

**(1998) 03 MAD CK 0190**  
**In the Madras High Court**

Arjuna Udayar (died) and Others

APPELLANT

Vs

Munuswamy Naicker and Others

RESPONDENT

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**Date of Decision :** 30-03-1998

**Acts Referred:**

**Citation :** (1998) 2 LW 763 : (1998) 3 MLJ 537

**Hon'ble Judges :** S.S. Subramani, J

**Bench :** Division Bench

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### Judgement

S.S. Subramani, J.—Plaintiff in O.S. No. 327 of 1978, on the file of Principal District Munsif, Arni is the appellant, After filing the second appeal, the appellant died and his legal heirs have been impleaded as additional appellants 2 to 7.

2. Deceased plaintiff filed the suit for declaration of plaintiff's right to take water from the well through the channel market as A, B, C, D in the plaint plan and for a mandatory injunction to restore the obliterated channel, Plaintiff purchased properties included in S.Nos. 141/9, 142/1, 142/12, 142/8, 142/13, 142/14 under various sale deeds. It is his case that he has got right to take water from the well situate in S.No. 142/3 over which he has got an undivided share. But the water has to be taken through the properties of the defendant's situate in S.Nos. 142/6 and 142/7. It is his further case that his right to take water through the channel is being exercised by himself and his predecessors from time immemorial and by about 1974, the defendants obliterated the said channel. It is said that he has complained about the same to the local Tahsildar. The 1st defendant agreed to restore the channel to be taken on the southern side of the lands and he did not agree to the water being taken through the usual route. Therefore, the plaintiff has filed the suit for declaration of his right to take water through A, B, C, D portion passing through the defendant's land.

3. In the written statement filed by the 1st defendant he disputed the right of the plaintiff. He said that there is no channel and the plaintiff was also not taking water through the So-called channel and demarcated as "A, B, C, D." in the plaintiff plan. Even as early as on 7.12.1973, the plaintiff caused a lawyer's

notice stating that a channel is used by him and he wanted to remove the obstruction. It is further said that the plaintiff is taking water from his well through some other way. At any rate since the suit is filed on the basis of easement by prescription, it is not maintainable as it is filed beyond the time.

4. The trial court after taking evidence, oral and documentary, decreed the suit in favour of the plaintiff and the mandatory injunction sought for was also granted. But in appeal filed by the defendants 2 to 5 as A.S. No. 7 of 1984, on the file of Subordinate Judge, Arni, the lower appellate court, set aside the judgment of the trial court, and allowed the appeal. The only reason for setting aside the judgment of the trial court within two years from the date of interruption of the easement, and therefore, he cannot claim any right u/s 15 of the Indian Easements Act. It is against the said judgment of the lower appellate court, the plaintiff has filed this second appeal, on the following substantial questions of law:

Was not the lower appellate court in error in holding that by virtue of Section 15 of the Easements Act, the suit claim is barred?

5. Before going into the facts of the case, let us take note of Section 15 of the Indian Easements Act, which reads thus:

15. Acquisition by Prescription: Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years, and where support from one person's land or things affixed there to has been peaceably received by another person's land subjected to artificial pressure or by things affixed thereto, as an easement, without interruption and for twenty years, and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years, the right to such access and use of light or air-support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested. Explanation I: Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease. Explanation II: Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made.

6. In Goyle's Law of Easements and Licences-Second Edition 1996, the learned author has said thus:

For the acquisition of easement by prescription under the Easements Act, it is necessary that the required period of 20 years or over must end within two years next before the institution of the suit wherein the claim to the easement is contested. This necessarily implies that the right of easement by prescription under the Act cannot become absolute unless the right has been contested. Further, where the plaintiff files a suit for (sic.) has enjoyed an easement for 19 years and a day, and files his suit on the first day of 21st year, he will succeed, since he can then show 20 years enjoyment before the filing of the suit, the interruption being disregarded, since it would be one day less than a year. But if a suit is filed on the following day, it will be too later, for, then the interruption will have lasted for full two years. But if, instead, the servant owner starts proceedings disputing the right of the claimant, the claim will be defeated, for his action cannot be described as "interruption".

The minimum period of enjoyment is not 22 years, but 20 years. All the same, the period of enjoyment should continue ending within two years of the institution of the suit.

The Rajasthan High Court has held that u/s 15 there are two requirements to be fulfilled; first, the enjoyment must be upto within two years of the date of suit; and, secondly, that upto time it must have been enjoyed for; years; and without interruption; The period of enjoyment upto within two years of the suit need not be a period of actual user up to the last moment, provided one can hold that the absence of user does not amount to absence of enjoyment, whether it does or does not depends on the facts of the particular case. This passage indicates that there is distinction between the enjoyment of an easement and absence of user as such. The underlying concepts overlap substantially and yet they are not exactly identical. There is a distinction between enjoyment of an easement and non-user. No doubt, this may very well apply markedly in cases of easements which are seasonally or periodically exercised. Therefore, the Court has to arrive at a conclusion bearing in mind the facts and circumstances of the case in hand. Moreover, whenever an easement is the subject-matter of a contest in a suit, it is for the party claiming the easement to establish that it was enjoyed upto a period ending within two years next before institution of the suit.

7. In one of the earliest decisions of a Division Bench of our High Court reported in *Nachiparayan v. Narayanan* AIR 1920 Mad. 541 : 12 L.W. 713, an argument was taken that 20 years enjoyment alone is sufficient and if that is proved, he is entitled to the relief of injunction. This contention was repelled by the Division Bench, by saying that "enjoyment of 20 years must terminate within two years prior to the institution of the suit and the suit also must be filed within the said period of two years". In that case, the Division Bench has held thus:

The language of the section seems to be clear that the enjoyment for a period of 20 years must terminate within two years prior to the institution of the suit, otherwise his enjoyment of a right contemplated in Section 15 for a period of 20 years, however long prior to the institution of the suit, would give a person who

so enjoyed it an absolute right of easement although for years prior to the suit he never exercised such right at all. That would be really violation the policy apparently underlying the law of easements. The English law of easements on which the Indian law of easements is practically based though with some difference, as has been pointed in some of the case, in this Court, requires that the 20 years enjoyment of the right must be next previous to the institution of the suit. That is what the English statute requires, and this is explained in *Glover v. Coleman*, by Brett, J. as he then was. The same view of the law is taken for granted in *Flight v. Thomas*. The Indian Legislature in this connection has departed from the English rule to this extent, that it lays down that it would be sufficient that if the enjoyment for a period of 20 years extended within two years before the institution of the suit instead of being immediately previous to the institution of the suit, and the rulings of the Indian Courts are unanimous on the point. In this Court the law is explained in *Muthu Goundan v. Anantha Goundan*. In the Allahabad High Court in *Sultan Ahmad v. Walliullah* and *Muhammad Maroof v. Sultan Ahmed* and in the Calcutta High Court in *Janhavi Chowdhurani v. Bindu Bashini Chowdhurani* and in *Jeggernath Brj v. Nanai Das Byragi*. As pointed out by Chamier, J., in *Sultan Ahmad v. Walliullah*, the result of the Easements Act and the similar provisions of the Limitation Act is that a right of easement cannot be said to be perfected until the right is declared by a decree of Court.

8. In *Siti Kanta Pal and Another Vs. Radha Gobinda Sen and Others*, , a Division Bench of the Calcutta High Court held that in order to establish the title to easement, when brought in question the enjoyment relied on, must be an enjoyment for 20 years up to within two years of the institution of the suit. In *Sohan Lal and Another Vs. Smt. Manohar Bai and Others*, , in paragraph 14 of the judgment, it has been held thus:

14 Now, if is a question of fact depending upon the facts and circumstances of each case whether non-user of an easement would result in cessation of the enjoyment within the meaning of the section or not. In AIR 1940 197 (Oudh) , the learned Judge observed.

"Under Section 15 there are two requirements to be fulfilled first the enjoyment must be up to within two years of the date of suit and secondly that upto that time it must have been enjoyed for 20 years and without interruption. The period of enjoyment upto within two years of the suit need not be a period of actual user up to the last moment, provided one can hold that the absence of user does not amount to absence of enjoyment; whether it does or does not, depends on the facts of the particular case.

9. If we go by the above decisions, I feel that the judgment of the lower appellate court is only to be confirmed. In the cause of action itself, the plaintiff has stated that in or about 1974, the defendant obliterated the said channel and when the same was complained to the Tahsildar, defendant agreed for a channel to be opened on the southern side and he did not agree for water being taken

through the usual channel. Once the channel is obliterated, it is effaced completely and the plaintiff is completely prevented from taking water through that place. Even before 1974, the plaintiff himself issued a lawyer's notice i.e., in December, 1973, stating that the defendant has obliterated the channel, and he wanted the matter to be restored.

10. Some of the witnesses examined on the side of the plaintiff have spoken that the channel ceased to exist for last more than ten years (at the time when they deposed). Some of the witnesses say that five years prior to the institution of the suit, the channel was obliterated. On the basis of this evidence, it is clear that there is no channel at all, for the purpose of taking water to the plaintiffs property, as per the. Explanation to Section 15 of the Indian Easements Act, the suit must be filed within two years from the date of interruption. The admitted case of the plaintiff himself is that channel was obliterated in the year 1974, and the suit was instituted only in the year 1978.

11. According to me, the finding of the lower appellate court is based on appreciation of evidence, and if factual findings are accepted, it can only be found that the suit is barred and the plaintiff is not entitled to the declaration sought for. Being a finding of fact, u/s 100 of the CPC the powers of this Court are also limited. Appellant's counsel was not in a position to persuade this Court that this case comes within the exceptional cases where the powers u/s 100, C.P.C. can be invoked. Consequently, the substantial question of law is found against the appellants. The second appeal is dismissed without costs.