
(1954) 08 MAD CK 0029
In the Madras High Court
Case No : S.A. No. 1032 of 1950

Chinnaswami Pillai and others

APPELLANT

Vs

Syed Kuthbisha Durga and others

RESPONDENT

Date of Decision : 25-08-1954

Acts Referred:

Citation : (1954) 08 MAD CK 0029

Hon'ble Judges : Krishnaswami Nayudu, J

Bench : Single Bench

Advocate : K. Rajah Ayyar and M. Natesan, for the Appellant; B. Pockar, for the Respondent

Judgement

Krishnaswami Nayudu, J.—The plaintiffs, who are the appellants, claiming to be the representatives of the Hindu residents of Tennur, Tiruchirapalli instituted the suit out of which this appeal arises for a declaration that the Hindu residents of Tennur village are entitled to a particular plot of land demarcated in the plan annexed to the plaint bearing T.S. Nos. 351/2 and 351/3 and also entitled to contact the festivals of the Ugra Mahakali Amman, Kaman Pandigai and Karakam festivals in the suit site in accordance with custom, usage and prescription, and for a permanent injunction restraining the defendants from committing acts of trespass and interfering in any manner with the user and enjoyment of the suit site by the Hindus. The first defendant is the Syed Kuthbisha Durga represented by five trustees. The second and third defendants claim to have obtained a lease of T.S. No. 351/2. The fourth defendants is interested as a lease of T.S. No. 351/3, The substance of the defence is that the entire inam village of Tennur was granted to the first defendant Durga and the suit property, which is within the inam village, belongs to the Durga and that the plaintiffs are not entitled to any right in respect of the suit site.

2. The plaintiffs based their claim on three grounds : (1) on a grant by the ancient inamdar of the site to the use of the deity, the deity being the village deity worshipped by the Hindu residents of the village; (2) that by reason of the

exclusive enjoyment and possession by the Hindu residents of the locality, using the site not only for the conduct of the festival but also for locating a school conducted by the Hindu residents, they have acquired title by prescription; and (3) that in any event by long usage of the suit site for purposes of the deity and for the conduct of the festivals, they have acquired the right to use the site for the said purposes and the Durga has therefore lost its rights, if any, to the site.

3. The trial Court granted a declaration and injunction holding that the plaintiffs became entitled to the suit site by grant, customary usage and prescription. In appeal, the learned Additional District judge found that the plaintiffs are not the owners of the suit site but they have acquired a customary right for the celebration of the Ugra Mahakali Amman festival, Manamman Karakam festival and Kaman Pandigai festival, and granted only an injunction in a modified form restraining the defendants from interfering in any manner with the conduct of the said festivals in accordance with the custom.

4. The suit property originally formed part of the inam village of Tennur, which was granted to the first defendant Durga, and is borne out by the inam title deed, Ex. D. 1. Ex. D. 7 is the Tiruchirapelli town map published in 1900. There S. No. 351 is divided into S. No. 351/1 and 351/2. In S. No. 351/2 a building is stated to exist and is marked a mosque. But in a later plan of field No. 351 of 1926, Ex. D. 14 (c), there is a further subdivision of the survey number into S. No. 351/3 and S. No. 351/2 is not shown to contain any building, much less a mosque, as is found in Ex- D. 7. In the Commissioner's plan Ex. P. 2 (a) prepared during the trial of the suit, a raised platform 36 x 30 feet is shown to exist as also four granite pillars in another portion of the site, the rival contentions being that the mosque existed on the portion wherein the raised platform is shown by the Commissioner, while the plaintiffs contend that, though the shed was put up on the raised platform, a school was conducted by the Hindus, and that the four granite pillars were permanently installed for resting the Goddess during the time of the festival.

5. There is volume of evidence accepted by both the Courts which conclusively establishes that the festivals of the deity and the other festivals have been conducted from time immemorial on the suit properties and that during the said period no mosque as such existed, though Ex. D. 7 shows a mosque. Ex. D. 7, the survey plan published in 1900 was of the year 1897. It might be that the Muslim community used that raised platform prior to 1897 for offering prayers and as such it was marked in the survey plan to indicate a mosque. The Durga is further to the south east of S. No. 351/2 and between the Durga and S. No. 351/2, there is a new sub division S. No. 351/3, which, it may be mentioned, is now in the possession of the 4th defendant, who claims to hold it under a lease by the trustees of the Durga, wherein he has put up some shop and other constructions. The suit site is also known as the Pidari Mandhai, Pidari referring to the deity. That the name Pidari Mandhai has been attached to the suit site is evident from a number of documents, where, in the boundaries of adjoining

properties the suit site is described as Pidari Mandhai and the street is also described Pidari Mandhai Street.

6. A new mosque was erected in the field opposite to the suit site separated by a road known as the Tennur Road, by a busy, thoroughfare in Tiruchirapalli containing a number of shop fronts and, at the time of the constructions, the Hindus of Tennur objected to the proposed construction of the mosque opposite to the Mandhai of the village deity, namely, the suit site, and an order was passed by the Sub Divisional Magistrate, Ex. P. 5 dated 5th November 1924. The order discloses that the Hindu residents objected to the constructions of the proposed mosque, as it might interfere with the customary rights of celebrating the festivals with music and procession in the suit site and as the Muhammadans might also interfere with animal sacrifice including that of pigs. The order granted permission to construct the mosque subject to the provision that the Muhammadans using the mosque could not object to the celebrations of the Hindu festivals in the Mandhai, that is the suit site and in and near the vicinity of the mosque with music, procession etc., and would not interfere with offering of any animals that might be made to the said deities at any time at the above mentioned places. The statement which was given by the leading Muslims of Tennur Ex. P. 4 shows that they intended to construct a mosque opposite to the suit site, which they themselves described as the "Mandhai of the Tennur village deity", and that they recognized that the village deity would be taken to the Tennur Mandhai with music and that pooja would be offered to the Avadi Amman temple. They undertook not to cause any hindrance whatsoever to the Hindus in the celebrations of the festivals.

7. In spite of the order, Ex. P. 5, and even before the construction of the mosque, difference seem to have arisen between the two communities and the Hindus again came to Court and instituted O.S. No. 82 of 1931 for a declaration that they were entitled to take processions on auspicious occasions and to keep the Amman in the Mandhai and to offer pooja etc., and for an injunction restraining the defendants from preventing the plaintiffs from exercising the said rights. The property where the festival is to be held is described in the plaint as the "Amman's (deity's) Mandhai" to the south east of the High Road, viz., the Tennur Road. An injunction was granted and was confirmed in appeal by the District Judge by Order dated 18th March 1931 in C. M. A. No. 30 of 1931 on the file of the District Court, Tiruchirapalli. In the written statement filed on behalf of the Muslims, they conceded the right of the residents of Tennur to the celebration of the festival in the Mandhai and they stated that they never objected to such procession. Eventually a compromise was entered into, which compromise agreement, Ex. P. 10, reinforces the established fact that the suit site was being used for the festivals of the deity and for other festivals of the Hindus.

8. The fourth defendant, who claims to be a hereditary trustee of the Durga, is in exclusive possession of S. No. 3513 as lessee. His evidence shows that the suit site is called the Attu Mandhai or Ugra Maha Kali Amman Mandhai and that the

Amman's festival is conducted in the Mandhai. But he would make it appear that the Hindus used to ask his father permission for celebrating the festival.

9. There is therefore sufficient evidence to support the finding of the lower Courts as regards the user of the suit site from time immemorial for the purpose of celebrating the festivals of the deity and for celebrating the other Hindu festivals referred to by the plaintiffs. The question however arises as to on what legal basis the right of the plaintiffs could be sustained, whether they could be held to have acquired title by prescription, or the principle of lost grant would apply to the present case, or whether it is purely a case of a customary right, which requires to be preserved. So far as title to the property is concerned, it has been shown to vest in the Durga. The doctrine of lost grant presupposes a grant in favour of the deity or the Hindu residents and it would follow from that that the plaintiffs have been in exclusive possession as owners. In such a case, it may be presumed that the possession must have originated in a grant by the inamdara and title could therefore accrue by reason of their long possession and the doctrine of lost grant might then apply. But it cannot be said in the present case that the Hindu residents on behalf of the deity ever claimed to be the owners of the site or that they have been in continuous and exclusive possession exercising acts of absolute ownership. Further, excepting that the festivals have been celebrated on the suit site on such occasions as the festivals were periodically held, no other acts of possession have been alleged or proved, except that at some time a school existed. But admittedly, there is no such school now on the property. Neither therefore the title on the basis of a lost grant nor title by adverse possession and prescription can be said to have been shown by the plaintiffs as to declare title in their favour. There must be not only continuous, open and exclusive possession as of right, but the possession must be in persons who could be said to derive title from one another, not, as in the present case, a fluctuating body of persons like the Hindu residents of Tennur. It is therefore difficult to uphold the right of the plaintiffs on any of these basis, namely, title by lost grant, or prescriptive title by adverse possession.

10. But the fact remains and has been conclusively established that the Hindu residency of Tennur have been by long usage and custom celebrating the festivals of the Durga Mahakali Amman deity and the ether Hindu festivals in the suit site without any objection or interference from the first defendant Durga at any time. All the legal requirements of the proof of custom as of right have been shown to exist in the present case. The customary usage of the suit site is immemorial in origin. There is no uncertainty about it and it cannot be said to be unreasonable even in nature and though periodical is continuous in the sense that the festivals are celebrated on the suit property every year in the several months in which the festivals are celebrated- The true legal basis on which the plaintiffs right could be supported is that such a right lies in custom.

11. Such customary rights have been recognised and protected by Courts and the decision in *L. Misra v. Ranglal* 29 Pat. 1=63 L.W. 1 (P.C.), is illustrative of the

recognition of a similar customary right and the securing of such right by a decree of Court. In that case, the appellants in a representative capacity on behalf of a certain village claimed that a defined area of land in the village must be recognized in law as a cremation ground of the village and not available for other purposes, as the land had been reserved as a cremation ground from time immemorial and that the people of the locality had so used it from generation to generation. The Subordinate Judge upheld the right on the basis of dedication or a regnant by the landlord. The High Court reversed the finding and dismissed the suit and the Privy Council upheld the right basing it on custom. It was held that the true legal basis of such a right lay in custom and that such a village custom existed to which the law could attach legal sanction. Lord Radcliffe in delivering the judgment of the Board observed at pages 9 and 10 as follows:

In their Lordship's view the true legal basis of such rights lies in custom. This is as much the case in India as it would be in England. Indeed, this is the view which is fully set out in the judgment of Mukherjee, J. in *Asrabulla v. Kismatulla* AIR 1987 Cal. 245. A customary right can exist only in relation to the inhabitants of a district and it cannot be obtained in respect of the public at large *Fitch v. Rowling* (1795) 2 H.B. 393. The custom if established, makes the local law of the district and it creates a right in each of the inhabitants irrespective of his estate or interest in any particular property. The Courts of England have upheld many customs in different parts of the country side which have had the effect of binding some piece of land to the perpetual service of the village or district. The claims so upheld are not different in any essential respect from the claim to the cremation ground in the village of Byre which is in question here. A custom for the inhabitants to dance upon a piece of ground for their recreation. *Abbot v. Weekly* (1666) Leav. 176., a custom to use a close for exercise and play at all kinds of lawful games, sports and pastimes (*Fitch v. Rowling* (1795) 2 H.B. 393) a custom to enter upon certain land, erect a maypole thereupon and dance round and about it *Hall v. Nottingham* (1875) 1 Ex. D. 1. What the Courts have required of a custom, if the law is to uphold it as a right, is that it should be immemorial in origin, certain and reasonable in nature and continuous in use.

12. In the present case the plaintiffs have alertly made out a case that the suit property is bound by custom to be reserved for the purpose of celebrating the festivals of the Hindu residents. Considering that the suit site is only a portion of the entire property belonging to the Durga it cannot be said that the upholding of the custom would be unreasonable and there is also no evidence that the suit site has been used at any rate as a prayer ground by the members.

13. In *Hall v. Nottingham* (1875) 1 Ex. D. 1, referred to by the Privy Council in *L. Misra v. Ranglal* 29 Pat. 1= 68 L.W. 1 (P.C.), the right that was claimed was to enter upon a certain land belonging to the defendants, erect a maypole thereon, and dance round and about it, and otherwise enjoy on the land any lawful and innocent recreation at any times in the year, and it was held to be a good custom. An argument was advanced in that case that the effect of giving legal

sanction to such a custom would be to deprive the freeholder the whole use and enjoyment of his property. The Court, however, accepted the authorities based on *Abbot v. Weekly* (1666) Lev 176 and *Fitch v. Rawling* (1795) 2 H.B 393 and upheld the custom.

14. The effect of upholding the right of the plaintiffs to use the land for the purpose of the festivals would virtually deprive the first defendant Durga from the user of the site absolutely, for the site must be kept open always, since, on the occasion of the Hindu festivals, there is likely to be a large congregation and any user or interference with any portion of the site would amount to deprive the long established user by the plaintiffs on the occasions of the festivals. But since this user has been recognized from generation to generation and the site considered as a place where the festivals are to be held and worshippers meet in congregation, such a right arising from such user requires to be preserved and secured to the plaintiffs. The suit land is therefore subject to lawful custom for the Hindus of Tenure to have the festivals performed not only of the deity but of the other festivals enumerated by the plaintiffs and in the circumstances they are entitled to have that site free from its being utilized in any other manner. Though the right claimed by the plaintiffs is based on a lawful custom and such a customary right has a legal sanction, it cannot be said however that such a right would enable the plaintiffs to acquire title to the property. The declaration of title to the property cannot therefore be conceded to the plaintiffs, while an absolute injunction in the terms of the plaint prayer has to be given in order to secure their rights. There will therefore be a decree (1) declaring that the Hindu residents of the Tennur village are entitled to use the site bearing town survey No. 331/2 for the purpose of conducting the festivals of the Ugra Mahakali Amman, Kaman Pandigai and Karagam festivals in accordance with the custom and usage and (2) granting a permanent injunction restraining the defendants, their men and agents from committing acts of trespass on the suit site and interfering in any manner with the user and enjoyment of the site by the Hindus. The appeal is therefore allowed partially. The Memorandum of objections is dismissed. In the circumstances, each party will bear their respective costs throughout. No leave.