

(1929) 02 AHC CK 0039
In the Allahabad High Court

Municipal Board

APPELLANT

Vs

Khalil-ul-rahman

RESPONDENT

Date of Decision : 25-02-1929

Acts Referred:

Easements Act, 1882 — Section 15

Citation : AIR 1929 All 382

Hon'ble Judges : Ashworth, J

Bench : Division Bench

Judgement

Ashworth, J.—This second appeal arises out of a suit brought by the plaintiff-respondent against the defendant-appellant for an injunction, restraining the defendant from allowing the margin of a public road to be used by traders for the vend of merchandise. The plaintiff owns a shop and also an open space in front of that shop. This open space borders a public road. The defendant is the Municipal Board of Pilibhit. By a bye-law, passed on 27th June 1917, the Municipal Board signified its intention to let out the spaces at the sides of roads to hawkers, and it has allowed hawkers to stand or sit and sell their goods on the side of the road in question. This prevents the public having free access to the shop booths allowed by the plaintiff on his vacant strip of land, and hence this suit.

2. The trial Court found that the plaintiff had failed to prove that the public had enjoyed for 20 years free access from the road to this piece of land. It also found that the suit was barred by limitation as not brought within two years when the Municipal Board began to let out the side of the road to hawkers.

3. In first appeal the Subordinate Judge found that the plaintiff's witnesses did prove use of the land by the plaintiff for stalls for over 20 years. It also found that there was no evidence to show that the side of the road had been used by licensees or lessees of the Board at a date more than two years before the filing of the suit.

4. The memorandum of appeal by the Municipal Board contains two clauses. The first plea is that as the land at the side of the road belongs to the Board, it can use it in any way it likes, and the second plea is that the plaintiff has no right to interfere with the use of the defendant's land. When, however, the case came to be argued, the point taken up was that the findings of the lower appellate Court both as to the establishment of a right of easement and as to the limitation were wrong. By no stretch of construction can these pleas be found to be included in the two pleas taken in the memorandum of appeal. Those two pleas entirely ignore the findings of the lower appellate Court as to an easement or as to limitation. They assert the right of the owner of land to deal with his land as he wishes, which right was never denied by the lower appellate Court. The pleas in the memorandum of appeal appear to mean that no owner's right can be destroyed by any easement, which I do not understand to be maintained by the appellant's counsel.

5. At the same time, as I hold that the pleas now argued are equally untenable, it appears more satisfactory to dismiss this appeal on all the merits rather than on the remark that the pleas taken in the memorandum of appeal are not sustainable.

6. As regards the question of easement, it is argued that where land belongs to Government, an easement can only be established by 60 years enjoyment of the right claimed: see the last paragraph of Section 15, Easements Act 5 of 1882. But this land was not Government land. It was land belonging to the Municipal Board. Section 116(g), Municipalities Act (U.P. Act 2 of 1916) vests in the Board all public streets and the expression "street" is defined in Section 223 to include the land on either side of a road up to the defined boundary of any abutting property. So at the date of suit the land belonged to the Board. The provision in Section 15 requiring 60 years use to establish an easement refers to the date when the easement is claimed. It would not therefore be open to the appellant to plead that at some period antecedent to the bringing of the suit the road belonged to Government. Even if this might be argued, it has not been argued, and there is no evidence to show the date when under any Municipal Act for the time being in force streets vested in the Board, or when this particular street came into existence. What is argued by counsel for the appellant is that it was only on 27th June 1917 that a bye-law was made by the Board and approved by Government declaring the Board's intention to let out the sites in the streets. He urges that it was only from this date that the side of the road became the property of the Board. Even if this were so, it does not appear to me that the last paragraph in Section 15, Easements Act would assist the appellant, but the view that the bye-law vested this road in this Municipal Board is not correct. The road was vested in the Board by Section 116, Municipalities Act of 1916, or by any previous Municipal Act, containing a provision similar to Section 116 of the present Act. From the date that the road became vested in the Board the Board was owner, but its power of dealing with the road was restricted. It could not merely by right of ownership be entitled to use the land for purposes other than

that of a road. It was by the bye-law that its power of user became extended or rather by the fact of Government sanctioning the bye-law. Consequently the road was properly vested in the Board, and u/s 15 an easement could be established by 20 years user.

7. As to limitation the plea now argued is that at the date when the suit was brought the plaintiff had been obstructed in his enjoyment of the right of access from the road for a period extending over one year. It was, therefore, argued that under Expl. 2 the plaintiff could not prove 20 years enjoyment without interruption. This plea ignores the fact that there is no evidence or even allegation that the plaintiff acquiesced in the Board's action in letting out the side of road. Expln. 2, Section 15, will not therefore apply.

8. It appears to me possible to have raised the contention, and indeed, when the memorandum of appeal was drafted, this may have been what it was intended to mean that the power acquired by the Board by reason of the sanction by Government of the bye-law for letting out this street for the use of hawkers was a power that would override any private right of property or of easement. It will be observed that in the bye-laws a reservation is made in favour of certain private owners probably because those private owners had long exercised a certain right. If this contention had been raised it would have been argued. But as it was not specifically raised in the memorandum of appeal and has not been argued at all, I do not think it proper now to consider it. For the above reasons, this appeal is dismissed.