
(1991) 12 AP CK 0004

In the Andhra Pradesh High Court

Case No : Second Appeal No. 560 of 1988

Josyula Hanuma Venkata Rao

APPELLANT

Vs

Nandam Subbarayudu and Others

RESPONDENT

Date of Decision : 03-12-1991

Acts Referred:

Andhra Pradesh Gram Panchayats Act, 1964 — Section 2(27)
Civil Procedure Code, 1908 (CPC) — Section 100, 91

Citation : (1992) 3 ALT 375

Hon'ble Judges : N.D. Patnaik, J

Bench : Single Bench

Advocate : V.S.R. Anjaneyulu, for the Appellant; V. Venkateswara Rao, for the Respondent

Final Decision : Allowed

Judgement

N.D. Patnaik, J.—This appeal is filed by the plaintiff in O.S. 530/1976 in the court of District Munsif, Tanuku. The plaintiff filed the suit against 14 defendants for a mandatory injunction directing the defendants 1 to 13 to remove unauthorised construction of walls etc. on the road margin in Lingala street in Penugonda village adjacent to the northern side of the plaintiff's house and for costs of the suit.

2. The plaintiff's case is that in the road margin between his compound wall and the road there is a space of about 3 yards width which is road margin and defendants 1 to 13 have constructed a building on the road margin with the avowed object of installing a deity in spite of the plaintiff's objection that it will interfere with the access to the street. The defendants 1 to 9 and 13 contended that the Mandapam was constructed in 1968 and the deity has to be installed and walls are being constructed to prevent its exposure to Sun and rain but the plaintiff himself encroached into the road margin and constructed a pial and opened a doorway and he has no legal right to occupy the road margin. They also contended that the temple is not causing any obstruction to the plaintiff to

reach this street through this new doorway and by enclosing the temple with walls no loss or inconvenience is caused to the plaintiff. Defendants 10 and 11 contended that they are in no way interested and they are not necessary parties. The 14th defendant i.e. Gram Panchayat contended that it is not a proper or necessary party.

3. The trial court dismissed the suit on two grounds i.e., though the Mandapam was constructed as long as in 1968 the plaintiff kept quiet for a period of about 8 years and secondly the plaintiff himself having encroached into the Panchayat site by constructing pials is not entitled to seek for discretionary relief of mandatory injunction. On appeal preferred by the plaintiff i.e., A.S. 5/1980 the learned Appellate Judge also agreed with the findings of the trial court that the person who has allowed the nuisance to continue for 10 long years is not entitled to contend that the above construction is infringing his right and that the plaintiff who constructed pials in the road margin cannot complain that the defendants are encroaching in their part of the same site and so he has not come to the court with clean hands and hence the plaintiff is not entitled to claim the relief of mandatory injunction. This appeal is preferred against the said judgment.

4. The learned counsel for the appellant (plaintiff) contended that since the construction made by the defendants is made in the road margin, which is part of the public street, the defendants cannot make the construction. They cannot also contend that the space which is left over is sufficient for the access of the plaintiff from his house to the public road and that no obstruction is caused. My attention has been drawn to the report filed by the Commissioner who has been appointed by the trial court and the plan attached thereto. According to the plan the construction made by the defendants i.e., Mandiram along with the walls is in between the plaintiff's compound wall and Lingala Street. Likewise, the pials constructed by the plaintiff are also in between his compound wall and the road and Lingala street. The definition of public Road in Section 2(27) of A.P. Gram Panchayats Act, 1964 reads:

"Public road" means any street, road, square, court, alley, passage, cart-track, foot path or riding path, over which the public have a right of way, whether a thorough-fare or not, and includes-

(a)

(b)

(c) the drains attached to any such road, public bridge or causeway, and the land, whether covered or not, by any pavement, veranda or other structure, which lies on either side of the roadway up to the boundaries of the adjacent property whether that property is private property or property belonging to a local authority, or the State or Central Government."

5. The learned counsel for the appellant-plaintiff therefore contended that the site in between the compound wall and Lingala street also comes within the

definition of road and so nobody has got any right to make any construction therein. The learned counsel for the contesting respondents contended that the portion where Mandapam is constructed by the defendants belongs to them and not to the Gram Panchayat and that the dispute relates only to the construction of walls.

6. In order to appreciate that contention it has become necessary to go through the pleadings. In para 3 of the plaint the plaintiff alleged that there is a road to the north of his house and in the road margin in between his compound wall and the road there is a space of about 3 yards which is road margin. He, further, alleged that defendants 1 to 13 high handedly began to construct a building in the road margin. His prayer in para 6(a) of the plaint is to grant a mandatory injunction directing the defendants 1 to 3 to remove the illegal construction of walls etc. on the road margin of Lingala street. There is also a schedule attached to the plaint which described the suit property. From a reading of these averments, the learned counsel for the appellant contended that the entire space between plaintiff's compound wall and the Lingala street is road margin and the construction made by the defendants is in the said road margin. The width of the road margin is given approximately as 3 yards but it may be more or less. Though, the learned counsel for the contesting respondents contended that the Mandapam had been constructed in the site of the defendants, there is no specific averment to that effect in the written statement. What all they stated is that a temple came to be located in the Lingala street about 60 or 70 years ago and there used to be several Lingams scattered in the street itself, but in the year 1968 the Mandapam was constructed. They further allege about the encroachment made by the plaintiff. A reading of the judgment of the trial court as well as the lower appellate court would also show that there was no dispute regarding the fact that the Mandapam was constructed in the space belonging to the Panchayat in between plaintiff's house and the Lingala street. Therefore, in the second appeal it is now not open to contend that mandapam was constructed in the site belonging to the defendants. If the site in which construction is made is in between the plaintiff's house and the road it comes within the definition of public road as defined in Section 2(27) of the A.P. Gram Panchayats Act. In *S. Someswararao v. S. Tirupatamma*, 1988 (2) Law Summary 223 a Division Bench of this Court has held that "no person can be allowed to occupy a portion of a public road, a highway, or even a public pathway and argue that even after his encroachment there is sufficient space left for public to pass by. He cannot be the judge of the requirements of the public, nor can he decide for himself what extent must be left for public use and what extent must be occupied by him". On difference of opinion between Amareswari, J. and Upendralal Waghray, J., the matter was referred to Jeevan Reddy, J. (as he then was). The learned Judge referred to the decision of a Division Bench of this Court in *Movva Butchamma Vs. Movva Venkateswararao and Others*, and the decision of the Supreme Court in *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, and agreed with the view taken by Upendralal Waghray, J. This decision was followed

by a learned single Judge of this Court in *K. Abdul Malik v. D. Shama Vali* 1989 (2) ALT 340. Therefore, it is quite clear that a person cannot make any construction by making any encroachment in the public street and the mandatory injunction can be granted directing the demolition of the said construction.

7. The lower Court has referred to the decision of a Division Bench of this Court in *Neti Gopalakrishna Gokhale v. Brahmanandam Narasimham* 1957 (2) An.W.R. 546 in which it is stated "The law vis-a-vis public nuisance has been firmly established. The public and every member thereof has a right to use the entire width of a public highway without obstruction. Any person or body of persons or even public body cannot interfere with that right unless statutorily or otherwise legally empowered to do so. Such an obstruction without any averment of special damage could be removed by following the procedure prescribed u/s 91, Civil Procedure Code. But an individual cannot maintain a suit to remove it unless by reason of such obstruction special damage of a substantial character has been caused to him or to his premises". It is further observed therein that "when a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right and makes no objection while the act is in progress he loses the remedy by injunction which he would otherwise have." As regards the latter portion i.e., a person keeping quiet for a long time, the learned counsel for the appellant has pointed out that the facts of the reported case would show that the plaintiff in that case was actively participating in the joint endeavours and consciously stood by it for a period of about 10 years during the gradual progress of the institution. The somersault in his attitude is prompted more by his estranged feelings towards defendants 1 and 2 than by any attempt on his part to redress an otherwise innocuous act suddenly developing into an act threatening damage to his person and property. In view of the above circumstances, it is held that the plaintiff had been active participant in the encroachment and stood by for a long period of time and has so acquiesced in the act and is so guilty of laches that he would not be entitled to any equitable relief. As regards the other portion of the judgment that unless the plaintiff proves special damages he is not entitled to ask for mandatory injunction without following the procedure u/s 91 C.P.C., the learned counsel for the appellant has pointed out that the said judgment is not good law in view of the later judgments and the same was not followed. He has referred to the decision of the Supreme Court in *Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj*, in which it is stated that "the Municipality could not put up the structures which it intended to erect on the vacant site as it could not be said that they were necessary for the maintenance or user of the road as a public highway. The said acts were unauthorised and the plaintiff, who was the owner of the soil, would certainly be entitled to ask for an injunction restraining the Municipality from acting in excess of its rights. But the plaintiff could not ask for possession of any part of the public pathway, as it continued to vest in the Municipality". In *Butchamma v. Venkateswarao* (2 supra) a Division Bench of this Court held that "The right of

the public to pass and repass extends over every inch of the street and the defendant cannot in any manner restrict the right and compel the plaintiff to confine herself to a part of the street of the choice of the defendant. The plaintiff is clearly entitled to the mandatory injunction for removal of obstruction and the permanent injunction granted by the lower courts cannot have its full effect unless the mandatory injunction is granted too". A suit for removal of obstruction to a pathway was maintainable without proof of special damage to her when the pathway was a highway or a village pathway". In K. Sudarsan and Others Vs. The Commissioner, Corporation of Madras and Others, the learned Judge considered the decisions reported in Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj, and Movva Butchamma Vs. Movva Venkateswararao and Others, and several other decisions and has stated that the right of public to pass and repass extends over the whole width of the highway or the street, in other words, over every inch of the street. A member of the public cannot be compelled to confine himself to a part of the street at the choice of another. The owner of a property adjacent to a highway or a public street has got a right of access to such highway or street at any point of which his land actually touches it. His right of access from his premises to the highway and vice versa is a private right. However, his right to use such highway or public street as soon as he is "on the highway" or the public street becomes a public right". Therefore, I agree with the contention of the learned counsel for the plaintiff that if constructions are made in the road margin, the plaintiff who has got a right of access into the road can seek the relief of mandatory injunction for demolition of the constructions made by the defendants. No doubt the constructions made by the plaintiff are also encroachments in the said road margin. It is open to the Gram Panchayat which is 14th defendant or anybody else to take appropriate action against the plaintiff.

8. As regards the ground on which both the Courts have dismissed the suit as I have pointed out above in the case of 1957(2) An.W.R. 546 (5 supra) the plaintiff was an active participant in the said construction and therefore it was held that he cannot complain about the said construction. The second ground is that since the plaintiff has not come to the Court with clean hands inasmuch as he himself has made encroachment, he is not entitled to the discretionary relief of mandatory injunction. On this point the contention of the learned counsel for the appellant is that the plaintiff has been paying the encroachment tax to the Gram Panchayat and nobody issued any notice to him asking him to remove the construction. As I have stated above if the Gram Panchayat or anybody else takes action against him for removal of the construction appropriate direction may be given therein. But, on that ground the plaintiff cannot be deprived of the relief claimed by him.

9. In the result, the appeal is allowed and the judgments and decrees of both the courts are set aside. The suit is decreed for mandatory injunction directing defendants 1 to 13 to remove the constructions made in the road margin between the plaintiff's house and the Lingala street in Penugonda village. In the circumstances of the case, the parties are directed to bear their own costs.