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**(1921) 06 BOM CK 0026**  
**In the Bombay High Court**  
**Case No : Second Appeal No. 756 of 1920**

Abaji Ragho Mhalas

APPELLANT

Vs

The Municipality of Jalgaon

RESPONDENT

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**Date of Decision :** 27-06-1921

**Acts Referred:**

Bombay District Municipal Act, 1901 — Section 122  
Limitation Act, 1908 — Article 146A, 29

**Citation :** (1921) 23 BOMLR 1028

**Hon'ble Judges :** Shah, J; Norman Macleod, J

**Bench :** Division Bench

**Final Decision :** Allowed

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## Judgement

Norman Macleod, Kt., C.J.—The plaintiff sued for an injunction against the Municipality of Jalgaon not to remove the eastern two rows of steps leading to his house. The suit was dismissed in the trial Court, and an appeal against that decision was dismissed on the 30th July 1920. Since the appeal was dismissed the decision of this Court in Tayballi Abdullabhai Vohra Vs. The Dohad Municipality, . was reported. This case is on all fours with that case, and, therefore, we must follow that decision unless we refer the matter to a Full Bench.

2. It was argued that that decision was in conflict with a prior decision of this Court is Dakore Town Municipality v. Anupram. (1913) 15 Bom L.R. 883. But Mr. Justice Heaton was a party to both the decisions and when the latter case was decided the prior case was before us, and I do not think that Mr. Justice Heaton could have concurred in my decision in the Dohad Municipality case, unless he was satisfied that the two cases could be differentiated. However, there is no doubt that the facts of this case are very similar to the facts in the latter case, and we are bound by that decision. The basis of that decision is that after thirty years" adverse possession, an owner of a house who has encroached on the public street obtains a good title, therefore Section 122 which deals with

encroachments on streets no longer applies.

3. It is argued to the contrary on the merits of the case, that Section 122 of the Bombay District Municipal Act gives the Municipality power to remove an encroachment which has been set up in any place after it has become a Municipal district, and to fine a person who has so encroached, and also to remove the encroachment, and that that power continues, however long the party who has encroached has been in possession of the site of the encroachment. That of course is a perfectly legitimate argument. It does not follow that the opposite argument is wrong, that as the Municipality is barred from tiling a suit for the possession of the site encroached upon after thirty years, the site after that period no longer forms part of the street, but belongs to the party who has been in adverse possession. The appeal, therefore, must be allowed and the plaintiff must be granted the injunction which he has asked for and the refund of Rs. 2 paid under protest with costs throughout.

Shah, J.

4. I agree that this case is not distinguishable from the case of *Tayaballi v. Dohad Municipality* (1920) 22 Bom. L.R. 951 and that on the authority of that case the plaintiff is entitled to a decree, which he prays for. I desire to add, however, that, apart from that decision, I feel some difficulty in holding that the powers conferred upon the Municipality u/s 122 for the removal of encroachments upon public streets are subject to the rule of limitation to be deduced from the combined operation of Section 29 and Article 146A. of the Indian Limitation Act, as regards the acquisition of title by adverse possession. It seems to me that there is a good deal to be said in favour of the view that u/s 54 of the Bombay District Municipal Act, it is obligatory on the Municipality to see that encroachments on public streets are removed and that the necessary powers are conferred upon the Municipality u/s 122 without any limitation in the interests of the public. At the same time it is clear that there is no express provision for a case of this kind where for thirty years the Municipality has taken no action, and the party encroaching on the public street claims to have acquired a title under the Indian Limitation Act by continuing the encroachment for a period exceeding thirty years. In this conflict of considerations I am not prepared to dissent from the view taken in *Tayaballi's* case. The question no doubt is one of practical importance. To my mind there is an apparent conflict between the decision in *Tayaballi's* case and the ratio decidendi in *Bhaiya Janki Pershad Singh Vs. Bhaiya Dwarka Pershad Singh*, . But Mr. Justice Heaton, who was a party to both the decisions, agreed in the later case that the earlier decision was distinguishable. Under the circumstances. I think that the decision in *Tayaballi's* case should be followed. If that view is not in consonance with the true intention of the Legislature on this point, the Bombay District Municipal Act can be amended by the Legislature so as to give effect to its real intention.