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them, we think that they can fall back upon their position of mortgagees under their mortgage of 9th May, 1872, which, as we have said, became by prescription a valid mortgage on the 9th May, 1884. The plaintiffs must, therefore, redeem that mortgage before they can recover possession of the mortgaged premises. For these reasons we must reverse the decree of the Courts below and remand the case for determination of the remaining issues. Costs hitherto incurred to be costs in the cause.

*Decree reversed and case remanded.*

## APPELLATE CIVIL.

*Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Fulton.*

1896. *April* 16.

PATEL PANACHAND GIRDHAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANT), RESPONDENT.*

*Municipality—Suit against municipality for injunction—Notice of action—Bombay Act VI of* 1873, *Secs.* 17, 33 *and* 42—*Discretion of municipality to take action under Section* 33, *clause* 3 *of Bombay Act VI of* 1873—*Court's power to interfere with such discretion—Bombay Act II of* 1884, *Sec.* 48.

A suit for an injunction to restrain a municipality from removing a certain building or construction is not an action "for anything done, or purporting to have been done in pursuance of the Act" within the meaning of section 48 of Bombay Act II of 1884. Such a suit can, therefore, be brought without giving previous notice to the municipality.

Apart from the provisions of section 33 of Bombay Act VI of 1873, it is only if the site of a building is vested in a municipality under section 17, that this body is empowered, whether by section 42 or by any other section, to take steps for the removal of the building.

The discretion of taking action or otherwise under the 3rd clause of section 33 is vested in the municipality, which alone can determine whether or not the removal of a building erected contrary to the provisions of section 33 is or is not a measure likely to promote the public convenience. If the municipality adopt the proper procedure, no Court can review its decision on the ground that in the opinion of the Court the removal of the building is not likely to promote public convenience. The Legislature has confided to the municipality, and the municipality alone, the duty of deciding what measures within its legal powers are for the public convenience, and its discretion is not subject to control by the Courts.

* Second Appeal, No. 541 of 1895.

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SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad, in Appeal No. 242 of 1893.

The plaintiffs sued for an injunction restraining the municipality of Ahmedabad from removing a *chora* and a *parabdi*, alleging that the *chora and parabdi* stood on a site belonging to the inhabitants of Hanumán Street in Ahmedabad; that the *parabdi* was recently rebuilt on the foundation of an old *parabdi*; and that the municipality had attempted to remove the same without giving proper notice.

The defendant municipality pleaded (*inter alia*) that the site of the *chora* and *parabdi* was part of a public street and as such was vested in the municipality; that the municipality had authority to remove the structures under section 33 of the Bombay District Municipal Act (VI of 1873); and that the suit was bad for want of notice under section 48 of Bombay Act II of 1884.

The Subordinate Judge disallowed these pleas, and passed a decree granting the injunction sought.

On appeal the District Judge reversed this decree, holding that the suit was bad for want of notice under section 48 of the Bombay Act II of 1884, and that the ground upon which the *chora* and *parabdi* stood did not belong to the plaintiffs but to the municipality.

Against this decision the plaintiffs preferred a second appeal to the High Court.

*Nagindas Tulsidas* (with *Ganpat S. Rao*) for appellants.

*C. H. Satalvad* for respondent.

FULTON, J.:—The objection to this suit based on section 48 of Bombay Act II of 1884 was not pressed in argument by Mr. Chimanlal. It is clear that a suit for an injunction to restrain a municipality from removing a certain building or construction is not an action "for anything done, or purporting to have been done, in pursuance" of the Act.

We turn then to the merits. Apart from the provisions of section 33 of Bombay Act VI of 1873 it cannot, we think, be disputed that it is only if the site of the *chora* and *parabdi* are vested in the municipality as a public street that this body is empowered, whether by section 42 or by any other section, to

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take steps for their removal. Section 17 specifies the property vested in the municipality, and it is contended that the ground in dispute—namely, the site on which the *chora* and *parabdi* are erected—forms part of a public street. The question, then, to be determined is whether such site forms part of a public street. The learned District Judge has discussed the question whether the recess in which the *chora* and *parabdi* stand is a public street, though he has not arrived at any very clear decision on the point. But he has not considered whether, supposing the recess to be a public street, the site of the *chora* and *parabdi* forms part of such street. *Primâ facie* the site is the property of the persons who by building the *chora* have occupied it to the exclusion of the public—*The Secretary of State for India in Council* v. *Jethabhái* [1]. They have apparent possession, and are presumably the owners till the contrary is proved (section 110, Evidence Act). But it may be shown that previous to the recent construction or reconstruction of the *chora* the site on which it now stands formed part of the public street. That is a question of fact on which we can come to no decision. It is alleged that there was an old *chora* of which only foundations remained. It is also alleged that the post on which the *parabdi* stands has always been there. If these allegations are sustained, there can be no doubt the difficulty of proving the site to be part of the public street will be increased. The site of an old *chora* which had been abandoned for a number of years might possibly be found to have been left so long unoccupied by its owners as to raise a presumption of dedication to the public or the public might have acquired a right of way over it; but facts necessary to support either of these conclusions would have to be established, and in the case of a small plot of land the proof of acts of user by the public would probably be difficult. However this may be, as the site is now covered by a *chora*, it is for the municipality, which alleges it to form part of the public street, to prove facts from which it can be inferred that the allegation is correct.

There are other points, too, in regard to which findings are necessary to enable us to dispose of the case. In the lower Court it was contended for the municipality that the *chora* had

(1) I. L. R., 17 Bom., 293.

been recently constructed without notice under section 33, and that, therefore, irrespective of title to the ground, it had a right to remove it. The Subordinate Judge held that the *parabdi* did not interfere with the public safety, health or convenience, and that, therefore, the municipality were not justified in exercising the discretionary power given them by clause 3 of section 33. He also held that as upon the evidence on record it appeared that the disputed *parabdi* and *chora* had been built upon the site of the old *parabdi* and *chora*, no notice was necessary under section 33, clause 1, and the municipality was consequently not justified under that section in ordering their removal —*Krishnaji* v. *The Municipality of Tásgaon* (1). Against this decision no very distinct objection was taken in the points of appeal to the District Court; but as the question was apparently raised in the 3rd issue, and decided in the affirmative, we have to determine it. We are unable to agree with the Subordinate Judge that, assuming the plaintiff to have built without notice, and assuming that under the circumstances of the case notice was necessary under section 33 before building, it was not within the discretion of the municipality to order the removal of the *chora* if it thought a proper case had been made out. The discretion of taking action or otherwise under the 3rd clause of section 33 is vested in the municipality, which alone can determine whether or not the removal of a building erected contrary to the provisions of section 33 is or is not a measure likely to promote the public convenience (*vide* section 24, clause 21). If the municipality adopts the proper procedure, no Court can review its decision on the ground that in the opinion of the Court the removal of the building is not likely to promote public convenience. The Legislature has confided to the municipality, and the municipality alone, the duty of deciding what measures within its legal powers are for the public convenience, and its discretion is not subject to control by the Courts—*vide Allcroft* v. *Lord Bishop of London* (2). As to the second ground on which the Subordinate Judge considered that no order for removal could be made under section 33—namely, that the *chora* was built entirely on old foundations—we refrain from expressing any opinion until the District

(1) I. L. R., 18 Bom., 547.

(2) [1891] A. C., 666.

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Judge has formed his conclusions as to the facts and the application to them of the law.

Assuming that notice under clause 1 of section 33 ought to have been given to the municipality before the *chora* was constructed, the question remains whether the municipality has given due notice of removal under clause 3. Mr. Chimanlal contended that the notice to Vithal Panachand had been accepted as sufficient; but until it is found either that the notice to Vithal has been accepted as sufficient or for some reason is sufficient, or that notice has been duly served as provided in section 76, it is impossible to see how the municipality can be justified at present in removing the *chora*. We do not know the facts, which must be ascertained by the District Judge. They may be important in determining whether, in case an injunction is granted, it should be of permanent effect or merely of temporary effect until the municipality has followed the procedure prescribed by law.

Lastly, supposing the procedure in section 33 to be inapplicable, and supposing it to be found that site of the *chora* is part of a public street, it has to be found whether the municipality has given sufficient notice of removal to satisfy the requirements of section 42. But as no form of notice is prescribed, it is probable that, if there was sufficient notice of removal for purposes of section 33, it would equally suffice for the purposes of section 42. We shall, however, be in a better position to decide the whole case when the facts are before us.

We now send down the following issues :—

1. Whether it is proved that the site of the *chora* and *parabdi* forms part of a public street?

2. Whether, before the recent construction or reconstruction of the *chora*, notice to the municipality was required under the first clause of section 33?

3. Whether notice by the municipality requiring removal of the *chora* and *parabdi*, whether (*a*) under section 33, clause 3, or (*b*) under section 42, has been duly given or accepted as sufficient?

As on the first of these issues neither the parties nor the Courts appear to have noticed the necessity for determining whether the actual site (as distinguished from the recess in which it is situated) was part of a public street, we think it fair to allow fresh evidence to be given.

The findings of the District Court should be returned within four months.

*Case remanded.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Strachey and Mr. Justice Fulton.*

### QUEEN-EMPRESS *v.* NAGLA KALA.*



*Evidence Act (I of 1872), Sec. 26—Confession—Confession made to a Magistrate of a Native State—Admissible—Evidence.*

The words "police officer" and "Magistrate" in section 26 of the Indian Evidence Act (I of 1872) include the police officers and Magistrates of Native States as well as those of British India.

A confession made by a prisoner, while in police custody, to a First Class Magistrate of the Native State of Muli in Káthiáwár, and duly recorded by such Magistrate in the manner prescribed by the Code of Criminal Procedure (Act X of 1882), is admissible in evidence.

*Queen-Empress* v. *Sundar Singh*(1) followed.

APPEAL from the conviction and sentence recorded by Gilmour McCorkell, Sessions Judge of Ahmedabad.

The accused was tried for murder.

The evidence for the Crown consisted (*inter alia*) of a confession made by the accused while in police custody.

The confession was made to a First Class Magistrate of the Native State of Muli in Káthiáwár. It was recorded by the Magistrate in the manner prescribed by the Code of Criminal Procedure (Act X of 1882) and signed by the accused in the presence of the Magistrate.

At the trial the Magistrate was called as a witness for the Crown; and he deposed that he had taken down the prisoner's statement with his own hand in the prisoner's own words.

* Criminal Appeal, No. 50 of 1896.

(1) I. L. R., 12 All., 595.