

**APPELLATE CIVIL.***Before Mookerjee and Cuming JJ.*

GUNENDRA MOHAN GHOSH

v.

CORPORATION OF CALCUTTA.\*

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July 11.

*Public Drain—House drain—Title—Calcutta Municipal Act (Beng. III of 1899), ss. 3, cl. (16), 286, 337—Vesting of a street in a municipality—Its effect—Rights of the owner.*

The legal effect of the statutory vesting of a street in a municipality is not to transfer to the municipality the ownership in the site or soil over which the street exists. The effect of the statutory provision is merely to vest in them the property in the surface of the street, road or drain and in so much of the actual soil below and air above as may reasonably be required for its control, protection and maintenance as a highway or drain for the use of the public. The Court will not presume that the intention of the Legislature was to confiscate private property and vest it in a public corporation without compensation granted to the proprietor. The right of the owner was intended to be abridged only to the extent necessary for the discharge of the statutory duties imposed on the Corporation for the benefit of the public.

The property of the local authority concerned does not extend further than is necessary for the maintenance and use of the highway as a highway; that, subject to this qualification, the original owner's rights and property remain, and that if the highway ceases to be a highway the owner becomes entitled to full and unabridged rights of ownership in the property.

*Sundaram Ayyar v. Municipal Council of Madura* (1) and *Madathapu Ramaya v. Secretary of State for India* (2) followed.

*Chairman of the Naihati Municipality v. Kishori Lal Goswami* (3)

\* Appeal from Appellate Decree, No. 184 of 1912, against the decree of Bhagabati Charan Mitra, Subordinate Judge of 24-Parganas, dated Sep. 20, 1911, modifying the decree of Amrita Lal Palit, Munsif of Alipore, dated July 27, 1911.

(1) (1901) I. L. R. 25 Mad. 635. (2) (1903) I. L. R. 27 Mad. 386.

(3) (1886) I. L. R. 13 Calc. 171.

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*Modhu Sudan Kundu v. Promoda Nath Roy* (1), *Chairman of the Howrah Municipality v. Khetra Krishna Mitter* (2), *Nihal Chand v. Azmat Ali* (3), *Nagar Valab Narsi v. The Municipality of Dhanthuka* (4), *The Municipal Commissioners of Madras v. Sarangapani Mudaliar* (5), *Sundaram Ayyar v. The Municipal Council of Madura* (6), *Madathapu Ramayy v. Secretary of State for India* (7), *The Mayor of Tunbridge Wells v. Baird* (8), *Municipal Council of Sydney v. Young* (9), *Finchley Electric Light Co. v. Finchley Urban Council* (10), *Foley's Charity Trustees v. Dudley Corporation* (11), *London and N. W. Ry. Co. v. Westminster Corporation* (12), *Lodge Holes Colliery Co. v. Wednesbury Corporation* (13), *Battersea Vestry v. County of London* (14) referred to.

SECOND APPEAL by Gunendra Mohan Ghosh and others, the plaintiffs.

This appeal arose out of a suit for declaration of the plaintiffs' title to the land of the drain just to the west of their premises No. 13-3, Circular Garden Reach Road and just to the East of that Road as appertaining to their premises aforesaid, and for an injunction upon the defendant Corporation from interfering with the drain on the declaration that the Corporation has no right to the same or has at least subordinate right to it.

The Court of first instance found for the plaintiffs on the question of title and granted them a perpetual injunction. On appeal, the Subordinate Judge dismissed the suit. On second appeal to this Court, the case was remanded for re-consideration with special reference to an *amalnama* produced by the plaintiffs in proof of their alleged title to the land in controversy. Thereupon the Court of first instance recorded the evidence mentioned in the order of remand and decreed

(1) (1893) I. L. R. 20 Calc. 732.

(8) [1896] A. C. 434.

(2) (1906) I. L. R. 33 Calc. 1290, 1303.

(9) [1898] A. C. 457.

(3) (1885) I. L. R. 7 All. 362.

(10) [1903] 1 Ch. 437.

(4) (1887) I. L. R. 12 Bom. 490.

(11) [1910] 1 K. B. 317.

(5) (1895) I. L. R. 19 Mad. 154.

(12) [1905] A. C. 426.

(6) (1901) I. L. R. 25 Mad. 635.

(13) [1908] A. C. 323.

(7) (1903) I. L. R. 27 Mad. 386.

(14) [1899] 1 Ch. 474.

the suit. The Corporation, then, appealed to the Subordinate Judge. The Subordinate Judge passed a decree declaring plaintiffs' rights *only* to the site of the drain, that is, the land in which it stands and held that the drain as such vested in the Calcutta Corporation and the plaintiffs' right to the drain as such was extinguished. The prayer for injunction was rejected. Hence this appeal by the plaintiffs to this Court.

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*Babu Bhudeb Chandra Roy*, for the appellants.

*Babu Debendra Chandra Mullick*, for the respondents.

*Cur. adv. vult.*

MOOKERJEE AND CUMING JJ. This is an appeal by the plaintiffs in a suit for declaration of title to land and for a perpetual injunction to restrain the defendant Corporation from interference with them in the exercise of their rights as proprietors. The case for the plaintiffs is that the disputed land appertains to their premises 13-3, Circular Garden Reach Road, that their predecessor constructed a drain thereon for the outlet of water from the premises, and that on the 29th May 1906, two of the officers of the Corporation had caused the land to be included within the boundaries of the adjoining street. The plaintiffs assert that such unlawful action on the part of the Corporation had rendered it necessary for them to obtain a declaration of their title and an injunction so as to secure them from future interference. The defendant Corporation resisted the claim on the ground that the land was not the property of the plaintiffs, that the drain was a part and parcel of the public street, and that it was in any event a public street within the meaning of section 336 of Beng. Act III of 1899, and had become vested in the Corporation.

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and was their property. The Court of first instance found in favour of the plaintiffs on the question of title, and granted them a perpetual injunction. On appeal, the Subordinate Judge reversed this decision and dismissed the suit. On second appeal to this Court, the case was remanded for re-consideration with special reference to an *amalnama* produced by the plaintiffs in proof of their alleged title to the land in controversy. The Subordinate Judge, after remand, has declared the title of the plaintiffs to the site of the drain, but has refused the injunction on the ground that as the drain had vested in the Corporation, the right of the plaintiffs had been extinguished. The decree as drawn up is possibly not in exact conformity with the judgment. The plaintiffs have now appealed to this Court and have pressed their claim for an injunction; there is no cross-appeal by the Corporation upon the question of title. Consequently, we must proceed upon the assumption that the land in suit covered by the drain appertains to the premises owned by the plaintiffs.

Section 286 of the Calcutta Municipal Act, 1899, provides that all public drains and all drains in, alongside or under any public street, whether made at the charge of municipal funds or otherwise, and all works, materials and things appertaining thereto, shall vest in the Corporation. The drain which passes over the land in suit is not a public drain within the meaning of this section, but is a drain alongside a public street. Section 3, clause (16), shows that the term drain includes a house drain; consequently the fact that the drain is a house drain, made by the owner of the adjoining premises for the outlet of water therefrom, does not exclude it from the operation of section 286. What then is the precise effect when, under section 286, a drain vests in the

Corporation; does the Corporation thereby become the proprietor of the soil? The question is by no means of first impression. It has been ruled in a long series of decisions that when a road or a drain vests in the Municipality, the effect is not to confer the full proprietary right in the soil itself covered by the road or the drain on the Commissioners: *Chairman of the Naihati Municipality v. Kishori Lal* (1), *Modhu Sudan v. Promoda Nath* (2), *Chairman of the Howrah Municipality v. Khetra Krishna* (3), *Nihal Chand v. Azmat Ali* (4), *Nagar v. Municipality of Dhandhuka* (5), though possibly a different view was taken in *Municipal Commissioners of Madras v. Sarangapani* (6). The principle applicable to cases of this character was elaborately examined by Sir V. Bhashyam Ayyangar J. in *Sundaram v. Municipal Council of Madura* (7) which was followed in *Madathapu v. Secretary of State* (8). It was pointed out that the legal effect of the statutory vesting of a street in a Municipality is not to transfer to the Municipality the ownership in the site or soil over which the street exists; the street, *qua* street, vests in the Municipality, that is, the surface and so much of the air space above and so much of the soil below the surface as is reasonably necessary to enable the Municipality adequately to maintain and manage the street as a street, was vested in and belonged to the Municipality. This conclusion is in conformity with what has been recognised as settled law in England and America. In England, the effect of a statutory provision whereby a road or drain is made to vest in a County Council or County Borough, is not to

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(1) (1886) I. L. R. 13 Calc. 171. (5) (1887) I. L. R. 12 Bom. 490.

(2) (1893) I. L. R. 20 Calc. 732. (6) (1895) I. L. R. 19 Mad. 154.

(3) (1906) I. L. R. 33 Calc. 129, 1303. (7) (1901) I. L. R. 25 Mad. 635.

(4) (1885) I. L. R. 7 All. 362. (8) (1903) I. L. R. 27 Mad. 386.

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transfer the free-hold to the authority concerned, but merely to vest in them the property on the surface of the street, road or drain and in so much of the actual soil below and air above as may reasonably be required for its control, protection and maintenance as a highway or drain for the use of the public; to this extent only, the owner is divested of his property. The Courts will not presume that the intention of the Legislature was to confiscate private property and vest it in a public corporation without compensation granted to the proprietor. The reasonable inference, on the other hand, is that the right of the owner was intended to be abridged, only to the extent necessary for the discharge of the statutory duties imposed on the corporation for the benefit of the public. Reference may usefully be made to the decision of the House of Lords in *Tunbridge Corporation v. Baird* (1), and of the Judicial Committee in *Municipal Council of Sydney v. Young* (2). In the former case, Lord Halsbury held that the street, *qua*-street, and so much of the actual soil of the street as might be necessary for the purpose of preserving, maintaining and using it as a street, had vested in the Corporation. Lord Herschell added that the vesting of the street vested in the urban authority such property and such property only as was necessary for the control, protection and maintenance of the street as a highway for public use. In the latter case, Lord Morris observed that the vesting of a street vested no property in the Municipality, beyond the surface of the street and such portion as might be absolutely necessarily incidental to the repairing and proper management of the street; it did not vest the soil or the land in them as owners, that is, the street vested in them *qua*-street and not as general property. The

(1) [1896] A. C. 434.

(2) [1898] A. C. 457.

loctrine thus formulated has been recognised and applied in a variety of cases: *Bagshaw v. Buxton Local Board* (1), *Rolls v. Saint George Vestry* (2), *Wandsworth Board v. London and S. W. Railway Co.* (3), *Finchley Electric Light Co. v. Finchley Urban Council* (4), *Coverdale v. Charlton* (5), *Poplar Corporation v. Millwall Dock Co.* (6), *Hyde Corporation v. Oldham* (7), *Foley v. Dudley Corporation* (8), *London and N. W. Railway Co. v. Westminster Corporation* (9), *Lodge H. C. Co. v. Wednesbury Corporation* (10), *Wandsworth v. United Telephone Co.* (11), *Battersea Vestry v. County of London* (12), *Mayor of Birkenhead v. L. N. W. Railway Co.* (13), *Lord Provost of Glasgow v. Glasgow S. W. Railway Co.* (14). No useful purpose would be served by a minute analysis of the varying circumstances of these decisions; but the general principle deducible may be summarised to be that the property of the local authority concerned does not extend further than is necessary for the maintenance and use of the highway as a highway, that, subject to this qualification, the original owner's rights and property remain, and that if the highway ceases to be a highway, the owner becomes entitled to full and unabridged rights of ownership in the property. A similar view has been adopted in the Courts of the United States, where the question of the precise interest taken by the Municipal Corporation has sometimes arisen in relation to title to underground minerals or alluvial accretions. The doctrine has been adopted that the property or estate vested

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(1) (1875) 1 Ch. D. 220.

(2) (1880) 14 Ch. D. 785.

(3) (1862) 31 L. J. Ch. 854.

(4) [1903] 1 Ch. 437.

(5) (1878) 4 Q. B. D. 104.

(6) (1904) 68 J. P. 339.

(7) (1900) 64 J. P. 596.

(8) [1910] 1 K. B. 317.

(9) [1905] A. C. 426.

(10) [1908] A. C. 323.

(11) (1884) 13 Q. B. D. 904.

(12) [1899] 1 Ch. 474.

(13) (1885) 15 Q. B. D. 572.

(14) [1895] A. C. 376.

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in the Municipality is such only as is necessary for street purposes and is in trust for public uses and not for purposes of profit and emolument: Dillon on Municipal Corporations (1911), Vol. III, page 1691, *Banks v. Ogden* (1), *Thomas v. Hunt* (2), *Donovan v. Allert* (3), *City of Leadville v. Bohu Mining Co.* (4). In some of these cases, reference was made with approval to the decisions in *Tunbridge Wells v. Baird* (5), *Coverdale v. Charleton* (6), *Wednesbury v. Lodge Holes Colliery Co.* (7) in support of the view that the intent and purpose of a Municipal Statute is to clothe the city, in its governmental capacity, with the entire title to the streets, as such, for public use, and not for the profit or emolument of the city, in other words, the interest or estate thus conferred upon the Corporation is limited and not absolute, limited by the purposes which the Legislature had in view when the Corporation was created.

In the light of these principles, it is obvious that there was no foundation for the claim of the Corporation to include the disputed land within the boundaries of municipal land. The plaintiffs are accordingly entitled not merely to a declaration of their title, which has been unsuccessfully contested by the Corporation, but also to a perpetual injunction. The injunction will restrain the Corporation, its officers and servants, from interfering with the exercise by the plaintiffs of their right of ownership in the disputed land, except in so far as such interference may reasonably be required for the control, protection

(1) (1867) 2 Wallace 57.

(2) (1896) 134 Mo. 392 ;  
 32 L. R. A. 857.

(3) (1902) 11 N. D. 289 ;  
 58 L. R. A. 775.

(4) (1906) 37 Colo. 248 ;  
 8 L. R. A. N. S. 422.

(5) [1896] A. C. 434.

(6) (1878) 4 Q. B. D. 104.

(7) [1907] 1 K. B. 78 ;  
 [1908] A. C. 328.



and maintenance of the drain thereon for the use of the public.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside in so far as it dismisses the claim for a perpetual injunction. In supersession of the decree of the Subordinate Judge, a decree will be made to the following effect:

The title of the plaintiffs is declared to be the disputed land; it is further declared that the drain thereon is vested in the Municipality as a drain. The defendant Corporation, its officers and servants, are hereby perpetually restrained from interfering with the plaintiffs in the exercise of their rights as proprietors of the disputed land, except where such interference may reasonably be required for the control, protection and maintenance of the drain for the use of the public."

As the plaintiffs have substantially succeeded, they are entitled to their costs in all the Courts.

S. K. B.

*Appeal allowed.*

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