

(1924) 10 MAD CK 0045
In the Madras High Court

A.S. Pakkir Mahamud Rowthen and Another
Vs

APPELLANT

Pichai Thevan and Others

RESPONDENT

Date of Decision : 28-10-1924

Acts Referred:

Citation : AIR 1926 Mad 625

Hon'ble Judges : Phillips, J;Odgers, J

Bench : Full Bench

Judgement

Odgers, J.—This was a representative suit brought by the plaintiffs on behalf of themselves and the other Hindu inhabitants of the village of

Perungulam, Ramnad taluk, against the defendants who are Muhammadans and settlers in that village. The plaintiffs are Maravars and they allege a

right to throw seedlings into the tank adjoining the Ayyankoil at the Mulaikottu festival held every year. These seedlings are raised in the houses of

the Maravars. Eight days after sowing they are thrown into the tank. The seedlings are watered with the water of the tank and are grown in mud

pots and manured with dung. One of the plaintiffs' witnesses (P.W. No. 3) says that all kinds of animal excreta are used as manure.

2. The plaintiffs put their right on two grounds: (1) Prescriptive title or casement by prescription as found by the lower Courts; and (2) custom.

They ask for a declaration that the tank belongs to the Hindu community and for an injunction restraining the Muhammadans from obstructing the

performance of the Mulaikottu ceremony. The defence traverses the plaint allegations and alleges that the right claimed cannot be acquired as the

throwing of seedlings into the water pollutes it and renders it unfit for drinking purposes. The District Munsif finds against plaintiffs on the question

of ownership, but declared that the Hindus were entitled to throw the seedlings
""after washing them so as to remove the dung manure sticking to it

and restrained the Muhammadans from interfering. The District Munsif decided that the Hindus had acquired an easement by prescription and that

if the seedlings were thrown into the tank without removing the dung the water would be polluted. He discusses the varying standards of cleanliness

in the matter of washing the seedlings and considers that the Maravars are not likely to be over scrupulous in the matter. If it is regarded as a

custom, it may be unreasonable. There is no doubt but the Hindus have been throwing seedlings without washing into the tank for a long time: how

long there is no evidence to say.

3. There is also no doubt that the tank is not theirs and that it is the main, if not the only, drinking water supply for the village. The washing of the

seedlings seems to have been introduced into the judgment and decree from certain proceedings in 1915, before the Sub-Divisional Magistrate, u/s

144, Criminal P.C. This was an order rescinding an order of the Sub-Magistrate, Ramnad, restraining the throwing of these seedlings. The Sub-

Divisional Magistrate found it was obviously improper to throw manure and earth into the tank and ordered the Sub-Inspector of Police to see that

the seedlings were well washed elsewhere, and, when cleaned, should be thrown. Nothing is said in the plaint or the issues about throwing in

washed seedlings. Plaintiff Witness No. 3's evidence given in 1919, is that the seedlings are not washed to remove the manure though P.W. No. 4

says the manure is thrown on the bank. He does not say the seedlings are washed. Defendant's Witness No. 1 says the fact of throwing seedlings

into the water will render it unfit for drinking purposes. The order of the Sub-Divisional Magistrate is obviously one ad hoc and related to a single

celebration of the festival. I can see no ground for thinking the condition of washing was one which could properly be incorporated in the decree

when the right claimed is absolute and the question to be decided was one as to the existence of the right either as an easement or as a custom.

4. The defendants appealed and in Ground No. 4 of their grounds of appeal stated:

The lower Court should have held that no custom has been proved and the custom set up is unreasonable and opposed to public health and safety

of the inhabitants of the village.

5. The Subordinate Judge found : (1) that the Hindus had no exclusive title to the tank; (2) the Hindus have performed the Mulaikottu ceremony in

the tank for a very long time; (3) there is no evidence to show that the throwing of the seedlings (which the Subordinate Judge assumes are by

order of the Magistrate ""well washed"") will pollute the water and the District Munsif was not justified in inferring this; (4) assuming the water would

be polluted, have the Hindus established a customary right or right by way of easement ? As it is nobody's case that the tank is public property he

holds that the Hindus have acquired an easement by prescription and confirmed the District Munsif's decree. I think the Subordinate Judge is

wrong in saying there is no evidence that the throwing of the seedlings pollutes the water for drinking purposes. See P.W. No. 3 and D.W. No. 1.

The question is: Are the lower Courts right in the view of the law they have taken as establishing an easement by prescription ? They have neither

of them come to a conclusion on the question of custom. The Subordinate Judge rightly says that if the tank be public and the throwing of the

seedlings is a public nuisance no right could be acquired by long user: see *Municipal Commissioners of the Suburbs of Calcutta v. Mahomed Ali*

16 W.R. Cr. 6. The acquisition of an easement by prescription is governed by Section 15. Easements Act:

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 20 years the right...shall be absolute.

6. To begin with : Has this right been enjoyed as an easement? An easement is defined in Section 4 of the Act as:

A right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do,

something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

7. The tank has clearly been held not to be the property of the Hindus. The defendants in their written statement seem to intend to plead (para. 31)

that the tank is public They apparently do not say it belongs exclusively to themselves. To create an easement there must be a dominant and a

servient heritage and the right acquired must be for the beneficial enjoyment of

the dominant heritage. If the right claimed u/s 15 be against Government the period of user to be proved must be 60 years. The right is claimed primarily on the ground of ownership of the tank by the Hindus, but user under a claim of ownership of the tank, in and over which such user is had, and which is negatived, cannot operate to found a right of easement over the tank: vide *Chunilal Fulchand v. Mangaldas Govardhandas* [1892] 16 Bom. 592 In the absence of a finding that the tank is either private property or the property of the Government, I am of opinion that a right of easement by prescription cannot be established.

Another objection is taken for the appellants, viz., that the acquisition by prescription must be by a definite person or persons either natural or juristic, and that a fluctuating and uncertain body like the Maravar inhabitants of this village cannot acquire. In *LutchmEEPut Singh v. Sadaulla*

Nushyo [1883] 9 Cal. 698 it was held no defined or ascertained person had been in the continuous possession of a fishing right which had been

exercised by the tenants of certain pargannahs. In *Lord Rivers v. Adams* [1878] 3 Ex. D. 361 a right to profits a prendre was claimed by the

inhabitants of a parish. Kelly, C.B., said, after holding that there could not be a custom in such a case,

And for the same reasons, and for other reasons there cannot be a prescription, and there could not be a valid grant unto so fluctuating a body and

a body so incapable of succession in any reasonable sense of the word so as to confer a right on each succeeding inhabitant.

8. The learned Chief Baron also quotes Willes, J., in *Constable v. Nicholson* [1863] 14 C.B.N.S. 230

The prescriptive right is not claimed for a corporation or persons taking by succession (it was claimed there by the inhabitants of a township), but

only for a fluctuating body of inhabitants. The prescription pleaded is a grant to that body but not so as to have the effect of incorporating them. It

is clear that such a right cannot exist.

9. In *Secretary of State v. Mathurabhai* [1890] 14 Bom. 213 the right of free pasturage was distinguished from these cases on the ground that such

a right has always been recognized by Government as a right belonging to certain villages and must have been acquired by custom or prescription.

This is a very different case and has, in my view, no bearing on the point. For

these reasons I am of opinion that the finding of the lower Court that the right of throwing seedlings into the tank has been acquired by the Hindus as an easement by prescription is not in accordance with law and must be set aside. The question remains: Has the right been acquired by custom ? The remarks of the District Munsif and Subordinate Judge on this point have already been set out. Neither of them records a finding on the point. If such a custom is established, various points will have to be considered as to its certainty and reasonableness (inter alia). If the tank is a public tank there will have to be considered whether the throwing of these seedlings is a nuisance. The case must go back to the Subordinate Judge for a finding in the light of the above judgment whether the right of throwing seedlings into the plaintiff tank at the Mulaikottu festival has been acquired by the plaintiffs (Hindus) by reason of a valid custom. Fresh evidence. Finding, six weeks; and objections, seven days. Question of costs reserved.

10. I may add that I have no objection to the last paragraph in the judgment about to be delivered by my learned brother and the question may be reserved for argument if and when it arises, though I take leave to doubt at this stage if a custom for doing a definite thing being established, it is open to a Court to decree modification of it or something else.

Phillips, J.

11. I agree that no case of acquisition of right of easement by prescription has been made out and that the case must go back to the Subordinate Judge for a finding on the question whether the right of throwing seedlings into the plaintiff tank at the Mulaikottu festival has been acquired by the plaintiffs by reason of a valid custom and I agree that fresh evidence may be taken.

12. I would, however, reserve for decision, after receipt of the finding, any question that may arise as to whether the custom, if established, may be restricted in any of its incidents by incorporating a condition in the decree.

13. In accordance with the order contained in the above judgment, the Additional Subordinate Judge of Ramnad at Madura submitted a finding that the custom had been well established, but that the custom was unreasonable. The Court then delivered the following judgment.

14. We accept the Subordinate Judge's finding that the custom is unreasonable

and in allowance of the second appeal dismiss plaintiff's suit with costs throughout.