## APPELLATE CIVIL.

*Before Nasim Ali J.*

1935

*Jan.* 11, 14, 18.

BEER BIKRAMKISHORE MANIKYA

*v.*

CHAIRMAN, COMILLA MUNICIPALITY.*

*Public road—Dedication—Prescription—Owner, Rights of—Public, Member of, Rights of—Representative suit—Code of Civil Procedure (Act V of 1908), O. I., r. 8.—Bengal Municipal Act (Beng. III of 1884), ss. 30, 31.*

In cases where the dedication is not express but merely implied and consequently there is no deed defining the extent of the rights created by the dedication, a question may arise as to whether the dedication is of the entire ownership in the land or merely of the right of user, because a dedication is a devotion to public uses either of the land itself or of the easement in it by any unequivocal act of the owner of the fee manifesting such clear intention.

*Grogan* v. *Hayward* (1) and *Bushnell* v. *Scott* (2) followed.

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 is devoted. It is not essential to constitute a valid dedication that the legal title should pass from the owner.

*New Orleans* v. *United States* (3) and *Chairman of the Howrah Municipality* v. *Khetra Krishna Mitter* (4) referred to.

The words in parenthesis in section 30 of the Bengal Municipal Act, *i.e.*, "not being private property and not being maintained by Government or at public expense" were intended after the amendment to refer only to bridges, tanks, *etc.*, and not to roads both the sub-soil and surface of which are now vested by the amending Act in the municipality.

*Kumud Bandho Das Gupta* v. *Kishori Lal Goswami* (5) referred to.

Private pathways are not roads within the meaning of the Municipal Act, inasmuch as the public have no right of way over them, and, therefore, they do not vest in the municipality.

The intention of the legislature in 1894, therefore, must have been to vest absolutely those roads in the municipality, the surface of which only vested in it but the sub-soil remained private property before the amendment, otherwise it is difficult to conceive any other kind of road, for which the legislature was making provision.

* Appeals from Appellate Decrees, Nos. 1326 and 1327 of 1932, against the decrees of Ramanchandra Banerji, Second Subordinate Judge of Tippera, dated Feb. 29, 1932, confirming the decrees of Sharatchandra Mukherji, Fourth Munsif of Comilla, dated Dec. 23, 1930.

(1) (1880) 4 Fed. Rep. 161.
(2) (1867) 94 Am. Dec. 555.
(3) (1836) 10 Peters 662.
(4) (1906) I. L. R. 33 Calc. 1290.
(5) (1911) 9 Ind. Cas. 562.

If the words "private property" in section 30 be taken to refer to roads as well, only private roads or pathways would be exempted.

Section 31 evidently contemplates *private roads*, the surface of which did not vest in the municipality under section 30 of the Act before the amendment of 1894.

Where a person, being one of the members of the public equally affected by the obstruction to a road with the other members thereof, has suffered no special damage, his claim not being in respect of a wrong to him individually, and is one of the numerous persons equally affected by the obstruction, the proper course for him is to bring a representative suit in conformity with the provisions of Order I, rule 8 of the Code of Civil Procedure.

*Batiram Kolita* v. *Sibram Das* (1) and *Kumaravelu Chettiar* v. *Ramaswami Ayyar* (2) followed.

*Manzur Hasan* v. *Muhammad Zaman* (3) and *Mandakinee Debee* v. *Basantakumaree Debee* (4) referred to.

SECOND APPEALS by the plaintiff.

The facts of the case and the arguments in the appeals appear sufficiently in the judgment.

*Jogeshchandra Ray*, *Beerendrachandra Das* and *Shantimay Majumdar* for the appellant.

*Upendrakumar Ray* for the respondents.

*Cur. adv. vult.*

NASIM ALI J. These two appeals arise out of two suits brought by the Maharaja of Hill Tippera against the Comilla Municipality and the lessees from the said municipality. The case of the plaintiff briefly stated is as follows:—

The predecessor-in-interest of the plaintiff made a grant of certain lands included in his *zemindâri* for construction of roads for the use of the public, reserving the right to resume them when they would be no longer required for purposes of road. Roads were thereafter constructed on those lands and were being used by the public. Recently the defendant No. 1, *i.e.*, the Chairman and the Commissioners of the Comilla Municipality, within which the roads are situated, let out portions of the side slopes of these roads to the other defendants for the construction of

(1) (1920) 25 C. W. N. 95.
(2) (1933) I. L. R. 56 Mad. 657: L. R. 60 I. A. 278.
(3) (1924) I. L. R. 47 All. 151; L. R. 52 I. A. 61.
(4) (1933) I. L. R. 60 Calc. 1003.

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certain huts. Plaintiff is, therefore, entitled to resume possession of these lands. Plaintiff is also a rate-payer of the municipality. In addition to the damage sustained by him along with other rate-payers on account of the obstruction caused by the lessees, plaintiff has also suffered a special damage, as his right of reversion has been interfered with. Plaintiff is, therefore, entitled in the alternative to have an order from the court for removal of the obstruction and for restoration of the lands to their former condition for the purposes of the roads.

The defence of the contesting defendants in substance was that the plaintiff had no right of reversion; that the acts of the municipality had not in any way affected the comfortable user of the roads and that plaintiff had suffered no special damage. The defendants further pleaded that plaintiff's alternative claim in his capacity as a rate-payer was not maintainable in the present form.

The trial court dismissed the plaintiff's suit.

On appeal the learned judge has come to the following findings :—(i) that the roads are within the *zemindâri* of the plaintiff; (ii) that an implied grant of the sites of the roads by the plaintiff's predecessor for construction of roads thereon for the use of the public could be inferred from immemorial user; (iii) that there was no evidence to prove that a right of reversion was reserved at the time of the grant upon any condition; (iv) that, even if the grant was not absolute but conditional, the conditions are unknown; (v) that, under section 30 of the Bengal Municipal Act of 1884 as amended by Act IV of 1894, the roads, including their sub-soil, vested in the municipality and ceased to be private property of the plaintiff; (vi) that the object of the grant was not frustrated by the acts of the municipality complained of; (vii) that free and comfortable movements of the pedestrian passers-by have to a considerable extent been impaired by the erection of huts on the slope, which is the subject matter of Suit No. 101 and there is an apprehension of such impairment in case houses are

erected on the slope in dispute in the other suit and (viii) that plaintiff, having no right of reversion, suffered no special damage and consequently the suits are not maintainable, as the provision of Order I, rule 8 of the Code of Civil Proceedure have not been complied with. The learned judge, accordingly, confirmed the decree of the trial court and dismissed the suit.

Hence the present appeals by the plaintiff.

The first point raised by the learned advocate for the appellant is that the plaintiff, being the owner of the lands and the defendants' claim being based on an implied grant made by the plaintiff's predecessor inferred from immemorial user, in the absence of any evidence to show the extent of the grant, the courts below should have held that plaintiff's predecessor retained the right of resuming the lands when they would be no longer required for the purposes of the grant. It is argued by the learned advocate that the implied grant or dedication in this case was not of the entire proprietary interest in the land but merely of the user thereof.

In cases where the dedication is not express but merely implied and consequently there is no deed defining the extent of the rights created by the dedication, a question may arise as to whether the dedication is of the entire ownership in the land or merely of the right of user, because, as observed in *Grogan* v. *Hayward* (1) and *Bushnell* v. *Scott* (2), a dedication is a devotion to public uses, either of the land itself or of the easement in it, by any unequivocal act of the owner of the fee manifesting such clear intention. 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 is devoted. It is not essential to constitute a valid dedication that the legal title should pass from the owner. *New Orleans* v. *United States* (3), *per* Mookerjee J. in the case of *Chairman of the Howrah Municipality* v. *Khetra Krishna Mitter* (4).

In the cases before me there is nothing to show that the dedication by the plaintiff was of his entire proprietary right in the lands. No document has been produced to show the extent of the grant. Apparently none existed. I am, therefore, inclined to think that the grant or dedication in this case was

(1) (1880) 4 Fed. Rep. 161.
(2) (1867) 94 Am. Dec. 555.
(3) (1836) 10 Peters 662, 712.
(4) (1906) I. L. R. 33 Calc. 1290, 1297.

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of the user of the lands for the purposes of roads and the grant or dedication was to remain in force only so long as the property continued to be used as public roads.

The second point raised on behalf of the appellant is that plaintiff's right of reversion in the lands, being private property, did not vest in the municipality under section 30 of the Bengal Municipal Act. The contention is that the grant, not being an absolute grant, *i.e.*, a grant of ownership in the land, the lands in dispute are private properties within the meaning of section 30 of the Bengal Municipal Act and consequently are not vested in the municipality. It has been found in this case that the disputed lands are parts of roads and the roads, of which they are parts, are roads within the meaning of the Act. Before the amendment of the Act in 1894 the term "road" comprised only the surface of the road and not the sub-soil. In 1894, the legislature amended the section by inserting the words "including the sub-soil and all" in the first line of section 30. In view of the introduction of the words "and all" in section 30, Coxe J. in the case of *Kumud Bandho Das Gupta* v. *Kishori Lal Goswami* (1) held that the words in the parenthesis, *i.e.*, "not "being private property and not being maintained by "Government or at public expense" were intended after the amendment to refer only to bridges, tanks, *etc.*, and not to roads. The learned Judge in that case observed as follows :—

> In 1894, the words "including the soil" were added and it then became necessary to decide whether sub-soil of roads which had not up till then been included in the scope of the Act should in the case of private property vest in the commissioners or not. The express insertion of the words "and all" is an indication that the legislature intended that the sub-soil should follow the surface, and should cease to be private property as the surface had already ceased under the original Act before amendment. In any case as the words at present run they must grammatically be construed in the sense contended for by the appellant. It is true that it is difficult, if not impossible, to reconcile this construction with section 31. But this difficulty may be due to a slip in drafting and need not compel me to construe section 30 otherwise than in the ordinary grammatical way. If, therefore, the lands in suit are a road as defined in the Act, they must, I think, vest in the municipality under section 30.

(1) (1911) 9 Ind. Cas. 562.

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In the case of *The Chairman of the Howrah Municipality* v. *Khetra Krishna Mitter* (1), Mookerjee J. held that the title to a certain burning ground did not vest in the municipality under section 30. While discussing the question, whether the words "not being "private property and not maintained by Government "or at public expense" should be taken collectively or distributively, the learned Judge observed as follows:—

> In my opinion the phrases connected by the conjunction "and" must be taken distributively and not collectively. The section clearly means that all roads, *etc.*, shall vest in the commissioners but roads, *etc.*, being private property shall not so vest and roads, *etc.*, maintained by Government or at the public expense shall also not vest. The intention of the legislature appears to have been not to vest in the commissioners such roads, *etc.*, as are either private property or are maintained by Government or at the public expense.

In that case the question as to whether the words in the parenthesis refer only to bridges or tanks, *etc.*, or to roads also was not distinctly raised or decided. In the case of *Chairman, Howrah Municipality* v. *Haridas Datta* (2) Fletcher J., while discussing the effect of section 30, said:—

> The first question is "Is this pathway vested in the municipality under section 30 of the Bengal Municipal Act?" That depends upon the construction of the section. The section has been amended by recent legislation and it is argued that by reason of that amendment the statute operates to vest all roads, whether private or not, within the limits of the municipality. That view is supported by two unreported decisions both by a single Judge of this Court. On the other hand, in a considered judgment of Mr. Justice Mookerjee in the case of the *Chairman of the Howrah Municipality* v. *Khetra Krishna Mitter* (1), the learned Judge has put what to my mind is the only possible construction of section 30. I agree with the learned Judge in the view he has expressed there as to the meaning of the section. Any other view, I think, is altogether outside the range of argument.

Fletcher J. it appears simply followed the observation of Mookerjee J. in the case cited above. The case of *Nuddea Mills Company, Limited* v. *Siddheswar Chatterjee* (3) does not throw much light on the point under discussion.

It cannot be disputed that before the amending Act of 1894 the surface of all roads, over which the

(1) (1906) I. L. R. 33 Calc. 1290, 1304. (2) (1915) I. L. R. 43 Calc. 130, 134.
(3) (1928) I. L. R. 56 Calc. 280.

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public had a right of way, vested in the municipality. The proprietary right remained, *i.e.*, the right in the sub-soil, however, remained with the owner. Private pathways are not roads within the meaning of the Municipal Act, inasmuch as the public have no right of way over them. Therefore, they do not vest in the municipality. Roads, which have been constructed on lands either acquired by the municipality under the Land Acquisition Act or by private purchase, could not have been in the contemplation of the legislature, when the word "sub-soil" was inserted in the section by the amending Act of 1894, as the sub-soil had already vested in the municipalities. The intention of the legislature in 1894, therefore, must have been to vest absolutely those roads in the municipality, the surface of which only vested in it but the sub-soil remained private property before the amendment, otherwise it is difficult to conceive any other kind of road, for which the legislature was making provision. This view gets support from the insertion of the words "and all", and the grammatical construction of the section after the amendment, for, in that case, the words "private property" would not refer to roads. If, however, the words, "private property" be taken to refer to roads as well, only private roads or pathways would be exempted. The roads in dispute in the present suits not being private roads vested absolutely in the municipality and the plaintiff cannot, therefore, claim any right of reversion. Section 31 evidently contemplates *private roads*, the surface of which did not vest in the municipality under section 30 of the Act before the amendment of 1894. Again the grant or dedication was for the use of the public. It has not been found that the disputed lands are no longer required for the use of the public, or that they have become useless so far as the public is concerned. On the other hand, it has been found by the lower appellate court that the lands in suit are required for the free and comfortable use of the pedestrian passers-by. It cannot be said, therefore,

that the use, for which the grant was made, has become impossible of execution or the object of the use has failed. It cannot be said in view of the facts found in the case that there has been such abandonment of the user, in consequence of which the rights of the public therein have failed and a reversion has taken place. In the events that have happened in the case the grant cannot be said to have spent its force. Plaintiff, therefore, is not entitled to resume possession of the lands in suit.

The next contention of the learned advocate is that, in any view of the case, the roads being public roads, plaintiff is entitled to bring suits to remove the obstructions, even if the special damage pleaded by him is not established. The obvious answer to this argument is that in that case he would be hit by section 91 of the Code of Civil Procedure, as the acts committed by the defendants amount to public nuisance. The learned advocate for the appellant, relying on the decisions in the case of *Manzur Hasan* v. *Muhammad Zaman* (1) and *Mandakinee Debee* v. *Basantakumaree Debee* (2), argued that plaintiff was entitled to sue for the removal of the obstruction in these suits in their present forms. In the first case, in which the Shiahs prayed for a declaration of their right to go in procession in Matam on a public road and for perpetual injunction against the Sunnis interfering with them, Lord Dunedin observed that special damage other than the obstruction of the procession was not needed. The facts of the second case show that the plaintiff in that suit was put to much inconvenience as no large articles could be brought into her house along the public road which was the only means of entry into her house on account of the narrowing down of the passage by the defendant by the erection of a wall and privy. In view of these facts, Jack J., relying on the aforesaid observation of Lord Dunedin in *Manzur Hasan's case* (1), held that no special damage was required

(1) (1924) I. L. R. 47 All. 151; L. R. 52 I. A. 61.

(2) (1933) I. L. R. 60 Calc. 1003.

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further than the plaintiffs' inability to carry large articles into her house owing to obstructions. The plaintiff in the present suit, being one of the members of the public, is equally affected by the obstruction with the other members of the public. He has suffered no special damage. His claim is not in respect of a wrong to him individually. He is one of the numerous persons affected by the obstruction and, therefore, having same interest in the matter. Consequently, the proper course for him was to bring a representative suit in conformity with the provisions of Order I, rule 8 of the Civil Procedure Code. See *Batiram Kolita* v. *Sibram Das* (1) and *Kumaravelu Chettiar* v. *Ramaswami Ayyar* (2).

Plaintiff, therefore, in the present suits is not entitled to any relief. The appeals are, therefore, dismissed with costs.

G. S. *Appeal dismissed.*

(1) (1920) 25 C. W. N. 95.

(2) (1933) I. L. R. 56 Mad. 657 ; L. R. 60 I. A. 278