broader ground of distinction is that in this case, as found by the Courts below, no fraud was actually effectuated, and that is really the basis of the decision, as I understood it at the time, given by Jenkins C. J., in *Sidlingappá's*[1] case. Upon all the other points of distinction set forth in my Lord the Chief Justice's judgment just delivered I entirely agree.

Decrees set aside.

G. B. R.

[1] (1907) 31 Bom. 405.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

DAKORE TOWN MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT, *v.* TRAVEDI ANUPRAM HARIBHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

1913. *July* 11.

District Municipal Act (Bombay Act III of 1901), sections 113 and 122—Suit against Municipality for re-instating a stone removed by it—Plaintiff's adverse possession—Municipality creature of the statute—Duties of Municipality—Municipal District—Encroachment—Obstruction to safe and convenient passage—Notice of removal—Justification by reference to statutory powers.

In a suit brought against a Municipality to restrain them from obstructing the plaintiff in re-instating a stone which was imbedded in his *otla* in its original position, the lower appellate Court found that the stone had been *in situ* for twelve years, therefore the Municipality had no right to interfere with it as there had been adverse possession for the statutory period of the portion of the street occupied by the stone.

On second appeal by the Municipality,

Held, that the Municipality was the creature of the Statute with duties *inter alia* to preserve the passage along public streets. It mattered not for the Municipality whether the encroachment had been in existence for 12 years or more. Under section 113 of the District Municipal Act (Bom. Act III of 1901) the Municipality might, on proof that the encroachment objected to was an obstruction to the safe and convenient passage along a street, by written notice require the owner to remove it. Section 122 of the Act empowered the

* Second Appeal No. 211 of 1913.

1913.

DAKORE TOWN MUNICIPALITY v. TRAVEDI ANUPRAM.

Municipality to remove the encroachment which might have been put up after the place had become a Municipal District.

In the present case the Municipality having failed to justify their action by reference to the said statutory powers, the decree was confirmed.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, reversing the decree of M. I. Kadri, Subordinate Judge of Umreth.

This action was instituted by the plaintiff for a perpetual injunction restraining the defendant Municipality from obstructing him in putting the stone in suit in its original position in the *otla* of his house and for damages to the extent of Rs. 2 for unlawful removal of the stone. The plaint alleged that the stone in suit was included in plaintiff's *otla* and had been there since time immemorial and that nevertheless it was removed by the Municipality.

The defendant Municipality answered that the stone was a new erection and was put in the public road. It was, therefore, properly removed.

The Subordinate Judge found that the stone had not been there for 12 years and that it was not part of the plaintiff's *otla*. He, therefore, dismissed the suit.

On appeal by the plaintiff, the District Judge reversed the decree and granted the relief prayed for by the plaintiff on the ground "that the stone has been *in situ* for over 12 years and that the land under it was not public land. * * *"

The defendant preferred a second appeal.

M. K. Mehta, for the appellant (defendant):—The lower Court found that a part of the stone projected from the limits of the *otla* into the direction of the public road, therefore, the suit should have been dismissed. The limitation of 12 years is not applicable and no period of limitation would come in the way of the Municipality exercising its powers under section 122 of the District

Municipal Act. If any article of the Limitation Act applied it would be article 146A which gives the Municipality a period of 30 years. We rely on *S. Sundaram Ayyar* v. *The Municipal Council of Madura*[1].

Further the finding that the stone has been *in situ* for 12 years is bad in law. The lower Court found that practically there was no evidence on the point. The onus lay on the plaintiff to adduce evidence and there being no evidence the suit should have been dismissed.

G. N. Thakore, for the respondent (plaintiff) was not called upon.

SCOTT, C. J.:—In this case the plaintiff has obtained an injunction against the Dakore Municipality to restrain them from obstructing him in re-instating a stone which was formerly imbedded in his *otla* in its original position and Rs. 2 for damages for wrongful removal of the stone. The learned Judge has based his decision upon a finding that this stone had been *in situ* for twelve years, and that, therefore, the Municipality had no right to interfere with it as there had been adverse possession for the statutory period of the portion of the street occupied by the stone. We do not think that this is a good reason for the decision. The Municipality is the creature of the Statute with duties *inter alia* to preserve the passage along public streets, and, under sections 113 and 122 of the District Municipal Act, it is given certain powers depending upon the existence of certain conditions for the removal of encroachments or obstructions upon the streets. Under section 113, if it is proved that the encroachment objected to is an obstruction to the safe and convenient passage along a street, the Municipality may by written notice require the owner to remove it. Under section 122, the Municipality have power to remove an encroachment which may have been set up

(1) (1901) 25 Mad. 635.

1913.

DAKORE TOWN-MUNICIPALITY v. TRAVEDI ANUPRAM.

after the place has become a Municipal district. It matters not in either case whether the encroachment has been in existence for twelve years or more, but the statutory conditions regulating the exercise of the power must be shown to exist. The Municipality in the present case have not shown either that the stone which they have removed was an obstruction to the safe and convenient passage along the street or that the stone was set up by the plaintiff after the place became a Municipal district. They have, therefore, not justified their action by reference to their statutory powers. On that ground we affirm the decree of the lower appellate Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Heaton and Mr. Justice Macleod.

1913. *July* 16.

SAWANTRAVA KOM FAKIRAPPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* GIRIAPPA FAKIRAPPA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 2 (2), 10A† — Evidence Act (I of 1872), section 92—Agriculturist—Mortgage in form of sale—Redemption suit—Intention of the parties at the time of the transaction.

* First Appeal No. 272 of 1912.

† Sections 2 (*2*), 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) are as follows :—

2. (*2nd.*) In Chapters II, III, IV and VI and in section 69, the term "agriculturist," when used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law.