

(1934) 04 MAD CK 0006
In the Madras High Court

Chinnasami Goundan

APPELLANT

Vs

A.S. Balasundara Mudaliar and Others

RESPONDENT

Date of Decision : 09-04-1934

Acts Referred:

Citation : AIR 1934 Mad 575 : 152 Ind. Cas. 216 : (1934) 40 LW 514

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—The plaintiff, who is the appellant, is at present the owner of S. No. 6/2 in the village of Keeza Ami and he sued to

restrain defendants 1 and 2, who claimed to be the trustees of a neighbouring Pillayar temple, from interfering with the plaintiff's use of a pathway

across S. No. 1 (marked B in the plaint plan) leading from his smithy in S. No. 6/2 to a public road. The averment in the plaint was that defendants

1 and 2 had no right to or interest in S. No. 1 and the plaintiff had a right to use the pathway as an easement of necessity or by prescription or by

mamul. Defendants 1 and 2 pleaded that S. No. 1 belonged to the Pillayar temple of which they were the trustees and they denied that the plaintiff

had acquired any right to use the pathway whether by prescription or by mamul or as an easement of necessity. The Government was added as

defendant 3 and as Mr. Krishnaswami Ayyar had laid great stress upon the attitude taken by the Government in this litigation it is as well to set out

what exactly the Government's written statement states. The Government said:

The pathway concerned in the suit vests in the Taluk Board, Vellore. This defendant is not interested in the present suit and there is no cause of

action against him.

2. I am unable to understand this statement of the Government as justifying the argument that the plaintiff is a licensee from the Government in

respect of the user of this pathway or that the Government has authorized the plaintiff in his individual capacity to use this pathway. The view of the

Government that it is vested in the Taluk Board of Vellore may be right or may not be right. That has not been put in issue and tried. But in this

litigation the plaintiff is asserting his personal right and not a right as one of the public entitled to use a public path way. If I understand Mr.

Krishnaswami Ayyar's argument aright, his main contention was to the following effect: The appellate Court has held that the temple is not the

owner of S. No. 1 and it continues to belong to the Government and defendants 1 and 2 as representing the temple have no right to interfere with

the plaintiff walking across S. No. 1, so long as the Government who is the owner of that plot, does not choose to object. This contention over,

looks what is stated in another portion of the lower appellate Court's judgment (in para. 12) where the learned Subordinate Judge says:

It must be observed that the use of the servient tenement has been allowed by its real owner, the Government, in favour of the temple. It follows

that the persons responsible for the management of the temple are in possession of the property. They have therefore the right to obstruct anyone

from unlawfully making use of the site in question as a pathway.

3. It may be a question whether a mere stranger can obstruct another person in the exercise of even what may be called an inchoate right of

easement. But on the evidence in the case I am unable to accept the position that defendants 1 and 2 were mere strangers so far as S. No. 1 is

concerned. In the Diglott Register S. No. 1 is no doubt described ""puramboke"" but in the remarks column against that number there is a note

temple."" The exact position is made dear by the statement of the Deputy Tahsildar examined as P.W. 1 that in the case of temple purambokes the

Government has a right to enter upon the land when it is not used for the purposes or benefit of the temple. The District Munsif, though he decided

in favour of the plaintiff on other grounds, also takes the view that the land over which the pathway is claimed should be deemed to form a portion

of the temple land : see para. 9. It is not necessary for the purpose of the present case to define the exact nature of the interest that the temple

possesses in S. No. 1. All that I am concerned to point out is that the case cannot be compared with that of a mere stranger interfering with the use

of a right of way by a person who is in the process of acquiring it by a course of prescriptive enjoyment.

4. Mr. Krishnaswami Ayyar referred in this connexion to a case in Rudrappa Kayak v. Dasan 1938 Mad. 610, where it has been held by Walsh,

J., that the mere (act that certain lands are entered in the Settlement Register as cattle-stand does not stand; in the way of the Government

assigning any portion thereof to somebody and that the Revenue Officers are the proper Judges as to whether such assignment of a portion could

or could not be made without inconveniencing the right of other villagers to have sufficient land kept apart for their use as cattle-stand. I do not see

that there is any occasion to dispute that proposition in the present case. If the plaintiff can be said to claim under Government by reason of the

Government having allotted S. No. 1 to him, this question may arise. All that the plaintiff can now say is that as indicated in the written statement of

the Government, Government is indifferent in the matter. In this view the decision in Rudrappa Kayak v. Dasan 1938 Mad. 610, does not bear on

the determination of the question before us. Mr. Krishnaswami Ayyar further argued that though the temple may not be in the position of a stranger

it is no better than a "licensee" and cannot be said to possess any such interest in the land (S. No. 1) as will justify its trustees in interfering with the

plaintiff's user of the way.

5. In view of the explanation given by P.W. 1 as to the nature of the land described as "temple puramboke" I am not able to accept the contention

that the temple is no more than a licensee in respect of S. No. 1. Mr. Krishnaswami Ayyar next drew my attention to the circumstance adverted to

in para. 14 of the Munsif's judgment that the Government declined to produce certain documents summoned for on the plaintiff's side and he

contended that if those documents are before the Court, it may be possible to come to a more definite conclusion as to the nature of the interest of

the temple in S. No. 1. So far as I am able to gather from para. 14 these documents were summoned for the purpose of showing that the temple

authorities themselves applied for assignment to them of S. No. 1 on darkhast and it was hoped to show therefrom that the story put forward in the

written statement by the trustees that the temple was, already owner of S. No. 1 could not be true. For the purpose of this decision I am accepting

the finding of the Subordinate Judge that the ownership of S. No. 1 was not in the temple and my conclusion is merely based on the ground that

will not follow there from on the admitted facts a that the temple authorities are in no better position than mere strangers la this view it does not

seem to me necessary at this stage to insist on the production of the papers so summoned for or adjourn the case for that purpose.

6. Mr. Krishnaswami Ayyar insisted that as the only case put forward by defendants 1 and 2 was that the temple was owner of S. No. 1 and as

that has been found against, it will not be proper to allow the trustees to shift their ground and justify the obstruction on any other basis. I am

unable to see that this difference in the view point has in any manner prejudiced the plaintiff's case. The plaintiff came forward with the story that he

had acquired a right of easement by prescription or custom. I leave alone the claim of casement of necessity as both the Courts have negated it. It

is only incidentally that the further question arises whether defendants 1 and 2 have got a right to interfere with the plaintiff in the exercise of that

right or of an inchoate right of that kind. So long as Ex. A, which is the first document on the plaintiff's side, and the deposition of P.W. 1, who is

the first witness examined on the plaintiff's side themselves show that though the temple was not the owner, it had such a relation to the suit land as

to justify the conclusion that the trustees were not strangers. I do not see that the negation of the temple's claim of ownership can entitle the plaintiff

to say that he will be prejudiced, unless he is given a further opportunity to put forward anything in answer to the new basis. As I pointed out in the

course of the argument, the issue in the case was framed quite gene, rally and I have not been able to see what matter has been kept back by

reason of the way in which the defendants' case was put forward.

7. The other point for consideration is, whether the plaintiff can claim that, though for want of 60 years" user he has not acquired an easement as

against the Government, he has by reason of 20 years" user acquired a limited right which is sufficient to prevail as against any interest which

private persons like defendants 1 and 2 may possess in Section 1. The arguments pro and con, as to the possibility of acquiring by prescription an

easement for a limited term or one available against the holder of a limited interest but not against the owner in fee, have been set forth in the

judgments of Abdur Rahim and Phillips, JJ. in *Koyyammu v. Kuttiammoo* 1919 Mad. 339. It is not necessary for me in this case to say which of

those divergent views I should be prepared to adopt, because even according to the reasoning of Phillips, J., who was in favour of the possibility of

such acquisition, the acquisition is possible only to the extent to which a grant may be possible within the terms of Section 8. In this case no such

grant by the temple will be possible having regard to the nature of the interest possessed by the temple in Survey No. 1 as above explained. Mr.

Krishnaswami Ayyar however contends that the test suggested in the judgment of Phillips, J., ought not to be followed, that there is no necessary

connexion between the acquisition of an easement by grant and the possibility of its being acquired by prescription and that the test of alienability

may create serious difficulties in the way of acquisition of easement in respect of easement in land in the possession of limited owners like widows,

trustees, etc. I do not pursue this matter further because there is another difficulty in the plaintiff's way in the present case. Section 15, Easements

Act, provides that when the property over which a right is claimed under this section belongs to Government, this section shall be read as if for the

words "'20 years'" the words "'60 years'" were substituted. I am unable to accept the appellant's contention that the word "'belongs'" in this section

should be restricted to cases where possession and ownership continue to remain with the Government and the clause can have no application to

cases where any person with a limited right is in occupation of land belonging to Government. Whether the object of this provision was merely to

free Government from the restriction imposed by Section 16 that the full owner or reversioner can exclude the period of enjoyment had during the

time that the servient tenement was in the possession of the limited owner only if such owner or reversioner sues within three years of the

termination of the limited interest, can only be a matter of speculation. But when it is remembered that the Indian legislation departed from the

general rule of the English law that no right can be acquired against the Crown merely by lapse of time, I will not be justified in restricting the scope

of the provision" which insists on a period of 60 years" user not merely when the easement is claimed as against the Government (cf., the language

of Article 149, Lim. Act) but over any property belonging to Government.

8. In this view it is unnecessary for me to give a final opinion upon the question whether the plaintiff has proved even 20 years' user within the

meaning of Section 15. The first Court found in his-favour upon that point but the appellate Court in paras. 9 and 10 of its judgment decided even

this question against the plaintiff. I must observe that the discussion in paras. 9 and 10 does not sufficiently keep apart the possibility of the

easement being acquired against the Government and the possibility of its being acquired as against the temple. The lower appellate Court has not

stated whether or not it accepts the finding that the plaintiff has in fact been going from the road to this smithy on Survey No. 62 for more than 30

years before suit. The first Court says that even some of the defendants' witnesses confirm that story. The lower appellate Court merely says that

any user that the plaintiff may have had prior to 1907 when he became the owner of Survey No. 62 should be excluded. As at present advised I

should not be prepared to accept that view, if it were necessary for me to decide that question, Section 4, Easements Act shows, that not merely

the "owner" but even an "occupier" may acquire an "easement" and there is no prima facie reason why the enjoyment he had as an "occupier

should not be tacked on to his enjoyment as "owner" if there should be no interruption in his user. But in the view already stated that even by 20

years' user the plaintiff would not acquire prescriptive right as against the property which belongs to Government, even to the extent of preventing

defendants 1 and 2 from interfering with his user of that way, I do not wish to pursue this question. The second appeal fails and is dismissed with

costs.