

(1940) 09 MAD CK 0029
In the Madras High Court

Chinatalapati Venkatanarasimharaju	APPELLANT
Vs	
Suriseti Ramaswami and Another	RESPONDENT

Date of Decision : 04-09-1940

Acts Referred:

Citation : AIR 1941 Mad 176 : (1941) ILR (Mad) 367 : (1941) 53 LW 38 :
(1941) 1 MLJ 145

Hon'ble Judges : Alfred Henry Lionel Leach, C.J.; Venkataramana Rao, J.; Horwill, J

Bench : Full Bench

Judgement

Alfred Henry Lionel Leach, C.J.—The question which has been referred reads as follows:

Whether a person who is in the enjoyment of an easement, but who has not acquired a title to it by prescription or otherwise, can maintain an action to prevent its obstruction by any person other than the owner of the servient tenement?

2. The considerations which may apply when the interference complained of has reference to the access of light and air or to support from

adjoining land may not apply when the interference has reference to the use of a way over another's land and as this reference arises out of a case

relating to an alleged right of way we consider that the question should be re-framed in these terms:

Can a person who has been using a particular way over land adjoining his, but for less than the prescriptive period, maintain an action to prevent a

stranger from obstructing him using the way?

3. In Jootoor Acchanna Vs. Vanamala Venkamma, , a Bench of this Court (Collins, C. J., and Parker, J.) held that a plaintiff who had received

light through a window opening on vacant ground, but had not enjoyed the light sufficiently long to acquire an easement, was entitled to an

injunction against a person who was not the owner of the vacant land, restraining him from building on it so as to cause obstruction to the light. The

Court said:

It was not necessary for plaintiff to establish prescriptive rights of easement against a wrong doer and that the mere fact of plaintiff's enjoyment is sufficient to entitle him to an injunction.

4. The authority for this statement was the well known case of *Jeffries v. Williams* (1850) 5 Ex.792 : 155 E.R. 347, where Parke B., observed:

If a house is de facto supported by the soil of a neighbour, this appears to us to be sufficient title against any one but that neighbour or one claiming

under him. Just as one who should prop his house up by a shore resting on his neighbour's ground, would have a right of action against a stranger,

who by removing it, causes the house to fall; but none against his neighbour, or one authorized by the neighbour to do so, if he took it away and

caused the same damage.

5. The strict form of pleading of the olden days was an important factor in the decision in *Jeffries v. Williams* (1850) 5 Ex.792 : 155 E.R. 347, but

nevertheless the case established the principle that a person without title cannot interfere with the enjoyment of property by one whose title does

not even extend beyond possession. *Jeffries v. Williams* (1850) 5 Ex.792 : 155 E.R. 347, cannot, however, be read as laying down the

proposition that there is in the person in possession the right of action against a stranger who interferes with the acquisition of an easement which is

not essential for the enjoyment of the property possessed. Interference with the normal enjoyment of the property is the essence of the decision.

6. What the Court is called upon to decide in this case is whether a person who has been in the habit of using a way over his neighbour's land, but

has not acquired an easement, can prevent a stranger obstructing his user of the way. There is no direct authority to be found either in the English

or in the Indian decisions, but there are emphatic statements against the maintenance of such an action to be found in ""The Common Law"" by

Holmes, in *Salmond on ""The Law of Torts""* and in *Pollock on ""Torts""*. Holmes takes the case of a way used de facto for four years, but in which

no easement has been acquired, and asks whether the possessor of the quasi-dominant tenement would be protected in his use as against third

persons. He says;

It is conceivable that he should be, but I believe that he would not ""The Common Law"" by Holmes at p. 241.

7. At p. 354 we have this passage:

A way, until it becomes a right of way, is just as little susceptible of being held by a possessory title as a Contract.

8. And at p. 382 this:

But, as has been said before, the Common Law does not recognise possession of a way. A man who has used a way ten years without title cannot

sue even a stranger for stopping it. He was a trespasser at the beginning, he is nothing but a trespasser still. There must exist a right against the

servient owner before there is a right against anybody else.

9. Salmond Salmond on the Law of Torts, 8th edition, p. 259, says that the rule in Jeffries v. Williams (1850) 5 Ex. 792 : 155 E.R. 347 and Bibby

v. Carter (1859) 4 H. N. 153 : 157 E.R. 795, the latter case followed Jeffries v. Williams (1850) 5 Ex. 792 : 155 E.R. 347, cannot be extended:

to cover all cases of the de facto enjoyment of servitudes. It cannot be the law that a mere trespasser who has been in the habit of crossing another

man's land can sue a stranger for an act which obstructs his use of this de facto easement. Nor can it be supposed that a poacher can sue a

stranger who by polluting the water of a stream has interfered with his practice of catching fish therein.

10. Having put the question as to what forms of de facto possession the principle recognised in Jeffries v. Williams (1850) 5 Ex. 792 : 155 E.R.

347, does apply, Salmond submits that the true principle is this (p. 259):

As against strangers the possessor of land is entitled to the use and enjoyment of it free from all harmful interference due to acts done on the

adjoining land; and all such interference by a stranger is actionable, even though had it been done by the lawful owner of the adjoining land it would

have been *damnum sine injuria* because of the absence of any acquired servitude making it illegal. Where, on the other hand, the act complained of

has produced no harmful effects upon the plaintiff's land, it is necessary for him to plead and prove, even against a stranger, that he has a legal right

to the benefit of which he complains that he has been deprived.

11. In dealing with wrongs to easement and other incorporeal rights in property, Pollock says (the 14th edition, p. 99):

The enjoyment which may in time ripen into an easement is not possession, and gives no possessory right before the due time is fulfilled,

and proceeds to quote the passage from Holmes which says,

A man who has used a way ten years without title cannot sue even a stranger for stopping it.

12. Later he says (the 14th edition p. 300):

De facto enjoyment does not even provisionally create any substantive right, but is material only as an incident in the proof of title.

13. There are here strong expressions of opinion that where the right of way has been enjoyed for less than the prescriptive period the person

enjoying it cannot bring an action against a stranger who obstructs the use of the de facto easement, the principle being that a person cannot assert

even against a trespasser a right which does not really interfere with enjoyment of his own property. It is conceivable that a case might arise where

the principle involved in *Jeffries v. Williams* (1850) 5 Ex. 792 : 155 E.R. 347, could be appropriately applied, but it would be a very exceptional

one. Take for instance, the case where as the result of some catastrophe access to land could only be obtained over the land of another. If a

stranger attempted to prevent the possessor of the land so cut off from gaining access to his land the Court would surely interfere, as the stranger

would be interfering with the enjoyment of the land.

14. At this stage it will be convenient to refer to two decisions of this Court which are in conflict and in consequence have given rise to this

reference. In *Kondapa Rajan and Others Vs. Dwarakonda Suryanarayana and Others*, , *Benson and Krishnaswami Aiyar, JJ.*, after observing that

it was well settled law that if any trespasser was in enjoyment of land for less than the statutory period he would be entitled to protect that

possession against any one but the true owner, went on to say that they did not think that there was any distinction in principle, because the right to

be protected was in the nature of an incorporeal right in process of acquisition. This statement is certainly open to strong criticism and it was

criticised in *Narasappaya v. Ganapati Rao* I.L.R.(1913) Mad. 280 , but as pointed

out in that case, Kondapa Rajan and Others Vs. Dwarakonda

Suryanarayana and Others, , can be supported on the ground that the plaintiff was in possession of the channel which had been obstructed and

having a possessory title had a cause of action against the defendant for obstruction. In *Narasappaya v. Ganapati Rao* I.L.R.(1913)Mad. 280,

Miller and Sadasiva Aiyar, JJ., held that mere enjoyment of an easement for any length of time short of the full period of prescription gave no right

of action against a person obstructing the user. In that case the plaintiff sought an injunction preventing the defendants from cutting a channel from a

tank from which he watered some of his fields, so as to deprive him of the water. The District Munsif granted the injunction, but this was dissolved

by the District Judge, who held that the plaintiff had no right to the water of the tank, though he had been in the habit of taking the water through a

channel for some years. A second appeal was filed to this Court and the learned Judges upheld the decision of the District Judge. I regard the

decision as being a correct decision. It was not a case where the plaintiff was in physical possession of the channel from the tank, but a case where

the defendants were claiming a right to water which they did not possess.

15. In my opinion where a right of way has not been acquired by enjoyment for the prescriptive period there is ordinarily No. right of action for

interference. In a very exceptional case where access to the plaintiff's land would otherwise be cut off altogether a suit might be maintained against

a stranger on the principle propounded in *Jeffries v. Williams* (1850) 5 Ex. 792 : 155 E.R. 347, but not otherwise. The answer that I would give to

the question referred in its altered form is that an action cannot be maintained in ordinary circumstances. It can only be maintained if the obstruction

to user will have the effect of substantially depriving a person of the enjoyment of his property. To avoid any misunderstanding I would add that the

Court is not dealing with the rights of the villagers to pass over gramakantam land.

Venkataramana Rao, J.

16. I agree.

Horwill, J.

17. I agree.