all the three judgments the decision in *Nagar* v. *The Municipality of Dhandhuka*[2] is relied upon, but without notice being taken in two of the judgments of the dual nature already pointed out of the structure prohibited in that case.

Various decisions bearing on the point are discussed in the judgment recorded by Ranade, J., in the *Godhra Municipality case*[1] and I need not discuss them again.

I have dealt at length with the considerations which appear to establish the legality of the order in question under the Act of 1873, because it is possible that many such orders have been made by District Municipalities under that Act and the question whether such orders were legal under that Act must therefore be a serious matter.

I think that the decision in *Nagar* v. *The Municipality of Dhandhuka*[2] governs the present case. If it does not, then for the reasons already stated, I think that on a true construction of clause 2 of section 33 of that Act of 1873 the order complained of is not inconsistent with that Act and is a legal order which the Municipality had authority under this clause to make. If the matter rested there, then the injunction prayed for should be refused. But the order has not yet been enforced and meanwhile another District Municipal Act has been passed and came into force on 1st April, 1901 (Bombay Act III of 1901). The repeal of the District Municipal Acts of 1873 and 1884 does not affect the validity or the invalidity of anything already done under either of the said enactments (see section 2 of Bombay Act III of

(1) (1900) 2 Bom. Law Reporter 572.
(2) (1887) 12 Bom. 490.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

1901), but the enforcement of the order may well be stayed if such an order, as the order complained of is made after Bombay Act III of 1901 came into force, would be inconsistent with the latter Act: in other words, if a District Municipality has no power under the present Act (Bombay Act III of 1901) to prohibit such a building, for in such case the appellant could not be prevented *by the Municipality* from re-erecting the same balcony and eaves.

Section 33 of the old Act is reproduced in an altered shape in section 96 of the new Act, yet the words "the Municipality may issue such orders not inconsistent with this Act as they think proper" are retained by the Legislature notwithstanding the construction put upon those general terms in the case of *Nagar* v. *The Municipality of Dhandhuka*.[1] Nevertheless such an order, though consistent with the Act of 1873, would not be consistent with the present Act (Bombay Act III of 1901) if the ground over which the appellant's balcony and eaves project is private property, for in section 122 of the present Act there is express provision not only as to obstructions and encroachments upon public streets (see section 42 of the Act of 1873), but an added provision as to such obstructions and encroachments upon open spaces with an express exemption in clause 2 of section 122 of the present Act from this added provision where the open space is private property.

It has been decided by the lower Courts that the ground over which the appellant's balcony and eaves project is a street. It has been conceded by respondent's pleader that it is not a public street. This leaves it still undecided whether it is private property.

I would, therefore, remand the case for decision of the issue whether the ground over which the appellant's balcony and eaves project to the extent of 3½ feet is private property, as the question whether the order of the Municipality should still be enforced must turn, I think, upon the finding on that issue.

Owing to the above difference of opinion, the case was referred under section 575 of the Civil Procedure Code (Act XIV of 1882) to Mr. Justice Chandavarkar.

(1) (1887) 12 Bom. 490.

Ratanlal Ranchhoddas for the appellant (plaintiff) :—We contend that the Municipality has no right to interfere with the plaintiff's balcony. The street over which it projects was found by the lower Courts to be a private street. It is only the public streets that are vested in the Municipality : see section 17 of Bombay Act VI of 1873. The Act contains no provision enabling the Municipality to interfere in the case of a private street. Section 42 refers only to projections over public streets : see also sections 27, 30, 41, 43, 47, 48. Where it is intended to give the Municipality power to interfere in the case of private streets, the Act uses the words "any street" : see sections 37, 45, 46, 49, 50, 51, 53, 54.

Clause 3 of section 33 does not apply here. It only applies where the conditions of clause (1) are violated. That was not so in this case as the plaintiff gave the required notice.

The Municipality has no powers except those expressly given by the Act which creates it. The case of *Godhra Municipality* v. *Heptullabhai*[1] does not apply. In that case Parsons and Ranade, JJ., differed as to the law ; and Candy, J., agreed with the proposed decree only having regard to the nature of the pleadings and to the fact that the balcony in question projected over a public street.

L. A. Shah for the respondents (defendants) :—The Municipality in this case has acted under section 33 of the Bombay District Municipal Act (Bombay Act VI of 1873). The orders passed by the Municipality are justified by the terms of section 33. The section refers to "any building" and makes no mention of public street or private street. Clause 1 of the section requires any person intending to build a house to give notice to the Municipality. But he is also required to obey the orders which the Municipality may issue upon receiving his notice. If a man is permitted to disobey such orders, there is no object in requiring an intending builder to give notice of his intention to build, &c., and section 33 would be meaningless.

The powers of a District Municipality to regulate the construction of buildings in a private street have been recognized by

(1) (1900) 2 Bom. Law Reporter 572.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

this Court in previous cases, viz., *Godhra Municipality* v. *Heptulabhai*[1]; *Nagar Valab* v. *Municipality of Dhandhuka*[2]; *Municipality of Thana* v. *Fazal Karim*[3]; *Bhawanishankar* v. *Surat City Municipality*[4]; *Dave Harishankar* v. *Municipality of Umreth*.[5]

CHANDAVARKAR, J. :—The finding of the lower Appellate Court in this case is that the plaintiff has erected the balcony in dispute contrary to an order issued by the Municipality under a bye-law framed under the Bombay District Municipal Amendment Act (Bombay Act II of 1884).

It is contended for the plaintiff in this second appeal that as the balcony abuts on a private, not a public, street, the Municipality has no right to interfere with it. It is admitted for the Municipality that the building of which the balcony is a part abuts on a private street. The balcony is a projection of the building and must be taken to be a part of the building itself. "A projection from a building means a part of a building projecting or jutting out; it means a prominence extending from the building in the sense of coming out from the building as part of the building": *per* Bruce, J., in *Hull* v. *London County Council*.[6] The only question, therefore, is whether the order was within the jurisdiction of the Municipality under the provisions of the Bombay District Municipal Act of 1873. Mr. Justice Batty has held that it was not. Mr. Justice Aston has taken the contrary view. The second appeal has, under these circumstances, been referred to me for disposal under section 575 of the Code of Civil Procedure.

The contention of the Municipality is that its order falls properly within section 33 of the Act. The first clause of that section says: "Before beginning to erect any building, or to alter externally or add to any existing building, the person intending so to build, alter or add, shall give to the Municipality notice thereof in writing." By such notice he is required, among other things, to furnish to the Municipality "all information they may require

(1) (1900) 2 Bom. Law Reporter 572.
(2) (1887) 12 Bom. 490.
(3) (1901) 3 Bom. Law Reporter 842.
(4) (1895) P. J. p. 375.
(5) (1893) 19 Bom. 27.
(6) (1901) 1 K. B. 580 at p. 588.

regarding the limits, design, and materials of the proposed building." Clause 2 of the section says that "within one month after receiving such notice the Municipality may in writing issue such order not inconsistent with this Act as they think proper with reference to such building." Clause 3 says that if any person erect such building "without the notice, or without affording the information above prescribed, or in any manner contrary to the legal orders of the Municipality issued within the period abovesaid or in any other respect contrary to the provisions of this Act," he shall be liable to a certain penalty and "the Municipality may, by written notice, require such building to be altered or demolished as they may deem necessary."

Reading the whole of this section by itself, and having regard to its general terms, it is clear that the Legislature has given to every Municipality the power to regulate the construction of buildings, whether they abut on a public or a private street. The power may be exercised as the Municipality "think proper," which means that it should be exercised, not capriciously or arbitrarily, but reasonably (*Rex* v. *Wilkes*[1]; *Marshall* v. *Pitman*[2]), provided the order is "not inconsistent with the provisions" of the Act. In construing section 33 a good deal turns upon the meaning of the words "not inconsistent with the provisions" of the Act. To that I will address myself presently, but it is clear that if the action of the Municipality taken under the section is not inconsistent with the provisions of the Act, it will be legal provided it is reasonable. The question what is a reasonable exercise of such power must depend upon the character of the body acting on the delegated authority of the Legislature, upon the subject-matter of such legislation, and the nature and extent of the authority given to deal with matters which concern it. As observed by Lord Russell of Killowen, C.J., in *Kruse* v. *Johnson*[3] (which has been approved in subsequent decisions, as an instance of which I may cite *Gentel* v. *Rapps*[4]), if the bye-laws of a public representative body "were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they

(1) (1770) 4 Burr. 2527 at p. 2539.
(2) (1833) 9 Bing. 601.
(3) (1898) 2 Q. B. p. 91.
(4) (1902) 1 K. B. 160.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say: 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by qualification or an exception which some Judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local Government bodies, such representatives may be trusted to understand their own requirements better than Judges." I have made this citation from the judgment of the late Lord Chief Justice of England because the action of the Municipality, which is complained of as illegal in this case, was taken under a bye-law made by it under section 33, clause (*e*), of the Bombay District Municipal Amendment Act, 1884, which empowered it to make bye-laws consistent with that and the principal Act with the previous sanction of the Governor in Council, "generally for the regulation of all matters relating to municipal administration."

Section 33, then, read by itself must be construed as giving power to the Municipality to regulate the erection of all buildings, whether abutting on a public or a private street. The first limit to the exercise of that power is that it should be exercised reasonably. Clause 2 of the section provides another limit, which is that it should be exercised in a manner "not inconsistent with this Act." Clause 3 requires that the exercise of the power should be either "legal" or not "contrary to the provisions" of the Act. Those are the only limits to the exercise of the power. If any one erects a building "in any manner contrary to the legal orders of the Municipality or in any other respect contrary to the provisions" of the Act, the Municipality may under clause 3 by written notice require him to alter or

demolish the building, "as they may deem necessary." It follows, then, that if an order is contrary to or inconsistent with the provisions of the Act, it cannot be legal.

The first question then is, is the order issued by the Municipality a violation of any general law? The general law is that no man should be hindered in the exercise of any of his private rights, unless the Legislature has by any enactment taken away the right or put a limit to its exercise. Has the Legislature put any such limit to the right of a man to build as he likes? The answer to that depends on the question, what is the character of the body which has passed that order; with what object was it created; what is the subject-matter of the statute which created it and gave it that character; and with what powers did the Legislature arm it? It is a public representative body, created for the purposes of public health and sanitation; the Act gives it the power of regulating the erection of buildings towards that end; the Act, moreover, has armed it with the power of making rules or bye-laws for giving effect to that power. Now the law as to the interpretation of such Acts and bye-laws framed under them has been explained by Lord Russell of Killowen, Chief Justice, in the judgment to which I have already referred, and that law, to quote his words, says that in the case of such a body its rules "ought to be supported, if possible. They ought to be, as has been said 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction." It is true that section 33 does not in so many words say expressly that a Municipality has the power of preventing a man from *erecting* a *building* beyond certain limits. We have to infer that power from the terms of the section and the power given to regulate the erection of *any* building; and the inference must be drawn only if it is justified by the terms and is not against the argument of reasonableness and common justice. "When you are asked to infer a thing, I think the argument of reasonableness has, and ought to have, very great weight. What has sometimes been called the argument of common justice ought also to have great weight: you are not to infer an alteration of the general law if

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

that alteration be against common justice: it would require very strong words to lead to such an inference. I say that, because that must be a consideration in reading enactments" (*per* Jessell, M.R., in *In re Pigot and The Great Western Railway Company*[1]). Construing section 33 by the light of this canon of construction it would perhaps be unjust to infer from it that the Legislature intended to alter the general law by empowering a Municipality to prevent a man arbitrarily from building on his own land—that would be unreasonable and against common justice; but it is neither unreasonable nor against such justice to infer that the Legislature intended to alter that law in the interests of public health and sanitation by empowering the Municipality to control the erection of buildings in a reasonable manner. The terms of the section are wide enough to justify that inference. The only limit to the power given in such cases, then, by section 33 is that prescribed, firstly, by the general law that all such power should be exercised *reasonably*, not capriciously, and, secondly, by the section itself that it should not be inconsistent with or contrary to the provisions of the Act itself.

That the Municipality has exercised the power unreasonably has not been contended in this case. The argument for the plaintiff is that the power is inconsistent with and contrary to other provisions of the Act itself. The first provision of the Act which is relied upon as negativing the power of the Municipality is section 42. The argument based upon that section is that, as the Legislature has expressly provided against encroachments on public streets by giving a Municipality the power to remove them, it must be taken to have denied similar power as to encroachments on streets which are not public. At first sight I was much struck by the force of the argument, especially because under section 42 if an encroachment be made on a public street in the shape of a building or otherwise either overhanging the street or projecting into it, the Municipality can have it removed and may, in its discretion, give compensation to the person who made the encroachment lawfully. If the Legislature intended to give similar power as to other

(1) (1881) 18 Ch. D. 146, pp. 151-152.

encroachments, why has it not said so? Would it have left the power to be given by the general terms of section 33, without providing for compensation in terms similar to those in clause 2 of section 42? The argument is, however, plausible. Before we infer that the affirmative enactment in section 42 carries with it the implied negative as to section 33, and that, therefore, an inconsistency will arise between the two sections if we construe section 33 as giving the power to a Municipality to define the limits of a building abutting on a street which is not public, we must see what is the object and scope of each of the two sections and the mischief which each was intended to strike at. If both deal with the same subject-matter, then it may perhaps be fair to argue that we must avoid a construction of section 33 which will conflict with section 42, and that the principle *expressum facit cessare tacitum* must apply. But do they deal with the same subject-matter? Section 42 relates primarily to *encroachments* upon or *obstructions* to *public streets*, not to buildings. A building may be an encroachment or obstruction, but that is only an incident, so far as this section is concerned. The thing dealt with or intended to be dealt with as the principal subject-matter of the section is an *encroachment* or *obstruction* on a public street. The Legislature says none shall encroach upon or obstruct public streets if the Municipality so desire it. These streets are municipal property, being vested in the Municipality under section 17. The Legislature says that the Municipality shall have the power to say that no one can have the right to encroach upon or obstruct them, because they belong to the Municipality. The mischief intended to be struck at is interference with the ownership of the Municipality. Section 33 deals with a different thing altogether. It deals primarily with the erection of buildings, not with encroachments or obstructions. A building may be an encroachment or obstruction, but it is not because it is such that it falls within section 33. Its character as an encroachment or obstruction is only incidental. The mischief intended to be struck at by section 33 is that arising from the erection of buildings without proper regard to public health and sanitation. To prevent that mischief the Legislature says that the Municipality has the right of regulating the erection. The subject-matter,

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

the object and the scope of section 42 are different from those of section 33, and therefore there can be no inconsistency or repugnance between them.

Section 42 being, then, out of consideration, are there any other sections in the Act which are inconsistent with and contrary to the construction which, I think, the words and spirit of section 33 justify being put on it? Mr. Justice Batty has answered the question in the affirmative. He relies upon sections 25, 28, 29, 30 to 32, 35 to 43 and 48. Section 25 empowers Government to acquire land under the Land Acquisition Act or other existing law and vest it in the Municipality. It cannot have any bearing on the right of the Municipality to control the erection of buildings. So also sections 28 and 29, which deal with the power of a Municipality to lay out new public streets, &c. Section 30 relates to buildings which project into a public street, and empowers a Municipality to take possession of so much of the space occupied by them as can bring it into the regular line of the public street when the building has been taken down or burned or fallen down. This section is only a reiteration of section 42, except that under section 42 the Municipality may have the projection removed *suo motu*, whereas under section 30 the removal contemplated is the result of an act of the owner or an accident. It does not help us in the construction of section 33. It is said, however, that there is a connection between section 33 and sections 30 to 32 in this way: section 33 requires that a person who begins to erect a building shall give information to the Municipality regarding its level, limits, design, and materials; section 30 points out the limits; section 31 the materials; and section 32 its level. But as to section 30, the object is to widen public streets and bring the buildings abutting on them in a regular line. Section 33 deals with the limits of any building whether it abuts on a public street or not. If the object of getting information regarding the limits of a proposed building under section 33 were confined to that of section 30, where was the necessity of section 33 at all? The Legislature had already provided by section 30 and section 42 for buildings projecting into public streets; there was then no occasion for an additional section empowering the Municipality to require information

regarding the limits of other buildings. The Legislature would have in that case restricted section 33 to the class of buildings contemplated by sections 30 and 42. Then again, if sections 31 and 32 were framed with special reference to "the materials" and "the level" of a proposed building dealt with in section 33, why did the Legislature, after particularly prescribing in section 32 the proper level upon which a house or building should be built, go on to say in section 33 that the person building should give information "showing the levels at which the foundation and lowest floor of such building are proposed to be laid *by reference to some level known to the Municipality*"? The level pointed out in section 33 is not necessarily the level pointed out in section 32. Section 34 relates to the regulation of huts, and section 35 to the danger from overcrowded or badly drained huts or sheds used as dwellings or stables or for other purposes. The provisions as to huts are, no doubt, more specific than the provision in section 33 as to buildings, but it is obvious why the Legislature was more particular about the one than about the other. The danger from huts is greater than from buildings, and therefore the discretionary power given as to the former has been particularised. All that can be inferred from that is that the discretionary power given as to huts was perhaps intended to be wider than that given as to "buildings"; but it cannot be inferred that there is no discretionary power at all as to the latter. It may be, for instance, that as to buildings the Municipality cannot require that they should stand in regular lines, &c., and that they should not be overcrowded as they can in the case of huts. It is only to that extent that the argument based on the sections as to huts can go; but it cannot go the length of denying all discretionary power as to buildings under section 33; and if that section gives some discretionary power, the question is "what is its extent?" which must be decided, as I have said, by reference to the question of reasonableness. I pass on then to the sections in the Act (36, 37, 41) which relate to "buildings" in general, whether they abut on public or private street. It is these sections which seem to create some difficulty and to support the view taken by Mr. Justice Batty. These are sections which empower the Municipality to require the owners of buildings to provide for them

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

privies or cesspools and sufficient drainage. It is argued that the specific mention of these powers implies the exclusion of power to control the erection of buildings with reference to other matters. But when a statute gives by one section discretionary power in general terms as to buildings and says that the exercise of that power should be consistent with the provisions of the statute, and in other sections it mentions specifically cases where that power may be exercised, does it necessarily follow that the power given by the former section is exhausted by, and the exercise of it in other cases is inconsistent with, the latter? I do not think it is. Two things are inconsistent with each other if they cannot stand together. Before, therefore, one section in an Act can be said to be inconsistent with another, they must be mutually contradictory. The Municipal Act generally gives power to a Municipality to regulate the erection of *all* buildings. It also says that the exercise of that power shall be consistent with the provisions of the Act. Then it goes on to provide that the Municipality may order particular things with reference to those buildings. It also gives the Municipality power to make bye-laws, not inconsistent with the Act, "relating to municipal administration." In virtue of this power to make bye-laws the Municipality makes certain rules empowering it to order other things than those specified in the Act itself. The bye-law ordering these other things can be repugnant to or inconsistent with the Act only if it *alters* and thereby contradicts the Act. "A bye-law is a local law, and may be supplementary to the general law; it is not bad because it deals with something that is not dealt with by the general law. But it must not alter the general law by making that lawful which the general law makes unlawful; or that unlawful which the general law makes lawful" (*per* Channell, J., in *White* v. *Morley*[1]). Applying that principle here, the principal Act says that it shall be lawful for the Municipality to require the owner of a building to provide a privy or cesspool and sufficient drainage for it (sections 30 and 37). That is the general law; any bye-law which said that it shall be unlawful would be bad because repugnant. But the bye-law

(1) (1899) 2 Q. B. 34 at p. 39.

in the present case says nothing of the kind. It relates to other things than privies, cesspools, or drainage. No doubt it relates to "buildings," and sections 36 and 37 of the Act also relate to them. But does that create any repugnancy between the two—between the bye-law and the sections in the Act? It cannot, because the real subject-matter of the sections in the principal Act is different from the real subject-matter of the bye-law—they do not deal with the same case. In *White* v. *Morley* (1) (which I have above cited and which was approved in *Thomas* v. *Sutters* (2)) by section 23 of the Metropolitan Streets Act, 1867, it was provided that any three or more persons assembled together in any part of a street for the purpose of betting shall be deemed to be obstructing the street, and each of them shall be liable to a penalty. A bye-law made by the London County Council provided that no person should frequent and use any street or other place for the purpose of betting under a penalty. It was contended that the bye-law was repugnant to the Act, because section 23 had provided for the very thing at which the bye-law aimed, viz., betting and obstruction of the streets. Darling, J., said: "The question is whether this statutory enactment and this bye-law do deal with the same case. I do not think they do. It is true that they both deal with betting and that they both deal with obstruction of the streets. But that which is punishable under the one is not punishable under the other." So here, though the bye-law under section 33 deals with "buildings," which are dealt with also by the principal Act in certain sections, the particular things relating to buildings dealt with in the latter are different from the particular things relating to the same dealt with in the former. There can, therefore, be no inconsistency between the two, because the one does not contradict the other. We must then see whether the mention of particular things in the sections of the Act relating to buildings carried with it "the implied negative" as to other things relating to the same but not mentioned in the Act itself, on the principle of *expressio unius est exclusio alterius*. Before applying that

(1) (1899) 2 Q. B. 34. (2) (1900) 1 Ch. 10.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

principle we must bear in mind the observations of Lord Campbell in *Bostock* v. *N. Staffordshire Railway Co.*[1] with reference to statutes relating to a canal Company: "In construing instruments so loosely drawn as these local Acts, we can hardly apply such maxims as that "the expression of one thing is the exclusion of another" or that "the exception proves the rule." In *Thames Conservators* v. *Smeed Dean and Co.*,[2] Chitty, L.J. (Lord Esher, M.R., concurring) declined to apply the rule of *expressum facit cessare tacitum* to the Thames Conservancy Act, because it was "not a specimen of good drafting" and "many instances occur of a departure from the cardinal rule that the same words should always be employed to mean the same thing." The Bombay Municipal Act, 1873, is not, I venture to say, a specimen of good drafting and the remarks of Chitty, L.J., apply to it in some respects. In construing the Acts relating to a Municipality we must have regard to their object and policy and construe the sections so as to effectuate the intention of the Legislature to better provide for public health and sanitation. If the language of a section of the Act may fairly apply to many different cases and only some cases are specified in other sections, it is not straining the language and meaning of the Act if bearing in mind its object we infer that the cases specified are by way of example only and not as excluding others of a similar nature.

Such a construction of the Act ought indeed not to be adopted if there is warrant for saying that the Legislature has prohibited the Municipality from doing what it has not expressly authorized. And that seems to be the principle of law on which Mr. Justice Batty's judgment proceeds. He has, among other decided cases, relied upon the authority of the decision of the House of Lords in *London County Council* v. *Attorney-General*.[3] There the London County Council bought from the London Tramways Company their tramway, &c., and worked the tramways and ran the omnibuses. The Attorney-General brought the action complaining that the Council had no power to run omnibuses and to spend the ratepayers' money for that purpose. It

(1) (1855) 4 E. & B. 832. (2) (1897) 2 Q. B. 334 p. 351.
(3) (1902) A. C. 165.

was contended for the Council that it had the power because section 31 of the London Tramways Company Act, 1896, had authorized it to buy the tramways and "any works and property connected therewith," *i.e.*, the omnibuses and horses, &c.; and also because section 2 of the Act *impliedly* authorized the Council to work the omnibus traffic. Lord Macnaghten in his judgment puts very tersely the ground upon which the decision went against the contention of the County Council. He says "The London County Council are carrying on two businesses—the business of a tramway company and the business of omnibus proprietors. For the one they have the express authority of Parliament; for the other, so far as I can see, they have no authority at all. It is quite true that the two businesses can be worked conveniently together; but the one is not incidental to the other." I fail to see how a power given to a Municipality to regulate the erection of buildings stands on the same footing as a power given to it to carry on a business. A municipal body is created for the purposes of sanitation and public health; carrying on any business is not its object. Where, therefore, the Legislature empowers it to carry on a particular business, it can carry on that business only, not any other. The power to carry on business must be construed strictly and limited to what is expressly allowed. But the case stands otherwise where the interests of health and sanitation are concerned. There the power must be "benevolently" interpreted and supported if the terms in which the power is given justify either in express language or by necessary implication such interpretation. In the decision of the House of Lords just cited, the Earl of Halsbury, L.C., referred to the case of the *Ashbury Railway Carriage and Iron Company* v. *Riche*[1] and *Attorney-General* v. *Great Eastern Railway Company*[2] as laying down the law on the subject. In this latter case Lord Blackburn, speaking of the former, says: "That case appears to me to decide at all events this, that where there is an Act of Parliament creating a corporation *for a particular purpose*, and giving it powers for that particular purpose, what it does not *expressly* or *impliedly authorize* is to be taken to be prohibited; and

(1) (1875) L. R. 7 H. L. 653. (2) (1880) 5 A. C. 473.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

consequently that the Great Eastern Company, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose." The words in this citation which I have italicised are important. They show that when we have to decide whether a certain power is within the competence of a statutory body, we must look to the particular purpose for which it is created and see whether the power is impliedly given, if it is not expressly mentioned in the statute. Then Lord Blackburn goes on to say: "I quite agree with what Lord Justice James has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited." Lord Selborne in the same case puts it thus: "It appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, *i.e.*, *Ashbury Railway Carriage and Iron Company* v. *Riche*,(1) should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*." Applying these principles to the present case, the Municipal Act gives the Municipality the power to regulate the erection of buildings; the main purpose, then, is their control by the Municipality. The power has, according to the Act, to be exercised in a manner not inconsistent with its provisions or in a manner not contrary to them, *i.e.*, in the spirit of those provisions. The words used by the Legislature indicate that the power includes something which is not expressly mentioned in the provisions of the Act. Had the Legislature intended to confine the powers given to a Municipality in respect of buildings to those specifically mentioned in the Act, the language used in clauses 2 and 3 of section 33 could have been different from that actually employed by the Legislature. In that case the Legislature would have taken care to say that the Municipality shall issue

(1) (1875) L. R. 7 H. L. 653.

orders "in accordance with the provisions of this Act," instead of saying that they shall not be inconsistent with or contrary to them. Impliedly, therefore, the Act authorizes the Municipality to regulate the erection of buildings beyond controlling them in the manner specially provided by sections 36, 37 and 41.

I have so far discussed the question by confining myself to the Act itself and my reading of it is that section 33 gives a general power to the Municipality to regulate the erection of buildings which is not confined to the particular provisions of the Act relating to them. As to the decided cases of this Court, to which reference is made in the differing judgments, it was conceded at the Bar before me that none of them except one exactly touched the point which has arisen in this case. I do not, therefore, propose to deal with the authorities referred to in the judgments of Batty and Aston, JJ. The one case which does touch the point but which, I understand, was not cited before Batty and Aston, JJ., is that of the *Municipality of Thana* v. *Fazal Karim.*(1) It is a direct authority in support of the construction which I think should be put upon section 33 of the Bombay Municipal Act of 1873. It was held there that a Municipality, in granting permission to a person to erect his building, could legally impose, under section 33, a condition that he should leave a *gully* of a certain dimension. Mr. Justice Candy in delivering the judgment in that case said: "Then Mr. Chaubal argued that there is nothing in the Act empowering a Municipality to make a passage over which the public have no right of way. But there is nothing in the Act forbidding such a thing. The intention of the Act is clearly to make the Municipality trustees for the public, especially in all sanitary matters. The Municipality by their notice of 12th May asserted that their object in requiring a *gully* was for the sanitary purposes of light and air; and there is nothing to contradict their allegation. If they can require all information regarding the limits, &c., of the proposed building (section 33, clause 1) there is nothing inconsistent with the Act in an order limiting the extent of the building in such a way as to provide a narrow *gully*."

(1) (1901) 3 Bom. Law Reporter 842.

1902.

TRIBHOVAN v. AHMEDABAD MUNICIPALITY.

The result is that, in my opinion, the plaintiff has failed to show that the action of the Municipality of which he complains is illegal and *ultra vires*.

It was contended before me that, assuming the Municipality had power to issue the order complained of, the plaintiff had not acted contrary to that order, because the order was that he should build his house leaving five feet space from the wall of his eastern neighbour. Both the Courts below have held that the plaintiff has built contrary to the specific orders of the Municipality. No such contention as is now raised before me was clearly set up before them, nor can I say that the Courts below have misconstrued the order.

For these reasons, agreeing with Mr. Justice Aston in his view of the law, I confirm the decree appealed against with costs on the appellant.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1902. *December* 9.

BALAJI RAGHUNATH PHADKE (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMCHANDRA KASHI PATKAR (ORIGINAL DEFENDANT), RESPONDENT.*

Landlord and tenant—Lease—Tenant holding over—Assent of landlord—Liability for rent after expiry of term—Transfer of Property Act (IV of 1882), section 116.

The defendant held a share of a khoti village from the plaintiff under a kabuláyat dated 30th June, 1890, for a period of five years. This suit was filed to recover from him the rent due under it for the years 1898, 1899 and 1900. He pleaded that the kabuláyat had expired on 30th June, 1895, and that subsequently to that date he held possession not of the plaintiff's share as his tenant, but of the whole village as managing Khot, and that, therefore, the plaintiff was not entitled to rent from him, but was entitled merely to his (the plaintiff's) share of the profits of the village. It appeared, however, that though the kabuláyat had expired in June, 1895, the plaintiff in 1897 had sued the

* Second Appeal No. 421 of 1902.