

RAJASTHAN HIGH COURT

Municipal Board, Rajsamand

Vs.

J.K. Industries Ltd.

Civil Writ Petn. No. 4262 of 1992

(Rajesh Balia, J.)

24.07.2002

ORDER

Rajesh Balia, J.

1. Heard learned counsel for the parties.
2. This writ petition relates to the claim made by the petitioner-Municipal Board, Rajsamand to charge an amount by way of purported license fee for the user of sub-soil of land within the land adjacent to public road situated within the limits of Municipal Board, Rajsamand, by the respondent No.1.
3. The respondent No.1 had laid an underground pipeline of 4 1/2 Kms. in length with the pipe of two feet circumference from Rajsamand to its factory gate situated at Kankroli. This pipeline runs throughout all along the pipeline laid by Public Water Works. The pipeline was laid in the year 1976. The permission for laying down such an underground pipeline from Rajsamand lake to the factory gate of the respondent No.1 was granted by the Public Works Department, Udaipur vide letter dated 7-1-1975.
4. On an audit objection being raised in the year 1982-83 that the respondent is using the land of Municipality by laying down the pipeline 4 1/2 Kms. without making any payment to the Board and required the Board to charge Rs. 96,57,200/- as fees from the respondent No.1 company for the period commencing from 1-1-1976 to 31st March, 1984 @ 25 Paise per running feet for the entire distance of pipeline. This amount appears to have been scaled down to Rs. 7,30,620/- for the same period by the Audit Department itself, finding a calculation mistake.

5. The audit objection has initially been raised that monthly rent for the land occupied by pipeline beneath ground was Rs. 7,800/- per month or Rs. 11,73,600/- per year. The computation of rent per annum on the basis of rent fixed per mensem was apparently erroneous. This amount was scaled down by reducing the amount of demand as per the audit objection for the period between January, 1976 to 31st March, 1984 proportionately after issuing the notice for raising the demand in pursuance of the aforesaid objection vide Annexure/6 dated 26-7-1984. A demand notice was issued by the Municipal Board, Rajsamand vide Annexure/7, dated 2-3-1985 calling upon the respondent No.1 company to pay the amount of arrears up to 31st March, 1984 and annual license fee for the year 1984-85 as Rs. 11,73,600/-.

6. This demand was challenged by way of appeal before the Sub-Divisional Officer, Rajsamand under Section 139 of the Rajasthan Municipalities Act, 1959.

7. The S.D.O., Rajsamand vide order dated 8-12-1987 allowed the appeal and set aside the demand dated 17-4-1985 which is Annexure/8 containing the subsequent demand up to 31-3-1985.

8. The respondent-company has raised multiple objection which included that the road in question which leads to Kankroli Railway Station is maintained by P.W.D. and it is not vesting in Municipality. It was pointed out that as per the Notification issued by the State Govt. in exercise of its powers under Section 92(2) of the Act of 1959 the road in question along with 15 meter land on both sides of the road has been reserved by the State Government and it does not vest in the Municipal Board in view of the provisions of Section 92 (2) of the Act of 1959; that under Section 138 the Municipal Board has no right to issue license or grant permission for laying pipeline beneath the ground; and that without framing bye-laws no license fee under Section 138 (2) can be claimed. Along with these objections, specific plea was taken that while audit objection was raised for recovering rent, demand has been created on the basis of audit objection for charging license fee which is not livable.

9. The S.D.O. affirmed that in terms of Notification dated 1-12-1968 published in Rajasthan Gazette dated 1-5-1969, the land in question does not vest in Municipality and the land within 15 meters on both sides of the road was not available for grant of lease and, therefore, question of raising any demand on account of license fee or rent does not arise. The S.D.O. also found that there is no difference between laying down

the pipeline beneath the surface by Public Health and Works Department or by the Company so far as exercise of property right in respect of land in question is concerned; when no license fee is payable for use of land by laying down the pipeline beneath surface, no license fee or rent can be payable by the company for the similar use which has been permitted by the Board. The plea of the respondent-company for non- applicability of Section 138 (2) for want of bye-laws was also accepted.

10. The demand created by the Municipal Board was quashed by order dated 28-12-1987.

11. Aggrieved with the order passed by the S. D. O., the Municipal Board preferred a revision before the Addl. Divisional Commissioner, Udaipur. The revision was also dismissed by the order under challenge dated 13-3-1992. The Addl. Commissioner was also of the opinion that the license fee under Section 138(1) of the Act, 1959 could be claimed by the Board only if the land of the Municipality would have been occupied by the respondent-company with its permission or under a license issued by it; since no permission was granted by the Municipal Board, sub-section (1) of Section 138 cannot be invoked. If the land of Municipality is used or occupied by a person without license or permission from the Municipal Board, license fee or permit fee could be recovered under Section 138 (2). Since the rate at which such fees could be levied has to be determined by framing bye-laws, demand under sub-section (2) cannot also be recovered because no bye-laws have been framed by the Board prescribing the rates at which license fee could be charged under sub-section (2) of Section 138 of the Act. This led to filing of the present writ petition.

12-13. The learned counsel for the petitioner has urged that under Section 92 all public streets within Municipal limit vests in the Municipal Board and it becomes property of the Municipality. Section 138 empowers the Municipal Board to charge license fee for any occupation of the land with or without permission of the Board for the period for which it remains under such occupation by any person. The license fee is chargeable in exercise of property rights vesting in Municipal Board for occupancy of the property of the Municipal Board. The Municipal Board is otherwise entitled to charge the license fee or the rent as the case may be from the occupant. The learned counsel has relied upon the basic principle that a person in whom the land vests he owns not only surface but space above up to sky and sub-soil to any depth.

14. On the other hand, it was contended by Mr. Mehta, learned counsel appearing for the company that the public streets and other appurtenances vests in the Municipal Board only as trustee for the purpose of its management and control, but it does not carry ownership rights in the land itself. The rights which vests in the Municipal Board under Section 92 in respect of public streets and its appurtenances are only the rights to control and management of streets as streets but if any property interest existing on abutting land which abound the public street, the ownership rights continue to vest in those persons whether the State or other individual owner as the case may be. In this connection, he placed reliance on two decisions of the Supreme Court viz. *The Municipal Board, Manglaur v. Mahadeoji Maharaj reported in* ¹ and *State of U.P. v. Ata Mohd., reported in.* ² It was also contended by the learned counsel for the respondent that even otherwise Section 92 is confined to property mentioned in different clauses, only if such property is not specially reserved by the State Govt. As in the present case, the public road in question which is described as village road by the learned counsel for the appellant is maintained by the Public Works Department of State and has been specially reserved under sub-section (2) of Section 92 by the State Govt.. vide Notification referred to above. The property did not at all vests for any purpose in the Municipal Board. Mr. Mehta further contended that assuming that the land in question vest in municipality, provisions of Section 138 can be invoked only in respect of temporary use of land or the surface of land but, the provisions of Section 138 cannot be invoked for permanent use of the sub- soil with the permission of the paramount owner namely the State. Lastly, it was urged that assuming that any license fee is chargeable by the Municipal Board but, it can confine only for the period during which the surface of land in question remained temporarily in possession of the respondent-company for the purpose of laying down the pipeline which is under ground and is not part of the public street.

15. It will be apposite to notice the provisions of the Municipal Act relevant for the present purpose.

Section 92 reads as under :

Section 92. Power to acquire and hold property- (1) Every board may acquire and hold property both movable and immovable whether within or without the limits of the municipality.

(2) All property of the nature hereinafter in this section specified and not being specially reserved by the State Govt. shall vest in and belong to the board and

shall together with all other property of whatsoever nature or kind not being specially reserved by the State Govt., which may become vested in the board, be under its direction, management and control, and shall be held and applied by it as trustee subject to the provisions and for the purposes of this Act.

(a) to (d)

(e) Such Govt. lands within a municipality as the State Govt. may by general or special order vest in the municipal board.

(f) all public streets and the pavements, stones and other materials thereof, and also all trees, erections, materials, implements and things provided for such street.

(3) The State Govt. shall be competent from time to time, by notification in the Official Gazette, to resume any Govt. land vested in a municipal board under Clause (e) of sub-section (2).

(i) if such Board is found upon inquiry to have mismanaged such land, or

(ii) if such land is otherwise required by the State Govt. in the public interest.

Section 3 (xxvi) Public street : means any street (a) over which the public have a right or way, or (b) which has heretofore been leveled, paved, metal led, channeled, sewered or repaired out of municipal or other public funds, or (c) which, under any provision of this Act, becomes a public street ;

Section 3 (xxxii) Street : means any road, bridge, footway, lane, square, court, alley or passage accessible, whether permanently or temporarily, to the public or any portion of the public, whether a thoroughfare or not, and includes on either side (i) the drain or gutters and the land up to the defined boundary, notwithstanding the projection over such land of any verandah or other super-structure, (ii) every space, notwithstanding that it may be private property, or partly or wholly obstructed by any gate, post, chair or other barrier, if it is used by any person, whether or not occupying any abutting property, as a means of access to or from any public place or thoroughfare;

Section 138 : Board may charge fee for certain licenses- (1) When any license is granted by the board under this Act or when permission is given by it for making any temporary erection or for putting up any projection, or for the temporary occupation or any public street or other land vested in the board, the board may charge a fee for such license or permission.

(2) The Board may charge a higher fee by way of penalty for any erection or projection, or for the use or occupation of any public street or other land vested in the board by any person without its permission or license. Such fee shall be

livable irrespective of any other penalty or liability to which the person liable to pay the same may be subject under any other provision of this Act or any other law for the time being in force. The rates of such higher fees shall be determined by rules.

(3) The Board may also charge such fees as may be fixed by bye-law under clauses (a), (q) and (r) of sub-section (1) of Section 90, for the use of any such places mentioned in that sub-section as belong to the board.

(4) It shall be lawful for the board to lease the levy of any fee that may be imposed under sub-section (3) by public auction.

(5) When any fee has been leased under sub-section (4), any person employed by the lessee to collect such fees or the lessee himself may, subject to the conditions of the lease, collect the fee or expel from the place for the use of which the fee is payable any person who is liable to pay the fee but refuses to pay it.

16. The question what is the extent of vesting of the property in respect of public street in the Municipal Board under Section 92 is no more *res integra* and stands concluded by the decision of the supreme Court which has been rendered while interpreting the provisions of the U.P. Municipalities Act which contains provisions *pari materia* with Section 92 of the Rajasthan Municipalities Act, 1959.

17. The *Municipal Board, Manglaur v. Mahadeoji Maharaj*, reported in ³ was a case where the metalled road running through the plot of land belonging to the plaintiff, who was an individual, and there was open space on either side of the road and on the other side of the open space there was a municipal drain. The Municipality was to maintain the roads and drains. The Municipality was seeking to erect a structure on the vacant site lying between the drains and the road wherein it intended to install a statue of Mahatma Gandhi, two rooms on either side of the statue for Piyo and library. The plaintiff brought a suit for a permanent injunction restraining the defendant-Municipality from putting up the structure on the suit site and also for delivery of possession of the same to the plaintiff.

18. The Municipality has contended that open space abutting on the either side of the public street which was surrounded by the drain vested in Municipal Board absolutely as part of public street and was a property of Municipality which it can use within its discretion. The Municipal Board claimed exclusive right to maintain and control of

entire properties uninterrupted by the private individual. Section 116(g) of the U.P. Municipalities Act was couched in the same language as the provisions of Section 92 (2) (f) of the Rajasthan Municipalities Act, 1959. The Court said that the side lands are also included in the public way as the said land was between the metalled roads and the drain, admittedly maintained by the Municipal Board. Such a public path way vests in the Municipality, but the Municipality does not own the soil. It has 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 right. On this conclusion, the Court further held that the Municipality cannot put any structure which it intended to erect on the vacant site as it cannot be said that they were necessary for the maintenance or user of the road as a public highway. Such act was unauthorized of the municipality.

19. The matter again came up before the Supreme Court 15 years later again in a case arising under U.P. Municipalities Act. In this case the State of U.P. had filed a civil suit for a mandatory injunction directing the respondent private party to remove his material and construction and to clear the land in dispute which was situated in the city of Gorakhpur and for a decree for possession.

20. In this case, the Municipality has granted a lease in respect of open land situated on the side of metalled road which was abutting on the road. The respondents have claimed protection of being in lawful possession under a lease from Municipal Board on the ground that the property vests in the Municipality and he has been inducted by rightful owner of the land in question as a lessee. He has also contended that the land does not vest in the State Govt., so as to entitle it to bring a suit for mandatory injunction and possession of the respondent. The Court considered the general principles on the basis of which public streets are vested in the Municipalities in various States under different Municipal Laws. The Court said :-

"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 Boards 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 Govt., 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."

21. Referring to Clause (g) relating to vesting of provisions under Section 116 and the definition of street under Section 2(23) of the U.P. Municipalities Act, the Court reiterated the view expressed by the Supreme Court on an earlier occasion in the case of Municipal Board, Manglaur.

22. The Court also referred to a decision of Madras High Court in *S. Sundaram Ayyar v. The Municipal Council of Madura and The Secretary of State for India in Council reported in* ⁴ The Court quoted with approval the following ratio from the Madras decision :

"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 of soil over which the street exists. It does not own the soil from the centre of the earth usque ad coelum, 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."

23. 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 thus vested in a Municipal Council is not general property or a species of property known to the Common Law, but a special 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 the Act IV of 1884 or by being legally stopped or

diverted, or by the operation of the law of limitation.

24. The Court further concluded after referring the decision of the Calcutta High Court and Allahabad High Court that the nature or 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.

25. It is apparent that vesting of property in a public street under sub-section (2) of Section 92 in the Municipality is only street *qua* street and it does not acquire proprietary right except to the extent it is necessary for managing and controlling the property as a street. The right of proprietorship to manage and control the street as street vests in the owner in whose favor such right vests before the vesting of such property under Section 92 (2) of the Act of 1959.

26. It is not in dispute before me that but for Section 92(2) (f) the public street and the land adjoining thereto up to 15 meters which can well be considered as necessary for access to the street in question belongs to the State Govt. It is not the case of Municipality that laying down the pipeline beneath surface in any way affects the maintenance, management and control of the surface as a street or it affects managerial proprietorship vesting in the Municipality in the sub-soil. In the absence of any such claim of interference with the rights vested in the Municipality as enunciated by the Supreme Court in respect of a public street, the right to levy charge of any amount from the respondent-company for constructions made beneath the surface does not vest with the Municipality. Right to charge any amount, if any, by way of user of the sub-soil of the land which is abutting on the public street or road vests with the Govt. It is not in dispute also that the respondent-company has laid underground pipeline with the permission of the State Govt. through its PHED Deptt. in whom such right vests. The Municipality cannot claim to have right to recover any amount in respect of any erection of pipeline underground. Therefore, claim to levy license fee in respect of sub-soil land occupied by the pipeline with the permission of the State Govt. on the adjoining land of the public street cannot be made by Municipality in exercise of its ownership rights.

27. In view of the aforesaid conclusion, it is not necessary to examine in detail the contentions raised on the basis of Notification. Suffice it to state that the notification clearly indicates that only such roads are specially reserved under Section 92 (2) so as to take its management and control away from the Municipality itself, if such State road is maintained by P.W.D. On this question there is dispute between the parties and there is not a clear finding to that effect by the authorities. Similarly, this aspect has not been examined by the Addl. Divisional Commissioner. This question may be relevant if the Municipal Board, Rajasamand proposes to levy the license fee for the period the surface was in temporary occupation of the respondent No.1 for the purpose of laying down the pipeline in question. In that event, the question may arise whether the management and control of the surface land in question continued to vest in the Municipal Board, Rajasamand in view of the notification referred to above. That can only be decided by reaching a positive finding in one way or the other. The question may arise whether the public street in question was maintained by P.W.D. or the Municipal Board at the relevant time. If it is maintained by PWD, the public street ceased to be vested in Municipal Board even for the purpose of its management and control under Section 92(2). If this conclusion is reached that the street in question at the relevant time was maintained by the Municipal Board, the Municipal Board would certainly be entitled to charge license fee/permit fee for occupation of land temporarily by company for laying down the pipeline for the period during which surface area remained under occupation of respondent No.1. However, as that question does not arise for consideration in this petition, I leave it at that.

28. It is true that the reason which has weighed with the Addl. Commissioner for sustaining the objection raised by the respondent is erroneous. The authority to levy license fee flows from the statute, that is, in the present case is Rajasthan Municipalities Act, 1959. Section 138 authorizes levy of charges for occupation of land or property of Municipality whether under a grant of license or permission or without such permission. The only difference is in the rate at which such charges are to be levied. Where the occupation is under a license granted or permission given, levy is to be charged under sub-section (1) of Section 138 as per the rate or rates prescribed there under. If such occupation is without license or permission, the consequence is provided under Section 138(2). It *inter alia* envisages that penalty is livable in addition to license fee or permission or charges at the rate fixed by bye-laws. Merely because the rate has been left to be prescribed through bye-laws to be framed by Municipal Board, the provisions will not be defeated merely for want of framing of

the bye-laws or the Rules. The provisions of Section 138 authorize the Municipal Board to charge the fee for temporary occupation of the land or raising projection over the land does not depend on framing of bye-laws or the rules. The right flows from the statute. In case the bye-laws are not framed, the power vested in the Municipal Board as a authority in whom the surface of the street vests for the purpose of its management and control would not be defeated. The right to charge license fee or permit fee under sub-section (1) of Section 138 is recognition of the right of ownership. Section 138 only regulates such right. In the absence of framing of bye-laws, reasonable amount can be charged by the Board in exercise of its executive authority to recover charges for use and occupation of its property. The law is otherwise well settled and flows from the constitutional provision that executive power of the State extends to such areas in which the State has power to legislate but has not legislated. The Board does have the legislative power to make bye-laws for prescribing the rates for charging fees for use and occupation of its property without its permission. In absence of such bye-laws it can provide such gap by using its executive powers in the same field.

29. However, the demand raised by the Municipal Board, which has been set aside by the S.D.O. and Addl. Divisional Collector, cannot otherwise be sustained for the reasons stated above and, therefore, no interference is called for in this petition.

30. As a result of the aforesaid discussion, this petition fails and is hereby dismissed. No orders as to cost.

Petition dismissed.

Cases Referred.

1. AIR 1965 SC 1147
2. AIR 1980 SC 1785
3. AIR 1965 SC 1147
4. (1902) ILR 25 Mad 635