

State Of U. P.

Vs

Ata Mohd

Civil Appeal No. 1513 of 1970

(Syed M. Fazal Ali, P. S. Kailasam JJ)

08.05.1980

JUDGMENT

KAILASAM, J. –

1. This appeal is preferred by the State of Uttar Pradesh by certificate granted by the High Court of Judicature at Allahabad on May 18, 1970 in Supreme Court Appeal No. 105 of 1966 against its Judgment and Decree dated August 25, 1965 passed by it in First Appeal 27 of 1951 dismissing the suit filed by the State of Uttar Pradesh.
2. The State of Uttar Pradesh filed suit No. 109 of 1949 in the Court of Civil Judge, Gorakhpur against the respondent Ata Mohd. for a mandatory injunction directing the respondent to remove his material and construction and to clear the land and the plot No. 227 Mohalla Purdilpur in the City of Gorakhpur and for a decree for possession over the land measuring 45 ft. X 20 ft. The Civil Judge, Gorakhpur dismissed the suit by Judgment and Decree dated October 3, 1950. The plaintiff preferred First Appeal 27 of 1951 to the High Court of Allahabad. The appeal was heard by a Bench of two Judges but on a difference of opinion, the matter was referred to the third judge. In accordance with the view of the majority, the appeal preferred by the plaintiff was dismissed by its Judgment dated August 25, 1965. On a certificate granted by the High Court under Article 132 of the Constitution and also Article 133(1)(c) of the constitution, the present appeal in this Court was filed by the plaintiff/appellant.
3. The facts of the case are briefly as follows : The plot in dispute is plot No. 227 measuring 45 ft. X 20 ft. adjoining Patri along with the road running from Golgarh to Alinagar in Gorakhpur. The respondent Ata Mohd. applied to the Municipal Board, Gorakhpur for grant to him of a lease in the year 1939. The Board decline to grant him lease. The respondent again applied on October 10, 1945. The Municipal Board passed a resolution on November 24, 1945 granting to the respondent the lease and forwarded the resolution to the District Magistrate to accord his approval who on March 8, 1946 approved the resolution of the municipality. On April 12, 1946 the respondent executed a "KABULIYAT" in favour of the Municipal Board, Gorakhpur. On April 23, 1946, the respondent applied for permission to construct a house and submitted a plain for sanction. The plea was sanctioned by the municipality on May 8, 1946
4. On receipt of certain representations on June 10, 1947, the District Magistrate directed the Chairman of the Municipal Board not to allow the construction till a decision was taken on the question. On June 13, 1947, the Chairman, Municipal Board directed the respondent not to proceed with the construction of the house. The State Government on being satisfied that the resolution regarding the grant of the lease was not within the competence of the municipality, directed the

Commissioner to cancel the lease granted in favour of the respondent. The Executive Officer, Municipal Board, issued a notice on July 13, 1948 to the respondent cancelling the lease and called upon him to remove the construction and deliver vacant possession within 15 days of the receipt of the notice. The respondent filed a suit No. 86 of 1948 for an injunction restraining the Municipal Board from demolishing or otherwise interfering with the construction made by him on the disputed land. The Civil Judge, Gorakhpur, decreed the suit as prayed for. The present suit out of which this appeal arises was filed by the State of Uttar Pradesh subsequently in 1949.

5. In the plaint the State of U.P. submitted that plot No. 227 is Nazul land and is the property of the government. It described the disputed land as adjoining the Patri of the Municipal Board running from Golgarh crossing to Alinagar and situated beyond the limits of the road and Patri. According to the government, the Municipal Board without knowing the true position of the land passed the resolution on November 24, 1945 to lease the portion of the land in favour of the defendant. In paragraph 10 of the plaint the State of U.P. alleged that the government or the District Magistrate were not originally aware of the land being Nazul and of its being dealt with by the Municipal Board in an objectionable manner and that the Municipal Board was under the wrong impression and that on realising the true state of affairs on instructions of the government, the Municipal Board served a notice cancelling the resolution of the municipality to lease the land to the respondent. The government submitted that it was entitled to retain its possession on the ground (1) that it never leased out the land to defendant nor did the defendant make the construction with the plaintiff's permission; (2) that the Municipal Board is not the owner of the land and has no interest in it and the Municipal Board did not, in fact, execute any lease in favour of the defendant and that neither the resolution of the municipality nor the "KABULIYAT" executed by the defendant would confer any right on the respondent. The respondent in his written statement admitted that the land in dispute formed part of the Patri of the public road running from Golgarh to Alinagar in the City of Gorakhpur. He pleaded that there was a practice in the Municipal Board, Gorakhpur not to execute a lease but to obtain "KABULIYATS" from lessess and that he bona fide believed the Municipal Board is the owner of the plot and asked for permission and acting on the permission granted, put up a double storey house costing more than ten thousand rupees. He further contended that even assuming though without admitting that the land in dispute belonged to plaintiff-government, the Municipal Board is fully authorised to let out such a land, to him. He further submitted that as the Collector of Gorakhpur had authorised the lease of the land by the municipality and sanctioned the grant on the lease to the respondent, the government is not entitled to eject him.

6. From the pleadings, it is clear that the disputed land adjoins Patri of the road running from Golgarh to Alinagar. It is also admitted that the municipality did not execute the lease but the respondent executed a "KABULIYAT" regarding the land. The contention on behalf of the plaintiff, State of Uttar Pradesh, is that the land belonged to the State and the municipality had no power to lease the land.

7. The trial Court found that the land in dispute does not belong to the plaintiff-government but was a "street" and belonged to the Municipal Board, Gorakhpur. It also found that though no lease deed was executed by the municipality as the defendant took possession under the contract and admittedly built up a house, the plaintiff is estopped from praying for demolition and for possession of the building. On appeal, the High Court accepted the findings of the trial Court that the disputed land is adjoining Patri but as two judges took the view that land in dispute vested in the municipality under Section 116(g) of the Uttar Pradesh Municipalities Act, it was the only competent authority to sanction the lease in respect of the land and the State Government had no right or interest left in the land and could not, therefore, challenge the validity of the transaction entered into by the Board in

exercise of the power conferred under the Municipalities Act. As a result of the finding that the State had no right to the property, it was held that the government was not entitled to challenge the lease granted by the Municipal Board. In this view, the appeal preferred by the State was dismissed.

8. It may be noted that the suit filed by the respondent against the municipality for injunction restraining the Municipal Board from demolishing or interfering with the constructions made by him was decreed in O.S. No. 86 of 1948 and that decree has become final. In the present suit, the municipality is not a party. Therefore, the contention that the municipality had not leased the site to the respondent by a document as required by Municipal Act, would be of no avail. Equally, the plea that it acted beyond the scope of its authority, is not available to the municipality. The plea of the State taken before the High Court, and before us, by Mr. Dikshit learned counsel for the appellant, is that the State is the owner of the property in spite of the fact it had vested in the municipality as a "street" under Section 116(g) of the Act. It was submitted that when the property is put to a different use, it is open to the government to assert its title and require anyone in illegal possession of the property to vacate. There is not much dispute that the property belonged to the State before the Municipal Act was passed. The High Court has found that the State was the owner of the property till the Municipal Act was passed and this finding was not challenged before us. The only point on which the State lost the suit before the High Court was that after the passing of the Uttar Pradesh Municipal Act, the property vested in the municipality and the State ceased to be the owner and, therefore, cannot maintain the suit for evicting the respondent.

9. The municipalities in various States were created under the respective Municipalities Acts in order to facilitate the efficient administration of the municipal areas and to provide lighting, watering and maintaining of public streets and places. The duties of the Municipal Board are specified in Section 7 of the U. P. Municipalities Act. Under Section 118 of the Act, the Municipal Board is empowered to manage or control any property entrusted to its management and control. The vesting of the property, in the municipality is under Section 116 of the Act. Section 116 provides that subject to any special reservation made by the State Government, all property of the nature specified in this section and situated within the municipality shall vest in and belong to the Board, and shall, with all property which may become vested in the Board, be under its direction, management and control. Clause (g) relates to vesting of streets and is as follows :

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.

It may be noted that while under clause (f) of Section 116 all lands and other property transferred to the board by the government by gift, purchase or otherwise for local public purposes vest in the municipality, under clause (g), the streets vest only qua streets and not as absolute property with the municipality. The word "street" is defined under Section 2(23) as follows :

"Street" means any road, bridge, footway, lane, square, court, alley or passage which the public or any portion of the public, has right to pass along, and includes, on either side, the drains or gutters and the land up to the defined boundary of any abutting property, notwithstanding the projection over such land of any verandah or other superstructure.

It has been found that the property in dispute is Patri and a land which is within the defined boundary of the property abutting onto the road. Thus the property in question falls within the

definition of the word "street". The question as to the nature of the right that vests in the municipality under Section 116(g) of the Uttar Pradesh Municipalities Act will have to be considered. This Court in *Municipal Board v. Sri Mahadeoji Maharaj* ((1965) 2 SCR 242 : AIR 1963 SC 1147 : (1966) 1 SCJ 745), had to consider the nature of the right that vested in the municipality over the streets. Subba Rao, J. (as he then was) after considering the decisions of the English courts and the High Courts, summed up the law on this subject as follows :

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.

After referring to Section 116(g) of the Uttar Pradesh Municipalities Act, under which a public street vests in a municipality, the learned Judge referred to a decision of a Division Bench of the Madras High Court in *S. Sundaram Ayyar v. Municipal Council of Madura* ((1902) ILR 25 Mad 635 : 12 MLJ 37) where the scope of the vesting under the Madras District Municipalities Act was dealt with. The learned Judge extracted the head-note from the Madras decision observing that is brought out the gist of the decision. The headnote runs as follows :

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 side 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 view taken by the Division Bench of the Madras High Court was that though the street vested in the Municipal Council, it does not transfer to the municipality the right of the owner in the site or soil over which the street exists. The question has been dealt with at some detail in the Madras decision and as it has been approved by this Court, it may be usefully referred to. The High Court while observing that if the land itself had been acquired by the municipality, either by purchase or otherwise and roads and drains formed thereon, the municipality would have been the owner of the land but if the State or by the owners of the land adjoining the highway will continue vested, subject only to the burden of the highway, in the State or the respective owners of the land on either side of the highway ad medium filum, or in any other person who may have dedicated the street to the public as the case may be. The court after pointing out that the Madras Municipal Act was modelled after the English Metropolis Local Management Act, 1855, referred to the English cases which dealt with the vesting of the street in the municipality and observed :

The conclusion to be drawn from the English case-law is that what is vested in urban

authorities under statutes similar to the District Municipalities Act, is not the land over which the street is formed, but the street qua street and that the property in the street that vested in a Municipal Council is not general property or a species of property known to the common law, but a special property created by statute and vested in a corporate body for public purposes, that such property as it has in the street continues only so long as the street is a highway, by being excluded by notification of government under Section 23 of Act IV of 1884 or by being legally stopped up or diverted, or by the operation of the law of limitation (assuming that by such operation the highway can be extinguished), the interest of the corporate body determines.

It is, therefore, clear that when a street ceases to be a highway by its being diverted to some other use, the interest of the corporate body determines. After referring to the decisions of the High Courts in India, it expressed its concurrence with the decisions in *Naihati Municipality v. Kishori Lal Goswami* (ILR 13 Cal 171), *Modhu Sudan Kundu v. Promoda Nath Roy* (ILR 20 Cal 732) and *Nihal Chand v. Azmat Ali Khan* (ILR 7 All 362 : 5 Awn (1885) 56) and concluded that (Ed. : Words in ILR 25 Mad 635, 649 read : "In the view I take of the nature of the right vested in the municipality as regards public streets, there is no disposal by the Indian Legislature of any land or hereditament vested in Her Majesty by Section 39 of the Government of India Act, 1858 (21 and 22 Vic., Ch. 106) assuming that the Crown is the owner of the land forming the street in question.") the nature of the right that vested in the municipality as regards public streets, there is no disposal by the Indian legislature of any land or hereditament vested in the government. What is vested in the municipality under Section 116(g) is the street qua street and if the municipality put the street to any other user than that for which it was intended, the State as its owner, is entitled to intervene and maintain an action and to get any person in illegal occupation evicted. We accept the contention of Mr. Dikshit, learned counsel for the State of U.P., that the State is the owner and in the circumstances of the case entitled to maintain action for eviction of the respondent. The view taken by the High Court is erroneous. The result is that the appeal by the State is allowed with costs and there will be decree in favour of the plaintiff as prayed for.

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