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

1936
*January*, 3

GAURI SHANKAR AND OTHERS (DEFENDANTS) *v.* MAHARANI HEMANT KUMARI (PLAINTIFF)*

*Bathing Ghat—Dedication to public use without creating a trust—Rights of dedicator—Suit to eject squatters—Bathing ghat in Benares constructed and maintained by owner of the site for the public use—Ghatias occupying specific portions of ghat—Licensees—Prescriptive right—Customary right—Invasion of rights of the public.*

The plaintiff's predecessor purchased some land on the banks of the Ganges in Benares, built a masonry ghat thereon and dedicated it to the public use although no deed of endowment or trust had been executed. The public had been using the ghat for generations. The ghat was maintained and repaired by the plaintiff and her predecessors and they also had been realising toll from the stall keepers who sat on the ghat on festivals. The defendants were ghatias, who and whose predecessors had been occupying different portions of the ghat for generations, having put up *takhts* and canopies on poles let into holes on the pavement and stairs, leaving a width of about four feet only between the *takhts* for the bathers to pass down to the river; and they had been taking alms and gifts from the bathing public at the ghat, for assisting them in the performance of bathing and other religious rites. In a suit by the plaintiff against the defendants it was *held* that—

(1) As no trustee or manager had been appointed to look after the ghat on behalf of the public, the plaintiff as heir of the original donor was entitled to maintain the suit, the object of which was not to resume the grant but to effectuate the intention of the grantor by preserving the property to the uses for which it was dedicated to the public.

(2) The plaintiff was not entitled to a declaration of an absolute proprietary title in the ghat, as the same had been dedicated to the public, and the plaintiff had only the right of reversion if ever the ghat ceased to be used as such.

(3) The defendants were not entitled to exclusive possession over specific portions of the ghat and to place *takhts* and canopies over them by fixing poles in the pavement by digging holes in it. The right claimed by them was not capable of being

*First Appeal No. 558 of 1930, from a decree of J. N. Kaul, Additional Subordinate Judge of Benares, dated the 25th of June, 1930.

acquired by prescription or under a lost grant inasmuch as the ghat having been dedicated to the public, the defendants could not have acquired any right under any grant or prescription which might interfere with or limit or obstruct the rights of the public. The putting up of *takhts,* canopies, etc. by way of exclusive possession was a serious interference with and restriction of the rights of the public who were entitled to the use of the whole of the ghat. Where land has been dedicated to the public, no one can by invasion, however prolonged, gain for himself a title to the land or to the exclusive user of the land. So far as a grant is concerned, in the case of property which has been dedicated no person can make a valid grant affecting or interfering with the rights of the public. Again, the right set up by the defendants could not be a customary right of the ghatias as a class, for then the claim of exclusive possession of the defendants would militate against the rights of the other ghatias; moreover, the evidence showed that the other ghatias occupying this ghat and other ghats did so by leave and license of the builders of the ghats, so that ghatias were only licensees.

(4) But although the defendants had no right of exclusive possession over any portion of the ghat or to put any *takhts,* canopies, etc. thereupon, they as members of the public had a right to enter upon the ghat and to use it; and the plaintiff had no right to interfere with the right of the public of being served by the ghatias or with the defendants' receiving alms or gifts for their services from the public. The plaintiff was not entitled to any decree of ejectment of the defendants from the ghat or to any injunction against them preventing them from acting as ghatias on the ghat.

Messrs. *P. L. Banerji* and *A. Sanyal,* for the appellants.

Drs. *S. N. Sen* and *K. N. Katju* and Messrs. *H. K. Mukerji, D. P. Malaviya* and *A. M. Gupta,* for the respondent.

SULAIMAN, C.J., BAJPAI and GANGA NATH, JJ.:—This is a defendants' appeal and arises out of a suit brought against them by the plaintiff respondent. The ghat known as Prayag Ghat in mohalla Dasaswamedh, Benares city, was built by the ancestors of the plaintiff and the plaintiff recently repaired the same. The

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plaintiff's case was that the said ghat was her property, that she and her predecessors in title had been in peaceful possession as proprietors and that she had been exercising all the proprietary rights over the same. The defendants who are known as "ghatias" had been sitting in different seasons on different portions of the said ghat with her leave and license for earning their livelihood with alms and gifts from the Hindu pilgrims who came to bathe at the said ghat. The defendants have cut holes on the stairs and pavements and fixed bamboos on them and constructed fire-hearths on the ghat and have thereby been damaging and injuring the plaintiff's ghat. They have proved themselves to be a nuisance and have been causing damage to the plaintiff's ghat. The defendants are mere squatters. They have no right to sit on any portion of the plaintiff's ghat as ghatias without her consent. The plaintiff therefore prayed for:—(1) a declaration that she was the owner of the Prayag Ghat and the defendants had no right to sit on any portion of the said ghat as ghatias in any season of the year; (2) a decree in her favour ordering ejectment of the defendants from the said Prayag Ghat, and for removal of the railings from pier "A" and of planks, fire-hearths, earth-mounds, canopies, bamboo poles and any other articles and obstructions which may be found to have been placed by the defendants on any part of the said ghat; and (3) a permanent injunction against the defendants, restraining them from using any portion of the said Prayag Ghat as ghatias in any season of the year and from sitting and squatting over the same for the purpose of collecting "*dan dakshina*" from the bathers.

The appellants defendants contended that they belonged to the community of ghatias who were settled in the holy city of Benares from thousands of years and whose business and duty was to assist the pilgrims at the time of their bathing in the Ganges and in the proper performance of their religious ceremonies at the

bank of the holy river Ganges. The Hindus, they said, built ghats on the sacred river for the convenience of the pilgrims. Such ghats were dedicated for the benefit of the Hindu community at large. It was absolutely necessary that the person building the ghat should grant a right to some members of the ghatia community, or allow them to acquire such right by prescription, of occupying definite portions of the said ghat by the use of *chaukis* or *takhts* for the purpose of user by the pilgrims for the performance of the *puja* and other religious ceremonies. They (defendants) have been in occupation and possession of definite sites in the Dasaswamedh Prayag Ghat from the time of their ancestors for hundreds of years. They had acquired a right, either by grant (the origin of which was now lost) or by prescription or by custom as described above, to occupy the sites of the ghats in the usual manner by laying out *chaukis* and *takhts* and removing the same up and down as the river advanced or receded, from the time of their ancestors. The plaintiff cannot deprive them of this right and they were not liable for ejectment. The defendants also contended that the plaintiff was not competent to maintain the suit.

The trial court decreed the suit. It found that the ghat had been dedicated to the use of the public but the dedication did not in any way affect the proprietary right and did not vest the ownership of the soil in the public who had only got a right of user and the plaintiff retained her ownership of the soil and had a right of suit. The defendants had no legal rights against the owner and were liable for ejectment.

The appeal originally came up for hearing before a Bench of two learned Judges, who in view of the observations made in Second Appeal No. 286 of 1931, referred the case to the Full Bench. In Second Appeal No. 286 of 1931 the question whether the ghatia does acquire a right of property by long user of the ghat was not decided and it was observed by the learned Judges

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that if it had been necessary to decide the question as to whether the right claimed by a ghatia as against the owner of the ghat was a right of property, they would have felt bound to refer the matter to a Full Bench.

It is not in dispute that the land of the ghat was purchased and a masonry ghat built by the predecessor in title of the plaintiff. The ghat has been dedicated to the public and the public has been using the ghat for generations since it was built. It is also a matter of agreement that the defendants and their predecessors have sat on different portions of the ghat for generations and taken alms and gifts from the public who used the ghat and have assisted the public at the ghat in the performance of their religious rites. The defendants do not claim any right to the ghat by virtue of adverse possession.

Out of the two plots on which the ghat has been built, one was purchased by Raja Jagan Narayan from Bhawani Singh under a sale deed dated the 28th of Safar, 1229 Hijri and another by his son, Raja Bishun Indar Narayan under a sale deed dated the 15th of October, 1818. The land has been described as plots of land of the zamindari of the vendors. The masonry ghat was built after these purchases. The ghat, as already stated, has been dedicated to the public which has been using it since its construction. No deed of endowment is forthcoming which may show what rights, if any, were reserved by the plaintiff's predecessors who built and dedicated it. The plaintiff's rights have therefore to be judged from the nature and character of the connection the plaintiff and her predecessors in title have had with it. No trustee or manager has ever been appointed to look after the ghat on behalf of the public. The plaintiff and her predecessors have been looking after and maintaining it. They have repaired it from time to time when it fell into disrepair. The Municipal Board, Benares, called upon the plain-

tiff several times to do necessary repairs. In July, 1908, the Municipal Board sent a notice to the plaintiff to construct a staircase to remove the inconvenience of the public. On the 20th of January, 1913, a notice was sent to the plaintiff by the Municipal Board to complete the stone pavement of the ghat and remove the silt. In April, 1913, the Municipal Board again sent a notice to the plaintiff to remove earth heaped on the ghat. The sanitation department also called upon the plaintiff from time to time to remove sand and earth deposited on the ghat (vide notice, dated the 2nd of December, 1916, and notice dated the 27th of February, 1918). If the plaintiff had no connection left with the ghat, she would not have been asked to do all these acts.

There is evidence on the record to show that the plaintiff has been realising *"jharis"* from the shopkeepers keeping shops on the ghat on festivals. The *"jharis"* (toll) realised by the plaintiff from the shopkeepers has been entered in the account books maintained by the plaintiff. The witnesses have also deposed that it was realised by her. The plaintiff has produced account books from 1276 B.S. till 1334 showing the income and expenditure relating to this ghat. The *"jharis"* (toll) realised by the plaintiff from the hawkers who sit on the ghat has been entered in the account books, extracts of which have been proved by the evidence of Jogendra Nath Mukerji, plaintiff's mukhtar-i-am.

The ghat having been dedicated to the public, it is not conceivable that the plaintiff or her predecessors could have ever wished to appropriate its income to their private use, nor has the plaintiff made any attempt to show that its income was ever appropriated by her or her predecessors. It therefore appears that the plaintiff and her predecessors realised the income of the ghat and made repairs as a manager or mutwalli and not as an absolute proprietor.

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The evidence produced by both sides shows that practically the whole of the ghat has been occupied by the *takhts* placed by the defendants and other ghatias. Hardly a space of more than 4 feet has been left between the *takhts* for the passage of pilgrims and their access to the ghat. It is also proved by the evidence that the defendants have put up canopies and railings by digging holes in the pavements. The holes dug in the pavement covered by water are not only injurious to the pavement itself but are dangerous to the public as well, as any person may injure his foot which may fall in the hole. The defendants by placing their *takhts* have been doing acts which interfere with the rights of the public. If the defendants' *takhts* are left where they are, the public would be excluded from the space occupied by the *takhts*.

There being no other manager or mutwalli of the ghat, the plaintiff as heir of the original donor is entitled to maintain the present suit, the object of which is not to resume the grant but to effectuate the intention of the grantor by preserving the property to the uses for which he dedicated it to the public.

The plaintiff is not entitled to a declaration of an absolute proprietary title in the ghat, as the same has been dedicated to the public, and the plaintiff has only the right of reversion if ever the ghat ceases to be used as such. She or her successors in title can neither revoke the dedication nor do any act on the ground which would cause obstruction to the public in their use of the ghat.

As regards the defendants' right, they claim a right of exclusive possession over specific plots of land and to place their wooden platforms (*takhts*) and canopies thereon by digging holes in the pavements and to minister to the needs of the bathing public and receive alms and gifts from them in remuneration of the services which they may render to the bathing public.

They have not been able to define the nature and character of the right claimed by them. Sometimes they stated that they were claiming a personal right to do all these acts and sometimes they said that it was a customary right which belonged to the ghatias. The right claimed by the defendants may be divided into two parts, namely (1) a right to exclusive possession over specific plots of land and to place wooden platforms and canopies over them by fixing poles in the pavement by digging holes in it, and (2) the right to minister to the needs of the bathing public and to receive alms and gifts from it in consideration of the services to be rendered by them.

The first part cannot be claimed by the defendants under any customary right pertaining to the ghatias because the right claimed by the defendants for their exclusive possession militates against the rights of the ghatias as a class inasmuch as the other ghatias would be excluded from the land over which the defendants claim a right to exclusive possession. If it had been a customary right each and every member of the ghatia class without exception would be entitled to use every inch of the land and no ghatia would be entitled to exclude another ghatia from any specified portion of the ghat.

There is evidence on the record which leaves no room for doubt that ghatias have no customary right. They have been sitting at other ghats with the leave and license of the owners of the ghats or the persons under whose management the ghats are. They have no right to occupy any specific portion of the ghat without the permission of the owner. There are several ghats which belong to Bundi State, Maharana of Udaipur and Jaipur State. Ghatias have been sitting on them. The evidence of Bans Narain Singh who is the agent of the Bundi State proves that there are two ghatias who sit on the ghats of the Bundi State with the permission of the State. Prem Nath who is in charge of the ghat

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belonging to the Maharana of Udaipur and is himself a ghatia has also stated to the same effect. He has deposed that ghatias have no right to sit at the ghats without the permission of the owners of the ghat. Harnam Prasad who is in charge of the ghat of the Jaipur State has also deposed that three ghatias sit at the ghat of the Jaipur State with the permission of the Jaipur Durbar and the ghatias have otherwise no right to sit at the ghat.

As already stated, a dispute arose in connection with this ghat in 1917 between the plaintiff and two other ghatias, Baiju ghatia and Ramu ghatia. It was held that the ghatias had not acquired any right of user by prescriptive right or a right of easement or customary right to use the ghat in the manner in which they had done in the past except with the leave and license of the plaintiff; vide *Ramu Ghatia* v. *Rani Hemanta Kumari* (1).

In this connection it is also very significant that the other ghatias have executed agreements to the plaintiff and obtained her permission to sit at the ghat in dispute. If the ghatias had any customary right, they would not have done so. So the first part of the right claimed by the defendants cannot be established under any customary right.

As regards its being a personal right, the defendants claim it by prescription or by a lost grant as is stated by them in paragraph No. 10 of their written statement which is as follows: "That the defendants have acquired a right either by a grant (the origin of which is now lost) or by prescription or by custom as described, a right to occupy the sites of the ghats in the usual manner by laying out *chaukis* and *takhts* and removing the same up and down as the river rises or falls, from the time of their ancestors, and the plaintiff, even if she be the owner of the ghat, cannot deprive the defendants of this right."

(1) (1921) 19 A.L.J., 783.

In order to acquire a right by prescription or under a lost grant, it is necessary to show (1) that the origin of the right was legal, (2) that the right had been enjoyed openly, peaceably and uninterruptedly and (3) that the right was valid and enforceable against all.

The ghat having been dedicated to the public, the defendants could not have acquired any right under any grant or prescription which might interfere with or limit the rights of the public. As already stated, there is no difference in principle between the dedication of a ghat to the public and the dedication of a highroad. In the case of a highway dedicated to the public, no person can by occupation or by user of any part of it establish a right as against the public over any part of the land even had it never been used for the purpose for which it was dedicated. As held in *Turner* v. *Ringwood Highway Board* (1) the dedication to the public cannot be limited by invasion of any of the members of the public nor can they by such invasion, however prolonged, gain for themselves a title to the land or to the exclusive user of the land which was the subject of the invasion. The reason for this is clear. The user by them was a licensed user; they had a right to be there but their right of user could carry with it no right to exclude other persons. Similarly here the ghat was open to the public and the defendants as members of the public had a right to be at the ghat under the dedication and their right of user could carry with it no right to exclude other persons for whose use the ghat had been originally dedicated. So the defendants could not acquire any right by prescription or under any grant which could be valid and enforceable against the public.

In order to have a lawful origin under a grant, it is essential that there should be a capable grantor and a capable grantee. In the case of property which has been dedicated, no person can make a grant affecting or

(1) (1870) L.R., 9 Eq., 418.

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interfering with the rights of the public. If no right can be granted by any grant now, it could not have been granted in the past by any grant.

It was argued that the defendants might have been given a grant before the dedication. Apparently there appears no reason as to why any person dedicating his property to the public use would make any grant in favour of any single individual which may restrict the rights of the public. In the absence of any deed of grant, the only test to ascertain whether any grant was made in favour of any individual before dedication to the public is the manner in which the respective rights, if any, of the person who claims any right under the grant and of the public were exercised and enforced against each other. If dedication to the public is made subject to any grant in favour of any individual, his rights would have preference over the rights of the public and the public would exercise its rights subject to the rights given to any person under any grant. If the defendants had been granted any right of exclusive possession over any specified piece of land by placing their platforms, they or their predecessors would not have been ejected at any time nor their platforms removed. But we find that soon after the construction of the ghat the plaintiff's predecessors in title took action against the ghatias and on their complaint to the authorities the chabutras of the ghatias were removed and the ghatias were bound over to be of good behaviour in 1829, 1839 and 1840. If there had been any grant before the dedication in their favour, it must have been much more fresh in 1829, 1839 and 1840 than it is now, and the defendants should have been able to enforce their rights under it. But the very fact that the defendants could not do so shows the futility of their contention that a grant might have been made to them before the dedication. In 1914 when the repairs were made by the plaintiff, the ghatias were

removed from the ghat. That the public rights have always been paramount is proved by the fact that the *takhts* of the ghatias were removed whenever they interfered with the rights of the public or the public needed the whole of the ghat for its use. Mr. N. N. Banerji, a witness for the plaintiff, who has been working as the Captain of the Bengali Tola Sewa Sangh for the last ten years, has deposed that the defendants' *takhts* used to be removed at first through the police under the orders of the District Magistrate and now the defendants remove them themselves when asked to do so. His evidence is supported by that of Mangla Prasad Singh, a witness for the defendants. Mangla Prasad Singh deposes that the ghatias' *takhts* are removed on the occasion of eclipses. It is only on the occasions of eclipses or festivals that the public goes to the ghat in a large number and needs the whole of the ghat for its use. On such occasions the defendants' *takhts* have always been removed. The defendants have not been able to show any single instance in which they exercised or enforced their rights against the public. All these facts leave no room for doubt that no grant was made in favour of the defendants before the ghat was dedicated to the public and the defendants have acquired no right which may affect, restrict or interfere with the rights of the public. As already stated, the right of exclusive possession by placing *takhts* as claimed by the defendants is bound to interfere with and restrict the rights of the public. The whole of the ghat has been occupied by the *takhts* and hardly a space of a few feet has been left open and available to the public.

If the defendants had any right to occupy any specific piece of land and to place *takhts* thereon, they should have appropriated the income derived from toll realised from hawkers who sit on the *takhts* or platforms on the occasion of eclipses or fairs. But it was never done so. As stated above, it is the plaintiff who has

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been realising "*jharis*" (toll) from the hawkers. The fact also negatives the right claimed by the defendants.

It is thus clear that the right claimed by the defendants has not been enjoyed by them openly, peaceably and uninterruptedly and it is not such as may be enforceable against all; nor could its origin have been legal.

As regards the second part of the right, namely the right to minister to the needs of the bathing public and to receive alms and gifts from it in consideration of the services to be rendered by them, there can be no doubt that the bathing public has a right to go to the ghat to bathe and perform spiritual ablutions and to take to the ghat persons who may help it in proper performance of spiritual ablutions and accompanying ceremonies. The defendants and other ghatias have been ministering to the needs of the bathing public and helping it not only in the proper performance of the ablutions and ceremonies but also in different other manners. The plaintiff has no right to interfere with the right of the public of being served by the ghatias. The ghatias themselves as members of the public also have a right to enter upon the ghat and to use it. In stopping the defendants from going to the ghat to minister to the needs of the bathing public, the plaintiff would be interfering with the rights of the bathing public which it has under the dedication and has enjoyed ever since the construction and dedication of the ghat. The plaintiff has no right to interfere with the defendants' receiving alms or gifts from the public which the public may give to the defendants in remuneration of their services. The matter of receiving alms or gifts does not interfere in any way with the rights of the plaintiff in respect of the ghat. It is a matter purely personal between the public and the defendants, and so long as the defendants do not do any act which may amount to or cause nuisance at the

ghat, the plaintiff has no right to interfere with the defendants. The plaintiff is therefore not entitled to any injunction against the defendants preventing them from acting as ghatias on the ghat and in the course of attending to the pilgrims either standing on the ghat, remaining there or sitting at the ghat, or to any decree of ejectment against them. But the defendants, as already stated, have no right of exclusive possession over any portion of the ghat or to put any *takhts* and fix canopies or railings by digging holes in the pavements.

As already stated, plaintiff is not the absolute owner of the ghat and is not entitled to a declaration of an absolute proprietary title in the ghat. The plaintiff is entitled only to a decree for removal of the railings from pier "A" and of planks, fire-hearths, earth-mounds, canopies, bamboo poles and any other articles and obstructions which may be found to have been placed by the defendants on any part of the said ghat, but not to a decree of ejectment against the defendants or to any permanent injunction restraining them from using the ghat as ghatias or sitting on the ghat while carrying on their profession of ghatias, and we order accordingly. Parties will bear their own costs throughout.