

(1984) 08 KL CK 0001
In the High Court Of Kerala
Case No : S.A.No. 132 of 1979-F

Godavari Bhai

APPELLANT

Vs

Cannanore Municipality, Cannanore

RESPONDENT

Date of Decision : 16-08-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 91
Kerala Municipalities Act, 1960 — Section 3(30), 392(2), 77

Citation : AIR 1985 Ker 2

Hon'ble Judges : P.C. Balakrishna Menon, J

Bench : Single Bench

Advocate : T.P. Kelu Nambiyar, P.G. Rajagoplan and John Joseph, for the Appellant; T.K.M. Unnithan, for the Respondent

Final Decision : Allowed

Judgement

P.C. Balakrishna Menon, J.—This second appeal at the instance of the plaintiff is admitted on the following questions of law formulated in the memorandum of second appeal : --

"(i) Whether, under the Kerala Municipalities Act, the Municipality derives any power or authority to construct, for being let out for trade. Bunks on road-margins;

(ii) Whether the Municipality is empowered to put up Structures on public highway, which are not necessary for the maintenance or user of the road as a public highway;

(iii) Whether the legal rights of the plaintiff are not infringed by the action of the Municipality in putting up Bunks in front of her property, adjoining, and parallel to, her compound wall."

2. The plaintiff is the owner in possession of the suit property adjoining a public road namely the Civil Station Road in Cannanore town. She has her residential house in the suit property besides some lorry sheds on the side of the road. The

plaintiff intends to construct buildings in her compound with direct access to the public road and she has obtained Ext. A3 permission from the Municipality for such construction. Exts. A4 and A5 are the approved plans. The defendant is the Cannanore Municipal Council, represented by the Commissioner of the Cannanore Municipality. It is the case of the plaintiff that during the period of her temporary absence from Cannanore, the defendant started construction of three bunks with reinforced concrete ceiling in front of her compound, on the road margin for the purpose of letting out for trade on rental basis. The work of construction of the three bunks was in progress at the time when the suit was filed on 8-12-1976 for a permanent injunction to restrain the defendant-Municipal Council from proceeding with the construction and also for a mandatory injunction to direct the defendant to remove the obstruction caused on the road margin in front of the plaintiffs compound. According to the plaintiff the defendant has no right to construct buildings on the road margin forming part of a public street as defined in the Kerala Municipalities Act. It is also alleged that the construction if carried out would affect the plaintiffs access to the public road from her compound, and would also obstruct the view of the buildings that she proposes to construct in accordance with the plan sanctioned and permission granted by the defendant-Municipality.

3. The defendant-Municipality resisted the suit contending that the Municipal Council had by Exts. B2 and B3 resolutions taken the decision to construct bunks in various localities within the Municipal area for the purpose of letting out the same to small traders. In accordance with the said decision tenders were called for as per the tender notification Ext. B4 from intending contractors and the tenders of two of the contractors had been accepted and agreements Exts. B5 and B6 entered into with them. In pursuance to the decision of the Municipal Council the defendant had almost completed the construction of the three bunks at the road margin in front of the plaintiffs compound. The construction is at a distance of 14.3 metres from the plaintiffs gate and is 80 cms. away from the plaintiffs compound wall. The defendant contends that the Municipality is within its rights in constructing buildings on the road margin in such a way as not to obstruct passage of pedestrians, the road vests in the Municipality and the plaintiff has no cause of action against the defendant. It is further contended that the suit is defective for non-compliance to the requirements of Section 91, C.P.C. and also for want of a notice u/s 392 of the Kerala Municipalities Act 1960 hereinafter referred to as "the Act".

4. Both the courts below have concurrently found that the suit is not one falling u/s 91, C.P.C. and is not therefore defective for non-compliance to the requirements of that section. It is also concurrently found that the suit being one for injunction is not defective for want of a notice u/s 392 of the Act. The trial court found that the defendant-Municipal Council has no right to construct buildings on the road margin and the construction of the three bunks nearing completion is in excess of the rights of the Municipality with respect to a public street vested in it. The lower appellate court has held that the road margin is not

part of the public road and it is open to the Municipality to construct buildings on the road margin. In this view of the matter the lower appellate court, in reversal of the decision of the trial court, has dismissed the suit. It is against this that the plaintiff has come up in second appeal.

5. There is no dispute that the construction of the three bunks on the road margin adjoining the plaintiffs compound is beyond the metalled portion of the road. Sub-sec. (30) of Section 3 of the Act defines the expression "public street" to mean any street, road, square, court, alley, passage, or riding path over which the public have a right of way, whether a thoroughfare or not, and includes :

"(a) the roadway over any public bridge or causeway;

(b) the footway attached to any such street, public bridge or causeway; and

(c) the drains attached to any such street, public bridge causeway and the land, whether covered or not by any pavement, varanda, or other structure, which lies on either side of the roadway up to the boundaries of the adjacent property, whether that property is private property or property belonging to the Government."

The definition takes in the footway attached to a public street as included in the "public street". The road margin in the present case is only a footway attached to the Civil Station Road which is a public street within the meaning of the Act. As per Sub-section (1) of Section 77 of the Act, all public streets in any Municipality, with the pavements, stones and other materials thereof, and all works, materials and other things provided for such streets, all sewers, drainage works etc. shall vest in the Municipal Council. By Virtue of the provisions contained in Section 77 of the Act, the Civil Station Road together with its footway or side margin is vested in the Municipality. The principal question urged before me is about the right of the Municipal Council to construct buildings on the road margin or the footway. Ext. B1 site plan prepared by the Municipal Engineer and produced by the defendant-Municipal Council clearly shows that the bunks are located on the road margin. Ext. A5 site plan approved by the Municipality for the construction of buildings in the plaintiff's compound also shows the Civil Station Road and the concrete bunks put up by the Municipality on the road margin. There is no dispute that the road margin in the present case is only a footway on the side of the metalled portion of the public road. It is not a separate plot of land belonging to the Municipality.

6. The court below has relied on a decision of a learned Judge of this Court in Thanoor Panchayat v. Kunhiamutty 1978 KLT 813 to hold that the plaintiff has no right to prevent the Municipality from constructing the buildings on the road margin. A scrutiny of the judgment would clearly show that the decision rested on the peculiar facts of that case. The learned Judge at the beginning of this judgment has referred to the facts as follows :

"There is a tarred road 20 feet wide running north and south vested in the

Tanoor Panchayat, which is the appellant. To the east of the road is a strip of land, belonging to the Panchayat, which, at the site in dispute, is 20 feet wide on the north and 19 1/2 feet wide on the south and 25 1/2 feet long south to north. For convenience I will call this strip as the road margin."

This plot of land belonged to the appellant Panchayat and the Panchayat was proposing to construct a building there. It was to prevent such a construction that the plaintiff-respondent, the owner of the adjoining land, had filed the suit, out of which the second appeal came up to this Court. The learned Judge after referring to the decision in Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj, stated at page 815:

"The law may be briefly stated thus : An owner of land adjoining a highway is entitled as a matter of private right to access to such highway at any point at which his land actually touches it. The width of the highway, except where it is the subject of a special enactment is a question of fact. The highway is not necessarily limited to the metalled or tarred track; it will include the side lands which are necessary for its maintenance or which are proved to be used by the public for the purpose of traffic. However where a metalled or tarred road crosses unenclosed land, there being no ditch or physical feature to indicate the other limits to the highway the proper inference is that the metalled or tarred portion alone forms the highway.

The plaintiff is thus entitled to access to the road only at every point where the suit property which belongs to him, touches it but as it does not touch the road at any point he has no such right of access. The eastern strip which I have called the road margin separates the road from his property and it is too wide to be treated as part of the road as necessary for its maintenance nor can it be treated otherwise as there is no proof that it is subject to the public right of passage. The plaintiff cannot therefore claim that the panchayat should keep the road margin vacant for his use, as part of the road especially when the construction proposed by the Panchayat leaves the plaintiff ample space on its north and south for access to the road."

The above decision is not an authority for the proposition that the Municipal Board is entitled to construct buildings on the road margin vested in it under law. The facts of the case clearly show that the proposed construction by the appellant-Thannor Panchayat in that case was on a separate plot of land which cannot be called a road margin or a footway. In the present case, the construction of the three bunks is on the footway or the side margin adjoining the metalled road which as per the definition of "public street" in Sub-section (30) of Section 3 of the Act forms part of the public street itself.

7. In Halsbury's Laws of England, Fourth Edition, Vol. 21 it is stated thus at paragraph 120 :

"Nature and extent of right. At common law, an owner of land adjoining a highway is entitled to access to that highway at any point at which his land

actually touches it, even though the soil of the highway is vested in another, but he has no such right of a strip of land, however narrow, belonging to another and not subject to the public right of passage, intervenes.

The right of access of an adjoining owner from his premises to the highway and vice versa is a private right, and is distinct from his right to use the highway as soon as he is upon it, which (at any rate if the soil of the highway is not his) he enjoys only as a member of the public. An interference with the transference of goods from the highway to private premises is therefore an interference with a public right in which the owner of the premises has an individual interest as a member of the public.

The private right of access is subject to the public right of passage which is the higher right, but the public right of passage is also subject to the private right of access to the highway where the adjoining owner may exercise that right by means which do not amount to a serious obstruction to the right of passage and are not therefore inconsistent with it.

The right of access is not limited to the right to pass from the premises to the Highway and vice versa, but includes the right of access to a wall on the boundary of the premises. Where a footwalk intervenes between the carriageway and the adjoining premises, the owner of those premises, if he also owns the soil up to the middle of the highway, is entitled at common law to access across the footwalk to the carriage way for any kind of traffic which is necessary for the reasonable enjoyment of his premises and will not, as he proposes to conduct it, cause a substantial nuisance, and, it seems, his rights are the same even if he does not own the soil of the highway."

8. In Smith's Leading Cases, Vol. 3, 13th Edition, page 172 it is stated :

"An owner of lands adjoining a highway is entitled to access to the Highway at all points where his lands adjoins the highway, whether or not the soil of the highway be his".

9. Vesting of a public street in the Municipal Council is not absolute. It is only for the limited purpose of preservation and maintenance as a public street is clear from the decision of the Supreme Court in the Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj, . In that case, the Manglaur Municipality was seeking to erect a structure on a vacant site adjoining a public road for the purpose of installing a statue of Mahatma Gandhi and also to put up two rooms on either side for piyo and library. The Supreme Court at page 1149 has approved the dictum laid down in Sundaram Ayyar v. Municipal Council of Madura ILR (1902) Mad 635, and has quoted the following Headnote to bring out the gist of the 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 or soil over which the street exists. It does not own the soil from the centre of the earth usque ad

caelum, but it has the exclusive right to manage and control the surface of the soil and so much of the soil below, and of the space above the surface as is necessary to enable it to adequately maintain the street as a street. It has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers".

The law in regard to the right of the Municipality on public roads and streets vested in it is laid down as follows : --

"8. The law on the subject may be briefly stated thus : Inference of dedication of a highway to the public may be drawn from a long user of the highway by the public. The width of the highway so dedicated depends upon the extent of the user. The side-lands 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 landmarks and the manner and mode of its maintenance usually indicate the extent of the user.

9. In the present case it is not disputed that the metalled road was dedicated to the public. As we have indicated earlier, the inference that the side lands are also included in the public way is drawn much easily as the said lands are between the metal road and the drains admittedly maintained by the Municipal Board. Such a public pathway vests in the Municipality, but the Municipality does not own the soil. It has the exclusive right to manage and control the surface of the soil and "so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street". It has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers. Subject to the rights of the Municipality and the public to pass and repass on the highway, the owner of the soil in general remains the occupier of it and, therefore, he can maintain an action for trespass against any member of the public who acts in excess of his rights".

Chandrasekhara Menon J. in the decision in Achuthan v. District Collector 1982 KLT 133 : (AIR 1982 NOC 118) after referring to the aforesaid decisions states as follows :

"8. We might also note in this connection that the proper use of a highway is for passing and repassing and user for any other purpose may amount to a trespass. The right to use public road is a common law right which every member of the public has the Municipal Committee cannot be allowed to take away this right at its pure discretion in the absence of any statutory provision leaving, in very clear terms the private right of citizens entirely to the discretion of the Municipality. The public have a right to use every part of public street and not merely the metalled portion in the centre."

Referring to the decision of the Madras High Court in Sundaram Ayyar v. Municipal Council of Madura ILR (1902) Mad 635, the Supreme Court in State of Uttar Pradesh Vs. Ata Mohd., states at page 1788 :--

"The view taken by the Division Bench of the Madras High Court was that though the street vested in the Municipal Council, it does not transfer to the Municipality the rights of the owner in the site or soil over which the street exists. The question has been dealt with at some detail in the Madras decision and as it has been approved by this Court, it may be usefully referred to.

The High Court while observing that if the land itself had been acquired by the Municipality, either by purchase or otherwise and roads and drains formed thereon, the Municipality would have been the owner of the land but if the street or highway over the land was dedicated to the public either by the State or by the owners of the land adjoining the highway will continue vested, subject only to the burden of the highway, in the State or the respective owners of the land on either side of the Highway ad medium filum, or in any other person who may have dedicated the street to the public as the case may be".

The construction of bunks in the present case on the road margin is on a public street, as defined in the Act, vested in the Municipal Council for the purpose of maintenance and use as a public street. The Municipality has no right to construct buildings on public streets vested in the Municipal Council u/s 77 of the Act. The plaintiff is the owner of land adjoining the public street. She has a right of access at every point where her land adjoins the public street. For that reason also the Municipal Council has no right to put up constructions obstructing the plaintiff's access to the public street.

10. Counsel for the respondent-Municipality has sought to sustain the decision of the lower appellate court on the ground that the suit is bad for non-compliance to the requirements of Section 91, CPC. Section 91, CPC applies only to suits relating to public nuisance or other wrongful act affecting or likely to affect the public. In the present case, apart from the question of rights affecting the public the plaintiff has a cause, of action against the infringement of her right of access to the public street adjoining her land. There is therefore no substance in the plea that the suit is bad for non-compliance to the requirements of Section 91, CPC.

11. It is next contended by the Counsel for the respondent that the suit is defective for want of a notice u/s 392 of the Act. Sub-sec. (1) of Section 392, requires a notice to be issued to the Municipal Council in the manner specified therein, before a suit is instituted in respect of any act done or purported to have been done in pursuance to the Act or any rule, regulation or bye-law made thereunder. Sub-section (2) expressly enacts that nothing in Sub-section (1) shall be deemed to apply to a suit in which the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the institution of the suit. In the present case the only relief claimed in the suit is for an injunction restraining the defendant-Municipality from making any further construction on the public street and also for a mandatory injunction to demolish that part of the construction already carried out. Since the construction had begun and had reached a certain stage, the relief

claimed could brook no delay and the suit falls squarely under Sub-section (2) of Section 392 of the Act.

The result of the foregoing discussion is. I set aside the judgment and decree of the lower appellate court and restore the decree of the trial court. The second appeal is allowed. There will however be no order as to costs.