

(1926) 08 MAD CK 0062
In the Madras High Court

Gogineni Gopayya and Others

APPELLANT

Vs

Manikonda Sobhanadri

RESPONDENT

Date of Decision : 19-08-1926

Acts Referred:

Citation : AIR 1927 Mad 188 : (1926) 24 LW 839

Hon'ble Judges : Jackson, J

Bench : Division Bench

Judgement

Jackson, J.—The petitioners seek to revise the order of the Subordinate Judge, Bezwada, in M. A. No. 12 of 1926 dismissing their appeal against the order of the District Munsif of Nuzvid in C. M. P. No. 660 of 1926, by which they have been ordered to remove earth and restore bunds upon their lands so as to allow the counter-petitioner to take water to his land by right of the easement which he claims.

2. The counter-petitioner is claiming this easement both by prescription and as of necessity. There is a channel supplying his land from the main irrigation channel and the Munsif finds that he has also taken water from the channel now in dispute and he also finds that the balance of convenience is in the counter-petitioners' favour. The learned Subordinate Judge remarks that the only question which needs consideration in a matter like this, is whether the plaintiff has shown that the balance of convenience is on his side and it is quite inopportune at this stage that the Court should try to determine the nature of the right claimed by the plaintiff, whether it is an easement by prescription or an easement of necessity; it is inadvisable that the Court should address itself to any of the matters which are in issue between the parties to the suit.

3. The lower Courts are mistaken in thinking that the balance of convenience is the only consideration. Probably in the majority of cases in this Presidency, where a man fills in a channel, the advantage he gains by such addition to his arable land is not commensurate with the disadvantage he causes to any neighbour who has been taking water from the channel. But that is not by itself

enough to justify the Court in issuing a mandatory injunction. The neighbour who feels himself aggrieved must show a fairly colourable right to the water before the Court can act"; and the Court cannot in terms decline to address itself to any of the issues between the parties to the suit.

4. The channel in dispute appears from the survey plan originally to have been a drainage channel flowing from west to east past the counter-petitioner's lands which at the time of the survey was dry. Whether he is now claiming by prescription or of necessity, the counter-petitioner must clearly show when his land became wet, and that material fact has not been proved. In these proceedings he relies upon the so-called admission of the petitioner that when the zamindar sold the lands, the main supply channel had been cut; therefore it is argued that the land must have been wet before the transfer and therefore there must be an easement of necessity. But the admission must be taken as a whole:

the old channel became useless by the time the zamindar sold the lands. By that time, the main channel and the branch channels had come into existence.

5. If so, there could be no question of an easement of necessity and apart from this statement on the Commissioner's report it is prima facie difficult to see how if the main supply to the counter-petitioner's field is direct from the irrigation channel he can say that this minor drainage channel is, or ever has been necessary for his enjoyment. In times of abundance there would be the main channel, and in times of scarcity it has yet to be shown that the drainage channel will continue as a subsidiary source after the main channel has ceased to flow. The learned Subordinate Judge seems to apprehend this difficulty in his fourth paragraph but decides to overlook it because the status quo ante must be maintained. It is often a predominant necessity to maintain the status quo at the time of the institution of the suit. But there is not the same justification for carrying the principle back to some period anterior to the suit as the Subordinate Judge has done. As a matter of fact it is the present injunction which is disturbing the status quo.

6. The District Munsif was moved under Order 39, Rule 1, CPC and apparently acted under that rule, which certainly gives him no jurisdiction; but apart from the question of the appropriate provision under which he could act, I must find that both he and the Subordinate Judge assumed jurisdiction in this matter without any judicial inquiry into the facts which would alone give them jurisdiction. An injunction cannot be passed merely on a balance of convenience before the Court is satisfied that on the facts before it, there is a probability that the plaintiff is entitled to relief. I do not find that such probability has been established and allow this petition with costs. The injunction order is cancelled. Costs to petitioners throughout.