

(1934) 03 PAT CK 0007

In the Patna High Court

Case No : Second Appeal Nos. 1686 and 1687 of 1931

Prabhu Dayal

APPELLANT

Vs

Commissioners of Arrah Municipality and another

RESPONDENT

Date of Decision : 14-03-1934

Acts Referred:

Citation : (1934) 03 PAT CK 0007

Final Decision : Dismissed

Judgement

Dhavle, J.—These are two appeals by the plaintiff in a suit against the Arrah Municipality and a Sub-Overseer under that public body for compensation for dismantling platforms and slops in front of two houses of the plaintiff. The dismantling was admitted by the defendants, whose case was that this was done under the authority of the Bihar and Orissa Municipal Act. The trial Court found that the plaintiff was entitled to erect and maintain wooden platforms in front of his houses projecting over the Municipal drain, and gave him a declaration accordingly. It however dismissed the plaintiff's claim for compensation or, the finding that the plaintiff had failed to prove that the Municipal employees had removed and misappropriated the materials or that the materials were worth the amount claimed. From this decision there were two appeals preferred to the lower appellate Court one by the Municipality assailing the plaintiff's right to erect wooden platforms, and the other by the plaintiff himself claiming compensation. The learned Subordinate Judge allowed the appeal of the Municipality and dismissed that of the plaintiff's. He accordingly dismiss the plaintiff's suit with costs in both Courts.

2. Though the plaint was filed on behalf of a father and his minor son, I understand that the son is now dead, and the second appeals to this Court are preferred by the father alone. Several points were urged on behalf of the plaintiff-appellant which, however on examination turned out to be plainly unsubstantial. It was urged for instance (and this, at the outset) that the structures that were dismantled by the Municipality being platforms and steps were not within the

section, viz., S. 196, Bihar and Orissa Municipal Act, under which the lower appellate Court held against the plaintiff that notice was served by the Municipality. This was because it was the plaintiffs contention below that no notice was served upon him under that section. The argument here was that the platforms were projections coming not under S. 196, but under S. 197 of the Act, and that as no notice was served upon the plaintiff under this latter section, the Municipality had no authority to dismantle them. It appears however from a perusal of the notices in the case that they were notices under S. 197 as well as under S. 196 of the Act. When this fact came out, the learned advocate quite properly dropped the contention.

3. The next contention was that the order of the Magistrate under S. 198 of the Act, which is the authority for the Municipality to dismantle the structures in question, was not properly proved by the production of what appeared to be a communication from his office to the Municipality. It was argued that the Magistrate's order is judicial in its character and can only be proved by the production of the original or by proper secondary evidence provided it is first shown that there is sufficient reason for not producing the original. This contention was based on Ex. L. It appears however on an examination of the record that the actual sanction of the District Magistrate is also on record as evidence (Ex. K-2) and the argument thus fails.

4. The third point taken was that the proceedings were not in order because the Magistrate of the District did not give notice to the plaintiff before ordering or empowering the Municipality to remove the platforms and the steps. Some Calcutta decisions were cited in support of the proposition that the Magistrate's proceedings under the section are of a judicial character and that though the statute may not prescribe the issue of a notice to the person whose property is to be dealt with, natural justice requires that an order should not be made behind the back of a party to his prejudice if it can at all be helped. It is however to be borne in mind that it is one thing to hold that the Magistrate's proceedings are judicial, so that the High Court would be entitled to interfere with them in revision, and quite another to hold that the Municipality is liable to pay damages for proceeding in accordance with the order of the Magistrate merely because it was passed by him without giving notice to the party concerned. The decisions cited do not go so far. They were cases in which the High Court was asked to, and did consider itself entitled to interfere in revision, with the order of the Magistrate, but not cases dealing with the position of a Municipality in or upon carrying out such order. S. 201 Bihar and Orissa Municipal Act, provides that:

the Commissioners shall be deemed to be persons bound to execute such orders of a Magistrate within the meaning of the Judicial Officers Protection Act, 1850

and S. 198 empowers them to carry out the orders obtained by them from the Magistrate. It seems to me clear that the Municipality cannot be held liable for carrying out such orders merely because the Magistrate might have been better advised if before passing them he had given notice to and heard the private

parties concerned, and that the orders cannot be regarded as ultra vires.

5. The next contention raised relates to the action of the lower appellate Court sending for three original letters to the Municipality from the District Magistrate's office. The circumstances in which the learned Subordinate Judge did so are stated in his judgment. Ex. L, the letter of 16th July 1928, from the District Magistrate, which, was in evidence, conveyed his sanction to the removal of the encroachment made on Municipal land by Khedan Kahar and others. This letter was sent in reply to four applications of the Municipality; and the plaintiff's two houses were referred to in the enclosure to one of these applications, which was made by letter No. 716, dated 3rd July 1928, from the Municipality to the District-Magistrate. It was argued on behalf of the plaintiff on Ex. L that the enclosure to the Municipality's letter referring to the houses of the plaintiff must have been, headed by the name of Khedan Kahar, and that the enclosure, relied upon by the defence, not being so headed, nor containing the name of Khedan Kahar at all, was unreliable. The position was obscure, and in order to clear the point the learned Subordinate Judge sent for the other letters and discovered that one of them related exclusively to Khedan Kahar and Rameshwar. There was thus no inconsistency at all between Ex. L and the enclosure. It may be doubted whether the argument itself would have been raised by any person accustomed to dealing with official correspondence, without looking into the connected papers, and it is somewhat surprising that it was not met at once by an offer to produce the connected papers. The learned Subordinate Judge remarks that until he sent for the letters the pleader for the defendants could not clear up the position and suggested that the letters might be called for. He also records that the plaintiff's pleader agreed that this should be done. There does not seem to be anything in this which can afford a legitimate grievance to the appellant. It is urged that if the lower appellate Court intended to take evidence under O. 41, R. 27, Civil P.C., it should have proceeded to do so regularly and that the appellant should have had an opportunity to meet such additional evidence. But the action of the lower appellate Court seems to have been taken under Cl. (b) of the rule and the requirements of R. 27 of that order were also complied with. It does not moreover seem from the order-sheet of the lower appellate Court that the present appellant at the time asked for any opportunity to produce further evidence. The learned Subordinate Judge's finding that the sanction of the District Magistrate covered the houses of the plaintiff must therefore be taken as a proper finding of fact unassailable in second appeal.

6. The only other point that has been urged before me is that the platforms and steps said to have constituted encroachments upon the Municipal land and Municipal drain cannot be dealt with under the Bihar and Orissa Municipal Act, at all, because they were situated on land belonging to the plaintiff from before the existence of the Municipality itself. It has been found as a fact by the Courts below that the structures stood on land belonging not to the plaintiff, but to the Municipality. The learned Advocate for the appellant has urged that the power to remove obstructions, encroachments, projections etc., given to Municipal

Commissioners by Ss. 196 and 197 and succeeding sections of the Act must be limited to such structures as were erected or placed in offending positions subsequent to the formation of the Municipality under former Acts or subsequent to the passing of the present Act, because an interference with private property is not to be lightly ascribed to the legislature. The learned advocate has endeavored to reinforce this argument, based as it is on a purely general consideration, by referring to the definition of "house-gully" in S. 3 (10) of the Act as meaning:

a passage.....affording access to a latrine urinal, cesspool.....to municipal servants or to persons employed in the cleaning thereof or in the removal of such matter therefrom.....

7. Upon this definition it is argued that house-gullies presuppose the existence of Municipalities; and it is further argued that as Ss. 196 and 197 of the Act deal with obstructions, encroachments, etc., in, on, into or along any house-gully (inter alia), the power of the Municipality is confined to such obstructions, etc., as came into existence after establishment of Municipalities. But S. 3 (2) of the Act, now defines a "road" as meaning:

any road, bridge etc.....which the publichas a right to pass along, and includes on both sides the drains or gutters and the land up to the defined boundary of any abutting property, notwithstanding the projection over such land or platform, veranda or other superstructure.

8. The last thirteen words indicate a consciousness on the part of the legislature of the existence of projections over roads even from before the establishment of Municipalities under the Act. The definition of "house-gully" is also by no means confined to passages pro-supposing the existence of the Municipality; in its first part it refers to passages utilised for the purpose of serving as a drain, not necessarily by Municipal servants. S. 200 of our Act, provides that:

No person shall be entitled to compensation in respect of the removal or alteration of any building, well, fence, rail, post, projection, obstruction or encroachment under Ss. 196, 197 or 193 unless it be proved that the projection etc.....has existed for more than three years or before the Municipality was constituted, whichever period may be less.....

9. The learned Subordinate Judge has interpreted this to mean that

new or old, the right of the Commissioners to get an encroachment removed is paramount.

10. The section continues:

in which case the Commissioners, on application being made to them in this behalf may order reasonable compensation to be paid to any person who suffers damage by reason of any removal or alteration under the aforesaid sections.

11. This portion of the provision has been taken by the Subordinate Judge to

mean that:

only in cases in which the encroachment has existed for more than three years, the Commissioners are liable on the application of the party-affected, to pay compensation for damages suffered by reason of the removal.

12. Before the Bihar and Orissa Municipal Act (7 of 1922) the Act in force was the Bengal Municipal Act (3 of 1384) Ss. 202 and 204 of which corresponded partially to Ss. 196 and 197 of our Act. Now, Ss. 202 and 204 of the old Act, definitely limit the power of the Municipalities to remove obstructions, encroachments and projections to such of them as were erected after that or earlier Municipal Acts, and they provide that in such cases no person shall be entitled to compensation in respect of the removal of the obstructions, etc. The Bengal Act of 1884, however also provided in S. 233 for the removal of projections, etc., erected before the Municipal Acts and made the commissioners liable to pay reasonable compensation to the person who suffers damage by any removal or alteration under the section. The Bengal Act was replaced by the Bihar and Orissa Municipal Act of 1932, This Act does not deal in separate sections with projections, etc., according as they were erected before or after the Municipal Acts, but does not fail to provide for compensation in the former, case, though not in the latter. It does not in Ss. 196 and 197 restrict the power of the Municipalities to deal with projections, etc., to those erected at any particular time; but, as I have already shown, S. 200 requires the Municipalities to award compensation for projections, etc., demolished under sections 196 and 197, Bihar and Orissa Act, provided that they have existed for more than three years or before the Municipality was constituted, whichever period may be less. A comparison of the Bengal and the Bihar and Orissa Municipal Acts, makes the position quite clear. Even under the old Act the Municipalities had power to deal with ancient projections. The new Act has not taken that power away, but has enlarged the rights of the ratepayers by requiring Municipalities to pay compensation not merely for projections, etc., erected before the Municipal Acts, but also for projections, etc, that have existed for more than three years. Nor can the right conferred upon the Municipalities by the statute to remove old projections, etc., in the interest of the public be regarded as wanton interference with private property, to say nothing of the fact that the Municipality may be required by the owner to pay compensation in such cases. This is sufficient to show the hollowness of the contention on behalf of the appellant that the Bihar and Orissa Municipal Act does not empower Municipalities to remove old obstructions, encroachments, projections, etc. There is as a matter of fact, no definite finding in favour of: the appellant that the platforms and steps existed from the time claimed by him. He asserted in para. 4 of his plaint that they had been in existence:

for along time, from time immemorial (i.e. from before the existence of Arrah Municipality.

13. The case of the Municipality on the other hand was that that allegation was

wrong and that plaintiff 1 had constructed the platforms and steps without sanction, definitely implying that the platforms and steps had been constructed since the establishment of the Municipality. The issue framed on the point was:

Were the platforms and steps demolished by the defendants new constructions?,

and this was answered by the trial Court by finding that they were old constructions. The learned Munsif refers to the evidence that they were as old as the houses themselves and were in existence for over 20 years; and it was on this ground that he came to the conclusion that the plaintiff had acquired a right of easement. It is not contended before me that the finding of fact that the platforms and steps had been in existence for more than 20 years will support the contention that they cannot be dealt with under the Municipal Act, on the ground of their dating from pre-municipal times. The learned Subordinate Judge who heard the appeal did not definitely find whether the platforms and the steps were pre-municipal; but it has been explained on behalf of the appellant that that was so because of the view taken by the lower appellate Court that the Municipal Act, will apply whether the encroachment, etc., is new or old. In my opinion that view was correct; and it is therefore unnecessary to obtain a definite finding about the pre-municipal or post-municipal character of the structures in question, there being no dispute that the age of the structures is such as would have entitled the plaintiff to apply to the Municipality for compensation and obtain it from that body.

14. The learned advocate for the appellant has also somewhat faintly urged that the appellant ought, at least, to have been given compensation for the removal of the structures. But the suit was not really based on the ground that under the Municipal Act, the plaintiff was entitled to compensation for the removal of the structures. There was undoubtedly a prayer for compensation, but if the plaint is read as a whole and regard is paid to the fact that in para. 12 the materials of the structures said to have been forcibly taken out, thrown away, spoiled and removed are valued at the very sum that was asked for as compensation, it is clear that what was sought was not compensation under S. 200 of the Act, but compensation for the materials of the structures which according to the plaintiff had been removed contrary to the provisions of the Act, and which, according to the concurrent finding of fact of the Courts below have not been removed by the Municipality at all. The claim for compensation under the Act ought, moreover to have been made in the first place to the Municipality itself; and it is not pretended that this was ever done by the appellant. What the effect of that failure may be, I am not concerned at present to say. It is sufficient to find that the suit was not in fact one for compensation under the Act and that the ground on which compensation was sought has clearly failed.

15. The result is that both the appeals fail and must be dismissed with costs.