

APPELLATE CIVIL.

Before R. C. Mitter J.

MANIRUDDIN BEPARI

v.

THE CHAIRMAN OF THE MUNICIPAL
COMMISSIONERS, DACCA.*

1935
April 16.

Public thoroughfare—Lease or license of public thoroughfare to vend articles—Municipality, Power of—Bengal Municipal Act (Beng. IV of 1884), ss. 34, 234.

The Bengal Municipal Act does not authorise the municipality to grant a lease or license to any person to vend his articles on any public thoroughfare which is used as such.

SECOND APPEAL by the plaintiff.

The facts of the case appear from the judgment.

Sir Saadullah and Farhat Ali for the appellant.

Prakashchandra Pakrashi for the respondent.

R. C. MITTER J. This appeal, which is on behalf of the plaintiff, must be allowed. The defendant is the Chairman of the Municipal Commissioners of the Dacca Municipality. There is a public thoroughfare in the town of Dacca, called the Chawkbâzâr Road, and the plaintiff's house abuts on it. It is still a public thoroughfare. The municipality has not stopped or diverted any portion thereof. In fact, it is admitted that the whole of it is used as a thoroughfare from morning up to 6 o'clock in the evening and portions of it are used as a public thoroughfare from 6 o'clock in the evening till 6 o'clock in the morning. But what the municipality has done is this. It has granted either licenses or leases to milkmen and other

*Appeal from Appellate Decree No. 538 of 1933, against the decree of Abinashchandra Ghosh Hazra, First Subordinate Judge of Dacca, dated Nov. 17, 1932, reversing the decree of Bimalchandra Sen, Fifth Munsif of Dacca, dated July 5, 1932.

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shop-keepers to use a portion of the public thoroughfare for the purpose of putting their articles there and vending them. This they usually do in pursuance of the said licenses or leases from the municipality generally from 6 o'clock in the evening till 12 o'clock in the night, as is the finding of the court below. The plaintiff's suit is a very simple suit. He has recited the fact that it is by the permission of the municipality that the said shop-keepers come there every evening, occupy a portion of the public thoroughfare and sell their articles. In paragraph 4 of the plaint, he stated definitely that this action on the part of the municipality is *ultra vires* and in prayers *ka* and *kha*, the plaintiff wanted first of all a declaration that the municipality has no right to grant licenses of this character to people for selling their articles by occupying portions of the public highway (prayer *ka*) and he wanted an injunction to restrain the municipality from granting licenses or leases of this character (prayer *kha*). In its written statement, the municipality admitted that it has been granting licenses and leases of the character alleged in the plaint and in paragraph 8 it justified its action by pleading that it was acting *intra vires*.

The learned Munsif made a decree in favour of the plaintiff. The terms of the decree are as follows:—

That the suit be decreed with costs. Plaintiff do get a declaration in term of the prayer in the plaint. The defendant municipality be permanently restrained from leasing out the roadside in front of the plaintiff's building to the *godlās* and other stall-keepers, as prayed for by the plaintiff.

The decree is a little defective, because if the plaintiff was entitled to the reliefs claimed, the word "license" also ought to have been included in the terms of the decree, that is to say, the decree ought to have been in this form,—

That the plaintiff do get a declaration in terms of the prayer *ka* of the plaint. The defendant municipality be accordingly restrained from leasing out the roadside land in front of the plaintiff's building or granting licenses of the same to the *godlās* and other stall-keepers as prayed for by the plaintiff.

Before the learned Munsif, the municipality wanted to justify its action by referring to sections

34 and 234 of the Bengal Municipal Act of 1884. Now, section 34 is in these terms:—

The commissioners at a meeting.....may sell, let, exchange or otherwise dispose of any land not required for such purposes.

If the Chawkbâzâr Road of that particular place had been closed permanently or if in that part the municipal commissioners had diverted the roadway with the result that the land formerly occupied by the road was no longer to be used as a roadway, the municipal commissioners could have proceeded under this section and could have sold or let out or exchanged that piece of land. But, inasmuch as the roadway is still there and the ground is being used as a roadway by the public, section 34 of the Bengal Municipal Act would not be sufficient to support the action which the municipality has taken, nor do I think that section 234 of the Bengal Municipal Act makes the action of the municipality complained of *intra vires*. Section 234 runs in these words:—

The commissioners may grant permission to any person, for such period as they may think fit, to deposit any moveable property on any road, or to make an excavation in any road, or to enclose the whole or any part of any road and may charge such fees as they may fix for such permission :

Provided that such person undertakes to make due provision for the passage of the public and to erect sufficient fences to protect the public from injury, danger or annoyance, and to light such fences from the sunset to sunrise sufficiently for such purpose.

This section clearly contemplates a case where, for the purpose of raising a building or for other requirements, the temporary use of the roadway is necessary by the owner for depositing or unloading building materials or where, for the purpose of erecting a building foundation, excavations have to be made near the road, *etc.* It does not contemplate establishment by the municipality of a regular market every day from 6 o'clock in the evening to 12 o'clock at night on a part of the roadway. The learned Munsif rightly repelled the contention of the municipality that it acted *intra vires* by holding that these two sections have no application to the facts of this case.

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The learned Subordinate Judge on appeal also takes the view that section 34 or section 234 cannot be called in aid by the municipality for the purpose of supporting its action, but the learned Subordinate Judge has proceeded on the ground that no evidence has been adduced by the plaintiff to show that the municipality has either granted leases to the *goálás* to occupy portions of the roadway or licenses to vend their articles there. I do not quite follow the learned Subordinate Judge in this respect. In the written statement, the municipality admitted that it has either granted licenses to the shop-keepers to vend their articles on the roadway or has granted leases to them. There being an admission of this fact in the written statement, the plaintiff is not required to adduce any evidence in support of the fact alleged in the plaint, namely, that it was by reason of the permission and leases granted by the municipality that the *goálás* and other shop-keepers come there and vend their articles every day. The reasons, therefore, which the learned Subordinate Judge has given in reversing the judgment of the learned Munsif do not appear to me to be sound.

It is a fundamental principle of law that a natural person has the capacity to do all lawful things unless his capacity has been curtailed by some rule of law. It is equally a fundamental principle that in the case of a statutory corporation it is just the other way. The corporation has no power to do anything unless those powers are conferred on it by the statute which creates it. In the Municipal Act of 1884, I do not find any power given to the municipality to allow the use of a public thoroughfare from day to day for any other purposes than a public pathway. It has no doubt the power to divert a road and if it diverts it, a portion of the old road which is no longer necessary to be used as a road is land for all intents and purposes and, as I have stated, the municipality can deal with that land, which is no longer used as road, under the provisions of section 34. Whatever doubt there may have been in this respect has been removed by reason

of the amendment of section 30 of the said Municipal Act by vesting the sub-soil of the road also to the municipal commissioners.

I, accordingly, hold that the action of the municipality complained of is *ultra vires* and the plaintiff is entitled to the declaration prayed for in the plaint and to an injunction in this form, namely, that the defendant municipality be restrained from leasing out the roadside in front of the plaintiff's building or from granting licenses of the said roadside lands to the *goálás* and other stall-keepers.

The result is that this appeal is allowed, the judgment and decree of the learned Subordinate Judge are set aside and the decree of the learned Munsif is restored with the slight modification which I have indicated above. The plaintiff is entitled to his costs against the municipality throughout.

Leave to appeal under the Letters Patent asked for is refused.

Appeal allowed.

G. K. D.

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