

(1996) 07 MP CK 0028
In the Madhya Pradesh High Court
Case No : Civil Rev. No. 668 of 1996

Akhilendu Arjaria and Others

APPELLANT

Vs

Banarasidas and Others

RESPONDENT

Date of Decision : 19-07-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A, 144
Madhya Pradesh Municipal Corporation Act, 1956 — Section 318, 320, 322, 5(49),
5(55)
Penal Code, 1860 (IPC) — Section 283

Citation : (1997) 1 MPLJ 376

Hon'ble Judges : T.S. Doabia, J

Bench : Single Bench

Advocate : N.K. Mody, for the Appellant; K.L. Mangal and H.K. Shukla, for the Respondent

Judgement

T.S. Doabia, J.

"We, the people of India", solemnly resolved to constitute ourselves into a "Sovereign Socialist Secular Democratic Republic." It was resolved to give justice and equality to all. Having been ruled by a foreign power for more than two centuries it was thought apt to include a chapter of Fundamental Rights in the Constitution which we gave to ourselves. Attainment of "Liberty" in all spheres was thought as an imperative goal. The Courts have been enforcing these fundamental rights only. Some how or the other it was felt that we were concerned about our rights only. We absolutely forgot that we owe a duty to this Nation also. It was precisely for this reason in 1976, a chapter dealing with "Fundamental Duties" of the citizen of this country was incorporated in the Constitution. Part IV A was added by 44th Constitutional Amendment Act, 1976. Article 51A which was so added prescribes a duty for every citizen of India "to protect and improve the natural environment including forest, lakes, rivers" and to safeguard "Public Property". It is imperative that the citizens of this country be reminded of their obligations to this Nation.

Expansionist instinct is a basic in-built human trait. When this desire was manifested by kings and Emperors this was described as "occupation" and "annexation". When this desire is exhibited by a common man, it is described as encroachment. It is one of these encroachments on public streets which is the subject-matter of this litigation. As a matter of fact this Court took cognizance of this very encroachment earlier also. It was concluded that Banarasi Das-plaintiff who figure as respondent in this petition had no right of statutory flavour in his favour to continue on a piece of land which is part of the public street. Now after a successful effort was made by Municipal Corporation, Gwalior (hereinafter referred to as the Corporation) to remove the encroachment the respondent plaintiff approached the trial Court. An application under Order 39, Rule 2-A of the Code of Civil Procedure, 1908, (hereinafter referred to as the Code) was filed. Contempt proceedings are sought to be initiated against the officials of the Corporation. The plaintiff-respondent insists that there is breach of the order of injunction passed by the trial Court on 11th of November, 1992. Restoration of possession has also been sought. Order by which proceedings have been initiated in this regard by the trial Court are being challenged in the present proceedings. The argument advanced on behalf of the officials of the Corporation is that they took action with a view to remove the encroachment in terms of the order passed by the trial Court itself and in any case it is submitted that the earlier decision given by this Court in civil revision No. 159 of 1994 decided on 24th of May, 1994 i.e., Banarasidas and Another Vs. Ramkrishna and Others, authorised the Corporation to take steps for removing the encroachment. It is, therefore, argued that the Court below has assumed jurisdiction not vested in it. Before noticing the contentions raised by both the sides, it would be apt to recapitulate some basic facts.

In the city of Gwalior, there is a place known as Jiwiji Chowk, Maharaj Bada. It is circular in shape. Buildings displaying fine architecture which may also be covered by the term "ancient monuments" exist on this circular chowk. One such fine structure known as "Victoria Market" is being used rather misused as Fruit Market. Several roads from different directions converge on this circular chowk. As a matter of fact, some of the traffic has necessarily to pass through this place. It is because the traffic converging on this circular area moves in one direction only. It is in this circular area there exists a temple dedicated to Lord "Hanumanji". The Corporation for reasons best known to it gave permission to respondent Banarasi Das to temporarily occupy a piece of land adjoining the temple measuring 12.5" x 8.4". This permission was for a limited period of and expired on 30-3-1996, the date after which no payment was received by the Corporation.

One fact is clear that there was no permission to raise any permanent construction. Later on, a permanent construction was raised. When steps were taken with a view to demolish it, the suit out of which this petition has arisen was filed. On 11th of November, 1992, the trial Court came to a prima facie conclusion that Banarasi Das respondent was a lessee under the petitioner

Corporation, and therefore, he should not be dispossessed from the land in question. In para 8 of the order, it was however made clear that if the plaintiff respondent Banarasi Das had raised any permanent construction or has occupied any area in excess of the area which he was permitted to occupy then the Corporation would be at liberty to remove the permanent encroachment and also see to it that the plaintiff does not remain in possession of an area more than that which he was allowed to occupy. This direction was given in civil suit No. 166-A of 1991. There was another litigation initiated by this very plaintiff. The subject matter of this was another encroachment adjacent to the area now in dispute. Steps were taken with a view to evict the plaintiff respondent and in fact, he was evicted from some portion of the land. This was subject-matter of civil suit No. 7-A of 1994. This litigation as indicated in para 2 above, came to this Court. Civil Revision No. 159 of 1994, came to be registered. This Court concluded that there exist no relationship of landlord and tenant between the plaintiff and the Corporation. It was also concluded that plaintiff having occupied a piece of land which was part of public street, he had no right to continue on the same. The Corporation filed an affidavit in the above proceedings and pleaded that the respondent had unauthorisedly occupied the land in dispute. As a matter of fact specific reference was made to dimensions of a piece of land which is the subject-matter of the present litigation. This petition was dismissed. This as noticed above is reported as Banarasidas and Another Vs. Ramkrishna and Others, . SLP preferred against the above decision was dismissed by the Supreme Court of India on 30th September, 1994. It bears SLP Civil 14591 of 1994.

It is in the light of the above facts, the arguments raised by the learned counsel for both the sides are required to be gone into. As such, it is thought apt to define the arena of dispute. The questions which require consideration are :

- (i) Whether the municipal authorities owe an obligation to the citizens of this country to see that the public property is not permitted to be encroached upon?
- (ii) Whether the piece of land on which permission was granted by the Corporation is part of public street?
- (iii) To what use public streets can be put?
- (iv) Whether there exists any relationship of landlord and tenant between plaintiff and the Corporation?
- (v) Whether the permission granted to the plaintiff was for indefinite duration?
- (vi) If the permission was null and void can it be ignored?
- (vii) Whether the action of the Corporation in removing the encroachments was in conformity with the directions contained in the order dated 11th of November, 1992, passed by the trial Court?
- (viii) Whether the respondent is entitled to restoration of possession?

(ix) Whether any civil or criminal liability is incurred when public streets are encroached up?

(x) If public streets are to be properly maintained then what should be the source of financial commitments?

Point No. (i) : Municipal authorities as Trustees.

By now it is well settled that the municipal authorities are in the position of trustees. They have to deal with the property with the same care with which a trustee is supposed to deal with a trust property. Some of the decisions which deal with this obligation of the municipal authorities be noticed.

More than a century ago in *Attorney General v. Corporation of Sunder Land*, 1875 (2) Ch.D 634, the position of the municipal authorities with regard to public parks, gardens, squares and streets was put at par with a trustee, and it was held that the municipal authorities would be guilty of breach of trust in employing any part thereof for purposes other than those contemplated by the relevant statute. Still later in *Maddison v. Alderson*, (1883) 8 App. 467, 52 LJQB 737, it was observed that an excess of statutory power cannot be validated by acquiescence in or by the operation of estoppel and the Court would decline to interfere for the assistance of persons who seek its aid to relieve them against express statutory provision. It was further observed that that Courts would not permit the statute to be made an instrument of fraud. The U.S. Supreme Court in *Samuel Berman v. Andrew Parker*, (1954) 99 Law Ed 27, 348 US 26, expressed a view that the concept of the public welfare is broad and inclusive. The same Court in *Village of Belle Terre v. Bruce Borass*, (1974) 39 Law Ed 797, 416 US 1 and again in *Agins v. City of Tiburon*, (1980) 447 (US) 255, expressed similar views. The regulations which prohibited conversion of open space land and thereby protecting against the resultant impacts such as pollution, destruction of scenic beauty, disturbance of the ecology and the environment, hazards related to ecology, fire and flood and other demonstrated consequences of urban sprawl, were upheld. It was held that the State's.

"Effort to discourage the unnecessary conversion of open-space land is to be appreciated. Specific zoning regulations at issue were held to be exercises of the state police power to protect the citizens from the ill-effects of urbanisation."

What was sought to be projected in the above cases was reiterated by the Supreme Court of *Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others*, . In the above case, the Municipality of Udipi had granted permission for construction of Cinema Hall in a place which was reserved for residential purposes. This action of the Municipality was struck down by observing that the Municipal authorities are supposed to enforce a scheme and not to act in breach thereof. It would be apt to quote what was said by the Supreme Court :-

"27... Where the Municipality acts in excess of the powers conferred by the Act

or abuses those powers then in those cases it is not exercising its jurisdiction irregularly or wrongly but it is usurping powers which it does not possess. The right to build on his own land is a right incidental to the ownership of that land. Within the Municipality the exercise of that right has been regulated in the interest of the community residing within its limits of the Municipal Committee. If under pretence of any authority which the law does give to the Municipality it goes beyond the like of its authority and infringes or violates the rights of others, it becomes like all other of the Courts. If sanction is given to build by contravening a bye-law the jurisdiction of the Courts will be invoked on the ground that the approval by an authority of building plans which contravene the bye-laws made by that authority is illegal and inoperative."

The same concern was shown by the Supreme Court of Bangalore Medical Trust Vs. B.S. Muddappa and others, . In this case action of the local authority which was destructive of environment was set at naught.

Therefore it can be said that the Municipal Corporation of Gwalior and other Municipal authorities have no right to permit user of public streets. They are mere trustees. If the authorities act to the contrary, they violate the trust reposed in them.

Point (ii) : What is a public street.

The second question be now examined. This is as to what is meant by street and public street and as to whether footpaths are also covered by the term. If the definition of the street and public street as found in the Madhya Pradesh Municipal Corporation Act, 1956, (hereinafter referred as the Corporation Act) is perused then it would become apparent that even private property can be part of the street. See : section 5(55) of the above Act.

In Halsbury's Laws of England, 4th Edition, page 53, para 72, hereinafter referred to as "Halsbury" this concept is dealt with. It has been observed as under:

"The fact that a way has been used by the public is evidence from which a dedication may be inferred if the way has been used for so long and in such circumstances that the proper inference is that the owner of the soil had said, or so conducted himself as to imply, that he had granted the right of passage to the public."

At page 55, paragraph 75-76 of Halsbury it has been stressed that "this user should be open". Again, at page 73, paragraph 103, of above treatise it has been indicated that "all highways vest in the authority which is for the time being constituted to look after these". The relevant portions be noticed as under:

"The extent of the acquiescence is also a material question, and to carry any weight the user must be open and unconcealed." (page 55)

"In order to infer a dedication, user of a way by the public must be as of right.

Members of the public enjoy a way as of right where they use it believing themselves to be exercising a public right. User as of right is actual enjoyment which is open, not by force and not by permission given from time to time..... an inference of dedication may be drawn if a landowner allows a certain class of persons, and no other, to use a way and does not expressly inform them that he is granting them a special privilege.." (page 55)

"In general, every highway maintainable at the public expense, vests in the authority which is for the time being the highway authority for the highway." (page 73)

In "Pratt and Mackenzies Law of Highways", 20th Edn., at p. 4 it is stated :

"Subject to 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."

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 may infer a dedication by the owner. 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 and levelled the site of a road-side ditch.

In *Harvey v. Truro Rural Council*, (1903) 2 Ch 638 at pp. 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 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."

The space at the sides that is of the hard road is also necessary to afford the benefit of air and sun. *Rex v. Wright*, (1832) 3 Band Ad. (681) 37 RR 520. The expression "road" or "highway" is not confined to the portion actually used by the public but it extends also to the side lands. *Anukul Chandra Chakravarti and Others Vs. Chairman of the Dacca Dist. Board*, . The ground, whether metalled or not, over which the public has a right of way is just as much the public road as the metalled part. The Court would be entitled to 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. *Municipal Board of Agra v.*

Sudarshan Das Shastri, AIR 1914 All. 341. The decisions given by the Supreme Court of India be also noticed. In *Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj*, it observed that inference of dedication of a highway to the public may be drawn from a long user of the highway by the public. It was observed :

"The width of the highway so dedicated depends upon the extent of the user. The side land 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 landmark and the manner and mode of its maintenance usually indicate the extent of the user."

Again, in *State of Uttar Pradesh Vs. Ata Mohd.*, , it was held that street would vest in the Corporation only qua the street and not as absolute property. What is vested in the Municipality is not general property or a species of property known to the common law but a special property created by a statute and vested in a corporate body for public purposes. Such vesting enables the Corporation to use the Street as a street and not for any other purpose. Not only pavements but verandahs in front of the shops are part of streets and public streets. Reference be made to a decision given by the Supreme Court in the case of *M/s. Gobind Pershad Jagdish Pershad Vs. New Delhi Municipal Committee*, . In this case verandahs in Connaught Circus in New Delhi were held to be part of public streets. In para 12 of the judgment it was observed as under :

"12. We see no ground to differ with the concurrent findings of the Court below and hold that the appellant has dedicated the Verandah in dispute to the public-use. It is being used for passing and repassing by the public at large and as such is a "street" in terms of section 3(13)(a) of the Act. The appellant has thus surrendered his rights in the property for the benefit of the public. The user of the property is and always shall be with the public. Any space, passage, verandah, alley, road or footway dedicated to public by the owner for passing and repassing, partakes the character of a "street" and no longer remains under the control of the owner has no right at all times to prevent the public from using the same. When the owner of the . property has, by his own violation permitted his property to be converted into a "street", then he has no right to claim any compensation when the same property is made "public street" u/s 17(4) of the Act. The "streets" are meant for public use. It is necessary that the "streets" which are being used by the public are frequently repaired and are also saved from public abuse. It is common knowledge that in the absence of any regulatory control the hawkers and squatters are likely to occupy the "streets" thereby creating nuisance for the public. In a situation like this it is necessary for the committee to step in and exercise its powers u/s 17(4) of the Act. The Committee exercises regulatory control and is responsible for the repair and upkeep of the "public streets". The verandah in dispute is a "street". It has been declared as a "public street" for the better enjoyment of the public right in the said street. We hold that when a "street" is declared as "public street" the owner of the property comprising the said "street", has no right to claim

compensation." Thus not only pavements, verandahs, drains but all open spaces in front of shops which are accessible to vest in the Municipal Corporation. This vesting is for the purpose streets are used are streets and are accessible to public without any obstruction."

A perusal of the aforementioned judicial precedents indicate that every inch of land which is accessible to the public would be part of street and public streets and this piece of land cannot be permitted to be used for a purpose other than for which it can be used under statutory provisions.

Point No. (iii): To what use streets and Public Streets can be put.

There can be no dispute with the proposition that the public has a right of passage and this cannot be obstructed. Halsbury deals with the rights of the public vis-a-vis passage. Relevant passage is as under :-

"The right of the public is a right to pass along a highway for the purpose of legitimate travel, not to be on it, except so far as the public's presence is attributable to a reasonable and proper user of the highway as such. A person who is found using the highway for other purposes must be presumed to have gone there for those purposes and not with a legitimate object, and he is to be treated as a trespasser. If a highway causes damage to premises adjoining the highway, the person who has suffered damage cannot recover in trespass in the absence of negligence on the part of the person causing the damage." (page 76)

In this very volume at page 182, even footpaths have been treated as part of the highways and it would be useful to note what has been said at page 182 :

"Public footpaths are highways, and the general law as to highways applies to them except where footpaths are excluded by the terms of a particular enactment or are subject to enactments applicable to footpaths only.

Like other highways, public footpaths owe their origin either to express or inferred dedication or to some statute."

In the light of the above, the question to what use public streets can be put be examined.

The judicial precedents support that the municipal authorities are under an obligation to not to permit any permanent or pakka constructions on streets and public streets. The principle that Municipality cannot use a public street otherwise than as a public street and it has no right to interfere with the enjoyment of the right of way by public by letting out a portion of it to a particular individual for private use was recognized in *Municipal Committee, Multan v. Abdul Gafoor and Ors.* AIR 1934 Lah. 900. In *Tallak Chand v. Dhoraji Municipality*, AIR 1955 Sau. 63, a Division Bench observed that the Municipality is not entitled to put up a pucca structure even on a footpath. Even the Government has no right whatsoever to declare any part of a public street to be a footpath to be a hawker's corner. *Biswanath Sinha and Others Vs. Sudhir Kumar Banerji and*

Others, . The fact that the public streets are to be kept free from encroachment was considered in *Pyarelal v. Sandal*, AIR 1972 Raj. 103. It was observed :

"10. When the Act did not give any power to the Municipality to let out portions of a public highway for putting up stalls for carrying on business this could not be done by framing any bye-laws. Section 129 of the Act which provides for framing bye-laws does not contain any clause specifically empowering the Municipality to frame bye-laws about letting out parts of public highways of Tehbazari clause (i) is a general clause enabling the Municipality to frame bye-laws for carrying out the purposes of the Act. As has been shown above the Act does not empower the letting out of portions of a highway for carrying on business and so no bye-laws could be framed authorising the Municipality to do so."

The Municipal Authorities cannot permit erection of a structure in violation, of the Municipal Act on a public street. Even an island is protected. It was observed that if the Municipal Authorities act contrary to the provision of a statute then they can be directed to act in accordance with law. *R. Varadarajan Vs. Salem Municipal Council and Another*, . In *Mst. Bhagwanti Vs. Mst. Jiuti and Another*, , it was observed that if an obstruction is made by any person or authority on a public way which affects the ingress and egress then a suit can be maintained for the removal and demolition of the construction in question. In *Prabhudas Kalyanji and Others Vs. Haji Hasan Haji Yusuf Maklal and Others*, , it was observed that a mandatory injunction can be granted directing the Municipality to take action against the person who has been permitted to put a cabin on the footpath. Reliance was placed on an earlier decision given in *Parasram Manjimal and Others Vs. The Kalol Municipality, Kalol*, and *Emperor Vs. Vishvanath Nana Karpe and Others*, The Municipality cannot permit any person to deposit goods for sale on any public street and cannot lease any portion of public street. *Municipal Committee, Multan v. Tahila*, AIR 1923 Lah. 272. Reference be also be made to the decision of the Patna High Court in *Dwarka Prasad Singh and Others Vs. Patna City Municipality and Another*, , wherein it was held that the owner of the land abutting on a roadway is entitled to access to that roadway. This decision was affirmed by a Division Bench of that Court. This is reported as *Patna City Municipality Vs. Dwarka Prasad Singh and Others*, . Other decisions dealing with the subject and holding that highways cannot be obstructed or fenced and that these must remain accessible to the adjoining owner are *District Board of Manbhum Vs. Bengal Nagpur Railway Co. and Another*, , *Pehlad Maharaj v. Gaudi Dutt*, AIR 1937 Pat. 620, *Dasrath Mahto and Others Vs. Narain Mahto and Others*, , *Firm Katoorilal Sandal v. M. C. Jagraon*, AIR 1939 Lah. 199 and *M. C. Delhi v. Mohd. Ibrahim*, AIR 1935 Lah. 196.

Under a government scheme to aid the disabled persons an institution was authorised to construct a bunk on the side of a road within the Corporation limit. This action was challenged. It was held that the land on which the bunk was built was a public street and neither the Government nor the Corporation had any right to allow any construction or to use it in a fashion other than the public

street. *Govinda Rao v. Distt. Collector, Ernakulam*, AIR 1983 Ker. 11. In *Corporation of Cochin and Another Vs. K. Janardhanan*, , a construction was made on footpath. It was held that the Municipal authorities could demolish the construction since it was constructed on property which vested in the Corporation. In this case, the permission was granted to construct a milk booth over a gutter. The booth was however constructed over the gutter and the footpath. It was held that the construction on the footpath could be demolished. In *Government of Tamil Nadu Vs. Chingleput Dravidar Kazhagam and Another*, , it was held that the Municipal Council cannot permit the user of the street for a purpose other than that indicated in the statute.

Accordingly, it is held that the Corporation is not within its rights to permit any permanent or pakka structure on a street or a public street. If it does so then it can be said that it has acted beyond the powers conferred on it and it would be beyond the statutory provisions. This would accordingly be null and void.

Point No. (iv) : Effect of receiving some payment by municipal authorities.

The fourth question is as to whether mere payment of rent would bring about the relationship of landlord and tenant. This aspect of the matter is no longer *res integra*.

The case of the respondent as projected is that he had been carrying on his business on the land which admittedly is part, of public street. His case is that he is paying "rent" and as such relationship between him and the Corporation is that of a landlord and tenant and he cannot be evicted in summary manner. This contention and plea was *prima facie* accepted by the trial Court. In this regard, it would be apt to notice section 80 of the Corporation Act. The mode of executing contracts stands provided in sections 73 and 74 of the Act. There is no written instrument in terms of section 73 or 74. Under these circumstances, even if plaintiff was paying some amount which has been shown as "rent" to the Corporation, it cannot confer the status of a tenant on the respondent-plaintiff. This question was considered by the Supreme Court in *Dr. H.S. Rikhy and Others Vs. The New Delhi Municipal Committee*, . The Supreme Court of India observed as under :

"6. The use of the word "rent" is not conclusive of the matter. It may be used in the legal sense of recompense paid by the tenant to the landlord for the exclusive possession of premises occupied by him. It may also be used in the general sense, without importing the legal significance aforesaid, of compensation for use and occupation. "Rent" in the legal sense can only be reserved on a demise of immovable property. Reference may be made in the connection to paragraphs 1193 and 1194 of Halsbury's Laws of England (Third Edition, Vol. 23) at pages 536-537. Hence the use of term "rent" cannot preclude the landlord from pleading that there was no relationship of landlord and tenant. The question must, therefore, depend upon whether or not there was a relationship of landlord and tenant in the sense that there was a transfer of

interest by the landlord in favour of the tenant."

The question as to whether relationship of landlord and tenant can be brought into existence orally was also examined in the above case. The observations made by the Supreme Court in this regard are found in para 8 and may be noticed as under :

"8. Now, in order that the transfer of the property in question should be binding on the Committee, it was essential that it should have been made by an instrument in writing executed by the President or the Vice-President and at least two other members of the Committee, and the execution by them should have been effected by the Secretary. If these conditions are not fulfilled, the contract of transfer shall not be binding on the Committee. But it has been contended on behalf of the appellants that the non-compliance with the provisions aforesaid of section 47, would not render the contract of transfer of property void but only voidable. In other words, where the actings of the parties have given effect to the transactions, as in the instant cases, by delivery of possession of the property by the Committee and payment of rent by the appellants, the absence of formalities would not render the transactions of no legal effect. But it has to be noted that it was not contended on behalf of the appellants that the provisions of section 47(3) of the Municipal Act are not mandatory and are merely directory. Such an argument was not and could not have been advanced because it is settled law that the provisions of a Statute in those peremptory terms could not but be construed as mandatory."

On the basis of the above decision of the Supreme Court of India, it can be safely concluded that that merely because the Municipal Corporation has been issuing some receipts in which payment is shown as rent would not confer on the plaintiff/respondent a status of tenant.

Point (v and vi) : Duration of permission in this case and if it is nullity.

The fifth question that the permission which was granted to the plaintiff/respondent was not for indefinite duration and the sixth question whether the permission is null and void and can be ignored be now examined.

The argument of the learned counsel for the Corporation is that the permission granted to the plaintiff/respondent was not of indefinite duration. He is right in his submission. In this regard, he referred to the permission which was granted. This indicates that the permission was granted to the plaintiff/respondent was only from month to month and no amount was received from him after 30-3-1996. Even if it be presumed that the permission was granted for an unlimited duration even then the permission would be null and void, it having been granted in breach of the statutory provisions. [See the discussion while dealing point No. (i)]

Point (vii) : Whether act of Corporation is in breach of Court order.

The question whether the Corporation in removing the encroachment has acted

in accordance with the direction contained in trial Court's order dated 11th of November, 1992 be examined. This order does indicate that the Corporation could remove the permanent structure. But, so far as actual dispossession from the piece of land is concerned, the plaintiff could not be dispossessed. It is the case of the Corporation that mere remaining in physical possession without there being shelter of a super structure is totally meaningless and the plaintiff would not be content with such a situation. It is further submitted that the action of the Corporation in permitting the plaintiff to occupy the land was contrary to the statutory provisions and this action should be treated as null and void.

It be seen that the act of the Corporation in dispossessing the plaintiff from the land when an injunction order existed is required to be gone into. An explanation has been given that there was some misunderstanding on account of an earlier order passed by this Court. The Corporation thought that it is within their right to remove the plaintiff. The Corporation officers have expressed that there was no intention to wilfully disobey the order passed by the trial Court, and the lapse, if any, be condoned. It is submitted that there was an earlier order passed by this Court vis-a-vis this very encroachment. It is stressed that there was a reasonable belief that the plaintiff could be dispossessed. In any case it is submitted that as the order passed by the trial Court dated 11th of November, 1992, permitted the Corporation officers to remove the super structure, it is argued that by demolishing the building, they have not dispossessed the plaintiff from the piece of land in question. In any case it is submitted that the Corporation is preparing a scheme under which an alternate site would be made available to the plaintiff. It is submitted that, that there is no justification to, proceed further with this aspect of the matter. The lapse, if any, would be out of bona fide mistake, and should be condoned.

I am of the view that the Corporation Officers did not properly appreciate the full impact of order dated 11th November, 1992. Order referred to above did authorise the Corporation to remove the structure. This would naturally involve interference in the possession also. The best way was to seek clarification from the Court. This was not done. May be the possession without the structure would be of no solace to the respondent/plaintiff. The fact remains that there is technical breach. However as the Corporation has shown its desire to rehabilitate the respondent and persons similarly situated it is not necessary to pursue the matter any further. Apart from this, in this situation it would not be apt to restore possession of the disputed site to the respondent plaintiff. The plaintiff has been dispossessed. It would not be just and proper to restore him back to his possession. This is because by giving a direction for restoration of possession a situation would arise which would not be in conformity with law. Such situation cannot be permitted to arise.

Reference may be made to a decision of the Supreme Court in *Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others*, , wherein it was observed :

"If the High Court had quashed the said order, it would have restored an illegal order."

In the circumstances the prayer made by the plaintiff/Respondent that he is entitled to same relief as could be granted u/s 14 of the Code of Civil Procedure, 1908 is without any merit.

One aspect of the matter which still requires to be gone into is that there is widespread notion on the part of the citizens of this country that they can resort to unchecked indiscriminate encroachments and public streets can be put to any use. Whether this can be done or not and as to whether it creates nuisance or it gives rise to civil or criminal liability has also to be gone into.

I am of the view that State and Municipal authorities must make it known in no uncertain words that public has no right to encroach on public streets. The public should also keep its eyes open and see to it that Municipal Officers are also not party to the systematic encroachment of streets. It is a nuisance if public roads are obstructed. Again such obstruction can again give rise to civil as also criminal liability. In this regard, it would again be useful to make reference to Halsbury's Law of England.

Obstructing or encroaching upon public streets may first be adverted to. In this regard it has been said :

An obstruction, encroachment or other nuisance upon a public footpath, including failure to repair, is punishable as in the case of any other highway, and certain obstructions and methods of user of a footpath or bridleway are liable to summary proceedings as in respect of a highway. It is also an offence to leave litter in an open air place to which the public has access. In addition, special protection to footpaths and bridleways is given by statute, and local authorities have certain statutory powers of control of the use of footpaths and bridleways for motor vehicle trials, (page 305)

"It is a nuisance at common law to obstruct a highway or to render it dangerous. Whether an obstruction, encroachment or other act or omission amounts to a nuisance is a question of fact. Generally, however, it is a nuisance to interfere with any part of a highway."

"A permanent obstruction erected upon a highway without lawful authority and rendering the way less commodious is a nuisance. It is a nuisance to erect a gate across a highway where there has been none before, or, if a footpath has been dedicated subject to the existence of a stile, to substitute a higher or less convenient stile, to erect posts in the highway, or to erect or place without statutory authority telegraph posts or tramway lines even with the consent of the highway authority. It is also a nuisance to place on the highway heaps of stone, wood or other materials, or to place stands on it.

To leave a cellar flap open and unguarded may constitute a nuisance. It is a nuisance to dig a permanent trench across a highway or to break open, without

statutory powers the soil of a highway for the purpose of laying drains or wires, or to fail to reinstate a highway after lawfully breaking it open, or to plough up the highway unless dedicated subject to a right to do so.

It is a nuisance to remove the lateral support of a highway by quarrying or the vertical support by underground workings."

Again, if vehicles of unreasonable size and character are put on a highway even that has been held to be a nuisance. See : Halsbury's pages 306 and 307. Again, if something is deposited on a public highway, it would be a nuisance. See : Halsbury's page 302.

Remedies to remove a nuisance is again found mentioned in Halsbury's Law of England. This be noticed :

"Every public nuisance at common law is an offence and is triable either on indictment or summarily. If the nuisance is still in existence at the time of the conviction, the Court may order the defendant to abate it. (Page 313)

No lapse of time, and no consent from any highway authority, except under statute, affords a defence to a charge of committing a nuisance." (Page 313)

"A highway authority has a duty to assert and protect the rights of the public to the use and enjoyment of any highway for which it is the highway authority, including any roadside waste forming part of it. Any council may assert and protect those rights in respect of any highway in its area for which it is not the highway authority, including any reasonable waste forming part of it. (Page 317)

It is the duty of a council which is a highway authority to prevent, as far as possible, the stopping up or obstruction of the highways for which it is the highway authority and any highway for which it is not the highway authority if, in its opinion, the stopping up or obstruction of that highway would be prejudicial to the interests of its area." (Pages 317-318)

"Any person who in any street, to the obstruction, annoyance or danger of the residents or passengers, places or leaves any furniture, goods, wares, merchandise cask, tub, basket, pail or bucket, or who places or uses any standing-place, stool, bench, stall or snowboard on any footway, or who places any blind, shade, covering, awning or other projection.....

or who places, hangs up or otherwise exposes to sale any goods, wares, merchandise, matter or thing whatsoever so that they project into or over any footway or beyond the line of any house, shop or building at which they are so exposed, so as to obstruct or incommode the passage of any person over or along the footway, is liable to a penalty." (Page 323)

"It is an offence for any person in charge of a vehicle to cause or permit it or a trailer drawn by it to remain at rest on any road in such position, condition or circumstances as to be likely to cause danger to other road users : and various other acts by drivers of vehicles are made offences by statute. It is also an

offence to ride, drive or lead animals, trucks or sledges on any footpath by the side of the road set aside for the use of foot passengers." (Page 323)

"If, without lawful authority or excuse, a person deposits on a made-up carriageway any dung compost or other material for dressing land, or any rubbish, or a person deposits on any highway which consists of or comprises a made-up carriageway any dung, compost or other material for dressing land, or any rubbish, within 15 feet from the centre of that carriageway, or a person deposits any thing whatsoever on a highway to the interruption of any highway user, or a hawker or other itinerant trader pitches a booth, stall or stand, or encamps on a highway, he is guilty of an offence and liable to a fine." (Page 325)

"Where a structure has been erected or set up on a highway otherwise than under a statutory provision, a competent authority may by notice require the person having control or possession of the structure to remove it within such time as may be specified in the notice. If the structure is not removed within the specified time, the authority may itself remove it and recover the expenses reasonably incurred by it in so doing from the person having control or possession of the structure, but this power may not be exercised until the expiration of one month from the date of service of the notice." (Page 326)

Before noticing the position as it exists under the Municipal Corporation Act, one aspect of the matter which is again dealt with in the Halsbury's Laws of England with regard to projections of the buildings, be also noticed. In this regard the observations made at page 327 be noticed :

"A competent authority may by notice to the occupier of any building require him to remove or alter any porch, shed, projecting window, step, cellar, cellar door, cellar window, sign, signpost, sign iron, showboard, window shutter, wall, gate, fence or other obstruction or projection which has been erected or placed against or in front of the building and is an obstruction to safe or convenient passage along a street."

As to whether things can be got deposited on a highway is a matter which is dealt with in above treatise at page 329. This be noticed :

"If any thing is so deposited on a highway as to constitute a nuisance the highway authority for the highway may by notice require the person who deposited it there to remove it forthwith. If he fails to comply with the notice, the authority may make a complaint to a magistrates' court for a removal and disposal order. Such an order may authorise the complainant authority either to remove the thing in question and dispose of it or, as the case may be, to dispose of the thing in question and after paying the expenses incurred in the removal and disposal out of any proceeds arising from the disposal, to apply the balance, if any, to the maintenance of highways maintainable at the public expenses by it. If the thing in question is not of sufficient value to defray the expenses of removing it, the complainant authority may recover from the person who deposited it the expenses, or the balance of the expenses, reasonably incurred in

removing it.

Where a highway authority has reasonable grounds for considering that any thing unlawfully deposited on the highway constitutes a danger to highway users, and that it ought to be removed without the delay involved in giving notice or obtaining a removal and disposal order from a magistrates' court, the authority may remove the thing forthwith. The authority may recover any expenses reasonably incurred in removing the thing from the person by whom it was deposited or from any person claiming to be entitled to it, or may make a complaint to a magistrates' court for a disposal order."

From what has been stated above it becomes apparent that:

- (i) Municipal Corporation is merely a trustee; when it manages the streets and public streets;
- (ii) every portion of the street or public street which is accessible to public is to be used only for that purpose;
- (iii) streets are to be used only for the benefit of the public at large;
- (iv) merely because some cash consideration is paid for occupation, that would not create relationship of landlord and tenant;
- (v) If any obstruction/encroachment is caused on the public street then it would be a nuisance.
- (vi) Depositing of goods on a portion of the street/footpaths would again be nuisance.
- (vii) This nuisance can give rise to civil as well as criminal liability. On the civil side, the Corporation can claim damages. On the criminal side the Corporation has sufficient power to take action in terms of section 435 of the Act.
- (viii) In the case of projections on a public street, the Corporation is not powerless. Section 318 of the Act makes a provision in this regard and section 322 provides in specific terms that streets are not to be obstructed.
- (ix) Apart from this, section 283 of the Indian Penal Code also makes a provision in this regard.

This reads as under :-

283. Danger or obstruction in public way or line of navigation. - Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction or injury to any person in any public way or public line of navigation, shall be punished with fine which may extend to two hundred rupees."

Thus it is an offence to occupy a public street; it gives rise to both civil and criminal liability when a person obstructs a path. Not only the person who makes

an obstruction/encroachment or deposits goods on a public street but the Corporation officials whose duty it is to see that there is no obstruction would equally be guilty of the abetting the offence, if they do not take remedial measures. As such, it is directed :

(i) that, the Corporation shall issue public notice to all persons having business premises have opening on the public streets that they would not place any of their merchandise or goods or sign board on a footpath, and in the event of failure to do so, the Corporation would be within its rights to go ahead to remove the encroachment. The Commissioner of the Corporation would ask the concerned officials deputed in the localities to make a report and in case they fail to take requisite action, the Commissioner of the Corporation shall take action both on civil and criminal side not only against the offenders but also against Corporation employees. The Commissioner of the Corporation would again take steps with a view to provide space for street trading and alternate space for persons who are likely to be displaced from footpaths. For this, a scheme be formulated, within a period of one month. So far as projections are concerned the Corporation is at liberty either to get them removed or in case these projections do not obstruct the traffic then these can be regularised. The Corporation would be at liberty to charge licence fees. The licence fees can be fixed by taking into consideration the dimensions of the projections and minimum rates can be fixed as per area of the projections. The amount so recovered would be used for the improvement of the pavements and also providing proper drainage facilities.

The Corporation would also see to it that garbage heaps lying at different places in the city of Gwalior are not allowed to remain there beyond a period of two to three days.

Something is required to be said regarding the vehicular traffic moving on the narrow lanes of Gwalior. The Corporation can persuade the Tonga owners and also other animal driven vehicle owners to adopt other system. The Corporation can assist them in getting ownership of two wheeler rickshaw. In any case, the tempos omitting obnoxious fuels and other heavy vehicles should not be permitted to be in the narrow streets leading to Maharaj Bada, more so in the evening between 5 to 8 P.M.

So far as the question of raising funds for meeting these commitments are concerned the Corporation can well augment its resources by charging licence fee from those persons who have constructed projections beyond the building line. The Corporation can again augment its resources by enhancing the rentals payable by its tenants. The Municipal properties are exempt from Madhya Pradesh Accommodation Control Act, 1961. It can seek eviction of the tenant by terminating the tenancy or in the alternative, tenants be asked to enter into fresh agreements, in terms of the decision given by the Supreme Court of India in the case H. S. Rikhi's case (supra). The resources so becoming available would be used for repairing the pavements and for covering the open drains. The

local stone available in this region is the cheapest source. If this stone can be used in States outside the State of Madhya Pradesh, then this stone can well be used in the city of Gwalior also.

The Commissioner of the Corporation would intimate to this Court within a period of one month as to what steps have been taken for removing temporary obstructions and encroachments in the city of Gwalior. It would also indicate as to what steps are to be taken to regulate traffic on the roads leading to Maharaj Bada.

It be seen that there are other structures also on the circular Road. These are outside the Victoria Market. There is a police post also. These constructions are in existence in breach of the provisions of the Corporation Act. In view of the conclusion arrived at above, no super structure whether of private person or Government, can be permitted. As such Corporation, shall take steps to remove even these structures.

So far as this petition is concerned even though the conclusion has arrived at that there was technical omission to obey the order passed by the trial Court but this technical omission has been explained. There does not appear to be any wilful disobedience of the order passed by the trial Court. As Corporation has assured that alternate space would be provided to the person likely to be displaced, it is not apt to proceed further in the trial Court. This petition is allowed. The proceedings initiated under Order 39, Rule 2(A) would automatically lapse.

There would be no order as to costs.