made before us to dispute these findings. In these circumstances I think a legitimate presumption arises that the title to this particular site vests in Government under the old customary law and section 37 of the Bombay Land Revenue Code, and the presumption displaces the original presumption arising in favour of the plaintiff under section 110 of the Indian Evidence Act. Accordingly I think the District Judge came to a right conclusion and I agree in dismissing the appeal with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

THE MUNICIPALITY OF SHOLAPUR (ORIGINAL DEFENDANT), APPELLANT *v.* ABDUL WAHAB VALAD SHAIKH CHAND (ORIGINAL PLAINTIFF), RESPONDENT*.

1920. *September 7.*

Bombay District Municipal Act (Bombay Act III of 1901), sections 96 and and 40 (6)—Permission to build—Permission once granted cannot subsequently be cancelled—Sale of land by Municipality—Absence of written contract of sale—Effect on the validity of the sale.

It is not competent to a District Municipality to revoke a permission to build which has already been granted under the provisions of section 96 of the Bombay District Municipal Act, 1901.

Emperor v. *Kareem Ranjan Khoji*[1] and *Vithal Dhonddev* v. *The Alibag Municipality*[2], followed.

Quaere—Where a District Municipality sells land without a contract in writing as required by section 40 (6) of the Act, is the sale valid?

Abaji Sitaram v. *Trimbak Municipality*[3] and *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa*[4], considered.

* Second Appeal No. 850 of 1919.

(1) (1916) 19 Bom. L. R. 65.
(2) (1918) 42 Bom. 629.
(3) (1903) 28 Bom. 66.
(4) (1883) 8 App. Cas. 517.

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SECOND appeal from the decision of T. R. Kotwal, Assistant Judge at Sholapur, reversing the decree passed by S. N. Sathaye, First Class Subordinate Judge at Sholapur.

Suit for injunction.

In 1913, the plaintiff purchased a plot of land, which was contiguous to his house, from the Municipality of Sholapur for Rs. 49-8-0 and took the land into his possession. The sale was not evidenced by any writing.

The plaintiff applied to the Municipality in 1914 for permission to build on the land. The permission was given in due course. But subsequently the Municipality revoked the permission and prevented the plaintiff from building on the land.

The present suit was filed in 1915 to restrain the Municipality from obstructing the plaintiff in building upon the land and to recover Rs. 75 as damages.

The First Court dismissed the suit; but on appeal, the Assistant Judge gave the plaintiff a decree.

The Municipality appealed to the High Court.

Rangnekar, with *N. V. Gokhale*, for the appellant.

G. S. Mulgaonkar, for the respondent.

SHAH, J. :—The question of law that has been argued in this appeal is whether the defendant, the City Municipality of Sholapur, had the right to cancel the permission granted to the plaintiff to build on a certain plot of open ground near his house. The right to cancel the permission is claimed on the ground, first, that the sale of the plot in question is not evidenced by a writing signed and sealed as required by section 40 sub-section (6) of the District Municipal Act (III of 1901), and, secondly that the plaintiff purchased the said plot subject to the condition that it was to be used for putting flower pots, &c., &c.

The facts necessary to appreciate the argument are these: In January 1913 the plaintiff applied to the Municipality for the purchase of the plot of ground in question. In the application he stated as follows:— "The place.....may be given to me for the purpose of placing flower pots, &c., &c." His neighbour Imam Mahomed joined in applying for the remaining part of the open plot. The Managing Committee of the Municipality decided to sell the land at two annas per square foot on "usual terms". This sale was sanctioned at a general meeting of the Municipality as required by sub-section (3) and by the Commissioner as required by sub-section (2) of section 40. The Municipality received the price of the land (Rs. 49-8-0) in November 1913 and it is now found by the lower appellate Court that the possession of the land was given to the plaintiff.

The plaintiff applied to the Municipality for permission to build on the plot in October 1914. On the 21st October he was asked to submit a plan of the proposed building: and ultimately on the 29th November the permission was granted by the Chief Officer, who had authority to do so, subject to certain directions as to windows and doors. The plaintiff appealed to Managing Committee for a modification of the said directions. The modification applied for was allowed by the Managing Committee on the 20th March 1915. Apparently when the plaintiff commenced to build, his neighbour Imam Saheb applied to the Municipality, on the 5th May 1915, complaining of the permission granted to the plaintiff. The Municipality cancelled the permission granted to the plaintiff on the 26th May 1915. Both the grounds now urged in support of the cancellation are referred to in the order communicated to the plaintiff. In terms it directed the plaintiff not to build until further orders which

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would be issued when the matters relating to the sale-deed and the condition as to keeping the plot open were settled.. He was informed that he would be prosecuted under section 96 if he disobeyed the orders. The plaintiff sued the Municipality for damages and injunction in respect of this order cancelling the permission already granted. The trial Court dismissed the plaintiff's suit, and the lower appellate Court allowed his claim for injunction and damages to the extent of Rs. 18 with proportionate costs.

In the appeal before us it is conceded on behalf of the Municipality, and it is clear on the decisions of this Court, as also on the provisions of section 96 that, apart from the special grounds urged on their behalf, the permission once granted to a person to build cannot be revoked. It is urged, however, that on the special grounds, which are already stated, the Municipality had the power to revoke it.

As regards the first ground, it is urged that the non-compliance with the provisions of section 40, sub-section (6) is fatal to the plaintiff's title to the land and to his right to build, as under sub-section (7) the contract is not binding upon the Municipality. In support of this argument Mr. Rangnekar has relied upon *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa*[1]. It is pointed out that the equitable considerations on account of the contract being executed have no application to cases where the formality for completing a contract is prescribed by a statute relating to public bodies, and that the considerations based on executed and executory contracts are confined to those cases, in which the contracts are required to be under seal by the common law. On the other hand on behalf of the plaintiff it is urged that the transfer

[1] 1883) 8 App. Cas. 517.

of ownership is complete as the purchase money is paid to the Municipality, and the possession transferred to him, under section 54 of the Transfer of Property Act, that the absence of a writing as required by section 40, sub-section (6) is due to default on the part of the Municipality, that they cannot be allowed to plead their own omission to comply with the requirements of law as creating a defect in title which is otherwise complete. It is also urged that in spite of the statutory provisions as to the formalities to be observed in such contracts, this Court has recognised the justice of not excluding considerations based upon the contract having been executed or being merely executory in adjusting the rights of the parties and reliance is placed upon the observations in *Abaji Sitaram* v. *Trimbak Municipality*[1]. The case of *Ahmedabad Municipality* v. *Sulemanji*[2] is another instance in which the same learned Judges accepted the differentiation between executed and executory contracts in relation to Municipalities, which were then governed by the corresponding provisions of section 30 of Bombay Act II of 1884. It is further urged that the possession of the land, which the plaintiff has obtained lawfully in pursuance to a sale, cannot be disturbed by the Municipality according to the *ratio decidendi* in *Bapu Apaji* v. *Kashinath Sadoba*[3]. These arguments require careful consideration, and will have to be considered when the question arises for decision. I desire to express no opinion in this case as to the effect of non-compliance with the provisions of section 40, sub-section (6) on the plaintiff's title to the land or to his right to retain possession thereof against the Municipality. It is sufficient for the purpose of this appeal to hold, and so far I feel clear that non-compliance

(1) (1903) 28 Bom. 66. (2) (1903) 27 Bom. 618.
(3) (1916) 41 Bom. 438.

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with the provisions of section 40, sub-section (6) affords no justification on the facts of this case for cancelling the permission granted by the Municipality under section 96 of the District Municipal Act. The order issued purports to be a sort of provisional order which is not contemplated by the section; and the purpose and the scheme of section 96 do not lend any support to the suggestion that the Municipality can cancel the permission granted under the section on such grounds. I do not see any reason why the *ratio decidendi* in *Emperor* v. *Kareem Ranjan Khoji*[1] and *Vithal Dhonddev* v. *The Alibag Municipality*[2] should not be applied to the present case. Whatever the rights of the Municipality against the plaintiff in respect of this land may be, I am clear that the permission granted under section 96 cannot be revoked and that the facts stated above do not afford any ground to refuse to the plaintiff a relief by way of injunction confined to the order in question.

As regards the second ground that the sale is subject to the condition that the plaintiff was not to build on the land in question, I do not see how it can be admitted as a justification for cancelling the permission once granted. As the relief by way of injunction is discretionary, the circumstance, if established, may afford a ground for not granting it. But there is no finding of the lower appellate Court to that effect in favour of the Municipality; and there is practically no evidence that the sale was subject to that condition beyond the statement in the plaintiff's application which I have already mentioned. Such a statement is vague, and not sufficient to make the sale subject to such an onerous condition. There is nothing in the papers put in from the Municipal records to show that

[1] (1916) 19 Bom. L. R. 65. [2] (1918) 42 Bom. 629.

the sale was subject to this condition. The expression 'usual terms' used in the resolution of the Managing Committee is not shown to indicate such a condition. Under the circumstances the sale must be taken to be an ordinary sale of the open plot for the purpose of this appeal.

I would, therefore, dismiss the appeal and confirm the decree of the lower appellate Court with costs without prejudice to the right of the Municipality, if any, that may be established hereafter to the ownership or possession of the plot in question.

CRUMP, J.:—It is unnecessary for me to recapitulate the facts of the case which have been already stated in the judgment delivered by my learned brother. The gist of the defence is contained in para. 7 of the written-statement and it is two-fold in its nature. The defendant Municipality alleges, first, that the sale to the plaintiff was subject to a certain condition, and secondly, that the sale was not completed in the manner required by section 40 of the Bombay District Municipal Act (III of 1901), and therefore conveyed no title to the plaintiff. The first of these defences clearly fails. For, it was practically conceded in the argument before us that beyond the vague statement in the plaintiff's application there was no evidence that any condition was attached to the sale. The plaintiff's application merely says that he requires the land for the purpose of placing flower pots, &c., and it would be impossible to argue from that alone that the two parties to this contract for sale consented that no building should be erected on the land. The suit was filed on the 26th November 1915 and the position on that date was there had been no document executed as required by section 40 of the Bombay District Municipal Act. The result, to put the case of the defendant at its highest, was that there was only a contract for

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sale. It has been found that the plaintiff was put in possession of the property and paid the purchase price, and as against his vendor he could have maintained his position by claiming specific performance of the contract as also on the ground that he had a charge for the purchase money as allowed by section 55 (6) (*b*) of the Transfer of Property Act. A claim to enforce specific performance is a good defence to a suit for ejectment as has been decided by this Court in *Bapu Apaji* v. *Kashinath Sadoba*[1]. In these circumstances, it appears to me that the question as to the exact title of the plaintiff becomes irrelevant for the purpose of this suit. It is enough to say that he had a title to possession which was sufficient to enable him to apply to the Municipality for the purpose of erecting a building. Indeed for the purpose of section 96 of the Bombay District Municipal Act it appears to me that the question of title is altogether irrelevant. I do not think that it was ever intended that a Municipality should under that section make inquiries as to the exact title of the applicant or that a flaw in the applicant's title would be a ground for refusing permission. However that may be, it is admitted here that permission was given and, that permission having been given, I agree that it could not be cancelled by the Municipality, as has already been decided in *Vithal Dhonddev* v. *The Alibag Municipality*[2].

In this view of the case, it is unnecessary to consider whether the decision in *Abaji Sitaram* v. *Trimbak Municipality*[3] applies here or not. But in view of the remarks of the lower Court and in deference to the arguments advanced here it is, I think, desirable to point out that so far as the judgment in that case applies the rule of common law as to contracts under

(1) (1916) 41 Bom. 438. (2) (1918) 42 Bom. 629.
(3) (1903) 28 Bom. 66.

seal, it is to some extent *obiter*. For the learned Chief Justice says that to consider the point it is necessary to travel outside the pleadings. Further, it must be remembered that it is a decision on a Statute which is no longer in force. It is difficult to say, even if it were applied here, that it fits the facts of this case. The facts of that case lay down that a corporation can sue on a contract which should have been under seal in spite of the omission of that formality where there is executed consideration. That is not exactly the case before us, and it is, therefore, not necessary to consider how far that decision can be reconciled with the decision of the House of Lords in *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa*[1] and how far the rule of English common law can prevail either in England or in India against Statutes containing restrictive provisions as to the form of corporate contracts. These are questions which will require consideration when a proper case arises.

For these reasons I agree with the order proposed.

Appeal dismissed.

R. R.

[1] (1883) 8 App. Cas 517.

APPELLATE CIVIL.

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

1920.

September 10.

VYANKAT WALAD AWACHIT PATIL AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS *v.* ONKAR NATHU CHOWDHARI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 3 TO 5), RESPONDENTS*.

Res judicata—*First suit decreed in the Second Class Subordinate Judge's Court—Subsequent suit filed in Court of the First Class Subordinate Judge —Identical issue involved in both suits--No bar of* res judicata--*Jurisdiction—Civil Procedure Code (Act V of 1908), Order II, Rule 2—Minor plaintiff not to be prejudiced by a mistake of his guardian.*

* First Appeal No. 88 of 1919.