

APPELLATE CIVIL.

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

BAI FATMA (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE RANDE
MUNICIPALITY (ORIGINAL DEFENDANT), RESPONDENT.*

1914.

March 4.

Bombay District Municipal Act (Bom. Act III of 1901), sections 92, 96†
—Erection of a new building—Application to Municipality for permission—
Condition requiring the owner to keep certain space vacant for widening street—
Condition not valid.

The plaintiff applied to the Municipality for permission to rebuild her house. The Municipality granted the permission on the condition, among others, that

* Second Appeal No. 383 of 1913.

† Sections 92 and 96 of the Bombay District Municipal Act (Bom. Act III of 1901) are as follows :—

92. (1) If any part of a building projects beyond the regular line of a public street either as existing or as determined upon for the future, or beyond the front of the building on either side thereof, the Municipality may—

- (a) * * * *
(b) * * * *

require by written notice either that the part, or some portion of the part, projecting beyond the said regular line or beyond the said front of the adjoining building on either side thereof, shall be removed, or that such building when being rebuilt shall be set-back to or towards the said regular line or the front of such building. And the portion of the land added to the street by such setting back or removal shall thenceforth be deemed part of the public street and be vested in the Municipality.

- (2) * * * *

(3) Compensation, the amount of which shall in case of dispute be ascertained and determined in the manner provided in section 160, shall be paid by the Municipality to the owner of any land added to a street under sub-section (1) or acquired under sub-section (2), for the value of the said land, and to the owner of any building for any loss, damage or expense incurred by such owner in consequence of any action taken by the Municipality under either of the said sub-sections * * * .

96. (1) Before beginning to erect any building, or to alter externally or add to any existing building, or to reconstruct any projecting portion of a building in respect of which the Municipality is empowered by section 92 to enforce a

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she should in rebuilding the house keep a specified space vacant and unbuilt upon for the improvement of the street by widening it. The plaintiff disregarded the condition and built upon the specified space. Thereupon the Municipality having threatened the demolition of the house, the plaintiff brought the present suit for an injunction restraining the Municipality from doing so.

removal or set-back, the person intending so to build, alter, or add shall give to the Municipality notice thereof in writing, and shall furnish to them, at the same time, if required by a by-law or by a special order to do so,

(a) the sanad, if any,

(b) 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, ventilation and materials of the proposed building, and the intended situation and construction of the drains, sewers, privies, water-closets and cesspools, if any, to be used in connection therewith, and the location of the building with reference to any existing or projected streets.

(2) The Municipality may issue such orders not inconsistent with this Act as they think proper with reference to the work proposed in such notice and may either give permission to erect or alter or add to the building according to the plan and information furnished, or may impose in writing such conditions as to level, drainage, sanitation, materials, or to the dimensions and cubical contents of rooms, doors, windows and apertures for ventilation, or with reference to the location of the building in relation to any street existing or projected, as they think proper, or may direct that the work shall not be proceeded with unless and until all questions connected with the respective location of the building and any such street have been decided to their satisfaction.

(3)

(4)

(5) Whoever begins or makes any building or alteration or addition without giving the notice required by sub-section (1), or without furnishing the documents or affording the information above prescribed, or except as provided in sub-section (4), without awaiting, or in any manner contrary to, such legal orders of the Municipality as may be issued under this section, or in any other respect contrary to the provisions of this Act or of any by-law in force thereunder, shall be punished with fine which may extend to one thousand rupees; and the Municipality may

(a) direct that the building, alteration, or addition be stopped, and

(b) by written notice, require such building, alteration or addition to be altered or demolished, as they may deem necessary.

Held, that under section 96 of the Bombay District Municipal Act (Bom. Act III of 1901) the Municipality was empowered to prescribe the location of the building in relation 'to any street existing or projected as they think proper,' whereas in the present case they had prescribed the location of the building in relation, not to the existing street, but to a street which might come into existence in the future. The object of the Municipality in imposing the condition was not for the purposes of sanitation or ventilation but to get a set-back which could not be obtained under section 92 of the Act.

If the condition of the permit were complied with, the plaintiff would have to give up or keep vacant or unproductive a considerable portion of her land and the Municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so, which would be contrary to the provisions of section 92 which contemplates that when a set-back is determined upon compensation should be paid to the owner and that the plaintiff was entitled to an injunction as prayed.

Queen-Empress v. Veeramal⁽¹⁾, referred to.

SECOND appeal against the decision of M. S. Advani, District Judge of Surat, confirming the decree of Naginal V. Desai, Joint Subordinate Judge.

The plaintiff sued for an injunction restraining the defendant Municipality from carrying out the threat held out by the latter to demolish the plaintiff's building described in the plaint which alleged that the plaintiff had, on the 25th April 1911, applied for permission of the defendant Municipality to rebuild her house, that the plaintiff having received no reply to that application from the defendant within one month, she commenced the building work, that about a month after the work had been in progress, that is, on the 5th June 1911, a permission was sent to the plaintiff which required her to set-back a portion of the house but as the building work had already advanced, the plaintiff was not able to comply with the said requisition and that the defendant having served the plaintiff with a notice, dated the 12th September 1911, of the demolition of the house, the

⁽¹⁾ (1892) 16 Mad. 230.

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plaintiff brought the present suit on the 27th November 1911 praying for an injunction.

The defendant Municipality answered that on the 23rd May 1911 a reply to the plaintiff's application was tendered to the plaintiff's son who was her agent, but he having refused to take it on that day and even on the next day, it was arranged to affix the reply to the house when the plaintiff's son accepted it on the 5th June 1911, that as the plaintiff began the building work before she obtained the defendant's permission, her action was in contravention of the provisions of the District Municipal Act and the defendant's order and that the defendant had, therefore, a right to demolish the plaintiff's house.

The Subordinate Judge found that the reply to the plaintiff's application dated the 25th April was offered to plaintiff's son on or before the 25th May 1911 as alleged by the defendant and that it was "served within a month" of the application, that the defendant had the power to pass the order as it had done, that the injunction asked for by the plaintiff could not be granted and that the plaintiff had commenced the proposed building without awaiting the orders of the defendant upon the application for permission to build which was made by her on the 25th April 1911. He, therefore, dismissed the suit observing :—

It was contended that defendant had no power to order plaintiff to leave open a *space* as was done in Exhibit 38 since there was no regular line of a public street determined upon in that locality. Defendant admits that the order is not passed under section 92 (see *purshis* Exhibit 15) but is one passed under section 96, sub-section (2), and on a consideration of the words now in that sub-section (*viz.*, or with reference to the location of the building in relation to any street existing), I think the order given was legal and not inconsistent with Act III of 1901. The order to plaintiff is to so locate her building as to leave a certain open space to the south of it and this I think the Municipality has power to do. Supposing for purposes of sanitation of the town or the locality a Municipality thinks it necessary to ask an owner who

wants to rebuild his whole house to build it, but to so build it as to leave an open space say a small compound in front or at the back has it or has it not got the power to ask him to do so? I think the words quoted by me give the power in question: for the owner, in that case, would be asked to locate his building, *i. e.*, the main structure, in a particular position. The open space left out under such a direction would continue no doubt to be the property of the owner and he may use it in any way he likes so long as he does not *build* upon it.

The result then is that defendant's notice to plaintiff (Exhibit 48) is quite according to the authority vested in it by law and I therefore refuse to grant any injunction as prayed for.

On appeal by the plaintiff, the District Judge confirmed the decree. He remarked:—

It now remains only to consider whether the action of the respondent is legal. Under section 96, clause 2 of the Municipal Act, the respondent had authority to issue orders regarding the location of the building in relation to any street existing and where the order made is not obeyed the respondent has the authority to order demolition, under clause 5 of the same section. As the order made is not oppressive I am of opinion that the respondent can proceed to execute it.

The plaintiff preferred a second appeal.

Inverarity with *Manubhai Nanabhai* for the appellant (plaintiff):—The condition in the permit requiring us to keep open a space of 5 feet 8 inches in width is illegal. It is admittedly not made under section 92 of the District Municipal Act. No regular line has been laid down and the other conditions of section 92 are not fulfilled. Set-back cannot be required for widening a street but only to make its line regular: *Essa Jacob v. Municipal Commissioner of Bombay*⁽¹⁾.

The Municipality, however, relies upon its powers under section 96 (2) of the said Act. The section empowers the Municipality to impose such conditions with respect to the location of the building in relation to any street existing or projected as they think proper. But it is provided at the same time that such orders should not be inconsistent with the provisions of

(1) (1900) 25 Bom. 107 at p. 110.

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sections 90 and 92 of the Act. The order would be to set-back the house without any compensation, being paid to the owner, while sections 90 and 92 require the Municipality to pay compensation forthwith: *Queen-Empress v. Veerammal*⁽¹⁾, The Madras District Municipal Act (Mad. Act IV of 1884), sections 158, 180.

The present case is distinguishable from the cases where for the sanitation of the house to be rebuilt, and not for the sanitation of the town, the Municipality requires a space to be kept open as fully as in *Municipality of Thana v. Fazal Karim*⁽²⁾.

Strangman (Advocate General) with *M. K. Mehta* for the respondent (defendant):—The condition is imposed under the powers given by clause 2, section 96 of the District Municipal Act. The Municipality may, for sanitary purposes or for ventilation, require a certain space to be kept open as in over-crowded areas. No street is yet projected, but the Municipality may fix the location of the building with reference to the existing street. The house is set-back, but there is no set-back in the sense used in section 92, as the land is only to be kept open by the owner. He is only prohibited from building upon it. It continues to be his property. He can use it as his garden or compound. For this, no compensation need be paid. The plaintiff will get the compensation when the Municipality may, at any time hereafter, take the space for widening the street. The conditions required for a set-back under section 92 do not exist at present, so the Municipality cannot acquire the land and cannot be called upon to pay compensation for it.

SCOTT, C. J.:—The plaintiff being the owner of a house in Rander applied to the Municipality for permission to rebuild it on the 25th of April 1911. The Municipality in reply to her application on the 5th of

⁽¹⁾ (1892) 16 Mad. 230.

⁽²⁾ (1901) 3 Bom. L. R. 842.

June 1911 prescribed conditions presumably under section 96 (2) of the District Municipal Act. The permit was granted to her subject to conditions noted on the back for pulling down the building and building a new building on the land by keeping a space so as to leave a width of road 14 feet and a half on the south side of the building in pursuance of the order passed by the Managing Committee on the 6th of May 1911, and the first condition of the permit is that "For the improvement of the said road you must leave on that side a space in length . . . and in width 14 feet and build the house"; and the seventh condition states, "As your building stands on the public road you should take precaution to see that the water from your roof does not fall upon persons passing by that way."

Now the public road at the time of the permit was considerably less than 14 feet, namely, 8 feet 4 inches. The power of the Municipality under the section to prescribe the location of the building is given in relation "to any street existing or projected as they think proper". They have prescribed the location of the building in relation, not to the existing street, but to a street which may come into existence in the future. But we do not think that on the admitted facts it can be said that there is a projected street 14 feet in width, for there is no regular line determined either for the existing street or for the future as contemplated in section 92. The permit clearly shows that the first condition is not for the purpose of sanitation or for the purpose of ventilation, but simply for the improvement of the street by widening it, and the object is to get a set-back which cannot be obtained under section 92, because the conditions contemplated in that section do not yet exist. The result is that if the condition of the permit were complied with the plaintiff would have to give up or keep vacant and unproductive a considerable

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portion of her land, and the Municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so, which would be contrary to the provisions of section 92 which contemplate that when a set-back is determined upon compensation shall be paid to the owner. The case is very similar to *Queen-Empress v. Veerammal*⁽¹⁾. We think that the plaintiff is entitled to the relief which she prays, namely, an injunction restraining the defendants from pulling down the building, or any portion thereof, or from putting in force their notice of the 12th of September 1911. The defendants must pay the costs throughout. The decree of the lower appellate Court is set aside.

Decree set aside.

G. B. R.

⁽¹⁾ (1892) 16 Mad. 230.

APPELLATE CIVIL.

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

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March 6.

MANILAL POPATLAL HEIR OF DECEASED SHAH CHHAGANLAL (ORIGINAL PETITIONER AND DECREE-HOLDER), APPELLANT, v. KHODABHAI SARTANSANG AND ANOTHER (ORIGINAL OPPONENTS AND JUDGMENT-DEBTORS), RESPONDENTS.*

The Gujarat Talukdars' Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905), section 29 and section 29B (1), (2), (3) and 29E†—Suit upon a mortgage—Talukdari Settlement Officer—Guardian of the minor defendants

* Second Appeal No. 342 of 1912.

† Section 29 and section 29B (1), (2), (3) and 29E of the Gujarat Talukdars' Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905) are as follows :—

29. (1) When any talukdari estate is taken under management by Government officers under any of the three last preceding sections, the provisions of section 160 of the Bombay Land Revenue Code, 1879, shall be applicable thereto.

(2)	*	*	*	*	*	*
(3)	*	*	*	*	*	*