

The Commis-
sioner of Income-
tax, Delhi and
Rajasthan
v.
M/s Motor and
General Finance
Ltd., Delhi
and another

Kapur, J.

Elaborate provisions were made in the financing agreement for securing the return of monies advanced by the company. Termination of such contracts would be necessary incidents of the trade itself carried on by the company. The termination of the agreement in the circumstances of this case could well be said to have been brought about in the ordinary course of business and the money received by the company would certainly be regarded as also having been received in the ordinary course of business and, therefore, a trading receipt. If we apply the test of fixed capital *versus* circulating capital we are left with no doubt in our minds that the payment was related to the circulating capital of the assessee and consequently not a capital receipt. The cancelled contract must be held, in these circumstances, to be an ordinary commercial contract made in the course of carrying on the company's trade and not such as can be said to affect the whole structure of the profit-making apparatus of the company. The ordinary conduct of business of financing must necessarily include not only making of the contract but also the modification or alteration thereof. It would, in our view, be apt to describe that even if there was a sterilisation of any asset it was a trading asset, and not a capital one. In the result the first question must be answered in favour of the Commissioner of Income-tax. We accordingly hold that the two sums of Rs. 2,75,000 received by the company and Rs. 75,000 received by Goodwill Pictures were trading receipts. In view of this answer to the first question, the second question really does not arise for consideration. We answer the question accordingly. Having regard to the circumstances of the case, however, there will be no order as to costs.

Mahajan, J.

D. K. MAHAJAN.—I agree.

B.R.T.

APPELLATE CIVIL

Before S. K. Kapur, J.

MUNICIPAL CORPORATION OF DELHI,—*Appellant*

versus

SAT NARAIN GURWALA,—*Respondent*

Regular Second Appeal No. 38—D of 1959.

Punjab Municipal Act (III of 1911)—S. 3(13)(a)—Street—Vacant space—Whether a street or not—How to be determined—“Accessible to the public”—Meaning of—Street and private passage—Distinction between.

1965

March, 22nd.

Held, that the scheme of section 3(13)(a) of the Punjab Municipal Act, 1911, appears to be that if a space falls within any of the categories mentioned in the first part of the section, namely, footway, square, court, alley or passage, then the question has to be determined in the light of that part of the section alone. The second part of the section merely includes something which may not be included in the first paragraph of the section. Paragraph 2, therefore, must be held to refer only to such vacant places as are not roads, footpaths, squares, courts, alleys or passages. By reason of this extension by paragraph 2, the word "street" would include not only roads and passages which can answer to the general idea of streets but also vacant places which may not be streets in the normal sense.

Held, that the words "accessible to the public" must mean open to all public in fact whether by right or permission. It is necessary, therefore, that all public must have some sort of right or permission to have access to the place in question. Even in the ordinary acceptation of the term it would not be stretching the language, to say that it is the right of travel, even though not exercised, that makes it a street. Again, if a distinction has to be drawn between a street and a private passage it may be that the former is intended for use by the public while the latter is intended for the exclusive use and benefit of particular persons. Where it is found that only two owners of the property, who were joint but later separated, had their buildings on the passage in question and that no member of the public had any access or right to enter upon the street, the passage must be held to be private property and cannot be termed as a "street" within the meaning of section 3(13)(a) of the Punjab Municipal Act.

Regular Second Appeal from the decree of the Court of Shri Ram Singh Bindra, Additional Senior Sub-Judge, Delhi (with enhanced powers), dated 11th day of December, 1958, reversing that of Shri Shiv Charan Dass Bajaj, Sub-Judge, 1st Class, Delhi, dated the 27th May, 1958, and granting the plaintiff a decree of the nature sought for by him with costs of both the Courts.

D. D. CHAWLA, C. P. MALIK, ADVOCATES, for the Appellant.

SHRI BHAGWAT DYAL, ADVOCATE, for the Respondent.

ORDER

KAPUR, J.—This order will dispose of Regular Second Appeals Nos. 38-D of 1959 and 39-D of 1959.

Kapur, J.

The facts leading to the present controversy are that two persons Sat Narain and Rattan Lal jointly owned extensive property in mohalla Mali Wara, Delhi. By a decree

Municipal Corporation of Delhi

v.

Sat Narain
Gurwala

Kapur, J.

of Court the properties were partitioned by metes and bounds on 30th of April, 1945. In the process of partition a passage was carved out by demolition of a part of the building for the convenience of the parties to the suit. The appellant Municipal Committee, Delhi, assumed control and possession of the said passage treating it as a street and the plaintiff respondent filed a suit being suit No. 167 of 1956 for injunction. Notwithstanding that the defendant-appellant declared the street as a public street in 1957 and the plaintiff-respondent filed another suit being No. 280 of 1957 for a mandatory injunction to the effect that the Municipal Committee should be ordered to restore the private land in its previous state to the plaintiff-respondent. The trial court by its judgment dated the 27th of May, 1958 dismissed both the suits *inter alia* holding that the passage in question was a street. Aggrieved by the said order the plaintiff-respondent took the matter in appeal to the Additional Senior Subordinate Judge, Delhi, who by his judgment dated the 11th of December, 1958, allowed the appeals and held that the passage in question was a private property, and not a street within the meaning of section 3(13) of the Punjab Municipal Act, 1911. The lower appellate Court also held that since the passage in question was not a street the resolution of the Municipal Committee declaring that passage as public street was illegal and invalid.

It is common ground between the parties that in case the passage is held not to be a street, both the suits must succeed, for it must be a street before it can be declared a public street. The learned counsel for the appellant points out that (a) the passage opens at Mali Wara, a thoroughfare; (b) there are a number of houses belonging to Sat Narain and Rattan Lal which abut on this passage; (c) House No. 1034 is occupied by Rattan Lal who neither filed suit nor appeared as witness in the suits by Sat Narain; (d) There is no Gate at the opening towards Mali Wara; (e) no board has been fixed asking the public not to enter; (f) the passage has been carved out by demolition of the part of the building; (g) it is a blind alley and ends in house No. 1034 and (h) one Ram Nath has a shop which opens towards Mali Wara but one wall of the said shop is in the passage in question. Submits the learned counsel that the test for determining whether it is a public street or not is that it should be accessible to the public and if that is so it is immaterial whether it is a private property or a thoroughfare. According to the learned counsel the term 'accessible'

means that there should be no physical obstruction like a fence or a gate in entering upon the said space. a Municipal Corporation of Delhi

On the other hand the learned counsel for the respondent submits that 'accessible' is not to be given that wide meaning and in the context should mean open to the public whether by right or by permission. It has not been disputed before me that the passage in question cannot be termed as a "vacant place" as contemplated in the second part of section 3(13)(a) of the Punjab Municipal Act. What is claimed by the learned counsel for the appellant is that it is a passage within the meaning of first part of section 3(13)(a) and since there is no physical obstruction or hindrance in entering upon the same it is "accessible" to the public and consequently a 'street'. The only question therefore, to be decided is whether it is accessible to the public and consequently a 'street' within the meaning of section 3(13)(a) of the Act. Section 3(13)(a) of the Punjab Municipal Act, 1911, is as under:—

"Street" shall mean any road, footway, square, court, alley, or passage, accessible, whether permanently or temporarily to the public and whether a thoroughfare or not:

and shall include every 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 abut thereon, and if it is used by any persons as a means of access to or from any public place 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 hours to prevent all other persons from using as aforesaid:

and shall include also the drains or gutters therein, or on either side, and the land, whether covered or not by any pavement, verandah or other erection, up to the boundary of any abutting property not accessible to the public."

Before I proceed to construe the section it would be appropriate to set out some of the findings arrived at by the

v.
Sat Narain
Gurwala
Kapur, J.

Municipal Corporation of Delhi

v.
Sat Narain
Gurwala

Kapur, J.

lower appellate Court. The learned Additional Senior Subordinate Judge has *inter alia* held that (a) the normal presumption would be that the passage is a private property of Rattan Lal and the appellant and no member of the public can use the same as a matter of right; (b) it is possible that passage may have been dedicated by the two joint owners for public use; this dedication was never pleaded or proved; (c) Fateh Chand, one of the witnesses had deposed that the passage in question was not being used by the public and that it was used only by those persons who happened to visit the owners of the houses abutting on the passage. There was no reason to disbelieve his statement; and (d) though there was a temple at the end of the passage but it had an entrance from the other side and the evidence clearly established that nobody used the passage for going to the temple. The learned Additional Senior Subordinate Judge also did not uphold the contention of the appellant—Municipal Committee that if some hawkers went into the passage in dispute to sell sundry articles that itself would make it a street. According to the learned Additional Senior Subordinate Judge such occasional visits by the hawkers could not turn each vacant space into a street. The scheme of section 3(13) (a) appears to me to be that if a space falls within any of the categories mentioned in first part of the section, namely, road, footway, square, court, alley or passage then the question has to be determined in the light of that part of the section alone. The second part of the section, in my view, merely includes something which may not be included in the first paragraph of the section. Paragraph 2, therefore, must be held to refer only to such vacant places as are not roads, footpaths, squares, courts, alleys or passages. By reason of this extension by paragraph 2 the word "street" would include not only roads and passages which can answer to the general idea of streets but also vacant places which may not be streets in the normal sense.

I have given my very anxious consideration to the meaning and scope to be attributed to this provision for it is of importance that in case it is construed the way the learned counsel for the appellant would like me to construe, then every open place on road which is accessible without any physical let or hindrance would be regarded as street within the meaning of the Act. Logically the term would then embrace every approach road of the private houses if

not protected by gates or other obstructions, thus giving a very wide power to interfere with the rights of private ownership. On the other hand it is necessary in the interest of public health that the local bodies should have powers to deal with the roads and streets with houses or buildings abutting on them and which are intended to provide access to the occupants of those houses and other members of the public. Such difficulties can be more acute in the congested localities. A number of decisions have been cited at the bar and there exists unanimity on the point that each case has to be decided on its own facts. As a matter of fact Beaumont, C.J., observed in *Provident Investment Co. Ltd., Bombay v. Emperor* (1), at page 439:—

Municipal Corporation of Delhi

v.
Sat Narain
Gurwala

Kapur, J.

“But I would recall an observation of a distinguished English Judge who said that, whilst he would be hard put to it to define an elephant, he would have no difficulty in recognising an elephant when he saw one. I think a similar observation may be applied to “street”. However, difficult it may be to define a “street”, there will generally be little difficulty in saying whether a particular place is a street within the ordinary acceptance of the term.”

The same view was expressed by the Lahore High Court in *Abdul Hassan Khan v. The Municipal Committee, Delhi* (2), where it was held that the finding whether or not a particular street was accessible to the public was a finding of fact which could not be disturbed in the second appeal. That, however, does not put an end to the matter for it still remains to consider as to what is the meaning to be put on the expression “accessible to the public.”

The learned counsel for the respondent suggested that the matter was concluded by the Privy Council decision in *Nawab Bahadur Muhammad Rustam Ali Khan and another v. The Municipal Committee of Karnal* (3), where their Lordships of the Judicial Committee held that to construe a

(1) A.I.R. 1943 Bom. 435.

(2) A.I.R. 1923 Lahore 417.

(3) I.L.R. [1920] 1 Lah. 117.

Municipal Corporation of Delhi

v.
Sat Narain
Gurwala

Kapur, J.

vacant place as a public street within the meaning of section 3 (13) of the Punjab Municipal Act, 1911, it was necessary that there should be dedication to the public. It was observed—

“It is in such cases of crucial importance to distinguish between the grant to the public as such of a right of way, and the permission which naturally flows from the use of the ground as a passage for visitors to or traders with the tenants whose shops abut upon it.”

Speaking about the use of the place by the shop-keepers and their customers, their Lordships expressed extreme doubt whether the term “dedication” could with propriety be applied to what took place and held that even if the term be employed, it could only be in this sense that the dedication of the court-yard was dedication not to the public, but to the uses of the shop-keepers and their customers, the principal use being the storing and display of grain. Their Lordships also approved the observations of Baron Parke, J., in *Poole v. Huskinson* (4), to the effect that—

“There may be a dedication to the public for a limited purpose, as for a footway, horse-way, or drift-way; but there cannot be a dedication to a limited part of the public.”

The learned counsel for the appellant seeks to distinguish this case on the ground that their Lordships were concerned to consider section 3 (13) of the Punjab Municipal Act, 1911, as it then stood and that the question in that case was whether the particular place was a public street or not. ‘Public Street’ according to the definition then in force meant any street—

- (1) over which the public have a right of way; or
- (2) * * * *
- (3) * * * *

Mr. D. D. Chawla, the learned counsel for the appellant, submits that it was because of the requirement of the statute that the public should have a right of way that

(4) 11 M.S.W. 827.

must have led the Judicial Committee to decide that dedication was necessary. One thing that, however, clearly emerge from this decision is that in case it is held that the expression "accessible to the public" must mean that the public should have a right of access over a passage then the mere fact that some of the visitors go to see Sat Narain or Rattan Lal or the members of their family or that some peddlers enter the passage with a view to sell articles would be of no avail to the appellant.

Municipal Corporation of Delhi

v.
Sat Narain
Gurwala

Kapur, J.

The learned counsel for the respondent while placing strong reliance on the Privy Council decision pointed out that the words "accessible to the public" must mean, as already pointed out, that the public has a right of access and in that view the statute then under consideration would be *in pari materia* with the statute under consideration now. In *Abdul Hassan Khan's case*, it was held that the expression "accessible to the public" in section 3(13) (a) meant open to all the public in fact, whether by right or permission. Again in *The Municipal Committee vs. Abdul Hassan Khan* (5), it was held that mere physical access alone to a place will not be enough to constitute the place as a street. In *Kumman and another v. Sujan Singh* (6), it was held that—

"Where a site has always been in use of the residents of the locality as an open space or a common courtyard and the members of the public have been passing through it without any let or hindrance by the owners thereof, the site is a street within the meaning of section 3(13) (a)."

Tek Chand, J., in dealing with *Nawab Bahadur Muhammad Rustam Ali Khan's case* said that "in view of the fact that oral and documentary evidence on the record showed that the site in dispute had always been in use of the residents of the mohalla as an open space or a common courtyard and that public had been passing through the same without any let or hindrance, dedication could be inferred from long user.

The learned counsel for the appellant has strongly relied on the decision of the Bombay High Court in *Provident Investment Company's case* and submits that in the

(5) A.S.R. 1924 Lahore 393.

(6) A.S.R. 1938 Lahore 619.

Municipal Corporation of Delhi

v.
Sat Narain
Gurwala

Kapur, J.

popular sense the general meaning to be attributed to "street" must be, a roadway, not necessarily a highway, which has on one side or both sides a more or less continuous and long row of houses" and that the definition in section 3(13) is not destructive of the general meaning. The learned counsel relies on the observations of Lokur, J., that the inclusive definition in section 3(w) of the Act was not intended to exclude the ordinary popular natural sense of the word "street". The following points have to be noticed with respect to the Bombay decision. The Bombay High Court was concerned with section 3(w) of the State of Bombay Municipal Act, 1888, which had an inclusive definition and it was in view of this definition that Lokur, J., said that "the legislature had deliberately given a wider scope for the interpretation of the word "street" but in the absence of the precise statutory definition, it is difficult to lay down any hard and fast rule as to the significant characteristics of a street so as to be applicable to all cases." Secondly the evidence in the case showed that (a) the passage looked like a street and was admittedly used as such for access to the buildings on both sides; (b) owners themselves treated it as a street and some owners had made applications to the Municipality showing such treatment; and (c) the Municipality had been exercising its powers in respect of that street treating it as a private street. As a matter of fact the predecessor-in-title of the petitioner in that case had himself asked for permission to construct a balcony, etc., and the permission was granted by the Municipality on payment of fee. In these circumstances, Lokur, J., held that the passage was a street.

Lastly section 302 of the Act had an important bearing on the matter inasmuch as the provision referred to "a private street over which the public have no right or access." That necessarily implied that the statute itself recognized a street with no right of access to the public. I also must refer to another Bombay case reported as *Kalidas v. The Municipality of Dhandhuke* (7), There the question was whether a "private court" which was surrounded by houses and to which the public had access had ceased to be a private property and had become a street within the meaning of sections 3 and 17 of the Bombay District Municipal Act. In that Act there was no definition of

(7) I.L.R. [1882] 6 Bom. 686.

public street and no powers were conferred upon the Municipal Committee to deal with the private streets. The Municipality had, therefore, necessarily to contend that the passage was a public street. Since there was no evidence in that case that public had a right to use that passage it was held not to be a public street as contended for by the Municipality. The importance of this case lies only in that the counsel for the Municipal Committee had contended that because any one of the outside public might have access, if he chose, to the doors of the separate house-holders within the court, and because the owners of the houses whose back walls bound the court on the north, had access at times in order to repair their back walls, the court must be held to be a street. Dealing with this argument Melvill, J., held—

Municipal Cor-
poration of Delhi

v.
Sat Narain
Gurwala

Kapur, J.

“It is proved that the property was originally a private property; it is not shown that it ever ceased to be so; and the court in question is evidently not used as a thoroughfare, but only as a means of access to the houses which surrounded it by persons who have business with the house-holders. No one’s rights of property would be safe if the Municipality could take advantage of such limited access by members of the public, in order to make out a claim to hold the land in question as public property.”

As I said the importance of this case lies in the fact that if “accessible to the public” is not to be given the wide meaning contended for by the learned counsel for the appellant the judgment would go a long way in showing that the mere fact of a very limited number of persons like hawkers and the visitors having access to the place will not be of any avail to the appellant. In my opinion the words “accessible to the public” must mean open to all public in fact whether by right or permission. It is necessary, therefore, that all public must have some sort of right or permission to have access to the place in question. Before parting with the case I must say a few words about the general meaning of the term on which a lot of emphasis was laid. The general meaning sought to be placed by the learned counsel for the appellant may for a moment obscure the issue but certainly does not serve to resolve it. Even in the ordinary acceptance of the term it would not

Municipal Corporation of Delhi
v.
 Sat Narain
 Gurwala

 Kapur, J.

be stretching the language to say that it is the right of travel, even though not exercised, that makes it a street. Again, if a distinction has to be drawn between a street and a private passage it may be that the former is intended for use by the public while the latter is intended for the exclusive use and benefit of particular persons. No doubt, some authorities do say that if there is a succession of houses and buildings, at least on one side of it, with some degree of continuity and proximity it may be a street in the popular sense but the meaning has to be resolved by construction and in my opinion the Legislature has chosen the test of accessibility to the public as one of the principle deciding factors and, I, therefore, choose to adhere to it.

Having regard to the finding of fact in this case that only two owners of the property who were joint but later separated had their buildings on this passage and that no member of the public had any access or right to enter upon the street, the learned Additional Senior Subordinate Judge was right in holding that it was a private property and could not be termed as "street" within the meaning of section 3(13) of the Municipal Act. In this view no other question arises with the result that the appeal must fail and is dismissed with costs.

B.R.T.

CIVIL MISCELLANEOUS

Before Shamsher Bahadur, J.

RAJ KUMAR AND OTHERS,—*Petitioners*

versus

THE STATE OF PUNAJB AND OTHERS,—*Respondents*

Civil Writ No. 2553 of 1964.

Punjab Municipal Act (III of 1911)—S. 24—Oath of allegiance not taken by an elected member of a municipal committee within statutory period because no meeting was held for the purpose—Whether makes his membership invalid—Words and Phrases—"Omit" and "refuse"—Meaning of.