

(1951) 07 AHC CK 0006

Allahabad High Court

Case No: Letters Patent Appeal No. 28 of 1946

Municipal Board

APPELLANT

Vs

Manohar Lal

RESPONDENT

Date of Decision: July 27, 1951**Acts Referred:**

- Easements Act, 1882 - Section 7
- Uttar Pradesh Municipalities Act, 1916 - Section 293

Citation: AIR 1951 All 867 : (1951) 21 AWR 534**Hon'ble Judges:** Wali Ullah, J; P.L. Bhargava, J; Agarwala, J**Bench:** Full Bench**Advocate:** S.K. Verma, for the Appellant; B.R. Avasthi and G.N. Kunzru, for the Respondent**Final Decision:** Disposed Of

Judgement

P.L. Bhargava, J.

The following question has been referred to the Full Bench for opinion :

"Whether Section 293, U. P. Municipalities Act, authorises a Municipal Board to change a fee in respect of projections which existed prior to the enactment of the bye-law imposing such a fee."

2. The facts and circumstances leading to the reference are these: The city of Kanauj has been declared to be a municipality u/s 3, U. P. Municipalities Act, 1916. In the year 1938 the Municipal Board of Kanauj made a bye law u/s 298 (E) (b), Municipalities Act described as the "Projection Bye-laws" levying an annual fee on the projections within the limits of the municipality. The bye-law was duly sanctioned by the sanctioning authority and it was notified in the United Provinces Gazette. Subsequently by means of another notification in the Gazette the bye-laws were made applicable to the "existing projections within municipal limits," Manohar Lal, the plaintiff-respondent, resides and owns a house within the municipal limits of

Kanauj. In the year 1934 he rebuilt or made alterations in his house and built a projection on a public street, which is less than 25 feet in width. The Municipal Board of Kanauj levied a projection tax amounting to Rs. 39-8-0 in respect of the projection in the plaintiff's house. The plaintiff filed the suit, which has given rise to the present appeal for a declaration that the fee, which he called a new tax known as "projection tax," was illegal and the bye-laws relating to the old projections, which were framed u/s 293, Municipalities Act, were not duly published and were illegal and the Board had no right to impose a new tax on the projections that were in existence prior to the promulgation of the bye laws. The plaintiff accordingly prayed for a permanent injunction restraining the defendant-Board from realising the tax from the plaintiff. The suit was contested by the Board on whose behalf it was contended that the bye-laws were perfectly valid and the Board was competent to make them.

3. The trial Court (Munsif of Kanauj) held that the bye-laws so far as they related to the existing projections were ultra vires. On appeal the learned Civil Judge of Farrukhabad remitted the following issue to the trial Court for a finding :

"Whether there exists any projection of the plaintiff's building on the defendant's street. What is the width of the defendant's street and what is its effect on this case?"

On this issue the trial Court recorded a finding that the projection made by the plaintiff was over the defendant's street, which was less than 25 feet in width and that the defendant was not entitled to impose tax on that projection for that reason. On receipt of this finding and after hearing further arguments, the learned Civil Judge held that the bye-laws imposing projection tax on the existing projection, which was made before the projection tax was imposed, was beyond the scope of Section 298, List I (E) (c), Municipalities Act and that the bye-laws framed by the Municipal Board showed that the Board was not competent to permit projection over a street, which was less than 25 feet in width. Consequently, the Board was not empowered to levy any fee for any such projection. In the result, the appeal was dismissed.

4. The Board then filed an appeal in this Court, which came up for hearing before a learned single Judge, who held that the bye-laws were duly made; but being of opinion that it would be most unjust and inequitable if the Municipal Board was allowed to charge a fee for projections which were in existence before the bye-law itself was passed, the appeal was dismissed. An appeal under the Letters Patent was then filed by the Board and during the hearing of that appeal before a Division Bench reliance was placed upon a decision of this Court in *Notified Area Committee, Deoria v. Sukhdeo Das* 1947 A. L. J. 177 which was decided by a bench of two learned Judges of this Court. In that case it was held that u/s 293, Municipalities Act, the Notified Area Committee or the Municipal Board could levy fee in respect of projections which were already existing at the date when the bye-laws in question

were made. As there was some doubt about the correctness of the decision of the case just mentioned the question aforesaid was referred to the Full Bench.

5. Section 293, Municipalities Act is in these terms:

"Fees for use, otherwise than, under a lease, of municipal property --(1) The board may charge fees to be fixed by bye law or public auction or by agreement for the use or occupation (otherwise than under a lease) of any immovable properly vested in, or entrusted to the management of, the board, including any public street or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise.

(2) Such fees may either be levied along with the fee charged u/s 294 for the sanction, licence or permission or may be recovered in the manner provided by Chap. VI "

6. The answer to the question referred to the Fall Bench depends upon the interpretation to be placed on the expression "allows the use or occupation whether by allowing a projection thereon or otherwise. Section 178, Municipalities Act requires every person residing within municipal limits to give to the municipal board notice of his intention to erect a building or make a wall. Section 209 of the Act empowers the board to sanction projections over streets and drains. It lays down:

"(1) Subject to any rules made by the Provincial 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 the 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 conditions, as or 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."

7. In this case it appears that no condition whatsoever was attached when the plaintiff was allowed to make the projection in his house. The existence of a projection overhanging in the open space above the street is, however, admitted. It is also admitted that when the projection was made there was no bye law levying any fee on such projections.

8. u/s 210, Municipalities Act, any person erecting or re-erecting any such projection or structure as is referred 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. Section 211 empowers the board by notice to require the owner or occupier of a building to remove, or alter a projection or structure overhanging, projecting into or encroaching on a street, or into, on or over any drain, sewer or aqueduct therein. This power is to be exercised subject to the provision that in the case of "any such projection or structure lawfully in existence on or before the tenth day of March, 1900, the board shall make compensation for any damage caused by the removal or alteration, which shall not exceed ten times the cost of erection and demolition.

9. It is not alleged that the Municipal Board of Kanauj has issued any notice as prescribed by Section 211, Municipalities Act, requiring the plaintiff to remove the projection; but as the projection was made in 1934 the Board is entitled to issue such a notice.

10. The column of air and the space above the public street on which the house of the plaintiff is situate is Immovable property and the Municipal Board of Kanauj is the owner of that property. The projection in the house of the plaintiff overhangs on that property of the Board ; or, in other words, the plaintiff is using and occupying the property of the Municipal Board. When the Board gave the permission to the plaintiff to construct the projection no charge was levied for the said use and occupation of the Board's property. As a result of the bye-laws subsequently made the Board has levied a fee or charge for such use and occupation. The question is whether u/s 293, Municipalities Act, the Board was entitled to levy the fee or charge.

11. On behalf of the Municipal Board it has been argued that the word "allows" in Section 293, Municipalities Act, is wide enough to cover existing projections as well, while on behalf of the plaintiff it is contended that the word refers to projections made in future only.

12. The relevant portion of Section 293 is :

"The Board may charge fees for the use or occupation (otherwise than under a lease) of any Immovable property of the board, including any public street or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise."

The section empowers the Board to charge fees when it allows the use or occupation whether by allowing a projection thereon or otherwise. In other words, it refers not only to use or occupation by means of a projection but also use or occupation in any other manner for instance by permitting anyone to sit or set up a stall on some vacant municipal land, road, patri, etc. The Board may have already allowed the use or occupation free of any charge and it may allow such use or occupation to continue in future. A municipal board like any other owner of property

may allow any person to use or occupy some land free of charge for a certain period and then may claim and demand a certain amount as fee or charge for such use or occupation. So long as another person is using or occupying any Immovable property vested in or entrusted to the management of the board, the board is entitled to charge fees for use otherwise than under a lease of the said property.

13. In a case of a projection which is already in existence, the use or occupation of municipal property is there and u/s 293 the board is entitled to charge fees for such use or occupation either by making a bye-law or by public auction or by agreement. When any municipal board in exercise of the powers conferred upon it decides to issue notice u/s 211, Municipalities Act, the person who has made the projection may come to an agreement with the board and agree to pay charges for the use or occupation of the municipal property. There can be no valid objection if any such agreement comes into existence, Similarly, when a particular piece of municipal land has been used by any person for any length of time without any charge, the board may decide to levy a charge for the use and occupation of that land by any person and, if there are several persons who want to use that land, the board may fix the charges by public auction ; and if the board adopts any such course that would be permissible u/s 293, Municipalities Act. The section also permits the board to fix the charges by means of bye-laws. The bye-laws are framed by a board u/s 298, Municipalities Act, for the purpose of promoting or maintaining the health, safety, and convenience of the inhabitants of the municipality and for furtherance of municipal administration under the Act. In relation to the streets within the municipal limits the board can frame the bye-laws (a) determining the information and plans to be furnished to the board u/s 203 ; (b) permitting, prohibiting or regulating the use or occupation of any or all public streets or places for itinerant vendors or by persons for the sale of articles, or for the exercise of any calling or for the setting up of any booth or stall, and providing for the levy of fees of such use or occupation and (a) regulating the conditions on which permission may be given u/s 209 for projections over streets and drains and u/s 265 for the temporary occupation of streets. The projection bye-laws in question have been framed under Clause (b) and it is not disputed that the bye-laws are valid so far as the charges in respect of projections to be made after the date of the coming into force of the bye laws are concerned.

14. In the case of existing projections which can be ordered to be removed by notice u/s 211, Municipalities Act, the question may still arise whether they should be allowed to continue or be removed. An application may be made for the making of a new projection and an application may also be made for allowing an already existing projection to stand. In both the cases the board may allow the use or occupation of the municipal property --in one case by allowing a new projection to be made and in the other case by allowing the old one to stand. In either case the board will be allowed to charge fees for allowing the use and occupation of municipal property u/s 293, Municipalities Act. There appears to be no reason why the expression

"allows the use or occupation whether by allowing a projection thereon or otherwise" should be confined to new projections only or to any such continued use or occupation of Municipal land which may be permitted in future. The expression can very well be applied to cases of existing projections or to continuance in future of such use or occupation as had commenced in the past.

15. Section 293, Municipalities Act, appears in Chap. VIII, which deals with the powers and penalties in respect of buildings, public drains, streets, extinction of fires, scavenging and water supply, under the sub-heading "Rent and Charges". The first section under this sub heading is Section 291, which relates to the recovery of rent of land. The next Section 292 relates to recovery of rent of other Immovable property. Then follows Section 293 relating to fees for use, otherwise than under a lease, of municipal property. Section 293A empowers the board with the previous sanction of the Provincial Government to impose and levy fees for use of any place to which the public is allowed access and at which the board may provide sanitary and other facilities to the public. The last section under this sub-heading is Section 294, which lays down :

"The board may charge a fee to be fixed by bye-law for any licence, sanction or permission which it is entitled or required to grant by or under this Act."

The facts of the case *Notified Area Committee, Deoria, v. Sukhdeo Das* 1947 ALL. L. jour. 177, were more or less similar. The plaintiffs in that case were joint owners of certain houses within the Notified Area of Deoria. The Notified Area Committee had passed certain bye-laws and, on the strength of those bye-laws, a demand was made on the plaintiffs for a certain sum as projection fees for the period from September 1937 to March 1941. The projections by the plaintiffs in that case had been made on land and drains which vested in the Notified Area Committee. The plaintiffs alleged that the projections had been erected before 23-8-1937, the date on which the bye-laws came into force. The bye-laws were said to be ultra vires and it was alleged that they could not have retrospective effect. The trial Court found that the projections over land and drains, which vested in the Notified Area Committee, had been made without permission at dates earlier than the date on which the bye-laws came into force but that from the date the bye-laws came into force fees could be realised for already existing projections as well as for projections which might be made after the bye laws came into force. The first appellate Court agreed with all the findings of the trial Court except that it held that the byelaws read together showed that there was no intention to levy fees on projections which were already in existence on 23-8-1937. Section 293, Municipalities Act, came up for consideration before this Court in that case and it was observed :

"In our opinion the meaning of this section is plain. If certain Immovable property is vested in the committee or is entrusted to its management the committee may charge fees the amount of which will be settled either by an entry in the byelaws or by the holding of a public auction or by agreement entered into by the Notified Area

Committee and the person who has used and occupied property over which he had no right of possession by title because it either vested in the committee or was entrusted to the management of the committee. To make it plain that fees could be levied even when permission had been applied for use or occupation and had been granted the words "including any public street or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise" were inserted in the section. The fact that these words there occur did not limit the power of the Notified Area Committee to charge fees for the use or occupation of any part of any public street or place when no permission had been sought from the Committee and (SIC) permission had been granted. . . . It seems clear to us that Section 293 gives the Committee power to charge fees when use or occupation of what we may conveniently term Notified Area land has taken place and it is immaterial whether such use or occupation has taken place one day or a month or a year or any other period, provided of course the land is still vested in the Notified Area Committee."

As regards the question whether it was unjust or inequitable to charge fees for use and occupation on account of existing projections, it was observed:

"We can see nothing inequitable in this, for a person, who has made projections on land which does not belong to him but vests in the committee has no right to retain possession free and, if he does not like the amount of fees fixed, it is always open to him to remove the projections by which time, if he does so, he will have had perhaps for a considerable period of time the free use of the Notified Area land."

A demand by any owner of property from a person who has the use or occupation of that person's land cannot be termed unjust or inequitable; for instance, in the present case the plaintiff used the municipal land for several years without any charge. Now when every other person residing within the municipal limits, who wants to make similar use of the land as the plaintiff has been doing, is liable to pay the charge fixed by the byelaws, the plaintiff is not entitled to free use of the municipal land any longer. In such circumstances the plaintiff's demand to continue the use and occupation of the land without payment of any charge and not the Board's demand for the charges which are to be paid by any and every other person residing within the municipal limits will be an unjust demand.

16. I, therefore, see no reason to doubt the correctness of the view expressed in the case of the Notified Area Committee, Deoria 1947 ALL. L. Jour. 177, cited above.

17. In the Municipalities Act, there is a separate provision in Section 211 of the Act for the demolition of an existing projection and another provision for levying a charge for the use or occupation of municipal property by means of a projection. A Municipal Board is entitled to exercise the powers conferred upon it u/s 211 of the Act independently of the power exercisable u/s 293 of the Act. That the Board has the power to direct the removal of any projection may, however, be taken into consideration in interpreting the relevant clause of Section 293 ; that is to say, the

Board may, instead of ordering the removal of the projections allow the same to continue and thus allow the use and occupation of municipal property on payment of any charge fixed in one of the modes laid down in Section 293 of the Act, irrespective of the fact whether the projection or the use and occupation has already existed for sometime past--the charge will be for the future use and occupation. The charges levied u/s 293 of the Act are different from any charge which may be levied by the Board, u/s 209 of the Act, as a condition precedent to the making of a projection and thus allowing the use and occupation of municipal property in future,

18. It has been pointed out that the result of holding that u/s 293, Municipalities Act, the Board is entitled to impose a fee in respect of existing projections would be to force a person to remove the projections or pay the fee and thus he would be deprived of the protection given to him u/s 211 of the Act. In my opinion, however, no such result is likely to follow. The person concerned will only be paying the fee for the use or occupation of another person's property and avoid the consequences arising from using or occupying another person's property and also to avoid demolition of the structure made by him over another person's property. There is nothing unjust or iniquitous in this.

19. It has also been pointed out that there may be cases of existing projections where by efflux of time the person who made the projection has become owner of the property over which the projection hang; but in such cases it would be open to the person concerned to plead and prove that he has become owner of the property for the use or occupation of which the fee is claimed. The Board is not entitled to levy fee for any property which does not vest in it or of which it is not the owner.

20. In my opinion, therefore, Section 293, Municipalities Act, authorises a Municipal Board to charge a fee in respect of projections over municipal property which existed prior to the enactment of the bye-laws imposing such a fee if the person who has made the projections has acquired no title to the property over which the projection hangs and he desires the Municipal Board to allow the projections to continue after the promulgation of the bye-laws imposing the fee.

Agarwala J.

21. I agree.

Wall Ullah J.

22. I also agree.

23. I desire, however, to guard against a possible misapprehension. In my view, the general rule embodied in the maxim, *cujus est solum, ejus est usque ad coelum et ad inferos* (whose is the soil, his it is even to the skies and to the depths below) has been considerably curtailed and qualified in recent times. This has been principally due to the development of aeronautics and consequently of the aeronautical law

during the past few years. Speaking about this maxim Prof. Winfield in his well known "Text-book of the Law of Torts" (1948), Edn. 4, p. 318, says :

"It is one of those unfortunate scraps of Latin that has become nothing but a clog round the neck of development of our law. . . . If it were anything like the truth, the law would be simple enough for the slightest entry into the air-space over one's land would be trespass, whatever other tort it might or might not be. But it is almost certainly too wide It has been grievously misunderstood and misapplied so far as the up ward limit is concerned; All that it means is that if one owns a portion of the earth's surface, one also owns anything below or above that portion which is capable of being reduced into private ownership."

24. Again, Sir Arnold McNair, in his book on the Law of the Air (The Tagore Law Lectures of 1931), chap. II, has summarised the researches made by him on the question how much of the air space is capable of ownership of possession. He has suggested two theories: (i) prima facie a surface owner has ownership of the fixed contents of the air-space and the exclusive right of filling the air-space with contents, and alter, natively (ii) prima facie a surface owner has ownership of the fixed contents of air space and the exclusive right of filling the air space with contents and ownership of the air space within the limits of an "area of ordinary user" surrounding and attendant on the surface and any erections upon it. Of these, he prefers the first. As Prof. Winfield in his book referred to above points out, however, the second theory appears to be preferable to the first. What is the area of ordinary user will naturally very largely depend upon the facts of the individual case which comes up for decision before a Court of law.

25. In U. S. A. in *Harry Warcester Smith et al v. New England Aircraft Co. Inc. et al*, (S. C. of Mass.) (Mass. 1930 170 N. E. 385, the Court enunciated as a rule of law that the private ownership of the air space is assumed to be limited to what is necessary for the present use of the property. It would thus be a clear case of trespass to invade the air space e. g. by flying over it at a level within the height of ordinary buildings.

26. In the case of *Maharaja of Jaipur v. Arjun Lal* (1937) ALL. L. Jour 1126, Sir George Rankin, delivering the judgment of the Board at p. 1128, affirmed as true the observations of Collins, M. R. in *Finchley Electric Light Company v. Finchley Urban Council* (1903) 1 ch. 437

"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."

27. It is thus clear that the ownership of the surface of the soil does not necessarily carry with it either the possession or ownership of the column of the air space ad infinitum. The upward limit of the general rule embodied in the maxim quoted above must, therefore, be understood to be rigorously limited at the present day.

28. In the present case, however, no dispute has arisen with reference to the projection in question being something either sufficiently above the surface of the street or to be beyond the range of its ordinary user as a street.

29. Our answer to the question referred to the Full Bench is that Section 293, Municipalities Act, authorises a Municipal Board to charge a fee in respect of projections over municipal property which existed prior to the enactment of the bye-laws imposing such a fee if the person who has made the projections has not acquired any title to the property over which the projection hangs and he desires the Municipal Board to allow the projections to continue after the promulgation of the bye-laws imposing the fee.