

(1955) 12 OHC CK 0002

In the Orissa High Court

Case No : Second Appeal No. 54 of 1952

Halim Mohammed and Others

APPELLANT

Vs

Commr. of Cuttack Municipality and Others

RESPONDENT

Date of Decision : 08-12-1955

Acts Referred:

Bihar and Orissa Municipal Act, 1922 — Section 58, 61
Easements Act, 1882 — Section 15, 18
Evidence Act, 1872 — Section 114

Citation : AIR 1956 Ori 92 : (1956) 22 CLT 119

Hon'ble Judges : Panigrahi, C.J.;P.V.B. Rao, J

Bench : Division Bench

Advocate : H. Sen, for the Appellant; S. Misra and J.M. Mitra, for the Respondent

Final Decision : Allowed

Judgement

Panigrahi, C.J.—The litigation culminating in this appeal was started in 1942 for, establishing the right of plaintiff 3 to a bit of land measuring .037 decimals in C. S. Plot No. 1468 situated within the Municipality of Cuttack. Plaintiffs 1 and 2 represented plaintiff 3 which is described as a Tomb of Haji Rustom Sahib, Fir, existing from time immemorial and is a pan of C. S. plot) No. 1490 which adjoins the disputed plot.

The plaintiffs' case is that the disputed plot which is recorded in the Current Settlement as part of a "Rastha" originally had formed part of Provincial Settlement Plot No. 2303, The Cuttack Municipality collected road materials and put up a road on it in spite of the protests of the plaintiffs. The plaintiffs complain that this action of the Municipality amounted to trespass and claim damages of Rs. 50/- for the same.

The contention of the defendant-Municipality was that there had been a passage on the land used by the inhabitants of the locality and that therefore the plaintiffs had lost their title to the property by reason of long user by the public. The Municipality further claimed to have been in possession of this passage

through the inhabitants of the locality who had been using it as a road.

The Municipality raised a number of pleas of a technical nature which resulted in the dismissal of the plaintiffs", suit on a preliminary point, and the matter" came up before this Court in -- "Salim Mahomed v. Cuttack Municipality", Second Appeal No. 135 of 1945 which was disposed of by me in 1948 (A). I held that the Municipality was not entitled to any notice as the suit was conceived in ejectment for alleged trespass. I, therefore, remanded the suit for a fresh trial.

2. The Courts below have again directed the dismissal of the plaintiffs" suit on the ground that the Municipality has acquired title to the land by adverse possession. When the appeal first came up before Mr. Narasimham J. counsel, for the plaintiffs raised a question as to whether there was a valid dedication of a public right of way and counsel for the Municipality represented that he would apply to this Court for permission, with retrospective effect, to validate the dedication of the disputed plot for the use of the public. The appeal was therefore, referred to a Division Bench.

3. The Courts below have concurrently found that the land which is claimed to be subject to a right of way belonged to plaintiff 3, and that the public have been using it as a thoroughfare at least since 1928 when the Current Settlement Record was prepared. The trial Court held that the public in general were using the suit land as a footway, before publication of the Current Settlement Record and that the owner had lost title to the same by reason of long user by the public.

After having held that the plaintiffs had lost their title the trial Court further laid down the proposition that the suit lands "automatically vested" with the management of defendant 1 (Cuttack Municipality) u/s 58, Bihar and Orissa Municipal Act. The Court of Appeal proceeded on the presumption of correctness attaching to the Current Settlement entry and held that the plaintiff had failed to rebut that presumption of law and observed that a statutory body like the Municipality can acquire title to land by adverse possession.

In the result the appellate Court held that the plaintiff's title to the disputed land was lost by prescription and that consequently the Municipality was entitled to put up a road over it.

4. It appears to me that neither of the Courts below has been able to disentangle the facts properly and apply the correct principles of law.

5. The initial error committed by the Courts below is that they failed to see that a right Of way vesting in a person or body of persons over another man's land, is not inconsistent with the title to the land remaining in the owner. Such a right of passage can be created by grant or by dedication. Dedication need not be express, but may be implied from the conduct of the owner. Secondly, dedication may be of the land itself or of the right of user, and may be inferred from any unequivocal act of the owner. It is not essential to constitute dedication that title should pass -- See --"Jaggamoni Dassi v. Nilmoni Ghosal" 9 Cal 75 (A1). The

English law on the subject is aptly put by Parke, B. in -- "Poole v. Huskinson", (1843) 83 RR 782 v. Huskinson", (1843); 83 RR 782 (B) as follows:

"There may be a dedication to the public for a limited purpose, as for a footway, a horse-way or a driftway; but there cannot be a dedication to a limited part of the public.....

In order to constitute a valid dedication to the public of a highway, by the owner of the soil, It is clearly settled that there must be an intention to dedicate -- there must be an "animus dedicandi", of which the user by the public is evidence and no more; and a single act of interruption by the owner is of much more weight upon the question of intention than many acts of enjoyment.

As to the ownership of the soil, I do not apprehend that there is any difficulty, it remains in the lord of the manor, for that portion of the soil only is taken from him for which he receives compensation, and which is allotted to others."

User as of right by the public would justify the inference of an intention by the owner to dedicate the land as a highway, but it is always a question of fact whether such intention can be inferred or not. It is necessary to prove an intention to dedicate by evidence other than that afforded by mere user. As the House of Lords have laid down in -- "Folkestone Corporation v. Brockman" (1914) 30 ILR 297 (C).

"while public user may be evidence tending to show dedication, it is good for that purpose only when it has been exercised so as to imply the assertion of a right within the knowledge and with the acquiescence of the owner of the fee".

6. The only fact relied on by the defendants in this case is the entry in the Current Settlement Record showing that the disputed bit of land was being used by the public as a "Rastha". The evidence on the side of the plaintiffs tends to show that even after the Current Settlement Register was prepared in 1928 there was a fence and a gate-way opening on the Kazi Bazar Road. This evidence has not been viewed in the proper perspective and it is not possible to find, as a fact, the precise date, of the dedication even if we make a presumption in favour of the defendants. Where the only user shown is an user extending over a period of twelve years there may be good ground for coming to the conclusion, that the dedication took place only just before the time at which the user began. The Provincial Settlement map destroys the case put forward on behalf of the Municipality. That map indicates the existence and possession of the disputed passage as a cul-de-sac which abruptly ended on the northern terminus.

The Current Settlement map however indicates that it connects two public roads at either end. There is no evidence at all that either the public or the Municipality ever spent a pie for the construction and maintenance of this passage. It would, therefore, be hazardous to infer, from the mere fact that the footway opens at either terminus, into municipal roads, that it is a highway.

The Settlement map merely records the existence of a pathway on the land and

nothing more than that. The question whether it has become public property by dedication by the owner involves consideration of other facts which are wholly absent from the records. The public, on whose behalf the right of way is claimed, are not represented in the suit and the contest is confined only to the Municipality which claims title on behalf of the public.

7. It should be remembered that in order to constitute a valid dedication there must be a person capable of making the dedication. Advantage was therefore, taken of this position by Mr. Sen appearing for the plaintiff-appellants, who argued that the land being the property of a Pir, no one can make a valid dedication without the permission of the Kazi. In order to meet this objection Mr. Misra- appearing for the defendant-Municipality represented that he would obtain the permission of the Court acting for the Kazi, so as to validate the dedication, whose origin is uncertain and unknown.

It is enough to point out that such a contention cannot be permitted to be raised in second appeal when the pleadings are silent, especially because it is essentially a question of fact to be determined by the tribunal of fact. An intention to dedicate land as a highway can only be inferred against a person who was at the material time in a position to make an effective dedication, that is to say, as a rule, a person who is an absolute owner in fee simple and sui juris -- Halsbury Vol. XVI, Hailsham Edition p. 218.

If public user is proved the onus is upon the Person disputing the fact of dedication, to rebut the inference by showing that there was no person capable of making a valid dedication.... The fact that a way has been used by the public so long and in such manner that the owner, 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.

The test is whether the owner has so acted as to induce a reasonable belief on the part of the public that the way is public. The weight to be attached to evidence of user depends upon a number of circumstances. The nature of the locus in quo is also material. See Halsbury, Vol. XVI pp. 224 and 226. There is a tomb of a Saint on the plot in dispute and the Muhammadan community visit it on ceremonial occasions to offer Chiragbati at the Asthan and recite Fateha every Thursday.

The Mohurram and Tajea festivals are held there and it may be that the dedication is confined only to such uses as are admitted by the plaintiffs. In such cases, the slightest evidence of public user will suffice. An Inference of dedication may be drawn even in the case of a cul-de-sac, for a highway need not be a thoroughfare. The fact that a way leads to nowhere is, however, a point for consideration, and it is difficult, if not impossible, to establish a public right of way over a cul-de-sac by evidence of user alone, without proof that public money has been spent upon it -- See Halsbury, Vol. XVI, p. 226.

Upon the question of intention to dedicate a single act of interruption by the owner is of much more weight than many acts of enjoyment by the public. Thus the closing of a way for one day in every year disproves such intention. It is equally well established that a land owner may dedicate land to the public for use as a highway subject to restrictions as to the time or mode of user. See -- Surendra Nath Saha and Others Vs. Harendra Kumar Saha and Others, and -- Panchanon Ray and Others Vs. Fazlur Rahman Chaudhury and Others, , which lay down that evidence of mere user by the public, without more, is not sufficient to constitute dedication of a public road.

8. But a more serious error which the Courts below have committed is their assumption that the dedication of a right of way to the public extinguished the legal title of the owner to the property. Even if the presumption of a grant or dedication to the public is made by reason of the exclusive and continuous user by the public, the question may still arise whether the dedication was of the entire ownership of the land or merely of the right of user in it.

As was observed by Mookerjee J. in -- "Chairman, Howrah Municipality v. Khettra Kristo Mitter" 33 Cal 1290 (P) an owner may appropriate land to public use and yet retain in himself all such rights in the soil as are compatible with the full exercise and enjoyment of the public use to which the property has been devoted. It is not essential, to constitute a valid dedication, that the legal title should pass from the owner; nor is it inconsistent with an effectual dedication, that the owner should continue to make any and all uses of the land, which do not interfere with the uses, for which it is dedicated.

9. Mr. Misra, however, claimed that the title to the property had vested in the Municipality by reason of the statutory provision in the Bihar and Orissa Municipal Act, apart from the question of adverse possession by the general public. The relevant provision is embodied in Section 58 of the Act, which describes what municipal property is. The section reads as follows:

"All property within the Municipality of the nature hereinafter in this section specified, other than private property or property maintained by Government or another local authority shall vest in and belong to the Commissioners and shall, with all other property of what nature or kind so ever, which may become vested in the Commissioners be under their direction, management and control, that is to say--(a) all roads, etc. etc."

This section in express language makes a distinction between private property and municipal property. All property within the Municipality other than private property maintained by Government or another local authority vests in the Commissioners and roads are only one class of such property described in Section 58. A road, like other property, may be either private or public. "Road" is defined in Section 3(24) of the Act as meaning

"any road, bridge footway, lane, square, Court, alley or passage, which the public or any portion of the public has a right to pass along. It is not enough that the

property claimed, as municipal property, should fall within the description of "roads" as defined in the Act. It must further be established that it is not private property the ownership of which vests with another person. Section 61, therefore, makes specific provision for the transfer of private roads to the Commissioners. It says:

"The Commissioners at a meeting may agree with the person in whom the property in any road, etc., is vested to take over the property therein or control thereof, and after such agreement may declare, by a notice in writing put up thereon or near thereto, that such road has been transferred to the Commissioners. Thereupon the property therein or the control thereof, as the case may be, shall vest in the Commissioners and such road shall thenceforward be repaired and maintained out of the Municipal fund". It is clear, therefore, that a private road may be transferred to the Commissioners by an agreement between the Commissioners and the owner, either wholly, or partly for the purpose of control and management, and until such an agreement is arrived at the road remains the private property of the owner of the land. It was held by the Calcutta High Court, in a similar case, in -- "*Howrah Municipality v. Haridas Datta*" AIR 1917 Cal 629 (G) which arose under the Bengal Municipal Act of 1884, that private pathways do not vest in the Municipality.

But the Municipality may have control over such a pathway if the public have a right to go over it -- as provided in the Act Itself. It was further observed that the difference between roads vested in the Municipality and other roads is that in the former case the Municipality is responsible for lighting, watering, sewerage and clearing of the roads, and in the latter case the Municipality has only the powers of control, to prevent the road from becoming a nuisance or the rights of the public from being interfered with.

It is, therefore, open to the Municipality to agree with the owners that control and management of the road may be transferred to the Municipality so that they may regulate its use in the interest of public health and sanitation. That has obviously not been done in the present case. Title to the property therefore still remains with the owner, and he has a right to prevent the Municipality from encroaching upon his rights, however well-intentioned the act of the Municipality may be.

10. The principles I have deduced from the English and Indian decisions cited above incline me to hold that the Courts of fact have not properly appreciated the question posed by the plaintiffs and have gone by the Current Settlement entry alone in denying the plaintiffs' right.

11. This appeal must, therefore, succeed and the decisions of the Courts below must be set aside. I do not think, however, that the plaintiffs are entitled to any damages for what amounts to a technical trespass, as the condition of the road has been improved by the Municipality. I would accordingly set aside the judgments of the Courts below and direct judgment declaring the plaintiff's title

to the disputed bit of land in Plot No. 1468, delineated in the map attached to the plaint, and their right to recover possession of the same from defendant 1. The plaintiffs will also have the costs of this litigation, incurred by them after remand, up to date. Hearing fee Rs. 100/-.

P.V.B. Rao, J.

12.I agree.