

**Gajanan Motal Complex Vs. Gwalior Development Authority**

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**Court :** Madhya Pradesh

**Decided On :** Feb-07-1996

**Reported in :** AIR1996MP135

**Judge :** T.S. Doabia, J.

**Acts :** Madhya Pradesh Municipal Corporation Act, 1956 - Sections 5(55); [Code of Civil Procedure \(CPC\) , 1908](#) - Order 39, Rule 1

**Appeal No. :** W.P. No. 1027 of 1991

**Appellant :** Gajanan Motal Complex

**Respondent :** Gwalior Development Authority

**Advocate for Def. :** N.K. Modi, Adv.

**Advocate for Pet/Ap. :** Ramji Sharma, Adv.

**Judgement :**

ORDER

**T.S. Doabia, J.**

1. It is high time that owners of commercial premises should make provision for providing space for parking, toilet facilities, approach roads and other basic ammenities to the public who come to their premises. The State burdened as it is

finding it difficult to make provisions for everything which a citizen requires. This can be achieved either by Legislative mandate or by terms of contract under which transfer of rights is made. One such step taken in the right direction by Gwalior Development Authorities respondent No. 1, is being impugned in the present writ petition. The matter is purely contractual. It would have been appropriate for the petitioner to pursue the same in the civil court. As a matter of fact, some litigation is pending in Civil Court. However, as the present petition is pending in this Court for almost four years, it would be apt to deal with the same.

2. A plot No. 38, was allotted to the petitioner. This allotment was made by the respondent No. 1. The plot is situated in the city centre at Gwalior. Annexure P/1 is a communication in this regard, This is dated 29th of October, 1988. The area of the plot is said to be 985.18 sq. metres. The petitioner was to pay the price of this land at the rate of Rs. 600/- per sq. metre. The dispute which has been raised by the petitioner is that the actual area of the plot is less than what has been stipulated in Annexure P/1. He submits that either the same area in Annexure P/1 be allotted or there should be a corresponding decrease in the price. The petitioner was to pay a sum of Rs. 5,91,108/-. He has paid only Rs. 55,000/-.

3. The stand taken by the Gwalior Development Authority be noticed.

4. According to it, the area which has been allotted to the petitioner is as per Annexure P/1. It has been pointed out that'-some part of the area is to be used for the purposes of foot-paths. This would provide access to the complex to be raised by the petitioner. It is this area which is covered by the foot-path, which is the bone of contention. According to the petitioner, he is not supposed to pay the price of the land which is covered by the foot-paths. According to him, the ownership of this is not going to be with it and, therefore, it cannot be made liable to pay the price thereof.

4A. I am of the view that the contention of the petitioner is totally misconceived. The law does contemplate ownership of an individual entity in footpaths and streets even though these are used by the public at large. The categorical stand taken by the respondents is that the ownership of the area shown as foot-path would vest in the petitioner. It has only to be used for a particular purpose. The

area in question would be utilised as a foot-path. General public would have access to the complex to be constructed by the petitioner. There is abundant judicial precedence for the proposition that a property may vest in one person but its user be prescribed. The various statutes dealing with municipal administration defined the term 'street' and 'public street'. The site is located in Gwalior as such the definition given in the M. P. Municipal Corporation Act, 1956 be noticed in this behalf. Street is defined in S. 5(55) of the Act. This section reads as under:--

(55) 'street' means any road, foot way square, court, alley or passage, accessible, whether permanently or temporarily to the public, whether a throughfare or not;

and shall include any vacant space, notwithstanding that it may be private property and partly or wholly obstructed by any gate, post, chain or other barrier, if houses, shops or other buildings about thereon, and if it is used by any person as means of access to or from any public or thoroughfare, whether such persons be occupiers of such buildings or not;

but shall not include any part of such space which the occupier of any such building has a right at all other persons from using as aforesaid;

and shall include but the drains on either side and the land whether covered or not any pavement, verandah or other erection, which lies, on either side of the roadway up to the boundaries of the adjacent property, whether that property be private property or property reserved by Government or by the Corporation for any purpose other than a street.

(56) 'street lines' means a line dividing the land comprised in and forming part of a street from the adjoining land.

A reading of the above provision indicates that a private property can also be part of the street. The ownership remains with the owner but the land in question is to be used as a street.

5. Some of the judicial precedents dealing with this aspect of the matter be now noticed :

'Subject to the right of the public to pass repass in the highway, the owner of the soil in general remains the occupier of it and as such may maintain trespass against any member of the public who acts in excess of his right.'

In Halsbury's Laws of England, 3rd Edn. Vol. 19 at page 43 rules of presumption and proof of dedication are stated thus:--

'The fact that a way has been used by the public so long and in such a manner that the owner of the land, whoever he was, must have been aware that the public believed that the way had been dedicated and has taken no steps to disabuse them of that belief is evidence but not conclusive evidence from which a Court or jury may infer a dedication by the owner.'

The learned author proceeds to observe at page 55.--

"A dedication may also be inferred when a highway authority has used a strip of land adjoining an admitted highway for the deposit of stones or by cutting grips, or has, as of right and without permission, piped in and levelled the site of a road side-ditch.'

15. In the case of *Galbraith v. Ammour*, (1) 4 Bell's App 374 in the House of Lords, Lord Campbell said:--

'I must express my clear opinion that by the law of Scotland as well as by the law of England the soil of public highways is presumed to be in the conterminous proprietors and that, if a public highway is established by usage, over the land of author, the soil is still his, with all his former rights, subject to the public servitude which he has suffered to be established.'

In the case of *Municipal Council of Sydney v. Young*, LR (1898) AC 457, which came on appeal before the Privy Council from the Supreme Court of New South Wales, Lord Morris in delivering the judgment of their Lordships of the Privy Council observed at page 459:

'Now it has been settled by repeated authorities which were referred to by the learned Chief Justice that the vesting of a street or public way vests no property in

the municipality, 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 it does vest the soil or the land in them as owners. If that be so, the only claim they could make would be for the surface of the street and not as general property.'

The conclusion to be drawn from the English case law is that what is vested in urban authorities is not the land over which the street is formed but the street qua street and that 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, that such property as it has in the street continues only so long as the street is a highway. The owner is thus not divested of ownership.

The cases originating in this country may now be noticed.

In the case of *Chairman of Naihati Municipality v. Kishorilal Goswami*, ILR 13 Cal 171, it was held:

'That the vesting of roads in a municipal corporation by Bengal Act V of 1876 Section 32, did not pass to the municipality the soil beneath the roads.'

In *Mandu Sudan Kundu v. Pramode Nath Roy*, ILR 20 Cal 732, the same view was taken and it was held that statute in question did not deprive a person of any right of private property that he may have in land used as a public road and that it does not vest the sub soil of the land in a municipality.

In *Tarlok Chand v. Dhoraji Municipality*, AIR 1955 Sau 63 a Division Bench observed that the Municipality is not entitled to put up a pucca structure on a foot-path merely on the strength of a fact that the street vests in it.

In *State of U. P. v. Ata Mohd*, AIR 198p SC 1785, it was held that street would vest in the Corporation only qua the street and not as absolute property. What is vested in the Municipality is not general property or a species of property known to the common law but a special property created by a statute and vested in a corporate body for public purposes. Such vesting enables the Corporation to use the street

as a street and not for any other purpose.

The term 'vest' was considered by the Supreme Court in *Fruit and Vegetables Merchants' Union as Delhi Improvement Trust*, AIR 1957 SC 344. It was held that the word , 'vest' has not got a fixed connotation meaning in all cases that the property owned by the persons or the authority in whom it vests it may vest in title or it may vest in possession or it may vest in a limited sense as indicated in the context in which it may have been used in a particular piece of legislation. The Court took note of certain English decisions. Paras 16 and 18 deal with them and are being reproduced below:--

'(16) In the case of *Coverdale v. Charlton*, (1878) 4 QBD 104, the Court of Appeal on a consideration of the provisions of the Public Health Act, 1875 (38 and 39 Vict, C. 55) with particular reference to Section 149, has made the following observations at p. 116:

'What then is the meaning of the word 'vest' in this section. The legislature might have used the expression 'transferred' or 'conveyed', but they have used the word 'vest'. The meaning I should like to put upon it is, that the street vests in the local board qua street; not that any soil or any right to the soil or surface vests, qua street.' (18) In the case of *Finchley Electric Light Co. v. Finchley Urban District Council*, (1903) 1 Ch 437, adverting to the provisions of Section 149 of the Public Health Act, 1875 (supra) Romer, L. J. has made the following observations at Pp. 443 and 444: 'Now that section has received by this time an authoritative interpretation by a long series of cases. It was not by that section intended to vest in the urban authority what I may call the full rights in fee over the street, as if that street was owned by an ordinary owner in fee having the fullest rights both as to the soil below and as to the air above. It is settled that the section in question was only intended to vest in the urban authority so much of the actual soil of the street as might be necessary for the control, protection, and maintenance of the street as a highway for public use. For that proposition it is sufficient to refer to what was said by Lord Halsbury L. C. and by Lord Herschell in *Tunbridge Wells Corporation v. Baird*, (1896) AC 434.....That section has nothing to do with title: it is not considering a question of title. No matter what the title is of the person who owns

the street, the section is only considering how much of the street shall vest in the urban authority.....'

The above decision given by the Supreme Court was followed by this Court in Municipal Committee, Raigarh v. Ram Ratan, 1958 MPLJ 585 : AIR 1958 MP 355. In para 25 of the judgment it was observed that so far as public Townhalls Gates, Public streets, springs, public sewers, lanes, public streets and roads within the municipality are concerned the vesting section must be so construed as to give to the municipality the least concern with the property that is compatible with the proper exercise of the power in relation to these things given in the municipality under the Act. In Om Prakash v. M.C. Bhatinda, 1986 (1) Legal Report and Statutes (pb) 415, it was held that the provisions dealing with the vesting of streets only enable the Municipal authorities to take responsibility on itself to improve the street and the transfer of the land to the committee is for this limited purpose only. The owner is not divested of ownership.

Thus, the petitioner would continue to be the owner but it would have to put the land to a particular user. The petitioner's grievance is without any merit. In the plan, copy whereof has been placed on record it has been clearly indicated that the property is to vest in the petitioner. The area shown in the map. by red lines is to vest in it. The area shown in hatches is to be utilised as footpath. The Gwalior Development Authority has indicated only as to how the area is to be utilised. The ownership is to remain with the petitioner. There is thus, no merit in the petition. The same is liable to be dismissed.

5A. There is, however, one aspect of the matter. It is indicated that some civil suit has been preferred in which the relief claimed is that the area shown as 'street' should not be permitted to be used by the petitioner. An order of 'status quo' has been passed in that case. The petitioner would be at liberty to seek vacation of the stay order by filing a fresh application. The trial Court will take notice of the decision in this petition and the decision given by the Supreme Court in the case of Mahadeo Savlram Shelke v. Pune Municipal Corpn., 1995 (3) SCC 33. It was held that if a person gets an order of injunction then he should be prepared for compensating the person against whom the injunction operates for the loss which

may be sustained by him on account of the injunction. It was observed ;

'It is common experience that the injunction normally is asked for and granted to prevent the public authorities or the respondents to proceed with execution of or implementing scheme of public utility or granted contracts for execution thereof. Public interest is, therefore, one of the material and relevant consideration in either exercising or refusing to grant ad interim injunction. While exercising discretionary power, the Court should also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the Court that in the event of his failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in favour of the plaintiff.'

The trial Court shall reconsider the question of continuance of the injunction. In case the plaintiff in the suit insist on continuance of injunction the trial Court would also assess the quantum of compensation payable by the plaintiff of that suit to the present petitioner in case it is ultimately found that the suit was without merit. The trial Court shall pass an order determining the loss which the present petitioner is likely to sustain. The loss can be on account of the increase in the raw material and other building materials which the present petitioner may have to pay while raising the construction. It is made clear that so far as the present petitioner is concerned, the petitioner has no cause of action and the respondent Gwalior Development Authority would be within its rights to recover the amount of instalments which have fallen due. It is accordingly held that:

- (i) The petitioner would continue to be the owner of the land indicated in Annexure P-1.
- (ii) The petitioner is to use the land in a particular manner. This is permissible under the law.
- (iii) The condition that out of the land allotted to the petitioner some land is to be used for footpaths is a permissible condition.

(iv) In case the condition does not suit the petitioner, it may take back the amount deposited by it. It has to accept the contract as it is.

(v) The petitioner would produce the copy of the order before the trial Court, which has issued the injunction and which operates' against the petitioner.

(vi) As in the suit the only relief sought is that place reserved for footpath be used as street, the suit is likely to be rendered infructuous. The trial Court to take notice of the fact.

Disposed of accordingly. Security, if deposited be refunded.

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