

(1938) 05 PAT CK 0006
In the Patna High Court

Dwarka Prasad Singh and Others

APPELLANT

Vs

Patna City Municipality and Another

RESPONDENT

Date of Decision : 05-05-1938

Acts Referred:

Limitation Act, 1963 — Section 26

Citation : AIR 1938 Patna 423

Hon'ble Judges : Dhavle, J

Bench : Division Bench

Judgement

Dhavle, J.—This is an appeal by the plaintiffs, owners of a holding No. 17 in Circle No. 11 of the Patna City Municipality.

2. The dispute relates to a strip of land lying immediately to the east of the compound wall of this holding. Between this strip and a public road called the Convent road which runs on the east of it there was, according to the plaintiffs, a kutchra drain which received the drainage from their grounds through openings in the compound wall and carried it south, wards into a pucca drain by the side of the Main Road from Bankipur to the City. In February 1933 the Municipality, defendant 2, gave a lease of the strip and some more land to the east (the kutchra drain having already disappeared) to defendant for the erection of "a petrol pump, underground tank and petrol kiosk." Defendant 1 began the work of erection, and in April 1933 the plaintiffs brought the present suit for recovery of possession of the strip which they claimed as their property and for the restoration of the kutchra drain.

3. In the alternative they claimed easements of drainage, passage, road frontage, etc. together with restoration of the strip and the drain to their former condition" They also applied at once for a temporary injunction against the continuation of the work of erection, but the trial Court refused it on defendant 1 filing an undertaking to waive all objections to the demolition of the construction made by him in case the plaintiffs succeeded in the suit. The plaintiffs later on gave up their claim to be owners of the land in suit. The trial Court thus dealt

with the suit as one for the removal of the entire construction made by defendant 1 and for restoring the land and drain to their original condition. The defence was a denial of the easements claimed by the plaintiffs--the kutcha drain, it was pleaded had ceased more than 12 years previously. The defence also asserted that the Municipality was entitled to lease the land to defendant 1 as it had done and that defendant 1 was entitled to use the land in accordance with the lease. The trial Court found that the plaintiffs were entitled to discharge into a kutcha drain to the east of the disputed strip of land the water of their compound through the openings in the wall which had been blocked by the construction of defendant 1, that this right of easement had not been interfered with beyond the statutory period of limitation and that they had a right of passage all over the strip to the Convent road.

4. The suit was accordingly decreed but with costs against the Municipality alone which was directed to see that the "constructions" are removed within two months. An appeal against this decision was preferred by the defendants and allowed by the District Judge who held that the plaintiffs had no right in the nature of an easement to discharge their surplus rain water over the land in suit into the kutcha drain, that even if they had any such right it had been extinguished and that the Municipality had a right to deal with the land in question as it had done.

5. It has been contended by Mr. Das who appears for the plaintiffs appellants that the lower Appellate Court fell into more than one error on the question of the easement of drainage. The learned District Judge observes that:

A local body, such as a Municipality, has no power to create a right in the nature of an easement and certainly when, as in the present case, it constructs a drain it cannot possibly be assumed that its intention is to create easements for the benefit of the owners of property contiguous to the road along the site on which the drain runs.

6. Upon this it has been pointed out and rightly that Section 26, Lim. Act, allows an easement irrespective of the capacity or; incapacity of the servient owner to make a grant. The lower Appellate Court also held that the right of easement, if any, had been extinguished "as the kutcha drain had been filled up more than 12 years before the date of institution of the suit" and it has been contended that this betrays a confusion, between the period of two years within which a suit must be brought if Section 26 is to be availed of and the period of one year which is mentioned in the Explanation to--the section. This contention also appears to be correct. The explanation only defines the interruption contemplated in the section by providing that:

Nothing is an interruption within the meaning; of this section unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person, other than the claimant and unless such obstruction is submitted to or acquiesced in for one year--after the claimant has

notice thereof and of the" person making or authorizing the same to be made.

7. But though an obstruction which is not submitted to or acquiesced in for one year is not an interruption within the meaning! of the section, the easement becomes] "absolute and indefeasible" on enjoyment] for 20 years "ending within two years next before the institution of the suit wherein the claim to which such period.¹ relates is contested."

8. The learned District Judge apparently-based his remark as regards the period of obstruction (and interruption) on the defence evidence (which he accepted) that the land in suit (together with the site of the filled-up drain) had been coal-tarred and metalled early in 1932. But he has not considered whether the obstruction had been submitted to or acquiesced in for on& year after notice. Nor has he considered the effect of the provision in the body of the section that the period of 20 years is to end within two years immediately preceding the suit. An interruption within the meaning of the explanation for more than a year will operate to prevent the claimant from adding the period of enjoyment after such interruption so as together to make up the requisite total of 20 years. But it will not by itself suffice to nullify any right that may have been already acquired by 20 years" uninterrupted enjoyment, for the section entitles the claimant to sue within two years. The plaintiffs claimed to have enjoyed the right of drainage for much more than 20 years ("several 20 years") as they put it in para. 13 of the plaint see also paras. 11 and 12, and this part of their stpry seems to have been accepted by the trial Court and not rejected by the lower Appellate Court. It thus appears that the learned District Judge did fall into an error on the question of limitation. Does it however follow that the easement in question is established?

9. It is essential to any easement claimed under the section that there should be 20 years" enjoyment "as of right." u/s 58, Bihar and Orissa Municipal Act, 1922, the kutchha drain vested in the Municipality, and u/s 223(1) of the Act the Municipality had power "from time to time (to) enlarge, lessen...close up or remove" the drain. If the water from the plaintiffs" grounds used to run into the kutchha drain, this was not inconsistent with the rights of the Municipality u/s 223, and it cannot be assumed that in using the public drain the plaintiffs were acting in assertion of a private right against the statutory rights of the Municipality.

10. Their enjoyment, in other words, was not "as of right" within Section 26, Limitation Act: cf. B. Subramanya Sastri v. B. Lakshminarasimham (1912) 16 I.C. 893. As long as the drain was there, the plaintiffs were no doubt entitled to use it, but the expression "as of right" means more than "rightfully" or "without trespass and under a strict legal right" and imports a claim or assertion of right to act against the will of the servant owner : see Alimooddeen v. Wuzeer Ali (1875) 23 W.R. 52 and Ram Sarup v. Abdul Haq AIR (1931) Lah. 395.

11. For this reason an easement of drainage u/s 26 seems to me to be out of the question when there is no allegation and no finding by either of the lower Courts

that the plaintiffs' enjoyment before the interruption of 1932 was had against the will of the Municipality. Indeed the Municipality could not, as long as it did not act u/s 223(I), have objected to the plaintiffs' water discharging into the drain though this would not affect its right to act under the section when necessary. The result is that the plaintiffs' case regarding an easement of drainage fails, not on the ground of obstruction for more than 12 months, but because they could not have availed themselves of the drainage "as of right." It is true that the exercise of the power of the Municipality under Sub-section (1) of Section 223 is conditioned by Sub-section (2), but the present suit was based on a claim of easement and the relief sought was the restoration of the drain on that basis. The basis itself failing, the appellants cannot have any relief in this respect.

2. As to the right of road frontage and of access to the road, there was no dispute in the trial Court that an owner of land abutting on a public road is entitled to access to such road at any point where his land actually touches it. But it was contended on behalf of the defence that the strip in suit was not a part of the road. This contention was overruled by the learned Munsif in view of the definition of "road" in Section 3(24), Municipal Act, according to which the word includes "on both sides, the drains or gutters and the land up to the defined boundary of any abutting property." It was however argued in the lower Appellate Court that the disputed strip as roadside land was vested in the Municipality u/s 56 of the Act, that Section 62 empowers the Municipality to lease any land not required for the purposes of the Act, and that the natural or common law right of access to the public road is automatically extinguished when the Municipality in the exercise of its statutory powers leases out a roadside strip. The learned District Judge accepted this contention with undisguised reluctance, after observing that:

When the Legislature empowered Municipalities to lease out road-side lands, it in effect deprived the owners of such land of their rights in it without compensation. Moreover not only were the owners deprived of a potential source of income, but a restriction was placed on the mode in which they might enjoy the rest of the property.

14. He pointed out the hardship which the restriction has actually caused to the plaintiffs and added that:

Presumably the Legislature did not foresee that such consequences might ensue when it vested road-side lands in Municipalities and empowered them to lease them out

This reasoning imputes an oversight to the Legislature by somewhat hastily assuming that the general power of leasing land given by Section 62 of the Act has any application to the strip in suit and that the lease given by the Municipality is authorized by the Act. Roads (and roadside lands) are however only vested in Municipalities as roads. The powers of a Municipality to deal with roads are to be found in Oh. 5 of the Act which contains a number of sections

from Section 172 to Section 185 showing how a Municipality may construct, improve, provide sites or permit deposits on, and temporarily close roads for repairs or other public purposes. Section 172(f) enables the Commissioners to transfer, lease, sell, or otherwise dispose of any land used, by them for a public road, but this is evidently for the purpose of improving the planning of the Municipality and has consequently not been referred to during the arguments. Section 185 enables the Commissioners to make by-laws consistent with the Act, *inter alia*,

(b) to prevent, prohibit, or regulate the use or occupation of any or all public roads or places by any person for the sale of articles or for the exercise of any calling or for setting up any booth or stall

15. This provision clearly applies to the land in suit. The by laws made u/s 185(b) by the Patna City Municipality provide that no person shall be permitted to use or occupy any part of any public road or place for the purposes specified in the Sub-section unless he has previously obtained a license from the Municipal Commissioners, but that no license shall be granted for the erection of a permanent booth or stall. They also provide that such license may be granted for such a specified period, not exceeding the year, as may be determined by the Municipal Commissioners. The lease given by the Municipality to defendant 1 is not within the powers of the Municipality under the section and these by-laws, for it is a lease for five years with an option of renewal and authorizes the erection of a petrol kiosk &c. (or "motor accessories shop") which can hardly be regarded as a temporary booth or stall. The Municipality has thus clearly exceeded its authority in settling the disputed strip of road-side land with defendant 1 as it has done, and the interference with the plaintiffs' right of access to the road cannot be justified as caused in the exercise of the statutory powers of the Municipality. Sir Sultan Ahmad has contended on behalf of the Municipality that the compound wall of the plaintiffs is so old that the plaintiffs must be taken to have themselves restricted their right of access to the gate (which stands not behind the strip in dispute but a little to the north). But in the first place the compound wall cannot restrict the plaintiffs' right of access. The books quote a dictum of *Chambre, J.* during the arguments in *Woodyer v. Hadden* (1813) 5 Taunt 125 at page 132:

A public road differs from a private road in this: you may make an opening in your fences and go into it at any part of the public road or at the end, but in a private road you must go into it at the usual and accustomed part.

16. Secondly, those plaintiffs who are now on the record have, by reason of a partition which began before the suit but ended before the trial, been left without any right to use the gate. The general rule that a case must be decided on the facts as they stood at the time of the institution of the suit is of no avail to the defendants, because the right of access claimed by the plaintiffs on record does not arise out of the partition proceedings at all but is referable to their original position as joint proprietors of the land enclosed within the compound.

17. The plaintiffs claimed not merely a right of access to the public road but also the right of road frontage. Sir Sultan Ahmad has pointed out, quite correctly, that the latter is a much larger right than the former; but the right of road frontage no less than the right of access is implicit in the position of the land within the plaintiffs' compound and the limited nature of "the powers conferred by the Statute upon the Municipality to deal with the strip as roadside land. As was said in *Municipal Committee Delhi v. Mohammad Ibrahim* AIR (1935) Lah. 196:

There can be no question that for the owners of houses abutting on a public highway, the question of frontage means a great deal, and if anything is done by those in whom the highway vests which interferes with the rights of the owners with regard to the highway, and which tends to diminish the comfort of the occupants of the house, the owners will undoubtedly have an actionable claim against them.

18. It is true that that was a case where the Municipality had put up a building on the highway itself just in front of the abutting owner's property, and not a case where the Municipality had done so on road-side land. But under our Act road-side land vests in and belongs to the Municipality in the same manner as the road itself, and the Municipality can exercise no rights over it except such as are authorised by law and must otherwise leave it as it is. In *Dhunmun Chowdhry v. Emperor* AIR (1922) Pat. 286. Jwala Prasad, J. held that fifty feet wide strips on the sides of the Lohardagga Road could not be lawfully used by the Lohardagga Municipality for the purpose of carrying on shops or exposing goods for sale. The learned Judge spoke of the Municipality having power to "use the road as owner of it for the purposes set forth in the Act" only, and probably did not distinguish between the road and the road-side (lands because the Bengal Act then in force made no express distinction between them cf. *Nihal Chand v. Azmat Ali Khan* (1885) 7 All 362 see also *Emperor Vs. Vishvanath Nana Karpe and Others*, a case under the Bombay District Municipal Act, 1901. Our Municipal Act, 1922, replaces the Bengal Municipal Act, 1884, which was amended in 1894 by the addition of the words "including the soil" after the word "roads" in Section 30 which vested roads in Municipalities.

19. It may thus be that Municipalities have a larger interest in some ways in road-side lands than before, but even so, the road and soil is only vested for the purposes of the Municipal Act and can only be used by Municipalities in accordance with the Act. This also applies to road-side lands. Mr. Das has cited *Fazal Huq v. Maha Chand* (1875) 1 All 557 a case in which it was held that notwithstanding the power of a Municipality in the neighbouring province to sell any portion of a public thoroughfare which was not required for the purposes of the Municipal Act then in force, a private owner was entitled to succeed against the purchaser in an action for interference with his right of way and drainage. But the appellants' case is stronger than that.

20. For, looking at our Municipal Act and bylaws u/s 185(b), I consider it beyond doubt that it is not competent to the Municipality to make an income by putting

[up substantial buildings on road-side lands [through lessees while largely destroying [the value of the abutting properties of "private owners.

21. The result is that this appeal must be allowed and the decision of the lower Appellate Court dismissing the suit reversed. The trial Court awarded costs against the Municipality only because "the main fault for the interference with the rights of the plaintiffs" lay with that body. The learned advocate who appears before me for defendant 1 has on that very ground asked that no costs should be awarded against him. Nothing has been urged before me against the form of the decree of the trial" Court which is confined to the removal of the constructions and costs and involves no question of substance as defendant 1 gave an undertaking in the trial Court to remove the buildings in case of the plaintiffs" success. The decree of the trial Court will therefore be restored, with costs to the plaintiffs in all Courts as against defendant 2 only. Leave to appeal under the Letters Patent, having been asked for, is allowed.