

PRIVY COUNCIL

MAHARAJA OF JAIPUR *v.* ARJUN LAL AND OTHERS[On appeal from the High Court of Judicature at
Allahabad]*J. C.**
1937
July, 26

Municipalities Act (Local Act II of 1916), section 116—"Vest", meaning of—Public street, vested in municipality, over private land dedicated for street.

Land privately owned was dedicated as a public street. With the permission of the Municipal Board under section 209 of the United Provinces Municipalities Act, the owners of a shop erected, in front of their shop, a portico the roof of which was supported by iron pillars resting on the surface of the street. The floor of the portico was on the foot-path and raised about a foot above its level.

In an action by the proprietor of the land over which the street ran, against the owners of the shop and the Municipal Board for a mandatory injunction for the removal of the portico and for damages,—

Held, that the action was not maintainable. The word 'vest' in section 116 of the Act is used in a restricted sense. The Municipal Board would not, under that section, have title in the full and proper sense to the solum of the street but would have the ownership necessary for the effective control of a structure such as that in suit affecting the surface of the street and the space immediately above the surface, and an action by the proprietor of the solum of the street for trespass would not lie either against the persons who erected the structure with the permission of the Municipal Board or the Municipal Board.

Municipal Council of Sydney v. Young (1) and *Finchley Electric Light Company v. Finchley Urban Council* (2), referred to.

Appeal (No. 64 of 1935) from a decree of the High Court (December 21, 1933) reversing a decree of the court of the Second Additional Subordinate Judge at Allahabad (November 14, 1932) reversing a decree of the court of the Munsif, West Allahabad (June 19, 1931).

*Present: SIR LANCELOT SANDERSON, SIR SHADI LAL and SIR GEORGE RANKIN.

(1) [1898] A.C., 457(459).

(2) [1903] 1 Ch., 437(440).

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The material facts are stated in the judgment of the Judicial Committee.

1937. June, 28. *Dunne, K. C. and J. M. Parikh*, for the appellant: The Courts below have held, it is submitted rightly, that the title to the solum of the street is in the Maharaja. All that vests in the Municipal Board under section 116 of the Act is the right to maintain the street as a street. The portico in question with its raised platform is a building erected on the street. It is an encroachment on the street and a prescriptive right to the land covered might be acquired. The law on the point in question is fully discussed in *Sundaram Ayyar v. Municipal Council of Madura* (1). The statutory right of the Municipal Board is a limited one: *Gunendru Mohan Ghosh v. Corporation of Calcutta* (2). The permission granted to the owners of the shop to erect a portico of the nature of the one here would be in excess of the rights of the Municipal Board, and the owners of the shop cannot by virtue of such permission acquire a right to erect such a building as this on the street.

Godfrey, for respondents Nos. 1 to 4: The question turns on the meaning of the words 'street' and 'vest' in the Act. It is submitted that what vests in the Municipal Board is the surface of the street and so much above and below the surface as is necessary for the discharge of the duty of maintaining the street as a street, that is the area called the area of user: *Finchley Electric Light Company v. Finchley Urban Council* (3), and *Wandsworth Board of Works v. United Telephone Co.* (4). The portico here would not be an interference with the user of the street. On the other hand, it would add to the amenities of the street. It would afford shelter. The Municipal Board is empowered under section 211 of the Act to direct its removal at any time, so no prescriptive title to the land can be acquired by the owners of the shop. Sections 7, 8, 209, 178, 211 and 298 of the Act were referred to.

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

(3) [1903] 1 Ch., 487(489 *et seq.*)

(2) (1916) I.L.R., 44 Cal., 689.

(4) (1884) 13 Q.B.D., 904.

Respondent No. 5, the Municipal Board, was not represented.

Dunne, K. C. in reply: Section 209 relates to verandahs in upper stories projecting over the street—balconies. It does not cover an erection on the street such as the one here. The *Finchley* case (1) is distinguishable.

The judgment of the Judicial Committee was delivered by Sir GEORGE RANKIN:

This appeal is brought by the plaintiff His Highness the Maharaja of Jaipur against a decree dated 21st December, 1933, of the High Court at Allahabad whereby his suit was dismissed with costs. The suit was brought on 2nd December, 1930, in the court of the Munsif at Allahabad against the Municipal Board of Allahabad (defendant No. 1) and four persons (defendants 2 to 5) who own and occupy a shop situated near to the junction of City Road and the road leading from the Collector's cutcherry to Colonelganj within the municipality of Allahabad. The appellant is the owner of revenue-free land measuring 0.35 acres in mohalla Katra Jai Singh Sewai, and the shop in question, as also the street in front thereof, are within the limits of the appellant's land. His complaint is that defendants 2 to 5 have, with the sanction of the Municipal Board, but without permission from him, erected a portico along the front of their premises and upon the margin or foot-path (*patri*) of the street. The roof of the portico is a masonry structure supported by iron pillars which rest on the street and the floor of the portico is raised (by stone slabs or concrete) about one foot above the level of the street. The top of the portico is at the same level as the floor of the second storey of the shop building, i.e., the portico is only one storey high. The appellant by his suit claimed a mandatory injunction for the demolition of the portico together with damages and other relief. The Munsif (19th June, 1931) dismissed the suit, but on first appeal the Subordinate Judge, though he refused to award damages, granted the claims "for injunction and demolition" (14th November, 1932).

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The appellant, before the Board as in the Courts in India, has contended that in his character as proprietor of the land over which the street runs he is entitled to object to the erection of the portico. Not as a member of the public complaining of the portico as an obstruction to traffic, or as the owner of a house or land adjacent complaining of it as a nuisance, but as the owner of the soil upon which defendants 2 to 5 have built a structure without his permission, he claims to be entitled to object to it. That the solum of the street was originally vested in him is plain, and the authorities have even recognized a right in him to levy a tax on itinerant traders who squat on the footpath in this locality at certain times. But it is equally clear that his rights as proprietor have been modified, not merely by the circumstance that he has or must be deemed to have dedicated the land as a highway, but also by the fact that it has become a public street within the meaning of section 2, clause (19) of the United Provinces Municipalities Act (II of 1916). Sections 116, 209 and 210 of this Act are of importance for the decision of this appeal:

"116. Subject to any special reservation made by the Local Government, all property of the nature hereinafter in this section specified and situated within the municipality shall vest in and belong to the Board, and shall, with all other property which may become vested in the Board, be under its direction, management, and control, that is to say:—

* * * * *

"(g) all public streets and the pavements, stones, and other materials thereof, and also all trees, erections, materials, implements and things existing on or appertaining to such streets.

"209. (1) Subject to any rules made by the Local Government prescribing the conditions for the sanction by a Board of projections over streets or drains, a Board may give written permission, where provision is made by a bye-law for the giving of such permission—

"(a) to the owners or occupiers of buildings in or on streets to erect or re-erect open verandahs, balconies, or rooms, to project over the street from any upper storey thereof, at such height from the surface of the street, and to such an extent

beyond the line of the plinth or basement wall as are prescribed in such bye-laws, and

“(b) to the owner or occupier of any building or land to erect or re-erect any projection or structure so as to overhang, project into, or encroach on or over a drain in a street to such an extent, and in accordance with such conditions, as are in like manner prescribed.

“(2) In giving permission under clause (a) of sub-section (1), a Board may prescribe the extent to which, and the conditions under which, any roofs, eaves, weather-boards, shop-boards and the like may be allowed to project over such streets.

“210. Any person erecting or re-erecting any such projection or structure as is referred to in section 209 without the permission thereby required or in contravention of any permission given thereunder shall be liable on conviction to a fine which may extend to two hundred and fifty rupees.”

The contention of the appellant is that the effect of section 116 is to give to the Municipal Board—not the full title to the solum of the street—but only a special property therein sufficient to enable the Board to control it as a street; that this right is not inconsistent with and does not oust the right of the appellant as the owner of the land to object to the erection of a building thereon without his permission. The respondents on the other hand contend that the section is intended to make the Municipal Board owners of the surface of the street and of so much above and below as is necessary for the discharge of their duties and the exercise of their powers under the Act. Both sides appeal to the decisions of the Courts in England upon the effect of similar language in Acts of Parliament—in particular, section 149 of the Public Health Act, 1875 (38 & 39 Vic. c. 55). In *Municipal Council of Sydney v. Young* (1) Lord MORRIS delivered the judgment of the Board upon a case arising under a provision that “all public ways in the city of Sydney now or hereafter formed shall be vested in the council,” etc., etc. It was held that upon a portion of the street being taken over and converted into a tram-

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way the council had no claim for compensation. Lord MORRIS said:

"Now it has been settled by repeated authorities . . . that the vesting of a street or public way vests no property in the municipal authority beyond the surface of the street, and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, but that it does not vest the soil or the land in them as the owners. If that be so, the only claim that they could make would be for the surface of the street as being merely property vested in them *qua* street, and not as general property."

This passage puts forcibly the restricted sense to be attributed to the word "vest" in enactments such as section 116 of the United Provinces Act now in question. It is equally true, on the other hand, as COLLINS, M.R. stated in *Finchley Electric Light Company v. Finchley Urban Council* (1):

"It has been decided by a long series of cases that the word 'vest' means that the local authority do actually become the owners of the street to this extent: they become the owners of so much of the air above and of the soil below as is necessary to the ordinary user of the street as a street and of no more."

In the present case the dispute is not with reference to something sufficiently below or above the surface of the street to be beyond the range of its ordinary user as a street. The erection complained of undoubtedly required sanction from the Municipal Board under clause (b) of sub-section (1) of section 209 if only by reason that it encroached on or over a drain. Apart from any right of the appellant to complain of it as an obstruction or nuisance, or to complain that sanction was not duly granted, their Lordships have upon a full consideration of the Act to see whether it intends that structures affecting the surface and the space immediately above the surface are to be erected only by permission of the proprietor of the solum of the street as well as by leave of the Municipal Board. Their Lordships think not. They consider that it would put too narrow

(1) [1903] 1 Ch., 437(440).

a meaning upon the words "shall vest in and belong to the Board" if it were to be held that the Municipal Board was not competent of itself in the due course and exercise of its powers to authorise such an erection as is here complained of. To that extent the Municipal Board has property in the street: it is part of the purpose of section 116 that the Board should not lack the ownership necessary to support an effective control of such matters, and that the general property of the original landowner in the solum of the street should be modified and abridged in that behalf. Without in any way holding that section 116 operates to convey title in the full and proper sense [cf. the observations of ROMER, L.J., in the *Finchley* case (1) at p. 443-4], their Lordships think it at least certain that the original owner of the soil cannot maintain trespass for an erection of the character now in question, and they do not think that he can otherwise complain of it as an infringement of his rights as owner.

They express no opinion upon the question whether a permanent structure with pillars resting upon the highway is or is not an obstruction or is an inappreciable obstruction to the highway or is such as could be complained of by the Advocate-General or by others with his consent (section 91 of the Code of Civil Procedure) on behalf of the public or by a member of the public showing damage special to himself. No such case is raised by the appellant before the Board and their Lordships are not to be understood to countenance any suggestion that the vesting in the municipal authority of a street and the control over it can enable the authority by licensing other persons to interfere with the street, to protect those persons from the consequences of any nuisance to the public or danger to individuals which may be caused by such interference.

They will humbly advise His Majesty that this appeal should be dismissed with costs.

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Solicitors for the appellant: *Hy. S. L. Polak & Co.*
Solicitors for respondents Nos. 1 to 4: *Douglas
Grant & Dold.*

FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,
Mr. Justice Harries and Mr. Justice Bajpai*

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COMMISSIONER OF INCOME-TAX v. TIKA RAM
AND SONS, LTD.*

Income-tax Act (XI of 1922), section 10(2) (ix)—Deduction from profits—"Expenditure incurred solely for the purpose of earning profits"—"Capital expenditure"—Brick-field purchased or taken on lease for taking earth for manufacture of bricks—Value of earth dug and utilised whether to be deducted in assessing profits.

Where a company carrying on the business of manufacturing bricks was the proprietor of a part, and the lessee of the remainder, of a piece of land on which it carried on the business and from which it dug up the earth for making the bricks:

Held, that the value of the earth dug up and utilised for the bricks was of the nature of "capital expenditure", and not of other "expenditure incurred solely for the purpose of earning profits", within the meaning of section 10(2)(ix) of the Income-tax Act and should not be deducted from the total profits for the purpose of assessment to income-tax. The position of the company was not that of one which carried on business by purchasing raw materials and converting these into marketable commodities; in purchasing and taking a lease of the land the company had not purchased so much earth as raw material but had acquired the land with the right of extracting earth from it, and the case was parallel to that of the business of working a mine or a quarry. The land therefore formed part of the fixed capital and the amount invested in acquiring it was of the nature of capital expenditure, and the company was not entitled to debit the profits account with the value of the earth extracted from the land for making the bricks.

Mr. *K. Verma*, for the applicant.

Mr. *Panna Lal*, for the opposite party.

SULAIMAN, C.J., HARRIES and BAJPAI, J.J.:—This is a reference by the Commissioner of Income-tax under
