APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Heaton.

1919. August 25.

THE VIRAMGAUM MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT *v.* BHAICHAND DAMODAR (ORIGINAL PLAINTIFF) RESPONDENT.*

District Municipalities Act (Bom. Act III of 1901), section 96, clauses (1) and (5)—Building an Otla in front of a house—Permission of the Municipality not obtained—Otla an additional structure—Permission necessary.

The plaintiff raised an Otla in front of his house without previously obtaining permission of the Municipality as required by clause (1), section 96 of the District Municipalities Act (Bom. Act III of 1901). The defendant Municipality served the plaintiff with a notice to remove the Otla. The plaintiff having sued for a permanent injunction restraining the Municipality from removing the Otla alleging that the Municipality's notice for its removal was illegal and *ultra vires*:

Held, dismissing the suit, that in raising the Otla, the plaintiff was seeking to add to an existing building which he could not do without asking for permission of the Municipality under clause (1), section 96 of the District Municipalities Act, 1901.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree passed by B. H. Desai, Subordinate Judge at Viramgaum.

Suit for an injunction.

The plaintiff alleged that in front of his house there was an old Otla standing on the land of his ownership; that the Otla was at first a low one and was built with bricks; that when he built his house anew, he raised the Otla also and put up stones over it; that the street land was of the private ownership of the householders living therein; that the defendant Municipality gave him notice, dated the 23rd October 1913, asking him to remove the Otla. He, therefore, sued for a permanent injunction restraining the defendant

* Second Appeal No. 740 of 1917

Municipality from removing the Otla, on the ground that the notice for its removal was illegal and *ultra vires*.

The defendant Municipality contended that the street land was Municipal land; that the Otla was an encroachment on Municipal land, and the same having been added to the plaintiff's building without obtaining the permission of the Municipality, the notice was legal and proper.

The Subordinate Judge allowed the plaintiff's claim on the ground that the street land on which the Otla was built was not a public street vested in the Municipality and therefore no permission of the Municipality was needed to build the Otla.

On appeal, the District Judge, confirmed the decree.

The defendant appealed to the High Court.

G. N. Thakor, for the appellant.

H. V. Divatia, for the respondent.

MACLEOD, C. J.:—The plaintiff sued for a permanent injunction restraining the defendant Municipality from removing the disputed Otla that he had raised, alleging that the defendant's notice of the 23rd October 1913 for its removal was illegal and *ultra vires*. The very simple fact appears from the evidence that the plaintiff built this Otla without obtaining permission of the Municipality under section 96 of the District Municipal Act, and having built without that leave, the Municipality were entitled under sub-clause (5) to issue a notice requiring such building or addition to be altered or removed, and under section 154 (6) they were entitled to give notice that if the plaintiff did not comply with the notice to remove, the work would be done by the Municipality at the plaintiff's costs.

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The main question which seems to have been tried in both the lower Courts was whether the ground on which the Otla was built was part of a public street or not. The first issue in the trial Court was whether the site of the Otla in dispute belonged to and as such had been in possession of the plaintiff. The trial Judge held that the site did not belong to the plaintiff, nor was it in his occupation as alleged. Then he went on to hold that it was part of the street land not vested in the Municipality. In consequence of that finding, and the way in which the first issue was dealt with, a long discussion ensued as to whether the land on which this Otla was built was part of a public street or not. The same error appears in the proceedings in the lower appellate Court, as after remarking that it had been held that the land on which the Otla was constructed was not the plaintiff's land, the learned Judge went on to say "the next question was whether the street in which the Otla was put up was a public street." The learned Judge thought as the street was not a public street the Municipality had no right to remove the Otla, nor had it any right to prohibit the plaintiff from building the Otla. That finding appears to me to have been due to a misunderstanding regarding the proper construction of section 96, which provides that a person intending (1) to begin to erect any building, or (2) to alter externally any existing building, or (3) to add to any existing building, or (4) to re-construct any projecting portion of a building in respect of which the Municipality is empowered by section 92 to enforce a removal or set-back, shall give notice thereof to the Municipality 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, certain documents and plans.

The Court seems to have been of the opinion that this was a question of reconstructing a projecting portion

of a building in respect of which the Municipality is empowered by section 92 to enforce a removal or set-back. It is quite clear that in this case the plaintiff was seeking to add to an existing building, and section 92 does not come into the case at all. The plaintiff was bound to ask for permission before he could build the additional structure, and if he built without obtaining permission, he did so at his own risk. Therefore it is quite clear to me that the Municipality were justified and were acting within their powers in issuing the notice of October 1913 calling upon the plaintiff to remove the structure. In my opinion the appeal succeeds. The decree of the lower Court must be set aside and the suit dismissed with costs throughout.

HEATON, J.:—I agree. The meaning of section 96 of the District Municipal Act apparently seems to have been misunderstood. I entirely concur in the analysis given by my Lord the Chief Justice of clause (1) of that section. It deals with four classes of cases, and it is only in dealing with the 4th class that section 92 comes into operation. It might of course have been a point in dispute in this case as to whether the mere making of a plinth was adding to an existing building. But as a matter of fact that contention never was raised, so we need not consider it. The plaintiff himself asked for permission to make the addition to the building, that is to say, the plaintiff himself proceeded as if section 96 applied and thereafter the Municipality also proceeded under section 96, and it is now outside argument that in this case section 96 is the one to apply. How then it ever came to be supposed that it mattered to anybody whether there was a public street or a private street or indeed any street at all, I am totally unable to understand. The judgments of the lower Courts do not do anything to remove the obscurity of

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my mind as to how this question of a street over was raised. I suppose something was assumed by both parties before the District Judge that is not assumed here. I think, therefore, the appeal must be allowed as proposed.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

1919. *August* 26.

SADASHIV RAMCHANDRA DATAR AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* TRIMBAK KESHAV VAZE (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 443—Decree in terms of award—Decree passed by consent of minor's mother—Mother not appointed guardian ad litem*—Decree not binding on the minor.*

In 1896, the plaintiff's father mortgaged his house to defendant No. 1 for Rs. 1,000. After his death, his widow, on behalf of her minor son (plaintiff), referred the mortgage claim to arbitration. The arbitrators settled the claim at Rs. 1,200. Defendant No. 1 applied to the Court for a decree in terms of the award; and the widow having consented, a decree was passed. In execution of the decree the house was put up to sale and purchased by defendant No. 1 for Rs. 1,700. The plaintiff attained majority in September 1911 and sued in August 1912 for a declaration that the decree was null and void, and for taking accounts of the mortgage of 1896 under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879). He alleged that the arbitrators in taking accounts did not give him the benefit of the Dekkhan Agriculturists' Relief Act; and that in the Court proceedings that followed on the award no guardian was appointed for him; and that at the Court sale the house was sold at an undervalue :—

Held, that inasmuch as the plaintiff's interest had not been duly protected the absence of a guardian *ad litem* in the Court proceedings of 1901 rendered the decree null and void under section 443 of the Civil Procedure Code of 1882.

Held, therefore, that the plaintiff was entitled to accounts of the mortgage of 1896, under the provisions of the Dekkhan Agriculturists' Relief Act, 1879.

* Second Appeal No. 709 of 1917.