

1900.

VINAYAK
v.
GOVIND.

though technically he succeeded as reversioner in his own right just as in the other case the son succeeded in the right of his father and not through his mother. The ruling in *Sia Dasi v. Gur Sahai*⁽¹⁾ shows how the doctrine of estoppel works in such matter. In this view of the law I am inclined to hold that the alienation of the two lands sold by Radhabai, being assented to by the chief reversionary heir, bound the plaintiff.

There is no such equity to protect the appellants in respect of the other three lands. I would, therefore, confirm the decree in regard to them and dismiss plaintiff's claim in regard to the lands Nos. 495 and 496 with costs in proportion throughout.

Decree varied.

(1) (1880) 3 All., 362.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Batty.

1900.

August 6.

MUNICIPALITY OF PAROLĀ (ORIGINAL DEFENDANT), APPELLANT, v.
LAKSHMANDĀS SUPADUBHAI AND ANOTHER (ORIGINAL PLAINTIFFS),
RESPONDENTS.*

*Municipality—District Municipal Act (Bom. Act II of 1884), Sec. 48—
Suit against Municipality for declaration and injunction—Notice of action.*

The plaintiffs sued the Municipality of Parola to obtain a declaration that a certain building erected by them had been built in accordance with, and not in contravention of, orders issued by the Municipality, and further, to obtain an injunction restraining the Municipality from pulling it down. The Municipality contended (*inter alia*) that the suit was not maintainable, as no notice of the suit had been given as required by section 48 of the District Municipal Act (Bom. Act II of 1884).

Held, that notice was not made an indispensable preliminary to such a suit by section 48 of the Act.

SECOND appeal from the decision of Ráo Bahádur Vaman M. Bodas, First Class Subordinate Judge of Dhulia with appellate powers, confirming the decree of Ráo Sáheb G. V. Patvardhan, Subordinate Judge of Amalner in the Khándesh District.

* Second Appeal, No. 38 of 1900.

The plaintiffs sued to obtain a declaration that they had built a certain privy according to, and not in contravention of, the orders of the defendant Municipality and an injunction restraining the defendant from pulling it down. They alleged that they had built on a piece of ground lying to the east of their house and measuring ten feet east to west and eight feet north to south in accordance with the permission of the Municipality granted on the 1st and 10th May, 1897. The Municipality, however, on the 13th December, 1897, issued a notice to the plaintiffs calling upon them to pull down the privy on the ground of its being built contrary to their orders.

The Subordinate Judge found that the plaintiffs had built according to, and not in contravention of, the orders of the defendant, and he granted the injunction.

The Municipality appealed, urging for the first time that the suit was not maintainable, inasmuch as no notice under section 48⁽¹⁾ of the Bombay District Municipal Act (Bom. Act II of 1884) had been given. The Judge confirmed the decree, holding that no notice was necessary under that section. He held also that the plaintiff had built in accordance with the permission of the Municipality.

The defendant preferred a second appeal.

Daji A. Khare, for the appellant (defendant):—The plaintiff should have given notice under section 48. The suits in which it has been held that section 48 does not apply are suits in the nature of ejectment suits, or which relate to an act done by the officers of a Municipality beyond its powers—*Kashinath*

(1) Section 48 of the District Municipal Act (Bom. Act II of 1884):—

48. No action shall be commenced against any municipality or against any officer or servant of a municipality, or any person acting under the orders of a municipality, for anything done, or purporting to have been done, in pursuance of this Act, or of the principal Act, without giving to such municipality, officer, servant, or person one month's previous notice in writing of the intended action and of the cause thereof, nor after three months from the date of the act complained of;

and in the case of any such action for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered and shall pay all costs incurred by the defendant after such tender.

1900.

MUNICIPALITY OF
PAROLA
v.
LAKSHMAN-
DAS.

1900.
MUNICIPALITY OF
PAROLA
v.
LAKSHMAN-
DAS.

Keshav Joshi v. Gangabai⁽¹⁾; *Manohar Ganesh v. Dákor Municipality*⁽²⁾; *Shidmallappa v. Gokák Municipality*⁽³⁾; *Harilal v. Himat*⁽⁴⁾. The ruling in *Ranchod v. The Municipality of Dákor*⁽⁵⁾ decides that the object of section 86 of the Municipal Act (Bom. Act VI of 1873) was to give the Municipality an opportunity of tendering sufficient amends for an illegal act done *bona fide* in the discharge of public duties, before being harassed with an action. That ruling further lays down that section 86 was not confined to an action for damages only. We submit that this principle should be adopted in construing section 48 of the present Act. The plans show that the plaintiffs have exceeded the area for which they got permission.

Mahadeo V. Bhat, for the respondents (plaintiffs):—The object of section 48 of the District Municipal Act is to shorten the time within which pecuniary claims for compensation for wrongful acts done by the Municipality in carrying out the Act can be brought, and to give the Municipality timely notice of such actions to enable them to consider their position and tender amends. We, therefore, submit that the section is not applicable to our present claim in which we seek an injunction and a declaration that the privy was built in accordance with the permission granted by the Municipality. It was not necessary for us to give to the defendant a notice of action. The considerations which induced the Court to hold that section 48 is not applicable to suits in ejectment based on title hold good in suits for a declaration and injunction. Both the lower Courts have found as a fact that the plaintiffs have built in accordance with the permission given by the defendants.

BATTY, J.:—In this case the plaintiffs sued the Municipality of Parola to obtain a declaration that a privy built by the plaintiffs had been built in accordance with, and not in contravention of, orders issued by the said Municipality, and further to obtain an injunction restraining the defendant, the Municipality, from pulling down the said privy.

(1) (1896) 22 Bom., 283.

(3) (1897) 22 Bom., 605.

(2) (1896) 22 Bom., 289.

(4) (1897) 22 Bom., 636.

(5) (1884) 8 Bom., 421.

The Municipality, in the Court of first instance, replied that the privy built was not in accordance with the orders issued, and the issue thus raised having been decided against the Municipality in that Court, objected in their memorandum of appeal to the lower Appellate Court that, under section 48 of the Bombay Act II of 1884, the suit was not maintainable, as no notice of the suit had been given as required by that section, and further contended that the permission given by them for the building had been misconstrued in the lower Court; and that as the building was not in accordance with that permission, it was liable, under the provisions of the Act, to be demolished on the requisition of the Municipality.

The lower Appellate Court confirmed the decree of the lower Court, finding on the facts that the building was not erected in contravention of the orders issued, and also that under the ruling in *Shidmallappa v. Gokák Municipality*⁽¹⁾ no notice was required in such a case by section 48 of the Amending Act of 1884.

It has been strenuously contended for the appellant-Municipality, that the rulings in *Kashinath Keshav Joshi v. Gangabai*⁽²⁾, in *Manohar Ganesh Tambekar v. Dákor Municipality*⁽³⁾, in *Shidmallappa Nurandappa v. Gokák Municipality*⁽⁴⁾, and in *Harilal Ranchodlal v. Himat Manekchand*⁽⁵⁾ go no further than to show that section 48 of Bombay Act II of 1884 is inapplicable only in cases where the action brought is in the nature of a suit for ejectment, or is in respect of an act which does not purport to have been done in pursuance of the statutory powers conferred on the Municipality.

The wording of section 240 of Bombay Act II of 1865, on which the ruling in *Sorabji Nassarvanji v. The Justices of the Peace for the City of Bombay*⁽⁶⁾ was given, clearly contemplated cases for monetary compensation for a wrongful act only. And in one of the cases therein cited—*Price v. Khelat*⁽⁷⁾—it was

(1) (1897) 22 Bom., 605.

(2) (1896) 22 Bom., 283.

(4) (1897) 22 Bom., 635.

(3) (1896) 22 Bom., 289.

(5) (1897) 22 Bom., 636.

(6) (1875) 12 Bom. H. C. R., O. C. J., 25. *Vilés* pp. 254, 255.

(7) (1870) 5 Ben. L. R., Appx., 50; 13 Cal. W. R., 461.

1900.

MUNICIPALITY OF
PAROLA
v.
LAKSHMAN-
DAS.

observed on an analogous section, that probably it was intended to apply to suits for damages only. In another case—*Poorno Chunder Roy v. H. Balfour*⁽¹⁾—also cited in *Soralji Nassarwanji v. The Justices of the Peace for the City of Bombay*, Phear, J., thought “it reasonable to suppose that the section (87 of Bengal Act III of 1864) was directed solely to the cases of suits brought against the Commissioners for damages consequential on the act done by them.” The same view was taken of this section in the case of *Chunder Sikhur v. Obhoy Churn*⁽²⁾, where it was held that the section was “applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act done by the Commissioners or their officers, in the exercise, or the honestly supposed exercise, of their statutory powers;” and it was added that “the notice is meant to give the defendant an opportunity of making some pecuniary amends for the wrong, without incurring the costs of litigation.” To a similar effect is the ruling in *Municipal Committee of Moradabad v. Chatvi Singh*⁽³⁾.

In the case of *Joharmal v. The Municipality of Ahmednagar*⁽⁴⁾ section 86 of Bombay Act VI of 1873, repealed and replaced by section 48 of Bombay Act II of 1884, was held applicable only to suits for damages; and the case of *Soralji Nassarwanji v. The Justices of the Peace for the City of Bombay* was considered applicable as dealing with an enactment (section 240 of Bombay Act II of 1865) analogous to section 86 of Bombay Act VI of 1873. In the case of *Shahabzadee Shahunshah Begum v. Fergusson*⁽⁵⁾ a similar view was taken of section 424 of the Civil Procedure Code as a section entitling public officers to notice when sued for damages for some wrong inadvertently committed in the discharge of official duties, the object being to give the officers or public body sued an opportunity of setting matters right, making amends, restoring what has been taken, or paying for the damages which have been done. The decision in the case of *Ranchhod Varajbhai v. Municipality of Dákor*⁽⁶⁾ dealing with section 86 of Bombay Act VI of 1873, while accept-

(1) (1868) Cal. 9 W. R., 535.

(2) (1880) 6 Cal., 8.

(3) (1873) 1 All., 269.

(4) (1878) 6 Bom., 580.

(5) (1881) 7 Cal., 499.

(6) (1884) 8 Bom., 421.

ing the view that the object of the provision was to give an opportunity of tendering sufficient amends, declared that the section was not confined to an action of damages, but was applicable to *every* claim of a *pecuniary* character arising out of the acts of municipal bodies or officers, who in the *bonâ fide* discharge of their public duties may have committed illegalities not justified by their powers. This somewhat wider construction of the section, now repealed, still required that, whether the action sounded in damages or not, it must, in order to render notice necessary, be for some *act done* in exercise of powers conferred by the enactment. So also in *Mayandi v. McQuhae*⁽¹⁾ interpreting section 168 of the Madras Town Improvement Act, 1871, which required notice "when a suit is brought against the Commissioners * * * for anything done under the Act", it was held that no notice was requisite in a suit to recover the balance due under a *contract*, for a breach of contract was not to be regarded as a thing *done under the Act*. This decision it may be useful to compare with that in *Selmes v. Judge*⁽²⁾ where the question arose on a section similarly worded, and it was held that a suit to recover back money paid on an assessment of a highway rate made under colour of the Acts 5 and 6, William IV, cap. 50, required preliminary notice, the collection, though illegal, being made in supposed pursuance of the powers thereby conferred.

The case of *Midland Railway Company v. Local Board of Wilkington*⁽³⁾ seems to go somewhat further in this direction: for there the notice was held necessary in a suit to recover back, as money had and received, sums which had been paid to the Local Board as charges for the repair by them of a road for which the plaintiffs had mistakenly been regarded as responsible. Lindley, L. J., observed that it had been argued that no physical power had been put in force, but that this was a vicious argument, and that he could not follow it. Probably, however, the thing done under the Act in that case, which was regarded as giving the cause of action to the plaintiffs, was not the voluntary payment

(1) (1878) 2 Mad., 124.

(2) (1871) L. R., 6 Q. B., 724.

(3) (1883) 11 Q. B. D., 788.

1900.

MUNICIPALITY OF
PAROLA
v.
LAKSHMAN-
DAS.

1900.

MUNICIPALITY OF
PAROLA
v.
LAKSHMAN-
DAS.

by them of the money, but the action of the Board in undertaking the repair of the road in question at the plaintiffs' charges.

In *Nagusha v. The Municipality of Sholapur*⁽¹⁾ it was held that, under section 48 of Bombay Act II of 1884 (the section now in question), the mere circumstance that an act done under the Act had rendered the suit necessary, would suffice to bring into operation the provisions of that section requiring notice before suit. But in that suit though one of the acts called in question may have been done under the Act, the suit was not strictly speaking an action for an act done under the Act, but on account of the continuance in possession, and assertion of title, by the Municipality, which it was impossible to regard as in pursuance of the statutory powers. The decision in the last mentioned case, therefore, having been questioned in *Kashinath Keshav Joshi v. Gangabai*⁽²⁾ was definitely overruled in the Full Bench case of *Manohar Ganesh v. Dákor Municipality*⁽³⁾, in which, though it was recognised that section 48 might apply to suits other than suits for damages, it was held that it could not apply to actions of ejectment based on title. Indeed in that case Hosking, J., pointed out that the only powers under the Act, by virtue of which a Municipality could take and retain possession of land, were coupled with special provision for compensation payable. The result of this case suggests that it is not sufficient that an act done under the statutory powers should have given occasion to the plaintiff to seek redress, but that it was further necessary that the redress sought, *i. e.*, the action itself, should be for the act so done and for nothing further. The case of *Shidmallappa v. Gokák Municipality*⁽⁴⁾ carries the principle a step further and rules that a suit for damages for the demolition of a wall by the Municipality in exercise of its statutory powers would require notice under section 48 of Bombay Act II of 1884, but that to recover possession of the site and to obtain an injunction against interference therewith, the plaintiff could sue without notice. In the judgment, the case of *Flower v. The Local Board of Low Leyton*⁽⁵⁾ was cited as showing that an injunction is

(1) (1892) 18 Bom., 19.

(3) (1896) 22 Bom., 289.

(2) (1896) 22 Bom., 283.

(4) (1897) 22 Bom., 605.

(5) (1877) 5 Ch. D., 347.

merely ancillary to the ejectment suit in respect of which notice was unnecessary.

In a still later case—*Harilal Ranchoddal v. Himat*⁽¹⁾—the suit was for an injunction without any prayer for ejectment, and though the Court observed that the suit was not for anything done in pursuance of the Act, it was also further stated that the sections conversant with this subject have always been held not to apply to actions for an injunction. In support of this position, in addition to cases above referred to, the Court cited *President of the Taluk Board, Sivaganga v. Narayanan*⁽²⁾. In that last mentioned case the defendant Board had called on the plaintiff to remove a wall alleged to be an obstruction, giving notice that on his default the Board would demolish it. The section referred to (section 156 of the Local Boards Act, Madras, 1884), was in its terms similar to section 48 of Bombay Act II of 1884, and was held not to require notice in such a case. In the case of *Flower v. Local Board of Low Leyton*⁽³⁾, above mentioned, the principle is more unmistakeably stated. There Jessel, M. R., observed that the real object of the action was to prevent the continuance of an intolerable nuisance which plaintiff said he had suffered through the acts of the defendants—acts which apparently depended on the exercise of their statutory powers. The section (38 and 39, Vict., cap. 55, sec. 264), requiring notice for anything done or intended to be done or omitted to be done under the provisions of this Act, it was held, was intended to apply to an action at law for damages, and its object was to give an opportunity to a local authority to make payment or tender of compensation for the damage sustained, but could not be intended to apply to a case where the local authority was improperly pulling down a house, for instance, or stopping up a sewer; and if that were so, it was added, it would amount to a license to every Local Board to do what injury they pleased while the month's notice was running. This ruling has now been superseded by 56 and 57, Vict., cap. 61, sec. 1, which, instead of requiring notice, provides (in respect of actions for damages) in clause (d), that if in the opinion of the Court the plaintiff has not given the

(1) (1897) 22 Bom., 636.

(2) (1892) 16 Mad., 317.

(1877) 5 Ch. D., 317.

1900.

MUNICIPALITY OF
PAROLAc.
LAKSHMAN-
DAS.

defendant a sufficient opportunity of tendering amends before the commencement of the proceeding, the Court may award to the defendant costs.

The result of the cases above cited appears to indicate, that for the purposes of section 48 what the Court has to look to is the real object of the suit, and the section requires notice only when the suit is for an act already done or purporting to have been already done, under the powers conferred. In such case only can it be necessary for the plaintiff to give an opportunity to make amends or compensation, and in such cases, the delay necessitated by notice is comparatively immaterial. But when the suit is not for an act already done, but to prevent an act from being irremediably, irrevocably done, neither can amends be claimable, nor can delay be obligatory. It is impossible to hold that a mere notice, a requisition or a threat to do a thing in the future, even though it be issued or made under the powers, is an act already done, or purporting to have been done; and there is nothing else alleged in this case that can be alleged to have been done by the Municipality. A notice, therefore, does not appear to have been made an indispensable preliminary to such a suit, by section 48 of the Act.

The question whether the erection now in dispute was constructed in contravention of the conditions annexed by the Municipality to their permission, has been decided by both of the lower Courts in the negative. If that decision can be regarded as one solely on the facts, it could not now be impugned on second appeal. If, however, it can be regarded as a question of law, it would suffice to observe that whether the Municipality purported to act under section 33 or under clause 2 of section 39 of Bombay Act VI of 1873, their orders and directions can only be construed so as to operate with a definite and legal effect. It has been found by the lower Courts that the orders passed could not so operate, for while on the one hand they authorized the construction of the building in question on a space measuring 10 feet by 8 feet from given boundaries, they directed, on the other hand, that it should not extend beyond a certain limit which according to their contention is within the measured space to which their permission in terms extended. Their orders were, therefore,

according to their own contention and the facts found, inconsistent and incapable of performance; and it is impossible for them to contend that the building which has been erected in compliance with the permission accorded, is in contravention thereof because it did not also conform to a direction utterly irreconcilable with that permission. Neither the law nor any direction purporting to be made under the law can compel any person to do what is impossible; and a permission which involves a condition absolutely inconsistent with its own terms could not come within the category of legal orders. The lower Courts, however, have concurred in finding that the permission given is, in reference to the facts established, susceptible of but one interpretation, and that the building erected by the plaintiff is not in contravention of the permission so interpreted. On these grounds the appeal must be rejected and the decrees of the lower Courts must be confirmed with costs.

FULTON, J. :—I concur.

Decrees confirmed.

FULL BENCH.

CRIMINAL REVISION.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Ranade, Mr. Justice Fulton, Mr. Justice Crowe and Mr. Justice Batty.

CHHOTALAL LALLUBHAI (ORIGINAL COMPLAINANT), APPLICANT, *v.*
NATHABHAI BECHAR AND ANOTHER (ORIGINAL ACCUSED), OPPONENTS.*

Criminal Procedure Code (Act V of 1898), Sec. 4 (h), Chap. XV, Part B, Secs. 191, 195, 196, 198, 199, and Sec. 345—Penal Code (Act XLV of 1860), Sec. 499, Explanation I—Defamation of wife—Complaint by husband—Aggrieved party.

Held by the Full Bench (Ranade, J., dissenting) that under the provisions of the Criminal Procedure Code (Act V of 1898) a husband is entitled to be complainant where the alleged offence is defamation, imputing unchastity to his wife.

* Criminal Application for Revision, No. 70 of 1900.

1900.

MUNICIPALITY OF PAROLA
v.
LAKSHMAN-DAS.

1900.
August 7.