

(1952) 12 MAD CK 0007

In the Madras High Court

Case No : Civil Revision Petition No. 1081 of 1950

District Board, Salem

APPELLANT

Vs

S.K. Hanumantha Rao and Another

RESPONDENT

Date of Decision : 17-12-1952

Acts Referred:

Limitation Act, 1908 — Article 142, 143, 144

Madras Local Boards Act, 1920 — Section 163A, 60, 61

Citation : AIR 1954 Mad 208 : (1953) 66 LW 765 : (1953) 2 MLJ 470

Hon'ble Judges : Venkatarama Ayyar, J

Bench : Single Bench

Advocate : S. Ramachandra Iyer, for the Appellant; D. Ramaswami Iyengar and P.R. Varadarajan, for the Respondent

Judgement

Venkatarama Ayyar, J.—This revision arises out of a suit instituted by the District Board, Salem, for re-covery of a sum of Rs. 135 being

the value of a tamarind tree cut and carried away by the defendants. The claim made in the plaint was that the tree in question stood on a public

street which had vested in the District Board and it, therefore, belonged to them. Defendants 1 and 3 pleaded that the tree stood on their patta

lands and that it belonged to them; that even if it stood on the public street the Government and not the. District Board was the owner thereof and

that, therefore, the plaintiff had no right of action. The learned District Munsif held that the tree stood not on the patta lands of defendants 1 and 3

but on a public street which had vested in the District Board. He also held that the tree was an ancient one and was in existence before the highway

vested in the District Board, that there was no proof as to who planted it, that it must, therefore, be taken to be of spontaneous growth and that the

vesting of the highway in the District Board in 1930 had not the effect of vesting the tree in the Board and that, therefore, the Government and not

the Board was the owner thereof. The District Munsif further ""held that while on the one hand the defendants had failed to establish title to the tree

by adverse possession the plaintiff had also failed to establish actual possession thereof. In the result he dismissed the suit. Against this decision the

District Board prefers the present revision and contends that the finding of the lower Court both on the question of title and of possession is

erroneous.

2. On the question of title Mr. S. Ramachandra Aiyar, the learned advocate for the petitioner argued that on a true construction of the relevant

provisions of the Madras Local Boards Act, (Act 14 of 1920) what vested in the District Board was not merely the public road but also the trees

standing thereon. Section 60 provides that all public roads in any district shall vest in the district board and Section 3 Sub-clause (18) defines a

public road as including

lands whether covered or not by any pavement, veranda or other structure which lies on either side of the roadway upto the boundaries of the

adjacent property, whether that property is private property or property belonging to Government.

"The argument for the petitioner is that ""land"" will include all trees growing thereon and that, there fore, when the land vests" in the Board the trees

standing thereon also must vest in them- It is also urged that the provisions of the statute recognise that the Board may have title to the trees other

than those planted by them and reliance is placed on Section 112 (1) (ii) wherein the Board is authorised to spend funds for

the preservation of trees planted by or belonging to the local board"";

Section 163-A (2) which enacts a prohibition against any person felling, removing, destroying or demaging

""any tree vesting in or belonging to a local board"":

and Section 202 (5) which confers on the Distric" Board power to make by-laws

for the protection of avenues and trees planter by or belonging to local boards and of grass am other appurtenances of public roads.

3. Whatever one might think of it if the matter were res integra", it is so far concluded by authority that it could no longer be said to be open to

argument The question has been considered in England in a number of cases arising under s 149, Public Health Act. In -- "*Coverdale v. Chartton*",

(1879) 4 Q. B. D. 104 (A) the point for decision was whether the local authority was entitled to lease a right of pasturage over grass growing on

public streets. The larger contention in support of the right to lease was that the vesting of the street carried with it full ownership of the land. In

rejecting this contention, Bramwell L. J. observed,

The word "vest" may have two meanings; it may mean that a man acquires the property "usque ad coelum" and to the centre of the earth but I do

not think that to be its meaning here The Legislature might have used the expression "transferred or conveyed", but they have used the word

"vest". The meaning I should like to put upon it is, that the street vests in the Local Board qua street; not that any soil or any right to the soil or

surface vests, but that it vests qua street; The meaning I put upon the word "vest" is, the space and the street itself, so far as it is ordinarily

used in the way that streets are used, shall vest in the local board.

After referring to the provision that any person who causes injury to the tree shall pay compensation to the local authority, which corresponds to

Section 163-A, Local Boards Act, the learned Judge observes

Does that mean that the local board have a property in the tree and in the soil? I doubt very much whether that ought to be the construction put

upon the enactment, but if it is. It goes a long way to show that the local board had such a property as they claim in this herbage. Even if it does

not, it will not apply to the tree which although surrounded by the street could be said in one sense to be no part of it, for the public had no right

to pass over where the tree stood; and if it does not apply to a tree now in existence, but only to the trees the local board may plant or become

otherwise entitled to, why even then it would show that they must have some property in the soil and its produce; that would assist the contention in

favour of the plaintiff,

In the result it was held that the vesting of the street carried with it the right to grass and herb growing thereon.

4. In -- "*Municipal Council of Sydney v. Young*", (1898) AC 457 (B) the question arose for determination as to whether a municipal council was

entitled to compensation when a portion of the street which had vested in it was

diverted by the Government for construction of a tramway. It was held that the vesting of the street in the municipal council did not vest proprietary rights therein so as to entitle it to compensation. On the same principle it was held that a local authority had no right to an injunction to restrain a telephone company from erecting wires at a great height over the streets, vide -- "Wandsworth Board of Works v. United Telephone Co.", (1884) 13 Q. B. D. 904 (C), and that it had no authority to excavate "the soil and erect lavatory below the surface of a street which had vested in them, vide -- "Mayor and CO. of Tunbridge Wells v. Baird", (1896) AC 434 (D). In -- "Stillwell v. New Windsor Corporation", (1932) 2 Ch. 155 (E) the question arose with reference to certain trees standing on public streets which had vested in the defendants. The defendants having notified that they were dangerous, removed some of them. Mrs. Stillwell sued for an injunction restraining the defendants from removing the trees and for other reliefs. She stated that the trees Were in existence even before the street vested in the defendants which was in 1920, that the vesting of the street did not vest the trees also in them and that they belonged to her. The claim was dismissed on the ground that the defendants were entitled, in exercise of their right to control the public street, to remove the trees which were dangerous and obstruction to the traffic, even if they did not belong to them. In this view it became unnecessary to decide, to whom the timber would belong when the trees were removed. But Clauson J. was inclined to hold that the ownership in, the trees vested in the defendants. He observed

In coming to this conclusion I have to face this, that in the case of "(1879) 4 QBD 104 (A)" Bram-well L. J. in a judgment which has often been referred to, expressed some doubt whether the effect of this section was to vest the property in the trees in the highway authority. It was not necessary for the purposes of that case to decide this point, but that case did determine this, as I read it, that there was a right of property, of some kind at all events, vested in the highway authority in the herbage growing in the soil of the highway; and I have some difficulty in seeing why there should not be a similar right of property, however far it extends, in the other vegetable growth in the soil of the highway which is constituted by the trees in the case with which I have to deal.

These observations lend some support to the contention of the petitioner that when a street vests in a public authority the trees growing thereon and standing thereon at the time of vesting also vest in them. The position is thus stated in Halsbury's Laws of England, (2nd Edn.), Volume 16, page 249, paragraph 300,

The effect of these provisions is not to transfer the freehold in the authority, even where it had originally been vested in turnpike trustees but merely to vest in the authority, the property in the surface of the street or road, and in so much of the actual soil below and air above as may reasonably be required for its control, protection and maintenance as a highway for the use of the public; and to this extent the former owner is divested of his property. Thus the herbage vests in the authority, and it may let the right of pasturage but "whether trees growing upon the highway similarly vest in it is perhaps doubtful".

5. The view that the vesting of a street in a local authority does not operate to vest in that body the full ownership over the soil was adopted by a

Bench of this Court in the decision in --"Sundaram Iyer v. Municipal Council, Madura", 25 Mad 635 (P). The following observations of Bhashyam

Aiyangar J, may be quoted:

The conclusion to be drawn from the English case-law is that what is vested in urban authorities under statutes similar to the District Municipalities

Act, is not the land over which the street is formed but the street qua street and that the property in the street thus vested in a Municipal council is

not general property or a species of property known to the Common Law but a special property created by statute, and vested in a corporate

body for public purposes.

Benson J. observed:

The whole current of authority both in England and in India shows that such vesting does not transfer to the municipal authority the rights of the

owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth "usque ad coelum" but it has the exclusive

right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to

adequately maintain the street as a street -- "(1879) 4 QBD 104 (A)", and it has also a certain property in the soil of the street which would enable

it as owner to bring a possessory action against trespassers -- "Rolls v. Vestry of St. George", (1880) 14 Ch. D. 785 (G) per James L. J. at page

795 so that the complete vindication of the rights of the public should be preserved by the local authority": "(1896) A.C. 434 (D)".

6. This decision was followed in -- Uppalapati Suryanarayaneswara Jogi Jagannadharaju Garu and Another Vs. Taluk Board and Others, in which

the point for decision WAS whether the Taluk Board of Rajahmundry was entitled to sell or lease the usufruct of the trees growing on "'punthas'" or

village tracks, in the villages of Bellampudi and Pedapudi. These villages were situated in a zemindari and the zamindar claimed that as the owner of

the village-he was entitled to the trees and their usufruct and not the local board. There was no proof as to who planted the trees; and it was

accordingly taken, as in the present case, that they were of spontaneous growth. On a consideration of the very provisions of the Madras Local

Boards Act on which the petitioner now relies and of the authorities, English and Indian, Curgenven and King JJ. held that the trees did not vest in

the Board.

7. The question came up again for consideration in the decision reported in -- (Sri Rajah Row) Venkata Kumara Mahipathi Surya Rao Bahadur

Garu Vs. Chairman, Municipal Council, . There also the dispute related to the ownership of trees in a "'puntha'" situated in Surya Rowpetta within

Fithapuram aamindari. That had vested in the taluk board of Coconada to whose rights the Municipal council, Coconada succeeded. The point in

controversy was whether the trees belonged to the Maharajah of Pithapuram or to the Municipal Council, Coconada. After referring to a passage

from Rollo's Abridgment that the

freehold and all profits belong to the owner of the soil; so do all the trees upon it and mines under it

which was cited with approval by Lord Mansfield and quoted in the speech of Lord Atkinson in --City of London Land Tax Commissioner v.

Central London Railways", (1913) AC 364 (J) Varadachariar J. observed:

There can thus be no doubt that where the pun tha" was in existence prior to the permanent, settlement or came into existence after the per

manent settlement, the zamindar as owner o the adjoining land, will also be the owner of the soil of the "puntha" and of trees growing upon it

subject to the right of the public to use it as highway.

The learned Judge then discussed the position with reference to the provisions of the Local Boards Act and the Municipalities Act and observed:

As regards trees on the highway, the rights of parties may differ according as they have been planted by the local authority or not. Whether "

ordinarily the local authority will have a right to plant trees on a highway or not, there can no doubt that under the Local Boards Act it is authorised

to plant trees (See Section 95 of the Local Boards Act, 1884 and Section 112 of the Act of 1920). And it may be a legitimate inference, that trees

so planted belong to the local authority. It may also be that the owner of the soil may not be entitled to plant trees on the highway so as to obstruct

the user thereof by the public or even without the previous permission of the Local Board if the statute provides -- Vide Section 163 (a) inserted in

the Local Boards Act by Act 11 of 1930. But where trees spontaneously grow on the highway, the balance of authority is in favour of the view

that they belong to the owner of the soil and not to the local authority.

And he concluded

There is nothing in the Local Boards Act to suggest that the beneficial enjoyment of trees spontaneously growing on the sides of a highway was

intended to belong to the local authority or to exclude the general principle that they belong to the owner of the adjacent lands.

8. These authorities which are binding upon me establish that the vesting of a street in a District Board under the Madras Local Boards Act does

not carry with it ownership of the trees standing thereon though the board may have large powers of control over it.

9. Nor is there any force in the contention that under s 60 of the Act it is not merely the roadway portion but the lands adjacent thereto that vest in the

local authorities and that the land includes trees standing thereon. The answer to this contention is to be found in the following observations of

Bhashyam Iyengar J. in -- "25 Mad 635 at p. 648 (F)".

I am aware that in the definition of "street" the word "land" is used in connection with appurtenances to the street lying on either side of the

roadway. It is evident that the word "land" is used as denoting only what in reality is a portion of the street as such and that such portion of the

street vests in the municipality only in the same way as the roadway or via trita".

Mr. D. Ramaswami Aiyangar the learned advocate for the respondent referred by way of contrast to Section 203, Madras City Municipal Act

(Act 4 of 1919) .which expressly provides that

all trees not being private property growing on public streets or by the side thereof, shall vest in the Corporation"" ,

and commented on the absence of a similar provision, in Section 60, Local Boards Act or in Section 61, Madras District Municipalities Act, Act 5

of 1920. It is difficult to say that the difference in the language of the vesting section in the Local Boards Act and the District Municipalities Act on

the one hand and the City Municipal Act on the other is purely accidental though the reason for such differentiation is not apparent. Following the

decisions in Uppalapati Suryanarayaneswara Jogi Jagannadharaju Garu and Another Vs. Taluk Board and Others, and (Sri Rajah Row) Venkata

Kumara Mahipathi Surya Rao Bahadur Garu Vs. Chairman, Municipal Council, , I must hold that fine tree in question did not vest in the District

Board.

10. It was next argued on behalf of the petitioner that even if the title to the tree was with the Government, the plaintiff had possession of the same

and therefore was entitled to maintain an action against the defendants who were trespassers. But the finding of the lower Court is that neither party

has proved possession of the tree. That is a finding of fact which is binding on me in revision. It was argued for the petitioner that when once

possession by the defendants was found against, it ought to be presumed that the plaintiff in whom the street had vested had possession of the tree

standing thereon. But the District Munsif points out that the tree in question bears no number and there is no proof that its usufruct had been leased.

I am unable to say that the finding of the lower Court is vitiated by any error of law. I must, therefore, hold that the tree was not in the possession

of the plaintiff at the time it was cut by the defendants.

11. If the grant of relief to the plaintiff depended only on proof by them of title to or possession of the tree then on the finding given above the suit

must fail. But there is another ground which though not distinctly raised either in the pleadings or in the arguments is clearly involved in the

contentions which were put forward and that is that the plaintiff can recover on the basis of conversion for the removal of the logs if they had

possession thereof after they were cut; notwithstanding that the title to the tree vested in the Government and no action could be maintained on the

footing of ownership. An action in trespass would lie if there is an invasion of the right of ownership; in such an action the plaintiff must succeed on

the strength of his title and not on the weaknesses of that of his adversary. An action in conversion would lie if there is invasion of the right of

possession and in such an action the plaintiff is entitled to succeed against all persons excepting the true owner. It is no defence to that action that

the plaintiff had no title to the property because possession is title as against all persons excepting the true owner and the plea of "jus tertii" which is

open in an action based upon title such as trespass is no defence to an action based on possession such as conversion.

In -- "Glenwood Lumber Co. v. Phillips", (1904) A. C. 405 (K), the facts were that on 20-1-1899 the Government granted a lease and a licence

to the respondent to cut down trees in a specified area. Before that date the appellants had applied for a similar licence for that area and had cut

down trees in the belief that it would be granted to them. The trees so cut were lying on the ground within the area comprised in the lease and were

actually removed after 23-1-1899. By that date the respondent had obtained the lease and the licence, and was in possession of the lands. In an

action by him for damages for conversion the appellants pleaded that as the trees had been cut prior to 20-1-1899 on which date only the lease

had been granted to the respondent, the latter had no title to the logs and that accordingly he had no right to maintain the action. In rejecting this

contention Lord Davey observed:

The action was in substance for trespassing on the respondent's lands and for detinue of the logs removed from his lands after 20-1-1899.. It

was then said that at any rate the logs were, as between the respondent & the Crown, the property of the Crown. The answer to this argument is

that the appellants were wrongdoers in every step of their proceedings. There is not a hint in either the pleadings or the evidence of any title in the

appellants to cut the trees..... The appellants were wrongdoers in entering on the lands of the respondent for the purpose of removing the logs,

and also in removing the logs, which were certainly not their property.

The respondent, on the other hand, was, in their Lordships' opinion lessee and

occupier of the lands, and, "as such, had lawful possession of the logs which were on the land." It is a well-established principle in English law that possession is good against a wrong-doer, & the latter cannot set up a "jus tertii" unless he claims under it. This question has been exhaustively discussed by the present Master of the Rolls in the recent case of "the Winkfield, In re. (1902) P. 42 (L)". In -- "Jeffries v. Great Western Railway CO.", (1856) 5 El. & Bl. 802 (M Lord Campbell is reported to have said: "'I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him having no title in himself is a wrong doer, and cannot defend himself by showing that there was title in some third person, for against a wrong doer possession is title."

The Master of the Rolls, after quoting this passage, continues "'Therefore it is not open to the defendant, being a wrong-doer, to inquire into the nature of limitation of the possessor's right, and unless it is competent for him to do so, the question of his relation to, or liability towards, the true owner cannot come into the discussion at all, and therefore, as between those two parties, full damages have to be paid without any further inquiry.'" Their Lordships do not consider it necessary to refer at any greater length to the reasoning and authorities by which the Master of ,the Rolls supports this conclusion and are content to express their entire concurrence in it.

12. These principles were reaffirmed in --"Eastern Construction Co. Ltd. v. National Trust " Co. Ltd.", (1914) A. C. 197 (N). There, two contractors. Miller and Dickson acting on behalf of the appellants cut down timber in an area which had been leased by the Government to the respondents and removed the logs. The ownership of those trees had not vested in the lessees but continued in the Government, who subsequently consented to the appropriation of the logs by the appellants on payment of the usual charges. Thereafter the lessees sued for damages on the - footing that even if they had no title to the trees they had possession of the logs after the trees had been felled and thrown on the land and that entitled them to sue in conversion. The Privy Council while affirming such a right in the plaintiffs held that it was subject to the limitation that it could not be set up against the owner of the goods and as the Government to whom

the logs belonged had consented to the appropriation thereof by the appellants on receipt of their dues; the action was not maintainable. The following observations of Lord Atkinson may be quoted:

No doubt in that position of things, if nothing more had occurred, they would have been entitled to have recovered from Miller and Dick-son, and

possibly from the Construction company the full value of the timber felled, as well as any special damage they might themselves have sustained by

reason of being deprived of the possession of the felled trees, not because they had in truth and fact any proprietary right in, or title to, the property

in the trees or in the ties into which they were manufactured, but because, to use the words of Lord Campbell in -- "(1856) 5 El. & Bl. 802 (M)",

as "against a wrong-doer possession is title". That is no new doctrine. It was decided in 1721 in -- "Armory v. Delamirie", (1721) 1 Str. 505 (O);

""that the finder of a jewel though he does not by such finding acquire an absolute property or ownership yet he has such a property as will enable

him to keep it against all but the rightful owner, and consequently may maintain trover." That principle was affirmed as applicable to a bailee by the

case of -- "1902 P. 42 (LX. Both this case and the case of --"(1856) 5 El. & Bl. 802 (M)", were approved of by Lord Davey in giving the

judgment of the Judicial Committee of the Privy Council in -- "(1904) AC 405 (K)" and it must be now taken as conclusively established.

13. Thus if the logs, after they were cut, could" be held to have passed in the possession of the District Board the removal thereof by the

defendants would be actionable at their instance. It is argued by Mr. D. Ramaswaini Aiyangar that the position of the District Board with reference

to the public street is not analogous to that of lessees who obtained possession of the lands in --"(1904) AC 405 (K)" and that, therefore, they

could not be said to be legally in possession of the moveables which may be found on the street. I am unable to agree. The street vests in the

District Board; they have exclusive control over it and they have an obligation to maintain it free from obstruction for user by the public. Any user

by the public on the road other than passing and re-passing over it, would be trespass in respect of which the Board has a right to take action.

Vide the observations of Benson J. in --25 Mad 635 (F)", already quoted. If in fact the District Board had removed the logs while they were on

the street they would be entitled to hold them as against the defendants and against all persons except the Government. It must, therefore, be held that the plaintiff had sufficient possession to maintain an action in conversion.

14. It was next contended that there was no proof that the logs had passed into the possession of the District Board and that, therefore, the

decision in -- "(1904) AC 405 (K)", was not applicable. But in that case what all was found was that the logs were stored on the land which had

been leased to the respondent. It would therefore be sufficient for the plaintiff to prove that the logs had been thrown on the streets after they were

severed. The respondents contended that there is no such evidence while the petitioner relies on the allegation in the plaint that the logs had been

removed by the defendants and on the evidence of D. w. 1 that the? were removed in carts. It is contended that, that shows that the logs must

have been stored on the street before they were removed. The respondent replies that this aspect of the matter was not put forward at any stage of

the proceedings and that at the least defendants are entitled to an opportunity to adduce evidence on that point. As neither side appears to have

had a correct appreciation of the true legal position I think it is desirable to remand the case with liberty to both the parties to adduce evidence only

on the question of possession of the logs after they were cut and before they were removed. On the question of the value of the tree cut also the

finding of the lower Court is cryptic and I consider that the Court below should on the existing materials record a fresh finding thereon. The decree

, of the lower Court is accordingly set aside and the suit remanded for disposal on the two points mentioned above. Costs of this revision petition .

will abide the result.

15. Before concluding I should draw the attention of the Legislature to the unsatisfactory state of the law relating to trees of spontaneous growth

standing on public streets. It would appear to be desirable that Section 60, Local Boards Act and Section 61, District Municipalities Act should be

amended on the lines of Section 203, Madras City Municipalities Act so as to vest trees not held in private ownership in the Local authority.