
(1939) 04 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 398 of 1937

Chhotalal Panachand

APPELLANT

Vs

The Borough Municipality of Nadiad

RESPONDENT

Date of Decision : 05-04-1939

Acts Referred:

Bombay District Municipal Act, 1901 — Section 3(13)

Citation : AIR 1939 Bom 501 : (1939) 41 BOMLR 1097

Hon'ble Judges : Lokur, J

Bench : Single Bench

Judgement

Lokur, J.—This second appeal arises out of a suit filed by the plaintiff for a declaration of his title to the land under and in front of Marudia Khadki in Kovada Pole and the Chowk in front of his house and the room in Nadiad, and for a permanent injunction restraining the Nadiad Borough Municipality from obstructing him in the enjoyment of his said site as its owner. The defendant Municipality contended that the plaintiff was not the owner of the site of the Khadki at the time of the City Survey Enquiry in the year 1916, the Khadki having been declared to be a public street, and the plaintiff's suit having been time-barred as it was not filed within one year after the decision of the City Survey Enquiry Officer. The trial Court framed two preliminary issues as to whether the suit was bad for want of necessary parties, and whether the suit was not in time as contended by the defendant Municipality; and it recorded findings in the affirmative on both the issues and dismissed the suit. The lower appellate Court confirmed the decree, and the plaintiff has come in appeal.

2. As regards the want of necessary parties, it is evident that the plaintiff is not, nor does he claim to be the exclusive owner of the entire Khadki. There are several houses in the Khadki, and even on the admission of the plaintiff, the owners of those houses have an interest in the Khadki. The proper course for the plaintiff was either to file a suit on behalf of all the owners under Order I, Rule 8, of the Civil Procedure Code, if it was permissible for him to do so, or to join them

as parties to the suit. However, non-joinder of parties is not fatal to the suit, and it is still open to the plaintiff to rectify the defect by joining the other owners of the houses in the Khadki either as plaintiffs or defendants.

3. As regards the other contention of the defendant Municipality, that the plaintiff should have filed a suit within one year after the decision of the City Survey Enquiry Officer declaring the Khadki to be a public street, it is necessary to consider certain material facts. The plaintiff alleged that he had no notice of the enquiry by the City Survey Enquiry Officer nor of the order passed by him. The City Survey Enquiry was made in 1915-16, and exhibit 16 shows that Chalta Nos. 1224 and 1225, which formed the Khadki of the site in dispute, were declared to be part of a public street on July 17, 1916. As against Chalta No. 1225, a note was made that it was claimed by the owners of Chalta Nos. 1210-1223 as possessed and owned by them. Against both Chalta Nos. 1224 and 1225 it was noted in column 5 that it was of the joint ownership of the owners of Chalta Nos. 1210-1223, that is to say, the owners of the houses standing on the Khadki. Chalta No. 1224 is described as Khadki and Chalta No. 1225 as Padtar. In column 10 a note was made against both the numbers that no evidence was produced, that they were decided to be part of a public street, that members of the same family were not found to be residing in that street, and that the Municipality had got certain otlas from that Pole removed. It is admitted that no protest was made by the residents in that Khadki against the order of the City Survey Enquiry Officer, nor was any suit filed within one year thereafter. The lower Courts have observed that on that account the present suit is barred u/s 64 of the Bombay Municipal Boroughs Act, 1925. By this they really mean that it is barred u/s 50-A of the Bombay District Municipal Act, 1901, which was in force when the City Survey Enquiry Officer's order was passed. Sub-section (1) of Section 50-A of that Act provides as follows :?

In any municipal district to which a survey of lands other than lands ordinarily used for the purposes of agriculture only has been or shall be extended under any law for the time being in force, where any property or any right in or over any property is claimed by or on behalf of the Municipality, or by any person as against the Municipality, it shall be lawful for the Collector after formal enquiry, of which due notice has been given, to pass an order deciding the claim.

4. It is clear from this that before an order deciding a claim is passed, it is necessary that the Collector or the City Survey Enquiry Officer must give. due notice to the parties concerned and then hold a formal enquiry. If after such an enquiry a decision is given, Sub-section (2) of Section 50-A of the Act provides that any suit instituted in any civil Court after the expiration of one year from the date of such an order shall be dismissed, (although limitation has not been set up as a defence), if the suit is brought to set aside such order or if the relief claimed is inconsistent with such order, provided that the plaintiff has had due notice of such an order.

5. The plaintiff contends that he does not know if any formal enquiry was held by

the City Survey Enquiry Officer, that he did not receive any notice of any such formal enquiry, and that he did not receive any notice of the order passed by the City Survey Enquiry Officer as required by Sub-section (3) of Section 50-A of the Bombay District Municipal Act, 1901. All these contentions were rightly disallowed by the lower Courts. The extract from the Survey Register (exhibit 16) clearly shows that the owners of the houses in the Khadki did appear and put forward their claim at to the Khadki Chalta No. 1225 as the note in column 9 shows. The remark made by the City Survey Enquiry Officer in column 10 that no evidence was produced shows that he expected the said claimants to appear before him and adduce evidence in support of their contention. In the absence of evidence he came to his decision from surrounding circumstances and held that both Chalta Nos. 1224 and 1225 were part of a public street. From these circumstances it may be presumed that a formal enquiry must have been held by the City Survey Enquiry Officer after giving due notices to the parties concerned as required by Sub-section (1) of Section 50-A of the Act. This could have been proved by the direct evidence of the notices and other proceedings held by the City Survey Enquiry Officer, but unfortunately those proceedings have now been destroyed, as seen from the reply given by the Mamlatdar of Nadiad to the plaintiff (exhibit 15). According to ill. (e) to Section 114 of the Indian Evidence Act, judicial and official acts may be presumed to have been regularly performed. There was no special reason why the City Survey Enquiry Officer should have omitted to follow the procedure laid down in Section 50-A of the Bombay District Municipal Act, 1901. Presumably the order passed by the City Survey Enquiry Officer must have been communicated to the plaintiff and other persons interested. En fact sanads must have been issued to the owners of the houses in the Khadki in respect of those houses. No such sanad has been produced by or on behalf of the plaintiff. From the sanad it could have been seen whether the Khadki which is one of the boundaries was or was not shown as a public street.

6. When the defendant Municipality came in the way of constructing otlas in the Khadki, the residents of the houses in the Khadki made an application to the District Deputy Collector on August 13, 1923, (exhibit 27), requesting that the Khadki should be declared to be of their private ownership. That application was rejected, and an appeal was preferred to the Collector on October 25, 1923 (exhibit 28). The Collector also rejected that appeal on the ground that the claim was time-barred. At least when this application and the appeal were presented, the plaintiff had come to know the order passed by the City Survey Enquiry Officer, and no suit was filed even within one year after that. Subsequently, on July 9, 1929, the plaintiff built an otla and a privy on a portion of the Khadki, and the defendant Municipality ordered their removal. This suit was not filed even within one year after that. It is thus clear that the presumption that the procedure laid down in Section 50-A of the Bombay District Municipal Act, 1901, must have been followed by the City Survey Enquiry Officer before deciding that the Khadki in suit was a public street stands un rebutted. It is also to be presumed that the decision was communicated to the plaintiff, and the plaintiff

admittedly came to know of it at least in the year 1923 ; and if the plaintiff wants to have that decision set aside or asks for any relief which is inconsistent with that decision, then his claim is barred under Sub-section (2) of Section 50-A of the District Municipal Act. But the matter does not rest there. The plaintiff is at liberty to ask for any relief in respect of the Khadki if that relief is not inconsistent with the decision of the City Survey Enquiry Officer. The wording of that decision is " decided to be part of a public street", which does not mean that the soil of that street belonged to or was vested in the Municipality. The expression "public street" is defined in Section 3, Clause (13), as follows :

Public street" shall mean any street?

- (a) over which the public have a right of way, or
- (b) heretofore levelled, paved, metalled, channelled, sewered or repaired, out of municipal or other public funds, or
- (c) which under the provisions of section 90 is declared by the Municipality to be, or under any other provisions of this Act becomes a public street.

It does not follow from this definition that the soil of every public street must necessarily be of the ownership of the Municipality. Section 50, Sub-section (2) (f), of the Bombay District Municipal Act, 1901, says that all public streets, and the pavements, stones and other materials thereof and also all trees, erections, materials, implements and things provided for such streets shall be vested in and belong to the Municipality, and shall be held and applied by them as trustees. In interpreting Section 32 of the Bengal Municipal Act (Beng. V of 1876), which is worded similarly, the Calcutta High Court in *Chairman of the Nai-hati Municipality v. Kishori Lal Goswami* ILR (1886) Cal. 171 observed as follows (p. 173):

If...the word "road" carried with it all the soil, all the materials, and all the erections on it, this enumeration, in express words, of " pavements," "stones," &c. would be unnecessary. Clearly then there must be some limitation to the word " road". It does not mean everything above and below the road; and we think, looking at the case of *St. Mary, Newington v. Jacobs* (1871) L.R. 7 Q.B. 47 that the sub-soil did not belong to the Municipality.

7. In that case the Municipality claimed compensation for the whole soil on the ground that they had a title to the property in the soil under the said Section 32, while the Zemindar claimed that money on the ground that the soil belonged to him ; and after interpreting the wording of Section 32 of the Bengal Municipal Act, 1876, the Calcutta High Court held that the soil belonged to the Zemindar. In the Bombay Act the word street" is used instead of the word "road". The same view was taken in *Modhu Sudan Kundu v. Promoda Nath Roy* ILR (1893) Cal. 732 and it was held that Section 10 of the Bengal Municipal Act (Beng. III of 1864) did not deprive a person of any right of private property that he might have in land used as a public road, nor did it vest the sub-soil of such land in a Municipality. It was also further held that when such land was no longer required

as a public road, the owner was entitled to claim its possession.

8. I agree with that view, and unless it is definitely proved that the soil of any public street belongs to the Municipality, it cannot be presumed to be of the ownership of the Municipality merely on the ground that it is used as a public street. In fact Section 90, Sub-section (5), of the Bombay District Municipal Act, 1901, contemplates a private street being declared by the Municipality as a public street, but thereby the soil of such street does not come to be of the ownership of the Municipality. The only effect of such a declaration is that the street is allowed to be used by the public, and the public can claim a right of way over it as contemplated by Section 3, Sub-section (13)(a), of the Act. If so, the decision of the City Survey Enquiry Officer that the Khadki was a public street did not declare that the Municipality was the owner of the soil of the street. It may be that at one time it was a private street and was declared by the Municipality as a public street u/s 90, Sub-section (5), of the Bombay District Municipal Act. Even in that case the City Survey Enquiry Officer would be justified in holding the Khadki to be a public street, although the soil belonged to the owners of the adjoining houses. If the City Survey Enquiry Officer had decided that the soil belonged to the Municipality and had been declared a public street, then the plaintiff's claim in the present suit would have been inconsistent with that decision. By reason of the plaintiff's failure to file a suit within one year after the decision of the City Survey Enquiry Officer, he is debarred from challenging the Municipality's claim that the Khadki is a public street; but the plaintiff is not debarred from claiming that even though it is a public street, the soil of the street belongs to him.

9. After the plaintiff's appeal to the Collector was rejected as time-barred in 1924, the plaintiff put up an ota and a privy in 1929, and when they were ordered to be removed, all the residents in the Khadki made an application to the Municipality requesting that the Khadki be declared to be of the private ownership and not a public street. At a general meeting of the Municipality held on February 28, 1931, (exhibit 22), it was resolved that the public street should be "made" a private street. A reply was given accordingly to the applicants on March 1, 1931, (exhibit 21). That resolution was forwarded to the Collector, but the Collector refused to sanction the conversion of the public street into a private street. When this decision was communicated to the plaintiff and other residents, the present suit was filed.

10. Section 90, Sub-section (1), of the Bombay District Municipal Act, 1901, which corresponds to Section 114, Sub-section (1), of the Bombay Municipal Boroughs Act, 1925, which now governs the Nadiad Municipality, empowers the Municipality "to widen, open, enlarge or otherwise improve, and to turn, divert, discontinue or stop up any public street." In exercise of this power the defendant Municipality passed a resolution discontinuing the use of the Khadki in dispute as "a public street". Such discontinuance did not require the sanction of the Commissioner u/s 40, Sub-section (2), of the Bombay District Municipal Act,

1901, or Section 48, Sub-section (2), of the Bombay Municipal Boroughs Act, 1925, since such discontinuance did not amount to a lease or sale of any Municipal land, unless it is held that the soil of the Khadki belongs to the Municipality. The question whether the soil of the Khadki belongs to the owners of the adjacent houses or to the Municipality has not yet been determined. If it belongs to the Municipality, then the plaintiff has no claim over it, and the suit is bound to be dismissed. If on the other hand it belongs to the plaintiff and other residents of the locality, then the Municipality can discontinue its use as a public street without the sanction of the Commissioner, since thereby it does not part with any land belonging to it. Admittedly, the Municipality passed a resolution at its general meeting discontinuing the use of the Khadki as "a public street", and the resolution was duly communicated to the owners of the houses in that locality. That resolution took effect immediately, unless it is held that it required the sanction of the Commissioner. Whether such sanction is required or not depends on the ownership of the Municipality over the soil of the Khadki. It is, therefore, necessary to raise an issue as to whether the land belongs to the plaintiff or to the Municipality, and this suit cannot be finally disposed of unless a finding is recorded on that issue.

11. This aspect of the case has not been considered by the lower Courts. They seem to have thought that the decision of the City Survey Enquiry Officer amounted to an order that the soil of the street belonged to the Municipality and that, therefore, the plaintiff's claim in this suit is inconsistent with that decision. But, as I have pointed out above, even if the decision of the City Survey Enquiry Officer cannot be challenged by the plaintiff, still he can contend that by reason of the resolution of the Municipality converting the public street into a private street, the land of the street reverts to him as he was its owner before it was declared to be a public street, as held in *Modhu Sudan Kundu v. Promoda Nath Roy* ILR (1893) Cal. 732. Both the lower Courts dismissed the suit "on their findings on preliminary issues and, therefore, the suit must be remanded under Order XLI, Rule 23, of the Civil Procedure Code.

12. For these reasons I allow the appeal and set aside the decree passed by the lower Courts. I frame the following issues :

- (1) Does the plaintiff prove that the site of the Khadki in suit belongs to him?
- (2) If so, can the defendant Municipality discontinue the use of the Khadki as a public street without the sanction of the Commissioner?
- (3) If so, does the ownership of the site of the Khadki, which was till then a public street, revert to the plaintiff?
- (4) And, if so, to what relief is the plaintiff entitled?

13. I remand the case to the trial Court for further hearing and disposal under Order XLI, Rule 23, of the Civil Procedure Code. Both the parties are at liberty to adduce further evidence. The costs in this Court and in the lower appellate Court

will be costs in the suit.