

APPELLATE CIVIL.

Before Young C. J. and Din Mohammad J.

MUNICIPAL COMMITTEE, DELHI (DEFENDANT)

Appellant

versus

MOHAMMAD IBRAHIM (PLAINTIFF) Respondent.

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July 9.

Civil Appeal No. 238 of 1933.

Punjab Municipal Act, III of 1911, Sections 169, 188 : Obstruction of highway by Municipal Committee without framing bye-laws—Right of action without proving special damage.

Held, that under Section 169 of the Municipal Act, the Committee may close any street temporarily for any public purpose, or may close any public street permanently, but it cannot place any permanent obstruction on a public highway. This power is not implied in the power of closure for such limited purposes as are contemplated by Section 169.

Emperor v. Wishwa Nath Nana Korpe (1), Sundaram Ayyar v. Municipal Council, Madura (2), and Municipal Committee, Multan v. Tehlia Ram (3), relied upon.

Held also, that in the case of a highway the public are entitled to the use of the entire width of it as the highway and neither an individual nor the Municipal Committee has any authority to interfere with their right.

Queen-Empress v. Virappa Chetti (4), and Municipal Board, Agra v. Sudarshan Das Shastri (5), followed.

Municipal Board, Benares v. Behari Lal (6), distinguished.

Peacock's Law of Easements, 3rd Edition, pp. 240 and 243, referred to.

Held further, that the Committee could not take any step in the matter of the construction of a tonga stand without framing the necessary bye-laws under Section 188, clause (p) of the Act, and as no such bye-laws had been framed in

(1) (1926) I. L. R. 50 Bom. 674. (4) (1897) I. L. R. 20 Mad. 433, 434.

(2) (1902) I. L. R. 25 Mad. 635. (5) (1915) I. L. R. 37 All. 9.

(3) (1923) 73 I. C. 292.

(6) (1926) I. L. R. 48 All. 560.

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this case, the Civil Court had power to interfere and grant relief to the aggrieved party.

Municipal Committee, Delhi v. Mst. Chambeli (1), *Municipal Committee, Delhi v. Narain Das* (2) and *Nuddes Mills Co. v. Siddheswar Chatterjee* (3), followed.

Held also, that for owners of houses abutting on a public highway the question of frontage means a great deal, and if anything is done by those in whom the highway vests, which interferes with the rights of the owners with regard to the highway, and which tends to diminish the comfort of the occupants of the houses, the owners have an actionable claim against them.

Gopi Nath v. Munno (4), distinguished.

And, that in such cases it is not necessary to prove that any special injury has taken place before a person wronged by the Committee can take action against it. Every obstruction on the road is a nuisance by itself.

Shiv Narain v. Din Dayal (5), and *Manda-Kinee Debee v. Basanta Kumaree Debee* (6), followed.

Chhajju Mal v. Ganda Mal (7), and *Satku v. Ibrahim* (8), not followed.

Manzur Hussain v. Mohammad Zaman (9), and *Queen-Empress v. Kidar Nath* (10), followed.

Second Appeal from the decree of Mr. R. B. Beckett, District Judge, Delhi, dated 13th October, 1932, reversing that of Mr. Abdur Rahman, Subordinate Judge, 1st Class, Delhi, dated 30th April, 1932, and decreeing the plaintiff's suit.

M. C. MAHAJAN and J. L. KAPUR, for Appellant.

KISHAN DAYAL and BHAGWAT DAYAL, for Respondents.

(1) (1930) I. L. R. 11 Lah. 276.

(2) 1930 P. L. R. 193.

(3) (1929) I. L. R. 56 Cal. 280.

(4) (1907) I. L. R. 29 All. 22.

(5) 1931 A. I. R. (Nag.) 189.

(6) (1933) I. L. R. 60 Cal. 1003.

(7) 4 P. R. 1895.

(8) (1876) I. L. R. 2 Bom. 457.

(9) (1925) I. L. R. 47 All. 151 (P. C.).

(10) (1910) I. L. R. 23 All. 159.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—This appeal has arisen out of a suit brought by the plaintiff-respondent against the Municipal Committee, Delhi, for a permanent injunction to restrain the said Municipal Committee from putting up a building on the highway just in front of his property, to demolish any part of the building which has already been constructed, and also to remove a tonga stand which has been set up in continuation of this structure. The plaintiff's main allegations were that the frontage of his property will be obstructed if the Municipal Committee was not restrained, its free enjoyment will be interfered with, its value will depreciate, the health of the locality as well as the comfort and convenience of the occupants of his property will suffer, and his right of way will be impaired. He further averred that this act of the Committee was *ultra vires* as the obstruction was being put up on the Grand Trunk Road, which is a public highway.

The Municipal Committee resisted this suit on the grounds that a platform had been in existence at the spot for more than 5 years, that it was the same platform on which the new stalls were being constructed, that the Committee possessed full authority to close any high road they liked, that no special injury was caused to the plaintiff, and that the plaintiff's suit was barred by the statute of limitation.

The only 3 issues that were framed by the learned Subordinate Judge were :—

(1) Is the Committee constructing shops and a tonga stand on a portion of the high road?

(2) If so, will defendant's act result in special injury to the plaintiff and is he, therefore, competent to sue for injunction?

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(3) Is the suit within time?

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The learned Subordinate Judge found the first and third issues in favour of the plaintiff, but decided the second issue against him on the ground that the act of the Committee had not been prompted by any malicious, revengeful or sordid motives, and though it may cause annoyance to the occupants of the plaintiff's house and inconvenience to the general traffic it has not resulted and will not result in any special injury to the plaintiff. He, therefore, dismissed the plaintiff's suit with costs.

On appeal the learned District Judge came to the conclusion that the Punjab Municipal Act did not confer any powers on the Committee which authorised it to override the rights which the public or any member of the public already possessed outside the Act, that the particular nuisance of which the plaintiff complained affected his property and his property alone and that he suffered all the inconvenience and loss which was incurred by the owner of a house abutting on a main road, who suddenly found a construction springing up a few feet away from his property. He further found that the construction of the tonga stand intensified the inconvenience already arising from the construction of the building, that the Committee had not acted under any bye-laws and its inviting tonga drivers to park their carriages at the short distance from the plaintiff's house constituted a nuisance in fact and the noise, smell and general inconvenience caused by the putting up of a carriage stand were a source of special injury both to the comfort as well as to the health of the persons occupying the plaintiff's house. He came to the conclusion that the Committee was not protected in either of its acts by the statutory

powers and the plaintiff had made out a sufficiently substantial case of special damages. He was of opinion that it was not possible to estimate the pecuniary value of the damage and in these circumstances an injunction was the only proper remedy that the plaintiff could seek. He, therefore, decreed his suit as lodged. Hence this second appeal by the Municipal Committee, Delhi.

The learned counsel for the appellant has attacked the findings of the learned District Judge on the following grounds:—

(a) The act of the Municipal Committee is authorised by the statute and hence the Civil Court cannot interfere;

(b) no right of frontage can be claimed under the law;

(c) the noise and smell arising from the tonga stand do not constitute a nuisance and the plaintiff's claim cannot be decreed without proof of special damage; and

(d) even if it was found that the tonga stand was a nuisance the remedy lay in the abatement of the nuisance and not by way of a mandatory injunction.

As against this the learned counsel for the respondent has contended that—

(a) the road on which the obstruction complained of has been constructed is a public highway, being the Grand Trunk Road, and no person has a right to obstruct such a highway under any circumstances;

(b) proof of special damages in such cases is not necessary;

(c) on highways frontage is of great importance and hence a person who owns a building abutting on the highway can legally claim this right;

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(d) the building put up is an obstruction and the tonga stand does constitute a nuisance;

(e) the Committee cannot exercise any authority without framing the necessary bye-laws, and as no bye-laws have been made under section 188 (1) (p) with regard to the control of traffic the action of the Committee is *ultra vires*;

(f) most of the findings arrived at by the learned District Judge are findings of fact and cannot be disturbed in second appeal; and

(g) the plaintiff's property has depreciated in value on account of the unauthorised conduct of the Municipal Committee, and as mere monetary relief would not meet the purpose, the relief granted by the learned District Judge was the only relief that could be or should have been granted.

The various contentions set forth above raise important questions of law and fact and it is necessary therefore to examine them in some detail.

The first point for consideration is what powers the Committee can exercise in respect of the public highways. It is common ground that the road with which we are concerned is the King's highway being the Grand Trunk Road. The Committee takes its stand on the fact that the road vests in it and consequently it can exercise all those powers *qua* this road which are permissible under section 169 of the Municipal Act.

Under sub-section (c) of this section, as it stood at the time of the suit and prior to its amendment in 1933, the Committee could close temporarily any public street or any part thereof for any public purpose. Under sub-section (d) of the same section it could turn, divert, discontinue or close any public

street vested in it. It would thus appear that the only power that the Committee could exercise with respect to the closing of any public street was confined either within the limits of section 169 (c), where a closure could only be temporary and for a public purpose, or within the limits of section 169 (d) where it could close any public street permanently. It had no authority therefore to put up a permanent obstruction in a public street in the manner in which it had done in this case and thus deprive the public eternally of that free use of the street to which they were otherwise entitled. If any authority was needed for this proposition, reference may be made to *Emperor v. Wishwa Nath Nana Korpe* (1), where the language of the section under consideration was the same as it is in the Punjab. It was held by Fawcett and Madgavkar JJ. "that the Municipality had no authority to allow a portion of a public street to be used as a market although under section 90 of the Bombay District Municipal Act the Municipality has authority to discontinue or close any public street. It is important to remember that public streets are vested in the Municipality for the purpose of being maintained as such, subject to the provisions and for the purpose of the Act, and there are clear provisions in the Act which show that ordinarily a Municipality should not allow a permanent obstruction on any such street." The nature of the right, title and interest vested in the Municipal Committee in respect of public streets has been explained in *Sundaram Ayyar v. Municipal Council of Madura* (2). This decision was relied on in the *Municipal Committee of Multan v. Tehlia Ram* (3) where a Single Judge of this

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Court held " when a street has vested in a Municipal Committee it only has the power to exercise rights over it in order to maintain it as a street and for the purpose of being used as such. It has no right to interfere with the enjoyment of the right of way by the public by letting out a portion of it to a particular individual for a private purpose." It would thus appear that the mere vesting of the public highways in the Committee does not confer any such powers on it, so as to permit the Committee to treat it as personal property. As seen above under section 169 it may close any street temporarily for any public purpose or may close any public street permanently, but in the latter contingency it shall have to provide the public with another road. The power of obstruction is not implied in the power of closure for such limited purposes as are contemplated by section 169.

Let us now see what rights the public enjoys on such public highways. " In the case of an ordinary highway the public are entitled to the use of the entire width of it as the highway and are not confined to the part which may be metalled or kept in order for the more convenient use of the carriages and foot passengers." (Peacock, Law of Easements, 3rd edition, p. 240). " An owner of land which is contiguous to a public highway has the right of access to the highway from his land and *vice versa* at any point along the line of contact whether the soil of the highway is vested in him or not." (Peacock, p. 243). In *Queen-Empress v. Virappa Chetti* (1), it was held by a Bench of the Madras High Court that whoever appropriates any part of a street by building over it infringes the right of the public *quo ad* the part built

(1) (1897) I. L. R. 20 Mad. 433, 434.

over, and although it was a member of the public that had infringed upon the public street in that case, the principle deducible from that judgment would apply to the case of a Committee also. In *Municipal Board, Agra v. Sudarshan Das Shastri* (1) a Bench of the Allahabad High Court laid down that 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. If it is once admitted therefore that the portion of the road which is being built upon by the Municipal Committee, Delhi, is a part of the public road, it would clearly follow that it had no authority to interfere with the right of the public *qua* that road, and the plaintiff being the owner of a house abutting on the road will be entitled to assert his right against the Committee. The learned counsel for the Municipal Committee has relied on *Municipal Board, Benares v. Behari Lal* (2), but a reference to that judgment would show that it is entirely beside the point. In that case the road had been closed temporarily for the purposes of repairs and as we have already remarked above, that power can be exercised by the Municipality under the provisions of law contained in section 169. The Committee therefore has failed to establish the claim it put forward to use the road in any manner it liked best.

It is also clear that the Committee cannot act without framing the necessary bye-laws in those matters in which a bye-law is necessary under the Act.

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In *Municipal Committee, Delhi v. Mst. Chambeli* (1) a Bench of this Court held that the Committee could not avail itself of the provisions of clause 'U' of section 188 of the Act, as it did not make the necessary bye-laws which it was empowered to do under the section. The same principles were reiterated in *Municipal Committee, Delhi v. Narain Das* (2), where a Bench of this Court laid down that the Committee was not entitled to regulate the line of frontage of houses unless it had framed a bye-law under that section. The position is so obvious that we need not pursue the matter further. If any power is vested in the Committee for which a bye-law is necessary, it is precluded from exercising that power in the absence of a bye-law. In the matter of the construction of a tonga stand therefore the Committee could not take any step without making bye-laws under section 188, clause (p) and as no such bye-laws have been framed, the act of the Committee is clearly *ultra vires*. In these circumstances a suit against the Municipal Committee is quite competent. A reference in this connection may be made to *Nuddea Mills Co. v. Siddheswar Chatterjee* (3). The learned Judges who decided that case observed that in cases where the Municipality acts *ultra vires* the Civil Court has power to interfere and grant proper relief to the aggrieved party.

The learned counsel for the Committee has relied on *Gopi Nath v. Munno* (4) in support of his contention that no action lies against the Committee for the removal of any construction in front of the plaintiff's house. This authority, however, is of no avail to him as it merely decides a question between two private

(1) (1930) I. L. R. 11 Lah. 276.

(3) (1929) I. L. R. 56 Cal. 280.

(2) 1930 P. L. R. 193.

(4) (1907) I. L. R. 29 All. 22.

owners and has no bearing on the point before us. There can be no question that for the owners of houses abutting on a public highway the question of frontage means a great deal and if anything is done by those in whom the highway vests which interferes with the rights of the owners with regard to the highway, and which tends to diminish the comfort of the occupants of the house, the owners will undoubtedly have an actionable claim against them.

The question of special damages is very simple. In such cases it is not necessary to prove that any special injury has taken place before a person wronged by the Committee can take action against it. In *Shiv Narain v. Din Dayal* (1) it was held that where a plaintiff complains of an invasion of his rights as owner of property, the beneficial enjoyment of which is adversely affected, he can sue for the removal of the obstruction of a public way without showing special injury to himself beyond that suffered by any member of the public. Similarly in *Mandakinee Debee v. Basantakumaree Debee* (2) a Bench of the Calcutta High Court held "Any individual member of the public has the right to maintain a suit for removal of obstruction of a public highway if his right of passage through it is obstructed without proving special damage." The principle of English Law which requires proof of special damage in such cases is not applicable to India. The learned counsel for the Municipal Committee has relied on *Chhajju Mal v. Ganda Mal* (3) where a Bench of the Chief Court, Punjab, held that in order to sustain an action for the removal of an obstruction in a public street it is necessary for the plaintiff to show, not merely that the

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(3) 4 P. R. 1895.

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damage he suffered is greater in degree or frequency than that suffered by the rest of the public but that it is different in kind. This authority was based on *Satku v. Ibrahim* (1) which affirmed the principle that no civil suit in respect of obstructions on the public highways could be maintained unless some particular damage in addition to the general inconvenience occasioned to the public was proved. This judgment, however, has been disapproved by their Lordships of the Privy Council in *Manzur Hassan v. Mohammad Zaman* (2) which has been followed in *Mandakinee Debee v. Basantakumaree Debee* (3). If the foundation fails the superstructure must fall and we have no hesitation therefore in holding that in face of the Privy Council ruling mentioned above, the Punjab Chief Court judgment is no longer good law.

In this case, however, we are further satisfied that the plaintiff has established special damage and special injury to him, different in kind from that which the general public suffered on account of the obstruction on the road as well as the construction of the tonga stand. That the act of the Committee constitutes a nuisance admits of no doubt. Besides being a finding of fact which we cannot disturb in second appeal, it would appear that the law goes to the length of saying that every obstruction on the road is a nuisance by itself. Reference may be made to *Queen-Empress v. Kidar Nath* (4) in this connection.

We are therefore fully satisfied that the learned District Judge was quite justified in the conclusions at which he arrived and in decreeing the plaintiff's suit with costs. We uphold his decision and dismiss the appeal of the Municipal Committee with costs throughout.

P. S.

Appeal dismissed.

(1) (1876) I. L. R. 2 Bom. 457.

(3) (1933) I. L. R. 60 Cal. 1003.

(2) (1915) I. L. R. 47 All. 151 (P. C.).

(4) (1901) I. L. R. 23 All. 159.