Municipal Board, Manglaur

Vs

Sri Mahadeoji Maharaj

Civil Appeal No. 841 of 1962

(K. Subha Rao, J. C. Shah, S. M. Sikri JJ)

24.11.1964

JUDGMENT

SUBHA RAO, J. -

This appeal by special leave raises the question of the right of a Municipality to a vacant piece of land adjacent to a metalled public road.

The plaintiff is the owner of plot No. 3211 in abadi No. 1416 in khewat No. 216 in the town of Manglaur. Through the said plot runs a public road and two nalis on the north and south of the said road. There is also a water pipe running through the said plot which belongs to the defendant Municipality. There is a vacant site lying in between the nalis and the road. The Municipality was seeking to erect a structure on the vacant site wherein it intended to instal a statue of Mahatma Gandhi and also to put up two rooms on either side for piyo and library. The plaintiff, who is the owner of plot No. 3211, filed Suit No. 138 of 1948 in the Court of the Munsif, Deoband, for a permanent injunction to restrain the Municipal Board, Manglaur, from putting up the said structures on the suit site and for delivery of possession of the same to the plaintiff. The defendant, inter alia, pleaded that the said site was part of the road which vested in it.

The Munsif found that the plaintiff has title to the said site and decreed the suit for possession as well as for permanent injunction. On appeal, the 2nd Civil Judge, Saharanpur, held that a road includes the "patris" on either side of it, and that the said road along with the patris has been under the management of the Municipal Board for several decades and that the plaintiff has lost title to the same. He further held that though the defendant has no right to restrict the use of the public road by putting up the alleged constructions, the plaintiff has also no right to object to the same. One second appeal, the High Court of Allahabad held that the plaintiff has title to plot No. 3211 and the Municipality has not shown how the plaintiff has lost his title to the "kacha" strips of land forming part of the said plot. On that finding, it set aside the decree of the learned 2nd Civil Judge, Saharanpur, and restored that of the Trial Court. Hence the present appeal.

Learned counsel for the appellant contended that the entire pathway between the two drains was dedicated to the public; and that the fact that only a part of the pathway was metalled would not detract from the totality of the dedication.

Learned counsel for the respondent argued that the disputed site is part of plot No. 3211 which admittedly belongs to the plaintiff and that it has not been established how the Municipal Board has become the owner of the said site though the metalled road passing though the said plot vests in it.

The facts are not in dispute. There is a metalled road running through plot No. 3211. On either side of the metalled road there is open space and on either side of the open space there is a drain. Admittedly, public have bean using the road for decades. The Municipal Board has been maintaining the road and the drains. It is, therefore, reasonable to hold that the entire pathway between the two drains was dedicated to the public. It is a common feature of metalled roads in towns that open spaces are left on either side of them. The fact that the entire pathway is not metalled cannot possibly detract from the totality of the dedication. The circumstance that the vacant spaces are on either side of the metalled road and between the two drains maintained by the Municipal Board leads to an irresistible inference that the strips of vacant spaces form part of the public pathway. The fact that only a part of the pathway is metalled does not necessarily limit the width of the pathway, but it is evidence of the user of the pathway by the public and its maintenance by the Municipality. We, therefore, hold that the suit site is part of the public pathway.

At this stage it is necessary to notice briefly the relevant aspect of the law of highways. In "Pratt and Mackenzies Law of High-ways", 20th Edn., at p. 4, it is stated :

> "Subject to the right of the public to pass and repass on the highway, the owner of the soil in general remains the occupier of it, and as such may maintain trespass against any member of the public who acts in excess of his right."

In Halsbury's Laws of England, 3rd Edn., Vol. 19, at p. 49, rules of presumption and proof of dedication are stated thus :

> "The fact that a way has been used by the public so long and in such a manner that the owner of the land, whoever he was, must have been aware that the public believed that the way had been dedicated, and has taken no steps to disabuse them of that belief, is evidence (but not conclusive evidence) from which a court or jury may infer a dedication by the owner."

The learned author proceeds to observe, at p. 55 :

> "A dedication may also be inferred when a highway authority has used a strip of land adjoining an admitted highway for the deposit of stones or by cutting grips, or has, as of right and without permission, piped in an levelled the site of a roadside ditch."

In Harvey v. Truro Rural District Council ([1903] L.R. 2 Ch. 638, 643, 643-644.), Joyce, J., makes the following interesting observations which are relevant to the present enquiry :

> " In the case of an ordinary highway running between fences, although it may be of a varying and unequal width, the right of passage or way prima facie, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot-passengers."

Adverting to the open strips of land on the sides of the road, the learned Judge observed :

> ".....as Lord Tenterden observed in Rex v. Wright ([1832] 3 B. & Ad. 681, 683; 37 R.R. 520.), 'The space at the sides' (that is of the hard road) is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the

> part actually used as road it could not be kept sound."

These observations indicate that the fact that a part of the highway is used as the actual road does not exclude from it the space at the sides of the road. Suhrawardy J., in Anukul Chandra v. Dacca Dt. Board (A.I.R. 1928 Cal. 485, 486, 487.), after considering the relevant English decisions on the subject, summarized the English view thus :

> "The expression 'road' or "highway" has been considered in many cases in England and it seems that the interpretation put there is not confined to the portion actually used by the public but it extends also the side lands."

The learned Judge applied the English view to the construction of the words "public street or road" in Art. 146-A of the Limitation Act, and stated :

> "I am of opinion that "road" in that article includes the portion which is used as road as also the lands kept on two sides as parts of the road for the purposes of the road."

So too, a Division Bench of the Allahabad High Court in Municipal Board of Agra, v. Sudarshan Das Shastri ([1915] I.L.R. 37 All. 9, 11.) defined "road" so as to include the side lands. Therein it was observed :

> ".....in our opinion all the ground, whether metalled or not, over which the public had a right of way, is just as much the public road as the metalled part. The court would be entitled to draw the inference that any land over which the public from time immemorial had been accustomed to travel was a public street or road, and the mere fact that a special part of it was metalled for the greater convenience of the traffic would not render the unmetalled portion on each side any the less a public road or street."

That a public street vests in a Municipality admits of no doubt. Under section 116(g) of the U.P. Municipalities Act, 1916 (U.P. Act II of 1916), "all public streets and the pavements, stones and other materials thereof, and also all trees, erections, materials, implements and things existing on or appertaining to such streets" vest in and belong to the Municipal Board. A Division Bench the Madras High Court in S. Sundaram Ayyar v. The Municipal Council of Madura and The secretary of State for India in Council ([1902] I.L.R. 25 Mad. 635.) dealt with the scope of such vesting under the Madras District Municipalities Act, 1884. The head-note therein brings out the gist of the decision, and it reads :

> "When a street is vested in a Municipal Council, such vesting does not transfer to the Municipal authority the rights of the owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth usque ad caelum, but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street. It has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers."

The law on the subject may be briefly stated thus : Inference of dedication of a highway to the public may be drawn from a long user of the highway by the public. The width of the highway so dedicated depends upon the extent of the user. The sidelands are ordinarily included in the road, for

they are necessary for the proper maintenance of the road. In the case of a pathway used for a long time by the public, its topographical and permanent landmarks and the manner and mode of its maintenance usually indicate the extent of the user.

In the present case it is not disputed that the metalled road was dedicated to the public. As we have indicated earlier, the inference that the side lands are also included in the public way is drawn easily as the said lands are between the metal road and the drains admittedly maintained by the municipal Board. Such a public pathway vests in the Municipality, but the Municipality does not own the soil. It has the exclusive right to manage and control the surface of the soil and "so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street". It has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers. Subject to the rights of the Municipality and the public to pass and repass on the highway, the owner of the soil in general remains the occupier of it and, therefore, he can maintain an action for trespass against any member of the public who acts in excess of his rights.

If that is the legal position, two results flow from it, namely, (1) the Municipality cannot put up any structures on the public pathway which are not necessary for the maintenance or user of it as a pathway, (2) it cannot be said that the putting up of the structures for installing the statue of Mahatma Gandhi or for piyo or library are necessary for the maintenance or the user of the road as a public highway. The said acts are unauthorized acts of the Municipality. The plaintiff, who is the owner of the soil, would certainly be entitled to ask for an injunction restraining the Municipality from acting in excess of its rights. But the plaintiff cannot ask for possession of any part of the public pathway, as it continues to vest in the Municipality.

In the result, we hold that the plaintiff would be entitled to a decree for permanent injunction restraining the Municipality from putting up the said structures on a part of the said public pathway, and the suit in so far as it asked for a decree for possession would be liable to be dismissed. We allow the appeal in part. As both the parties have succeeded and failed in part, they will bear their respective costs throughout.

Appeal partly allowed.

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