[L. & M.
9,000-8-3-96.]

Local & Munl. (1896) Department.

MISCELLANEOUS.

G.O., No. 1550 M

DATED 11-9-96

INDEXED.

[Despatch Abstract.]

Encroachment

Considering it undesirable to prefer an appeal to the High Court against the acquittal in a case of ——— in the Mangalore Municipality and directing the Chairman, with remarks, to address the Government promptly if any similar case should occur again.

BACK PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

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c 7/19

L. & M.
300-5-8-96.

Local & Munl. (1896) Department.

CURRENT No. 2310 M

Am
mil

Order No. 1650 mis 11-9-96
9/9/96

The Government considers it undesirable to prefer an appeal to the High Court in this case, as it would probably be rejected as time-barred. If however any similar case should occur again, it should be reported to Government promptly in order that the necessary action may be taken in time.

V.R.
7/9/96

WWS
20-9-96

The decision of the Hs Ch. was passed on the 3rd April but it was not until the 27th July that the Chairman adopted [illegible]

5/9/96

From

The Chairman, Municipal Council
Mangalore.

No. 503

Dated 27-7-96
Received 12-8-96
Registered 13-8-96
Enclosures 5
Spare copies

SUBJECT.

Requesting that Government may be pleased to instruct the Public Prosecutor to move the High Court to set aside the order of acquittal in a certain municipal prosecution.

Note [illegible] please see G.O. No. 68 pol d/15th Jany/94.

Despr.

Please return this time after despatch.
PR
11/9/96

To
The ~~District Magistrate~~ Chairman, M.C. Mangalore.
(with a plan etc.)

Despd 18/9/96

Circulated
PR
15/9/96

Office note this case
11/9

21/9

BACK PAPERS.

G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.

In the High Court of Judicature at Madras, Thursday the thirtieth day of April one thousand eight hundred and ninety six

Present:

The Honourable Mr Justice Shephard
The Honourable Mr Justice Benson.

Criminal Revision Case No 161 of 1896

Case referred No 56 of 1896.

C. Pacheco — Accused in calendar case No 184 of 1895 on the file of the 3rd Class Bench of Magistrates of Mangalore and Appellant in criminal appeal No 48 of 1895 on the file of the Head Quarter Deputy magistrate, South Canara.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of South Canara in his letter, dated 1st April 1896 Reference on No 3910 Magl / 95

This case coming on for hearing upon perusing the letter of reference and the records submitted therewith, the Court delivered the following Judgments:- Mr Justice Shephard:

I do not think this is a case justifying the

interference

Enclosure V.

In a letter from the Chairman, Municipal Council, Mangalore, No 503 dated 27th July 1896.

The decision of the High Court.

1 / 2310 M of 96

Reference on No 3910/96. Magl.

South Canara Dt. Magistrate's Office,
Mangalore, 27th March, 1896.

From
W. H. Welsh, Esq.
District Magistrate of South Canara,

To
The Registrar of the
High Court of Judicature,
Madras.

Sir

I have the honour to forward, under Section 438 of the Cr. P. C., the records of Criminal Appeal No 48 of 1895 on the file of the Head Quarters Dy. Magistrate, South Canara, and of Calendar Case No 184 of 95 on the file of 3rd Class bench Magistrates, Mangalore Town, as the decision in appeal seems to be erroneous in law.

2. The Mangalore Municipal Council charged C. Pacheco under Section 167 of the District Municipal Act IV of 1884 (1) for building a wall in a public Street without obtaining a license from the Municipal Council, and (2) thereby encroaching upon the public Street (municipal road), both acts made punishable under Section 263. It is stated under "plea of accused" (Col 9) that the accused pleaded "not guilty" but the judgment of the bench magistrates show that

the accused admitted raising the wall but denied the encroachment. Of the five gentlemen who formed the Bench deciding the Case, a majority of three found the accused guilty of both Charges while the President who is the Town Second Class magistrate, with the remaining number found him guilty under one Count only viz that of building the wall without permission which the accused pleaded guilty too. The magistrates have recorded different judgments. The accused was sentenced to pay a fine of four annas for each Offence. Against this conviction the accused appealed and the Sub-Divisional magistrate reversed the finding and sentence and ordered refund of the fine.

3. It is observed that the order of the appellate Court is illegal and opposed to facts; and I recommend that the order of acquittal passed by the appellate Court may be set aside.

4. Dealing with the two Charges against the accused separately it is observed that the two magistrates who found the accused guilty in respect of erecting the wall without permission did not say under what Section of the act they convicted him. This was a material omission. The appellate Court has also failed to notice this point. Section 167(1) says that no wall, fence or other obstruction or encroachment in any public Street shall be erected without the written permission of the municipal Council &c. So that if they convicted him under Section 167 and 263 so far as they

related

related to this Charge they practically convicted him of encroachment also, the erection of a wall in a public Street being held to be an encroachment. And likewise, if the accused, as is alleged, pleaded guilty to this Charge, he has tacitly pleaded guilty to the Charge of encroachment also. But the facts are against such a supposition. The accused urged that the ground on which he erected the wall is, his private land. Apparently therefore the Charge to which the accused pleaded guilty is one under Section 180 constructing a wall in a private land without permission and made punishable also under Section 263; and evidently the finding by the magistrates should be considered to have been under those sections. As the other three magistrates found the accused guilty of encroachment also, this point does not affect their finding. This no doubt was not so serious a Charge. However the appellate Court had power to alter the finding & convict him of the offence which he is shown to have committed. But the appellate Court has quashed the Conviction on the sole ground that the land in question is not a public street. The road throughout the trial is called "Sirkar Marga" meaning Public road and the accused has not questioned this fact. Evidence does not therefore appear to have been given to prove that the road is a public one. No one has besides ever asserted that it was a private one. If however there was any doubt on the point the Deputy Magistrate was competent to call for further evidence.

5. Turning to the charge of encroachment it was necessary first to see what a public street is. The words "Public Street" is defined in Section 3 to mean all streets which were when the District Municipalities Act came into force, public streets or which may be thereafter declared public streets according to its provisions. Section 6 says that on this act IV of 1884 coming into force in any municipality which comprises within its limits any town as defined in the Town Improvement Act 1871 the following consequences shall ensue: (iii) All property vested in the Town Council shall vest in the municipal Council established for such municipality to be held for the purposes of this act, subject to all rights (if any) affecting such property, and Section 23 says that all public streets in any municipality x x

and

and other things provided for such streets shall vest in, and belong to the municipal Council. Hence public streets with their belongings comprised within the limits of the Mangalore Town under the Town Improvement act also became Public Streets under the District Municipalities act on the introduction of the latter act. And evidently in the public acceptation of the term, the street in question was a public street under the earlier act. The street is thus shown to have come into the possession of the municipality. It was next to be considered how much ground was included in the public street. It is a patent fact that the avenue trees exist on this public street and actually on or near this very place of encroachment. The accused himself does not deny that the trees are avenue trees. The prosecution has proved that the application was made to the municipality by the accused's predecessor in possession of the compound whose new wall is now the subject of this case, stating that two old banian trees were injurious to her land and should be removed, thereby admitting and affording proof of the fact that the trees were old and belong to the municipality. From the existence of this fact it follows that the land on which they stand and the space between them and the road are not private property. This circumstance alone is sufficient to show that the wall of the accused has encroached on the Public street; because the prosecution has shown, the accused has admitted and the appellate Court has found that the wall comes up to a line with the trees, and consequently stands on the public Street. The prosecution has further proved that on this portion covered by the encroachment there stood an avenue tree which is admitted by the accused and after the removal of the tree the accused raised the wall enclosing the piece of land on which the tree stood. This is prima facie encroachment. Even if the land had ever been private property occupation for the purpose of avenue is good occupation, and adverse occupation has therefore given a title in the absence of exceptions. The trees were described as old in 1865. They were therefore more than 2 years old and there has been adverse possession

for

for more than 12 years. Thus the land occupied by the line of avenue trees, is vested in the municipality and included in the public Street.

6. Allegation is made of the existence of an old building where a new wall has now been erected, and this is supported by one of the Bench magistrates who inspected the spot. But the accused does not appear to have raised this point and it is not material when adverse possession is proved.

7. The extent covered by the new wall is deposed to by the prosecution witness as measuring 24 feet from north to south and 4 1/2 feet from east to west and lies to the west of the western main wall of the accused's house adjacent to the Street. This fact is not denied by the accused. The prosecution assert that this was public land included in the Street. The accused alleges that it is his private land. In support of the allegation he produced 3 documents, the earliest of which is dated 24th March 1859. In this the western boundary of the compound is given on the public road. The prosecution argues that as neither Government nor

municipality was a party to the decree in which this execution proceedings were taken they are not binding on it. The appellate court says that even in that case adverse possession has to be admitted for 36 years. So far from this view of the law being correct the municipality had exercised its right of adverse occupation for avenue in 1885 when Elizabeth Pacheco, the accused's predecessor, applied for leave to cut down one tree and lop the branches of another. It is besides remarkable that no mention of right of private ownership was made by this Elizabeth Pacheco to the land in dispute in her petition of 16th October 1885.

8. Turning to the definition of "Street" the word is defined to mean any road, street, square, court, alley or passage, whether a thorough fare or not, over which the public have a right of way, together with land (not being private property) whether covered or not by any pavement, verandah, or other erection which lies between the road-way and the main wall of any house adjacent

thereto

thereto. According to this, the land in question is included in the street provided there are no private proprietory rights to it. It seems to have been in evidence that the compound wall and in some instances the main walls of houses are in almost direct line along the whole of this street and this plainly shows that such walls are actually the demarcation between private and public ground. If this were not so, in a large town like Mangalore these and others of a similar nature would very probably have been occupied. This fact proves or at least makes out a strong presumption that the land belongs to the municipality and no private rights exist.

9. Since the ground is part of the public Street the accused's act in raising a wall without permission thereon

is an encroachment and the accused is therefore guilty under Sections 167 and 263 of Act IV of 1884.

10. The Chairman of the municipality reports that lately some persons have begun to encroach upon lands similarly situated which are always treated as public property and never claimed by private individuals and that subsequent to this appeal decision the Town Magistrate has discharged the accused in a similar case. More cases are likely to come up and public rights are likely to be affected thereby.

11. In G. O. No 1307 L, dated 25th July 1895, it has been directed that Local Boards and Municipal Councils should act with promptitude in every case of encroachment in order

to

to prevent prescriptive right being established against them. The erroneous decision is therefore an important matter.

I have &c

/Signed/ W. H. Welsh,
District Magistrate.

/ True copy /

T. M. Ramak
Chairman, M. C.

Enclosure IV.

In a Letter from the Chairman, Municipal Council, Mangalore, No 503, dated 27th July, 1896.

The Letter from the District Magistrate of South Canara to the High Court.

No 1530.

Municipal Office,
Mangalore, 17th March 1896.

Enclosure III of letter No 503 27-7-96

From
M. R. Ry T. M. Rama Rao, Avargal,
Chairman, Municipal Council,
Mangalore.

To,
W. H. Welsh Esquire
District Magistrate
~~South Canara~~

Sir

I have the honor to forward herewith copy of judgment of the Head Quarter Deputy Magistrate in criminal appeal No 48 of 1895 on his file, reversing the conviction and sentence of the accused by the Bench Magistrates in Cal. case No. 184/95 on their file for offences punishable under Sections 167 & 263 of the Municipal Act for his having encroached upon municipal land and to request that on a perusal of the records, if satisfied of the impropriety of the order to ask Government to instruct Government Pleader to move the High Court to set aside the order of acquittal.

The facts of the case are that between the 2 points where the Old Kent Road meets the Mangladevi Road in its north and south side there is a strip of land between the main road and compound walls of private individuals. This strip is marked blue in the map which I got prepared of the locality and submitted herewith. On this strip of land stands an avenue of banyan and other trees almost in a straight line which were undoubtedly planted as avenues and their age from their look must extend atleast 50 years. Private owners have been encroaching on this strip from time to time from the last 5 or 6 years and such encroachments are marked red in the said plan— The encroachment by the accused Pacheco now in question is marked B in the plan and was (~~repeatedly~~ recently) done by raising a wall enclosing a portion of the said ground 4½ feet broad and 24 feet long. Prompt action has taken in the matter by me by charging the accused which ended in the conviction of the accused. The reasons for conviction are detailed in the Judgment of the Bench Magistrates.

The Deputy Magistrate in para 3 of the Judgment finds that the land in which the avenue trees stand is not private property. It is proved for the prosecution that on this portion B there stood an avenue tree which was admittedly municipal property and no sooner the tree was removed the accused knocked down his old wall which was to the east of that tree and raised another wall enclosing the piece of land on which the tree stood and some more.

As the wall only comes up to the line of the trees there is no encroachment. This conclusion is wrong for two reasons. First the Inspector has sworn and he has not been discredited that wall is beyond the old wall by 4½ feet and secondly it is not likely that Government would plant banyan trees at the very extremity and not at the boundary line between public and private ground. Banyan trees are only planted as avenues and care seems to have been taken to plant them at some distance from private ground lest their roots may go into the private ground and damage the compound wall. A look of the place satisfies one in this matter.

As to para 4 of the Judgment.

The Bench Magistrates in para two of their judgment have recorded that at their local enquiry the accused admitted that the spot pointed out by the Municipal Inspector was the one where the old wall stood. This I think, is conclusive evidence on the point as this has not been objected to by the accused in his appeal memo and it is not clear to what traces of an old wall the dissenting Magistrate alludes to. I have seen the place myself to find out whether there are traces of an old wall and I find none and as a matter of fact the accused himself does not allege that there was any wall at the place where the new wall is built. It is a notable feature that the compound wall and in some instances the main wall of houses are in almost direct line along the whole of the strip which plainly shows that such walls were actually the demarcation between private and public ground.

In this town there are hundreds of acres of such land between the main walls of private land and the road always treated as the public property and never claimed by private individuals. It is only lately some persons have begun to encroach upon such land and when prosecuted to claim it.

If such land is held to be private property every one in the Town will enclose the margin of the road and the loss to the public would be immense.

Subsequent to this appellate decision the Town Magistrate has discharged the accused in in a similar case. I have applied for a copy of the decision and when I get it I will submit a separate report about it.

With reference to the remark in the Judgment that out of the 5 Magistrates who constituted the Bench two are Municipal Councillors I have the honor to state that one of them was not a Councillor on the date of the Judgment appealed against and the other did not take part in the Municipality that sanctioned the prosecution.

From the observations made by the Magistrate in para 4 of the Judgment the Magistrate appears to doubt the fact that road of which the alleged encroachment is a margin is a public street. As to this, I have only to observe that the road throughout the case called "సర్కారు బాట" which means Governmen or public road that the accused never questioned the road being a public one. Therefore evidence to prove the road to be public road is not given. It cannot be doubted for a moment that the road is a Public road and no one ever asserted that it was a privat one. I believe you have seen the road and

the accused in his appeal memo and it is
clear to what traces of ll I have applied for a copy
Magistrate alludes to pe when I get it & will submit
myself to find out ot or it.
of an old wall ed for further k in the judgment
matter of f of Government on the subjec stituted the
allege &
chments is herewith sent; which may
be returned after perusal.

I have &c.

(Signed) T. M. Rama Rao
Chairman.

True Copy

T. M. Rama R.
Chairman, M.C.

In the Court of the Head Quarters Deputy Magistrate of South Canara

Friday the 13th day of December one thousand eight hundred and ninety five.

Present: M. Ravi Varma Raja Avgl

Criminal Appeal No. 48 of 1895

C. Pacheco . . . . Appellant

From what Court the appeal is preferd } 3rd Class Bench Magistrates of Mangalore Town.

No. of the case in that Court } No. 184 of 1895

No. of the appeal No. 48 of 1895.

Name and desciption of the appellant } C. Pacheco son of Lucas Pacheco of Mangalore Town

The sentence and law under which it was imposed in the Lower Court } Defendant to pay a fine of 4 annas for each offence Secs: 167 & 263 of Municipal Act.

Whether confirmed modified or reversed } Reversed.

Date of					
Presentation	Filing	Notice issued to Court to appear	On which appellant was ordered to appear	Hearing	Order
28-[illegible]-95	6-12-95	6-12-95	11-12-95	11-12-95	13-12-95

Read the appeal petition and the record of the case [illegible] in his appeal memo. and it

case and heard Mr. K. Laxuminaraina Rao on behalf of the appellant and Mr. K. Ranga Rao on behalf of the Municipality.

Judgment

The appellant was convicted by the Bench of Magistrates Mangalore and sentenced under sections 167 and 263 of the District Municipalities Act No. 4 of 1884, to a fine of 8 Annas. It was alleged that he erected a wall on a public street without a license. The only question to be decided was whether the place where he erected the wall was a public street as alleged by the Municipality or private property as alleged by the appellant.

2. The evidence on the prosecution side consists of (1) The Municipal Inspector's statement that there was hitherto no wall or building on the space between the road and the inner wall of the appellant (2) the fact that the new wall objected to is on a line with some banyan trees which are presumably avenue trees, (3) the application made to the Municipality by the appellant's predecessor stating that one of the trees was injurious to her land and should be removed, the application being urged as proof that the tree belonged to the Municipality, and (4) the fact that there is still some vacant space in front of some other houses in the same street, which

which in a large town like Mangalore would very probably have been occupied if it was not Municipal property.

3. (2) & (3) — If the trees are avenue trees as appellant himself does not now deny, it may be assumed that the land on which they stand and the space between them and the road are not private property. But as the appellant's wall only comes up to the line of the trees and does not go beyond it this argument does not affect the issue at all.

4. (4) — One of the honorary Magistrates who composed the Bench has recorded a dissenting judgment in which he states that he can discern the remains of an old wall or building on or about the very place where the new wall has been raised. But granting for arguements' sake that the Inspector is correct, it does not necessarily convert the land into a public street. The District Municipalitees Act defines "public streets" to consist of all streets which were then public streets or which may be there after declared public streets according to its provisions — and a street is defined as any road, thoroughfare &c, and any space between a road and the substantial wall of adjoining buildings, provided that there are no private proprietary rights to it.

The Inspectors statement would bring (bring) this land under the first part of the definition of a street but neither under the 2nd part of it, nor under the definition of a public street. This defect is intended to be supplied by the (4th) argument. But if some persons have left space in front of their houses, others have got walls in a line with the appellants and at best, the prosecution can only be said to have made out a slight presumption that the land might probably belong to the Municipality.

5. I do not overlook the fact that the Municipality, unlike private owners, can possibly posses no title deeds for all its property. It is a body corporate which was brought into being by Act 4 of 1884, and its proprietary rights flow from statutory declarations and not title deeds. On this ground therefore I would regard the slight presumption in its favor as strengthened in some degree. But obviously it still falls far short of proof.

6. The chief support for the defence consists of three Exhibits. No I dated 24th March 1895 shows that the compound was handed over to the judgment creditor in the case by a Civil Court Amin in execution of a decree. In it the Western boundary of the compound is given as the public road. Ex II dated 23rd May

1876

1876 and III dated 9th August 1885 are subsequent conveyances relating to the same land and giving the same boundaries. These Exhibits seem to show that this land was treated as private property so far back as 1859 and this view was acted upon in 1876 and 1885. But it is urged by the prosecution that neither the Municipality nor Government was a party to the decree in 59. Even in that case adverse possession has to be admitted for 36 years. Undoubtedly this is much stronger proof than the Municipality has offered. The appellant has also made an allegation that an old building stood where the new wall has now been erected and this allegation is supported by one of the Bench Magistrates who inspected the spot.

7. I have hitherto treated the question fro a purely civil point of view. In its criminal aspect, I have no hesitation in holding that the conviction of the appellant is quite unsustainable. In the judgment of the majori of the Bench, they speak of two counts, and say that the appellant practically pleade guilty to one of them. But the sections quote are 167 and 263 of the District Municipali Act. I find however that the act provides a penalty only in sec: 263 and further bo

section

sections relate only to public streets. The conviction and sentence passed by the Bench are therefore set aside. The fine if paid should be refunded.

8. I observe in this case that of the 5 Magistrates who constituted the Bench, two are Municipal Councillors. There is nothing to show whether they actually took part in the Municipal resolution to prosecute the appellant. If they did it was improper that they should have taken part in the trial of this case. The Chairman will draw the attention of the Honorary Magistrates to G. O. No. 606 dated 11th May 1894 on the subject. In future, the fact whether the Municipal Members of the Bench took part in the preliminary proceedings before the Municipality should invariably be placed on record in Municipal cases

(Signed) M. Ravi Varma,
1st Class Sub Divl. Magistrate.
13-12-95

True Copy

T. M. Rama R
Chairman, M. C.

Register of Summary trials held before the III Class Bench Magistrates of Mangalore Town in A.D. 1895

Serial Number	Date of the commission of the offence.	Date of the report or complaint	Name of the complainant (if any)	Name, parentage and residence of the accused.	The offence complained of and the offence (if any) proved	The plea of the accused and his Examination (if any)	Finding, and, in the case of a conviction a brief statement of the reasons therefor.	Sentence or other final order.	Date on which the proceedings terminated.
a	b	c	d	e	f	g	h	i	j
Present 1. B. Shivaya. 2. Rama Rau, 3. Brito, 4. Narna Shetty, 5. Abboo Bakar.									
184	August 15/94	February 4/95	Municipality	1. Christian Pacheco son of Lucas Pacheco of Mangalore Town	Encroachment on Municipal Road by building a wall without license Section 167 & 263 of Municipal Act.	Pleads not guilty		Fined at 4 annas for each offences	7-10-95. Fine paid

1. This is a prosecution instituted by the Mangalore Municipality against the Defendant for raising a compound wall without obtaining license as required by Section 167 of the Municipal Act and for erecting the said wall 4½ feet further to the west of the site of the western wall of an old tumbled down house which latter wall, the prosecution say, was the western limit of the compound in question. This wall will hereafter be referred to as an "old wall". The strip of public land thus appropriated by Defendants encroaching upon is alleged to be 4½ feet broad from East to west, and 24 feet long from north to south.

2. The Defendant virtually pleads guilty to the first count but pleads that he was not aware that a mere "wall" comes under the definition of "building" as defined in the municipal Act. The Court took this circumstance into consideration when fining the accused for this offence.

As to the second count the accused states that the western boundary of his compound extends as far as the public road and so all land between it and the old house wall forms part and parcel of the compound and so there is no encroachment. He does not dispute the measurement given by the Municipal Inspector, examined as prosecution witness of the strip of land existing between the old and new wall. At the local enquiry the accused admitted to us that the spot pointed out by the Municipal Inspector was the one where the old wall stood and its traces are still visible.

3. The simple question to be determined is whether the strip of ground between the public road as it now stands and the old wall is public land or not.

4. The accused has filed three Exhibits and examined three witnesses. The last witness was simply to produce a document.

By Exhibit I dated 24th March 1859 the Court Amin delivered the possession of the compound in question to the execution petitioner Venkatramanaya in that case.

Exhibit II dated 23rd May 1876 is the Vaida Genichit executed by one Liandro Noronha for the said compound to Subba Rau.

Exhibit III dated 9th August 1885 is the transfer of Liandro Noronha's right in the said land to Elizabeth Pacheco the deceased sister of the accused.

5. In Exhibit I the western boundary of the compound delivered is described as the public road and it is upon this fact the accused mainly rests his contention. The boundaries given in Exhibit I must have been copied in Exhibits II & III and therefore

the question is how far Exhibit I helps the contention of the accused. It need hardly be said that the suit in connection with which the execution was taken and property delivered was between private parties and neither the Government nor the Municipality was privy to it. The suit was for the recovery of the compound in question and therefore the boundaries must have been simply copied in the order of the Court to the Amin to deliver the property and the Amin in his turn copied them in Exhibit I. Even supposing the boundaries are correct and all land comprising within those boundaries was actually made over to the execution petitioner the question is whether the then public road did not extend up to the old wall.

6. The present road seems to have been cut deep leaving high ground on either side both to level it and to reduce its width and it is not shown this was done previous to 1859.

7. A look of the place convinces me that the old road before the cutting was regarded to be from the wall skirting the premises of Messrs Arbuthnot & Co up to the old wall of the compound in question. There stands in a line with the new wall a banyan tree which again is in a line with several other banyan trees admittedly avenue. The Inspector swears and the Defendant admits that in line with this banyan tree there stood another on its
southern

Southern side. Elizabeth Pacheco applied to the Municipality to fell both these trees as their roots spreading far into her compound were prejudicial to the growth of vegetation in the compound. This petition dated 16th October 1885 has been produced and marked Exhibit A. From this it is clear that the ownership of the trees was acknowledged to be in the Municipality and not a word was said that the ground on which they stood was private ground. To my mind when such bitter complaint was made of the havoc the banyan trees were making of the ground on which they stood formed portion of her leased property or even if it was regarded as such, great prominence would have been given to this fact in the petition that destructive banyan trees were planted and allowed to remain by Government on private ground as is now contended.

8. The Inspector further swears that the Municipality felled one of the trees mentioned in A and lopped the branches of the other.

9. The Defence 1st witness who is the guardia of the minor son of the late Mr Subba Rao states that all the strip of land from the road
to

to the compound wall or garden, from the one in dispute up to the road which leads to the burial ground and lies to the south of Mr. Gundu Row's Bangalow is private property and portion of the same warg. If so it strikes me as most extraordinary that though in some places the ground is rather extensive and valuable it was never walled by the owners. His recollection as to where the old wall stood and other particulars, are so hazy that they are of no use to the accused.

10. The 2d witness' testimony is hardly credible. He has himself encroached upon public ground towards the north of the ground in dispute, and is interested in showing that his encroached land along with this, is private property.

11. The present wall is in a line with the wall raised by the accused in its southern side 3 years ago. The Inspector says that it is also an encroachment and was reported by him as such to the Municipality when it was made. No action seems to have been taken by the Municipality about this encroachment as also about encroachments both towards the north and south made since 5 or 6 years ago. The Inspector also says he reported about these encroachments too.

12. I think that if anything led the accused to commit this offence, it is the most regretful negligence of the Municipality to take prompt action in respect of encroachments on either side of the present disputed ground alleged to have been made and duly reported to the Municipality several years ago.

13. I regret that I have to dissent from the opinion of the president and Mr. Rama Rao, who hold that this is a fit case where the parties should be referred to a civil court to settle the question of ownership. I admit there is much force in this especially as the Municipality has allowed encroachments for years without bringing the parties to justice, but for reasons stated above in my mind, it is clear that the ground in dispute is public ground and therefore find the accused guilty of the offences of encroachment, and raising the wall without license punishable under sections 167 & 263 of the Municipal Act and considering the circumstances of the case, order him to pay a nominal fine of annas four for each offence.

The Defendant is also ordered to remov the wall in question. Messrs Abboo Bakar K.
Bahadur &

Narna Shetti concur in my conclusion.

14. The Chairman and Mr. Rama Rao concur in finding the accused guilty in respect of his raising the compound wall without obtaining previous permission from the Municipality.

(signed)
B. Shivayya
Chairman

True copy

T. M. Rama R
Chairman,
Municipal Council,
Mangalore.

Form No. 70.–50–4. 4. 92.

№ 503.

MUNICIPAL OFFICE,
MANGALORE, 27th July, 1896.

Local & Municipal Dept.
CURRENT No.

From,
M. R. Ry. T. M. Rama Rao Avargal,
Chairman, Municipal Council,
MANGALORE.

To,
The Chief Secretary to Government,
Local and Municipal Department,
MADRAS.
(thro' the Collector and District Magistrate of South Canara).

Sir,

As desired by the Municipal Council, I have the honour to submit the following matter, for the orders of Government.

2. One C. Pacheco was prosecuted by the Municipal Council before the Town Bench of Magistrates under Sections 167 and 263 of the Madras District Municipalities Act, 1884, for raising a wall on the margin of a public street, and thereby encroaching upon municipal land, without obtaining license or permission from the Municipal Council. The accused was convicted and sentenced by the Bench Magistrates to pay a fine

of 8 annas—vide their Judgment, Enclosure I.

3. The accused preferred an appeal to the Head-Quarter Deputy Magistrate, and he reversed the finding and sentence of the Lower Court on the ground that the land encroached upon did not form a part of the public street—vide his Judgment, Enclosure II.

4. As this decision was found to be erroneous, the matter was, at my request, (vide my letter Enclosure III), referred to the High Court under Section 438 of the Criminal Procedure Code, by the District Magistrate—vide his Reference, Enclosure IV. But that Court has declined to interfere in the matter on the District Magistrate's motion, and remarked that the Municipal Council should move Government, so that an application may be made by the Public Prosecutor on its

its behalf, for revision of the order of acquittal—vide the decision, Enclosure V.

5. The facts of the case are briefly these. On the margin of a public street, known as "Mangaladevi Road," there is a strip of land between the main road and the compound walls of private property. This strip is marked blue in the sketch herewith submitted, and the encroachment made by the accused is marked B.

Avenue trees were, at one time, standing on the land, and one of the trees standing outside the compound wall (of an old building since dimolished), belonging to the accused, had to be removed by the Municipality as its roots were found to be spreading into his garden. After the removal of the tree, the accused knocked down his old compound wall and raised a new one, enclosing 4½ feet of the public land, without obtaining permission from the Municipal Council.

The accused pleaded that the western boundary of his garden extended as far as the public road, and hence all land between the main road and his old wall, was his own property. But the Municipality has proved the existence, V on this land, of an avenue banyan tree before the new wall was raised, as well as its removal at the instance of the accused. These facts have not been disputed by the defence. But it has been urged that as the new wall only comes up to the line of the avenue trees standing on the remaining portion of the strip of land, and as the documents produced by the defence give the public road as the western boundary of the Compound, the land encroached upon must be treated as private property. This view has been upheld by the Deputy Magistrate in appeal.

The decision recorded by the majority of the Bench of Magistrates and the District Magistrate's reference to the High Court – Enclosures I and IV, fully deal with the evidence adduced

in

in support of the prosecution, and I beg to request that, on a perusal of them as well as of the other records herewith submitted, Government may be pleased to instruct the Public Prosecutor to make an application to the High Court for a revision of the order of the acquittal.

riod of limitation
cribed for an appeal
nst a judgment of
quittal is six months
Art 157 of the Limitation
The order of the Dy
istrate is dated 13th
ember 1895 & an appl
posed by the Muni
ncil will probably
me barred – cf. 80
63 Jud (?) 15.1.94.

6. I beg leave to submit that if no action be taken to have the acquittal reversed, similar margins of public roads in the town will be treated as private property and encroached upon by the owners of the adjoining properties. As a matter of fact, on the strength of the appellate decision under reference, the owners of properties in the locality have claimed the public land which is in a line with the encroachment in question as well as the avenue trees standing thereon to be their property.

I have the honour to be,
Sir,
Your most obedient Servant

T. M. Ramakr
Chairman

Q.

MUNICIPAL (1896) DEPARTMENT.

From,

The Chairman,
Municipal Council,
MANGALORE.

To,

The Chief Secretary to Government,
Local and Municipal Department,
MADRAS.
(thro' the Collector & Dt. Magistrate of South Canara).

Dated 27th }
Despatched } July, 1896
Received 12 AUG }

ENCLOSURES:— Six.

No. 503.

SUBJECT.

Municipal Prosecution.—

Requesting that Government may be pleased to instruct the Public Prosecutor to move the High Court to set aside the order of acquittal in a certain —

The Sketch will follow:—

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GOVERNMENT.

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