
(1967) 11 MP CK 0001
In the Madhya Pradesh High Court
Case No : S. A. No. 317 of 1964

State of Madhya Pradesh

APPELLANT

Vs

Atmaram

RESPONDENT

Date of Decision : 24-11-1967

Acts Referred:

Madhya Pradesh Land Revenue Code, 1959 — Section 248

Citation : (1970) JLJ 95 : (1970) MPLJ 195

Hon'ble Judges : G. P. Singh, J

Bench : Single Bench

Advocate : J. P. Dubey, Govt, for the Appellant; P. C. Khare, for the Respondent

Final Decision : Allowed

Judgement

G. P. Singh, J.

This second appeal arises on the following facts.

The plaintiff erected a Panthela on one side of a road in Balaghat. This led to Revenue Case No. 15/A-68 of 60-61, in which the Tahsildar, Balaghat, found that the plaintiff was in unauthorised occupation and ordered him to remove the Panthela. This order, which is dated 4-1-1961, was passed u/s 248 of the Madhya Pradesh Land Revenue Code, 1959. The plaintiff then filed the present suit against the State of Madhya Pradesh for a declaration that the order of the Tahsildar is illegal, void and without jurisdiction and cannot be executed against him. The grounds on which this relief is claimed by him are that he was in authorised occupation having obtained permission from the Municipal Committee, Balaghat, and that, in any case, as the road is within the limits of the Municipal Committee, the Tahsildar had no jurisdiction to take any action u/s 248 of the Land Revenue Code, 1959. The Courts below have held that the plaintiff's occupation of the road is wholly unauthorised but they have further held that as the road is within the limits of the Municipal Committee, Balaghat, the Tahsildar lacked inherent jurisdiction to pass any order u/s 248 of the Code. The plaintiff,

on this finding, obtained the declaration as prayed by him from 3rd Civil Judge, Class II, Balaghat, which was confirmed in appeal by the Additional District Judge, Balaghat. The State now appeals to this Court.

The only point argued before me is about the jurisdiction of the Tahsildar in passing the order impugned in the suit.

The learned counsel appearing for the parties are agreed that the land of the road is owned by the State, and that the road is in the nature of a public street within the area of the Balaghat Municipality. It is also now agreed that the plaintiff is and has always been in unauthorised occupation.

The question under consideration depends upon the construction of certain provisions of the Central Provinces and Berar Municipalities Act, 1922, which was in force at the time when the Tahsildar passed the order, and the Madhya Pradesh Land Revenue Code of 1959.

My attention is first drawn to section 38 of the Municipalities Act. The section declares that the property of the nature specified in clauses (a) to (g) of sub-section (1), if situated within the limits of the Municipality "shall vest in and be under the control of the Committee". One class of property is specified by clause (g) which is as under:-

(g) all public streets, not being open spaces or lands owned (by the Crown), and the pavements, stones and other materials thereof, and also all trees, erections, implements and things provided for such streets.

[N. B.-In view of the Adaptation of Laws Order, 1950, the word "Government" has to be read in place of the word "Crown".] Then reference is made to sections 93 and 94, which prohibit encroachments (immovable or movable) upon streets without the written permission of the Committee and authorise the Committee to take action for their removal. After reference to those sections, it is contended by Shri Khare, the learned counsel for the respondent, that the scheme of these sections is to vest all public streets in the Committee and authorise the Committee alone to take action for removal of encroachments upon streets.

Clause "g" of section 38 (1) of the C. P. and Berar Municipalities Act no doubt has the effect of vesting all public streets in the Committee, but this provision, which I have already quoted, contains an exception within its language in the words "not being open spaces or lands owned by the Government". Thus, if the land, over which the road or street exists, is owned by the State Government, this provision has not the effect of vesting the road or street in the Municipal Committee. But assuming that even such a street vests, the effect of the provision is not to vest the ownership in the Committee. The words "shall vest in and be under the control of the Committee" as they find place in section 38 (1), were construed in *Municipal Committee Vs. Ramkaran Ganeshilal*, where a Division Bench of the High Court (Naik and Chaturvedi JJ.) observed as follows:

From the cases, referred to above, and all the discussion therein it will be clear

that the word "vest" in section 38 of the Central Provinces and Berar Municipalities Act, 1922, has only a limited effect. So far as public sewers, drains, public streets and roads etc. within the area of the Municipality, are concerned, the vesting section (section 38) must be so construed as to give the Municipality the least interest in the property that is compatible with the proper exercise of the powers in relation to these things given to the Municipality under the Act.

Similar view was taken in *Bashiruddin v. Ramprasad* 1961 M P L J 311 (S. A. No. 31 of 1958 decided on the 15th March 1961), where S. B. Sen J., in interpreting section 48 of the Madhya Bharat Municipalities Act, 1954, held that the Municipality cannot claim general ownership of roads and has no power to lease out any portion of it for construction of Goomtis. The law regarding the rights of the public, municipality and owner inter se in relation to a road or highway has been reviewed by their Lordships in *Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj*, , at page 1149, para. 9, and the legal position has been stated as under:-

xx xx xx xx xx, 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.

From a consideration of these cases, it is clear, that if the road or street vests in the Municipal Committee, the Committee can manage it and can also bring possessory action against trespassers but the owner of the soil also retains sufficient interest to "maintain an action for trespass against any member of the public who acts in excess of his rights".

The occupation of the road in the present case by the plaintiff has been found to be wholly unauthorised and therefore the State, as owner of the soil, could take proper steps for removal of this unauthorised occupation notwithstanding that the Committee could also act under sections 38 and 39 of the G. P. and Berar Municipalities Act for the same purpose.

Next, it is argued by Shri Khare that section 248 of the Madhya Pradesh Land Revenue Code, 1959, did not on its own terms authorise the Tahsildar to take action against the plaintiff even though he was in unauthorised occupation.

Section 248(1) of the Code reads as under:-

248(1).-Any person who unauthorisedly takes or remains in possession of any unoccupied land, abadi, service land or any land which has been set apart for

any special purpose u/s 237, may be summarily ejected by order of the Tahsildar and any crop which may be standing on the land and any building or other work which he may have constructed thereon, if not removed by him within such time as the Tahsildar may fix, shall be liable to forfeiture. Any property so forfeited shall be disposed of as the Tahsildar may direct and the cost of removal of any crop, building or other work and of all works necessary to restore the land to its original condition shall be recoverable as an arrear of land revenue from him. Such person shall also be liable at the discretion of the Tahsildar to pay the rent of the land for the period of unauthorised occupation at twice the rate admissible for such land in the locality and to a fine which may extend to one thousand rupees. The Tahsildar may apply the whole or any part of the fine to compensate persons, who may, in his opinion, have suffered loss or injury from the encroachment.

The section as quoted above shows that the jurisdiction of the Tahsildar to summarily eject a person is dependent on the following conditions:

- (i) the subject-matter in respect of which proceedings are taken is "unoccupied land, abadi, service land or any land which is set apart for any special purpose u/s 237;
- (ii) the person against whom proceedings are taken is one who has unauthorisedly taken or is unauthorisedly remaining in possession.

As stated earlier, it is now admitted before me, that the plaintiff has been throughout in unauthorised possession hence the second condition for operation of section 248 is satisfied. But, it is further to be seen whether the first condition is also satisfied. Section 2 (K) of the Code defines "Land" to mean "any portion of the Earth's surface" and is deemed to include "all things attached to or permanently fastened to anything attached to such land". Section 2(2-3) defines "unoccupied land" to mean "land in a village other than the abadi or service lands or the land held by a Bhumiswami, a tenant or a Government lessee." Definition of "village" which finds place in section 2(Z-5) need not be quoted for it has been conceded before me that Balaghat, where the road in dispute is situated, is a village according to this definition and continues to be so, although its area is included within the Balaghat Municipality. This concession is correct for the idea of an Indian village is that it represents a division of a Pargana (tahsil) and is demarcated as such in a revenue survey. [See Sheikh Zahiruddin v. Collector of Goruckpore (1870) 4 B. L. R. 36 (P. C.) at pages 48, 49]. The area of a village continues to be a revenue unit in spite of its inclusion within the limits of a Municipality, for, there is nothing in the Municipal Act which destroys the identity of a village if its area is declared to be or is included within a Municipality. From the foregoing provisions, it is clear, that the road in dispute is "land" in a village and not being abadi or service land or land held by a Bhumiswami, a tenant or a Government lessee, is "unoccupied land" as defined in the Code. Further, this land was mentioned in Nistar Patrak (Ex. D-3) prepared under the Land Revenue Code of 1964 as set apart for road and by the deeming

provision contained in the Second Proviso to section 261 of the Land Revenue Code of 1959, must be deemed to have been set apart for road u/s 237 of this Code. Thus the road in dispute is "unoccupied land" and also "land which has been set apart for any special purpose (which includes road) u/s 237" within the meaning of these expressions as they occur in section 248. In this view of the matter, the first condition for the applicability of section 248 is also stained. The Land Revenue Code of 1959 in which section 248 finds place applies to the whole of the State and no exception is made for areas included within Municipalities. I, therefore, find that both the conditions for applicability of section 248, which I have mentioned above, were satisfied and the Tahsildar had jurisdiction to eject the plaintiff under this provision.

The learned counsel, Shri Khare, then again reverts to sections 93 and 94 of the C. P. and Berar Municipalities Act, 1922, which confer power on the Municipal Committee for removal of encroachments from public streets and argues that it should be held that such a power is impliedly outside the provisions of section 248 of the Madhya Pradesh Land Revenue Code, 1959.

I have already shown that mere existence of a power in a Municipality to eject trespassers from public streets does not take away the power of the owner of land over which the street exists to sue in trespass against any member of the public who acts in excess of his rights. The Tahsildar, when he acts u/s 248 of the Land Revenue Code, to eject persons in unauthorised occupation, in effect, acts on behalf of the State and it cannot be said that sections 93 and 94 of the Municipal Act impliedly negative such a power. These sections of the Municipal Act, 1922 and section 248 of the Land Revenue Code are all enabling provisions and the language used is affirmative; therefore, they can stand together without any conflict. In *Municipal Council, Palia through the Commissioner of Municipal Council, Palia v. T. J. Joseph* A I R 1963 B.C. 1561, it has been held by the Supreme Court that a provision in a Municipal Act authorising the Municipal Committee to provide for bus stands did not conflict with a later Motor Vehicles Act which authorised the State Government to do the same. The reasoning at p. 1566 (Para. 17) of the report is that the provisions in the later Act are to be read "in continuity" with the provisions in the earlier Act and the two sets of provisions can coexist "because both are enabling ones" a conflict can arise only when action is taken under both the Acts and, in such a case, action taken under the later Act, will supersede action taken under the earlier Act. Similar reasoning applies to sustain both sets of provisions under consideration in the present case, i. e. sections 93 and 94 of the C. P. and Berar Municipalities Act, 1922 and section 248 of the M. P. Land Revenue Code, 1959. No action was taken by the Municipal Committee under the Municipalities Act and, therefore, there was no question of conflict when the Tahsildar took action u/s 248 of the Land Revenue Code. Moreover, the Code is a later Act and in case of conflict would prevail over the earlier Municipalities Act.

Lastly, it is contended that the power of the Tahsildar u/s 248 of the Code is

either taken away or controlled by the Nazul Rules.

It was, however, conceded that the Nazul Rules are not statutory, and, if that is so, the positive provisions of a statutory enactment like section 248 of the Code cannot be negated or controlled by such rules.

I hold, that the Tahsildar had jurisdiction to order ejectment of the plaintiff u/s 248 of the M. P. Land Revenue Code, 1959, and the Courts below have erred in law in declaring that order as invalid and void.

This appeal, therefore, succeeds and is allowed. The judgments and decrees passed by the Courts below are set aside and the plaintiff-respondent's suit is dismissed with costs throughout.