## APPELLATE CIVIL.

*Before Mr. Justice Varadachariar.*

MAHARAJAH OF PITTAPURAM (PLAINTIFF), APPELLANT, 1936, April 17.

*v.*

THE CHAIRMAN, MUNICIPAL COUNCIL, COCANADA (DEFENDANT), RESPONDENT.*

*Zamindar—Village appertaining to zamindari—Public pathway in—Soil of pathway and trees of spontaneous growths thereon—Right to, of zamindar and of municipality or other local authority—Pathway vested in such local authority under provisions of Local Boards Act or Municipalities Act—Effect.*

The question was as to the rights of the plaintiff and the defendant in respect of palmyra trees growing on a *puntha* or public pathway in a village. The plaintiff was a zamindar and the village was a part of his zamindari. The defendant was a municipal council. The *puntha* was originally vested in a taluk board by whom it was transferred to the defendant municipality in whom the *puntha* was vested at the date of suit. The trees in question were spontaneous growths and the defendant council had only such rights as vested in them under the statute by reason of the land being used as a public way.

*Held* that whether the *puntha* was in existence prior to the permanent settlement or came into existence after the permanent settlement, the zamindar, as owner of the adjoining land, would also be the owner of the soil of the *puntha* and of trees growing upon it, subject to the right of the public to use it as a highway.

*City of London Land Tax Commissioners* v. *Central London Railway*, [1913] A.C. 364, and *Chairman of the Naihati Municipality* v. *Krisheri Lal Goswami*, (1886) I.L.R. 13 Cal. 171, referred to.

*Held further* that the fact that under the provisions of the Local Boards Act or the Municipalities Act the pathway or the highway had come to be vested in a local board or municipality

* Second Appeal No. 337 of 1931.

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could not affect the rights of the adjacent owner in the soil of the highway.

*Sundaram Ayyar* v. *Municipal Council of Madura and the Secretary of State for India*, (1901) I.L.R. 25 Mad. 635, referred to.

As regards trees spontaneously growing on a highway, the balance of authority is in favour of the view that they belong to the owner of the soil and not to the local authority. There is nothing in the Local Boards Act to suggest that the beneficial enjoyment of trees spontaneously growing on the sides of a highway was intended to belong to the local authority or to exclude the general principle that they belong to the owner of the adjacent land.

APPEAL against the decree of the Court of the Subordinate Judge of Cocanada in Appeal Suit No. 107 of 1927 preferred against the decree of the Court of the District Munsif of Cocanada in Original Suit No. 108 of 1926.

*K. Subramanyam* for *Advocate-General* (*Sir A. Krishnaswami Ayyar*) for appellant.

*K. Srinivasa Rao* for respondent.

*Cur. adv. vult.*

JUDGMENT.

This is an appeal by the plaintiff in which, though the pecuniary interests directly involved are small, some interesting questions arise for decision. There is a *puntha* or public pathway (marked Survey No. 260) in Suryarowpetta, a part of the plaintiff's zamindari. The defendant is the Municipal Council of Cocanada, in whom this puntha is now vested. Up to 1919 it would appear to have vested in the Taluk Board of Cocanada by whom it was transferred to the defendant municipality in 1919 or 1920. The point for decision is, what are the rights of the

plaintiff and the defendant in respect of the palmyra trees growing on this bit of land. Neither the plaint nor the written statement suggests that these trees were planted by the plaintiff or the defendant or the Taluk Board. P.W. 3 says: "I do not know who planted them." Presumably they were spontaneous growths and I deal with the matter on this assumption.

One contention on behalf of the plaintiff and one on behalf of the defendant may easily be put aside. The plaintiff claimed that the written statement admitted his original title to the land. I agree with the Courts below that this is not a reasonable construction of the allegation in the written statement. On behalf of the defendant, undue stress has been laid on the description of the land as "poramboke" in the Record of Rights and the Settlement Register. Being a public pathway, it was rightly classed as "poramboke"; but this description or classification throws little light on the question of title and much less on the right to the trees.

The written statement alleged that this piece of land had been acquired by the Government long ago for public purposes and the Taluk Board had been exercising ownership therein. No attempt has been made to prove any such acquisition. The case must therefore be dealt with on the footing that the Taluk Board and the defendant council have only such rights as vest in them under the statute by reason of the land being used as a public way.

The two issues framed in the case are by no means calculated to bring out the real points in controversy. The first issue was, whether the

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plaintiff has a subsisting title to the suit land. This language suggests that the question was raised in terms of article 142 of the Indian Limitation Act. But, as the question of limitation is raised by the second issue, the first issue must be taken to relate to the loss of the plaintiff's rights, if any, by some other means. But the judgments of both the Courts have mainly discussed the question, whether the plaintiff at any time had a right to the land or the trees.

The second issue was whether the plaintiff had been in possession for twelve years before suit. The word "for" must apparently be a mistake for "within" and that is how both the lower Courts have discussed it. The suit is not one for possession on the footing of dispossession but one for declaration and damages. In such a case it is difficult to see the justification for an issue in terms of article 142. Assuming, as a limitation issue *ex hypothesi* must, that the plaintiff had title at some anterior time, it would be for the defendant to establish its extinction, except when the suit falls under article 142. Further, I do not think that, in view of the pleadings, it was open to the Courts below to find that the plaintiff has not had enjoyment of the *trees* in question within twelve years of suit. The allegations in the written statement refer to the enjoyment of the *land* and the first issue specifically refers to the *land* and, when the second issue follows without specific reference to the trees as distinguished from the land, it is not clear whether the enjoyment of the trees by the plaintiff within twelve years was meant to be put in issue. The plaint specifically alleges in the fourth paragraph that

for fasli 1331 the trees were leased by the plaintiff to Veerasami and then it proceeds :

"The plaintiff understands that the defendant has been leasing out the trees for the subsequent faslis contrary to plaintiff's right."

In the eighth paragraph, it is stated that the cause of action arose on 10th July 1922 when the leaves were first cut by a lessee of the municipality. In answer to these definite allegations, there is not a word in the written statement suggesting that the defendant municipality, or the Taluk Board before it, ever leased or otherwise enjoyed the trees prior to fasli 1331. The District Munsif refers to an admission by P.W. 2 that the lessee Veerasami could not enjoy the trees as the defendant obstructed. But that would not amount to " dispossession " and much less to any proof that the municipality has been leasing these trees prior to the date admitted in the plaint.

The discussion of this question of limitation in paragraphs 4 and 5 of the appellate judgment is not very illuminating. I am not concerned to decide whether the plaintiff's allegation of enjoyment of these trees prior to 1918 is true or not. But the learned Subordinate Judge has not stated clearly what his opinion is as to the events that are said to have happened in 1918. His remark in the sixth paragraph that, because the plaintiff asserted in the plaint a specific kind of user for a long period of time, it was not open to him to rely upon the principle that possession must in such cases be held to follow the title, is too broadly stated [see *Ramanathan Chettiar* v. *Lakshmanan Chettiar*(1)]. It must be remembered in this case

(1) (1930) I.L.R. 54 Mad. 622.

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that the land is admittedly used as a public pathway and there is accordingly no possibility of its being used by the plaintiff as ordinary private land. The plaintiff claims only such interest in the land as a private owner could have in land which is subject to a public right of way ; and the user of it by the public as a way cannot be any interference with his rights. If, as owner of the soil, he is in law entitled to the trees, the least that should be shown by those who plead the extinction of his right thereto by lapse of time is that somebody else has been enjoying them for the statutory period. His mere non-enjoyment will not in a case of this kind amount to " dispossession " or " discontinuance " of possession. The sub-soil rights themselves require another kind of interference before any question of limitation can arise in respect thereof.

The question of the nature and extent of the plaintiff's right as a zamindar in land within his zamindari, when there is admittedly a public pathway over such land, may first be considered, without reference to the statutory provisions vesting such roads and pathways in Local Boards or Municipalities. In the absence of definite evidence as to the time when the site came to be used as a *puntha*, the question has to be dealt with on alternative hypotheses. If it became a *puntha* only after the permanent settlement, it is difficult to see why the plaintiff should not be held entitled to the land subject to the rights of the public. It is little to the point to say that this would depend upon the terms of dedication. Nobody has suggested an express dedication, and it will be strange indeed if there should have been

one for a village pathway. As observed by MOOKERJEE J. in *Chairman of the Howrah Municipality* v. *Khetra Krishna Mitter*(1), what is likely to have happened is that the public of the neighbourhood was merely allowed to use the land as a pathway and the only inference which may legitimately be drawn from such user is that the dedication was of just what was required for a public pathway.

Assuming however that the land was used as a public pathway even prior to the permanent settlement—and this is the assumption most favourable to the defendant—the question is whether the Courts below are right in their conclusion that the plaintiff has no title to maintain this suit. In dealing with this question, they have failed to take note of the distinction between the pathway *as such* and the ownership of the land. They have also lost sight of the basis on which the ownership of the soil under a highway rests.

The decisions referred to in the judgment under appeal, viz., *Narayanasawmy Naidu* v. *Secretary of State for India*(2), *Venkatarama Sivan* v. *The Secretary of State for India*(3) and *Surya Rao Bahadur Garu, Rajah of Pithapuram* v. *Secretary of State for India*(4), relate to the claim of a zamindar or inamdar to ownership of what is actually used by the public, not of the soil subject to the rights of the public. For instance, in *Surya Rao Bahadur Garu, Rajah of Pithapuram* v. *Secretary of State for India*(4) the plaintiff claimed that the *puntha* land had become his private property in the sense that

(1) (1906) I.L.R. 33 Cal. 1290, 1297 and 1298.
(2) (1912) 24 M.L.J. 36. (3) (1918) 36 M.L.J. 203.
(4) (1924) 47 M.L.J. 784.

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he could get it cultivated, that is, in negation of the right of the public to use it as a way. The observation that the Government is the custodian of the rights of the public and that therefore it cannot be presumed to have parted with them at the permanent settlement must be understood in relation to the rights of the public, who have nothing to do with the soil. Similarly, in *Venkatarama Sivan* v. *The Secretary of State for India*(1) the question related to land used as a cremation ground in an inam village and the learned Judges applied the theory that it would be presuming a violation of trust to hold that Government would have assigned to the inamdar land which Government were bound to preserve for the communal use of the village. As indicated already, there is no question of public use or trust for public use, so far as rights in the soil of a highway are concerned, when there is no denial of the rights of the public. The decision in *Narayanasami Naidu* v. *Secretary of State for India* (2) is of doubtful authority at the present day. [*See per* SADASIVA AYYAR J. in *Venkatarama Sivan* v. *The Secretary of State for India*(1)]. Whatever the position may be in respect of rivers bounding or flowing through an inam village, it will be too late at the present day to maintain that even in respect of rivers bounding or flowing through a zamindari, the bed continues to be vested in the Government. The principle that the proprietor of the adjoining land is also owner of the bed of the river *ad medium filum* has been recognised in several Indian decisions of which it is sufficient to mention *Venkata Lakshminarasamma* v. *The*

(1) (1918) 36 M.L.J. 203. (2) (1912) 24 M.L.J. 36.

*Secretary of State*(1), *Secretary of State for India* v. *Maharajah of Bobbili*(2), *Subbarayudu* v. *Secretary of State for India*(3) and *Secretary of State for India* v. *Maharaja of Burdwan*(4). *See* also *Secretary of State for India* v. *Subbarayudu*(5) In *Secretary of State for India* v. *Subbarayudu* (5) the Judicial Committee reaffirm what has been said in *Orr Ewing* v. *Colquhoun*(6) and *Galbraith* v. *Armour*(7) that a public right of way over land stands on the same footing as a public right of navigation over a river and that, in respect of a river as well as of a highway, the bed or soil is presumed to belong to the proprietors of adjacent land.

The question therefore is, not whether the *puntha* or even the land underneath it is likely to have been granted to the zamindar at the time of the permanent settlement, but whether, by reason of his ownership of the adjacent lands, the zamindar does not in law become the owner of the soil underneath the highway. The reason of this rule was sought to be canvassed in *City of London Land Tax Commissioners* v. *Central London Railway*(8), but the House of Lords intimated that, whatever its history or reason may be, the rule was too well established to be so canvassed or limited with reference to the reason underlying it. Lord ATKINSON observed that the presumption is applicable even to cases where no grant or conveyance has to be construed and

(1) (1918) I.L.R. 41 Mad. 840 (F.B.).
(2) (1915) 30 M.L.J. 163.
(3) (1927) I.L.R. 50 Mad. 961. (4) (1921) I.L.R. 49 Cal. 103 (P.C.).
(5) (1931) I.L.R. 55 Mad. 268, 276 (P.C.)
(6) (1877) L.R. 2 App. Cas. 839.
(7) (1845) 4 Bell's Appeals 374. (8) [1913] A.C. 364.

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unless and until rebutted the rule must prevail. Lord SHAW put rivers and highways on the same footing for this purpose; (see page 379). In *Chairman of the Naihati Municipality* v. *Kishori Lal Goswami*(1) the Calcutta High Court applied this principle as between a zamindar and a municipality.

With reference to the ownership of trees on a highway, it is instructive to note the observations of Lord ATKINSON in *City of London Land Tax Commissioners* v. *Central London Railway*(2). Speaking of the rights of the owner of the soil, he quotes Lord MANSFIELD as citing with approval a passage from Rollo's Abridgment to the effect that

> " the free-hold and all profits belong to the owner of the soil; so do all the trees upon it and mines under it ".

There can thus be no doubt that, whether the *puntha* was in existence prior to the permanent settlement or came into existence after the permanent settlement, the zamindar, as owner of the *adjoining* land, will also be the owner of the soil of the *puntha* and of trees growing upon it, subject to the right of the public to use it as a highway.

Does it then make any difference that, under the provisions of the Madras Local Boards Act or the District Municipalities Act, the pathway or the highway has come to be vested in a Local Board or Municipality? The effect of such vesting has been fully discussed in *Sundaram Ayyar* v. *The Municipal Council of Madura and the Secretary*

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(1) (1886) I.L.R. 13 Cal. 171. (2) [1913] A.C. 364, 372.

*of State for India in Council*(1) and the result of the authorities has been stated as follows:

"What is vested in urban authorities is not the land over which the street is formed but the street *qua* street and the property in the street thus vested in a municipal council is not general property or a species of property known to the common law but a special property created by statute and vested in a corporate body for public purposes." (Pages 646 and 653)

It is clear according to the authorities that this vesting cannot affect the rights of the adjacent owner in the soil of the highway.

As regards trees on the highway, the rights of parties may differ according as they have been planted by the local authority or not. Whether ordinarily the local authority will have a right to plant trees on a highway or not, there can be no doubt that under the Local Boards Act it is authorised to plant trees (*see* section 95 of the Madras Local Boards Act, 1884, and section 112 of the Act of 1920), and it may be a legitimate inference that trees so planted belong to the local authority. It may also be that the owner of the soil may not be entitled to plant trees on the highway so as to obstruct the user thereof by the public or even without the previous permission of the local board if the statute so provides—*Vide* section 163 (*a*) inserted in the Local Boards Act by Act XI of 1930. But where trees spontaneously grow on the highway, the balance of authority is in favour of the view that they belong to the owner of the soil and not to the local authority. This is the view stated in Mackenzie on Highways at page 54 on the authority of the opinion of

(1) (1901) I.L.R. 25 Mad. 635.

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JAMES V.C. in *Turner* v. *Ringwood Highway Board*(1). The other case referred to at the footnote on page 54 in Mackenzie's book, viz., *Nicol* v. *Beaumont*(2), throws no light on this question. *Coverdale* v. *Charlton*(3) related only to grass growing on the highway and, as observed in *Sundaram Ayyar* v. *The Municipal Council of Madura and the Secretary of State for India in Council*(4), its authority as to the nature and extent of the vesting in the local authority has been considerably shaken by later pronouncements. In *Stillwell* v. *New Windsor Corporation*(5) CLAUSON J. discussed *Coverdale* v. *Charlton*(3) and the learned Judge was of opinion that the trees on a highway should be treated as the highway authority's trees for all the purposes of exercising the rights of the highway authority, i.e., to the extent to which it is necessary to keep the highway fit for the use of the public. In that case, the claimant complained of the action of the local authority in removing or threatening to remove trees which were found to be in the highway. Dealing with the case on the footing that the trees might either have been planted by the highway authority or by the owner of the soil with the permission of the highway authority, the learned Judge held that if the highway authorities were satisfied that the trees caused an obstruction to the use of the highway, they would not only have the right but would be under a duty to remove the obstruction. He refers to the fact that even in *Coverdale* v. *Charlton*(3) BRAMWELL L.J.

(1) (1870) L.R. 9 Eq. 418.
(2) (1883) 53 L.J. (N.S.) 853.
(3) (1878) L.R. 4 Q.B.D. 104.
(4) (1901) I.L.R. 25 Mad. 635.
(5) [1932] 2 Ch. 155.

doubted whether the effect of section 149 of the English Public Health Act, 1875, was to vest the property in the trees in the highway authority. Being of opinion that the authority was entitled to remove the trees on the ground of obstruction, he left alone the question as to the property in the timber when the trees have been felled.

In the Madras Local Boards Act, a provision has been inserted by the Amending Act of 1930 prohibiting any person from felling, removing, destroying or otherwise damaging any tree vesting in or belonging to a local board and growing on any such public road [see sub-clause 2 of section 163 (A)]. There was no similar provision in the previous Acts, and it is perhaps too much to draw any inference from the language employed in this provision. But I may note, for what it is worth, that, according to this provision, *two* conditions must be satisfied, viz., not merely that the tree grows on a public road vested in or belonging to a local board but that the tree itself should vest in or belong to the local board. There is nothing in the Local Boards Act to suggest that the beneficial enjoyment of trees *spontaneously* growing on the sides of a highway was intended to belong to the local authority or to exclude the general principle that they belong to the owner of the adjacent land.

For these reasons, I should have upheld the plaintiff's claim to the trees in question but for one circumstance appearing in the evidence of D.W. 1, viz., that the defendant municipality is said to have acquired the lands adjoining the suit *puntha*. The bearing of this circumstance has not been adverted to by either of the Courts below nor

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has any reference been made to it in the written statement. But, as the defendant is a public body and as the fact has been spoken to by D.W. 1, I do not wish to deprive the defendant of the right which, on the very principle of the decision in *City of London Land Tax Commissioners* v. *Central London Railway*(1), it would have acquired by reason of the acquisition of the adjoining properties. Before coming to a definite conclusion on this point, it seems to me better to call for a finding from the lower appellate Court on the question, whether and to what extent the defendant municipality has become the owner of lands adjoining the suit *puntha*. Both parties will be at liberty to adduce any fresh evidence relevant to this question.

[The Subordinate Judge submitted a finding to the effect that the defendant municipality was the owner of the lands adjoining the suit *puntha*. In view of that finding the second appeal was dismissed with costs.]

A.S.V.

(1) [1913] A.C. 364.