

The respondents rely upon the case of *Ali Bakhsb v. Barkatullah* (1), and quote the following passage from the judgement: "In our opinion the personal law of the parties has nothing to do with the rule of succession which is laid down by section 22 of the Tenancy Act." In our opinion this remark of the Judges must be read in connection with the particular facts of the case before them.

The result is that the appeal is allowed, the decree of the court below set is aside and the decree of the court of first instance is restored with costs in all courts.

Appeal decreed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice
Tribhull.

MUNICIPAL BOARD OF AGRA AND ANOTHER (DEFENDANTS) v.
SUDARSHAN DAS SEASTRI (PLAINTIFF).*

*Public road—Metalled and unmetalled portions equally part of road—
Right of public way.*

Where the question is as to the breadth of a public road, it must be taken that all the ground over which the public have a right of way is part of the road; the mere fact that part of the road may be metalled for the greater convenience of the traffic will not render the unmetalled portion on each side any the less a public road or street.

THIS was a suit to recover from (1) the Municipal Board of Agra and (2) the Secretary of State for India in Council damages for alleged trespass in respect of certain land. The plaintiff alleged that he was the zamindar of mauza Basai, a suburb of Agra, including a large portion of the abadi of Tajganj, which mauza included many roads, streets and markets and in particular two places, known as Nanda Bazar and Tulshi Chabutra, where hawkers used to sell their wares by permission of the plaintiff who derived an income from them of some Rs. 265 per annum. The plaintiff stated that the Joint Magistrate of Agra, either as Magistrate or as Vice-Chairman of the Municipal Board, had prohibited the hawkers from selling their wares at the places where they had been accustomed to do so; and further

* First Appeal No. 268 of 1912 from a decree of Baijnath Das, Subordinate Judge of Agra, dated the 20th of March, 1912.

(1) (1912), I. L. R., 34 All., 419.

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that the Municipal Board had caused to be erected on the plaintiff's land certain stand-pipes (and subsequently some lamp-posts) without the zamindar's consent and without giving compensation. The plaintiff asked for a perpetual injunction prohibiting interference; for a declaration that the plaintiff was entitled to permit vendors to sell their wares in the places appointed by the plaintiff in the *abadi* of mauza Basai, or in the alternative for Rs. 7,000 as compensation, and for removal of the stand pipes or for Rs. 1,200 as compensation.

The defendants admitted the fixing of water pipes at six places, and that certain persons were restrained from selling articles, as they were obstructing the public way; but they pleaded that the land in respect of which such action had been taken was municipal land, being portions of public streets, and that they had full statutory authority for any action which they had taken.

The court of first instance found that the Nanda Bazar and Tulshi Chabutra did belong to the plaintiff and that he had a right to permit hawkers to occupy the land at the sides of the road "so long as they did not occupy or unreasonably obstruct the road proper", and that he had a right to collect taxes from them. It also found that "the defendants had no right to appropriate land for erecting water-stands, &c., without plaintiff's consent or paying him compensation." The court accordingly gave the plaintiff a declaration as to his right to permit (for a consideration) hawkers to vend goods along the road sides in Nanda Bazar and Tulshi Chabutra and restraining the defendants from interfering with such rights, as well as for Rs. 50 as damages on account of erection of the stand-pipes, the removal of which, however, it refused to direct.

The defendants appealed to the High Court.

Mr. A. E. Ryves, for the appellants.

Dr. Satish Chandra Banerji and Babu Piari Lal Banerji, for the respondent.

RICHARDS, C. J., and TUDBALL, J.—The court below framed an issue in the following terms.

"Is the plaintiff the owner and in possession of the lands in suit, or do the lands form part of the road belonging to the Board? If road, then what is its extent."

The court below has found on this issue that the place on which the plaintiff alleged that hawkers were accustomed to sit was no part of the road, at least this is what we understand the finding to be. The court seems to have thought that the only part of the road which could be said to be the public road was the part that was actually metalled. In our opinion this is clearly wrong. We are unable from the maps, and from any information either party can give us, to ascertain with any accuracy the places in which the hawkers sit; but in our opinion all the ground, whether metalled or not, over which the public had a right of way, is just as much the public road as the metalled part. The court would be entitled to draw the inference that any land over which the public from time immemorial had been accustomed to travel was a public street or road, and the mere fact that a special part of it was metalled for the greater convenience of the traffic would not render the unmetalled portion on each side any the less a public road or street. With this explanation we refer an issue to the court below, namely, whether or not the land in dispute is part of the public road.

The court may take any additional evidence relevant to the above issue that the parties may adduce. On return of the finding the usual ten days will be allowed for filing objections. We direct the court below in returning its finding to send a proper map marking distinctly the lands in dispute and their surroundings. The stand-pipes complained of may also be indicated in this map.

We need hardly say that we think it very desirable that the parties should, if possible, settle the question without spending their money in useless litigation.

Issue remitted.

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