

(1964) 09 MAD CK 0039
In the Madras High Court
Case No : Second Appeal No. 1906 of 1961

L. Damodaraswami Naidu	Vs	APPELLANT
S.T. Damodaraswami Naidu		RESPONDENT

Date of Decision : 24-09-1964

Acts Referred:

Easements Act, 1882 — Section 18, 24

Citation : (1966) ILR (Mad) 223

Hon'ble Judges : Natesan, J

Bench : Single Bench

Advocate : P.S. Balakrishna Ayyar and P.S. Ramachandran, for the Appellant; S. Mohan, for the Respondent

Judgement

Natesan, J.—The short question for decision in this second appeal is whether the Appellant who is the Plaintiff has a right to go over the

vacant space of the Defendant for the purpose of repairing and white washing the northern outer side of the Plaintiff's wall. The trial Court held that

the Plaintiff had such rights subject to certain limitations as to the time and extent so as not to inconvenience or cause hardship to the Defendant in

the enjoyment of his property. The learned Subordinate Judge on appeal held contra taking the view that he was bound by a Bench decision of this

Court in *Bhagavatula Subramanya Sastri v. Bhagavatula Lakshminarasimham* (1912) 16 I.C. 893 and must follow it in preference to *Subramania*

v. Pachaiyappa AIR 1956 Mad. 577 a decision of a single Judge of this Court.

2. The Plaintiff and Defendant are owners of adjoining properties, the Defendant being the owner of the northern property. The houses faced east

and between the houses of the Plaintiff and the Defendant there is a strip of vacant land. Normally there would have been no obstruction to the

Plaintiff having access to the northern side of his compound wall for repairing, over the space of the Defendant. But he brought opposition to this

course from the Defendant by his own act, namely his instituting the suit Original Suit No. 212 of 1956, on the file of the District Munsif's Court,

Coimbatore claiming title to the vacant space and a mandatory injunction for pulling down some construction which the Defendant had erected. It

is an admitted fact that the Plaintiff had been over this vacant space to repair his wall once about five years prior to this suit. The Defendant would

have it that it was by consent. Be it express consent or tacit acquiescence, so long as he is not inconvenienced and no rights are claimed, the

neighboring landowner generally does not object to such access for repairs. The wall in question was in the open and the right asserted by the

Plaintiff in this suit is the right of access over the available open space to repair and white wash the northern face of the wall periodically. The wall

is an ancient one and according to the Plaintiff has been in existence for over thirty years. The Defendant is a recent purchaser of his property

having purchased the same in 1949, and in his deposition states that he has no knowledge if the Plaintiff was white washing the wall before his

purchase. He admits that the Plaintiff has no other way except to enter his property and white wash the northern wall. The Plaintiff in his deposition

has stated that his house is south of the Defendant and has been in existence for over 30 years. It is elicited from him in cross-examination that till

the Defendant's prior owner Chinni Thayammal constructed a wall in the open space, the Plaintiff was repairing the wall under the impression that

he had title to the open space. The only inconvenience pleaded by the Defendant is that he intended putting up a construction and, if the Plaintiff is

given the right of access, then he could not put up any construction. The apprehension is imaginary as the Plaintiff cannot require the Defendant to

keep his land always as an open space.

3. In *Subramania v. Pachaiyappa* AIR 1956 Mad. 577, 578 *Krishnaswami Nayddu J.*, observes :

In the present case it cannot be said that the wall in question is a party wall in that sense. But it is common knowledge that the boundary walls of

houses not capable of being repaired from the owner's side are generally repaired by entering into the adjoining owner's house and no reasonable

neighbour would ever object to repairing such walls by gaining access into his house as he would be in the same position with his other neighbours

with regard to repairing of his boundary walls.

4. The argument in that case was that the right to enter the Defendant premises to repair the wall could only be acquired by prescription as an

easement and that the evidence in the case was not sufficient to establish that the Plaintiff had acquired that right. The evidence in the case showed

only, that 25 years previously the Plaintiff's men had been over the Defendant's property to repair the wall in question. After referring to the

decision in *Bhagavatula Subramanya Sastri v. Bhagavatula Lakshminarasimham* (1912) 16 I.C. 893 the learned Judge goes to the consideration of

the case thus:

The Plaintiff has been declared to be entitled to the wall in dispute by the lower appellate Court with which finding I am unable to see any ground

for interference and the only question is whether the Plaintiff in order to repair his wall standing on the Defendant's side has a right to go to the

Defendant's side to carry out repairs or plastering and whether such a right has necessarily to be acquired by a prescription or whether such an

easement could be considered as a, right attached to the ownership of the property.

5. The learned Judge has taken the view that there was no need to establish any acquisition of the right in question by prescription as repairs to

such walls will be carried out only periodically as and when there was necessity, that such a right cannot be expected to be acquired by

prescription and since such a right to repair the northern wall is being conceded by neighbours in towns, it should be considered as a customary

easement u/s 18 of the Easements Act, a right which could be acquired only by virtue of a local custom. Holding that though there was no evidence

in the case of such a local custom, the Plaintiff could not be denied the right to carry out the repairs to his wall by entering into the Defendant's

property as such a right is being recognized and permitted in towns where houses are situated adjoining each other and such rights being exercised

must be deemed to arise in pursuance of a local custom, the learned Judge held that the Plaintiff in that case should be held to have such a

customary easement. The Plaintiff's right was declared subject to restrictions in

its exercise as not to cause inconvenience to the Defendant. In another unreported case in *Erathayammal v. Subbu Naicker* (Second Appeal No. 796 of 1953) the same learned Judge has considered the matter again in extenso and viewed this right of access for repairs as one coming within the term urban servitudes. Once again the learned Judge discussed the scope of the division Bench decision in *Bhagavatula Subramanya Sastri v. (sic) Lakshminarasimham* (1912) 16 I.C. 893 and expressed as follows his view of the matter:

It appears to me that irrespective of whether the right to project eaves over the neighbours property is clear or not by the mere fact that a boundary wall of a house is exposed to sun and rain, the owner of that wall is entitled to have it protected and for that purpose the neighbour is liable to give access to the owner of that wall for the purpose of repairing and while washing it. The neighbour is entitled to a similar right as against that person or his other neighbour. This is a well recognized right of owners of properties in urban areas and I should consider that this is one of the miscellaneous easements which has been recognized and comes within the term of "Urban servitudes".

6. The origin of servitudes, it has been stated, is as ancient as that of property of which they are a modification. Limitation on the right in property,

referred to as pradeal servitudes are stated to have originated from the disposition of nature, want of society and the agreements of individuals.

Pradeal servitudes have been classified into urban and rustic servitudes--not now of much significance--the former including all servitudes relating

to buildings wherever situated, the latter relating to land uncovered by buildings whether situated in town or country. The rustic servitudes are

stated to comprise rights of way and water courses and rights to drive cattle to water and the urban servitudes comprehended all those which

belonged to a building as eaves droppings support of beams, right of light, etc.

7. Now in *Bhagavatula Subramanya Sastri v. Bhagavatula Lakshminarasimham* (1912) 16 I.C. 893 relied on by the lower Court the right to repair

was considered specifically with reference to three walls. The first wall W1 was held to have fallen to the share of the Plaintiff at a partition and as

he was undoubtedly entitled under the partition instrument to enjoy the wall, the repair of the wall was considered reasonably necessary for its

enjoyment and the right to go to the Defendant's side of the wall to repair it was viewed as a necessary easement. The Plaintiff however was held

not entitled to go over to the Defendant's roof for the purpose. Another wall W4 supported the Plaintiff's eaves which projected over the

Defendant's house. The learned Judges considered that the wall was necessary to support the eaves and that in order that the easement with

regard to the projection of the eaves may be enjoyed it was necessary that the walls on which the eaves rest should be repaired. As it was not

reasonably possible to repair the wall except by going on the Defendant's land, they upheld the Plaintiff's claim providing limits on the exercise of

the rights. Then they took up for consideration a wall which had been erected within two years prior to suit. With reference to this the learned

Judges observed at page 894:

There is no evidence of any contract by the Defendant permitting the Plaintiff to go to the Defendant's side of the wall to repair it in order that his

eaves might be protected. We may note that it is rather confusing to speak of acquiescence a source of easement. Unless the acquiescence

amounts to an implied contract granting the easement, any omission to object to the enjoyment of the easement will not give the dominant owner

any right except in cases where the enjoyment has gone on for the prescriptive period and an easement by prescription can be claimed having

regard to the nature of the right. There is absolutely no evidence of any customary right to support the Plaintiff's claim with regard to W3.

8. It may be noticed that the learned Judges have recognized the possibility of acquisition of a right to an easement of access for repairs by

acquiescence when it would amount to an implied contract granting the easement. In Gale on Easement, twelfth edition at page 55 it is observed

that there are.

numerous cases in which an agreement to grant an easement or some other right has boon, inferred--or, more correctly has been imputed to the

person who is in a position to make the grant, on account of some action or inaction on his part.

These cases rest on the equitable doctrine of acquiescence, but they may be referred to, for the purpose of classification, as imputed or

constructive grants.

9. The wall in question in this case is an ancient wall. It has been built at the extreme northern edge of the Plaintiff's property. It is exposed and could be maintained only by periodical attention which necessarily requires going over the neighbour's open space. As no writing is required for the imposition of an easement, an implied grant by acquiescence to such course could be inferred in the circumstances. Necessarily and naturally the acquiescence would be subject to the limitation that the neighbour was not inconvenienced nor condemned for ever to keep the space open, and so the easement right recognized would be subject to those limitations.

10. It may be looked at from another angle. The owner of the wall by reason of its location also could in the circumstances be held to have

acquired a right of lateral support to that wall. Applying the reasoning of the learned Judges in *Bhagavatula Subramanya Sastri v. Bhagavatula*

Lakshminarasimham (1912) 16 I.C. 893 it could be said in this case that for any enjoyment of the right of easement of lateral support which the

Plaintiff had acquired to his wall the wall itself must be kept in good repair and as an accessory to that easement, it could be held that he may do

acts necessary to secure the full enjoyment of the easement right. Of course, there is a limitation in the exercise of such rights. Section 24 of the

Easements Act itself limits the exercise of accessory rights by providing that it must be done at such time and in such manner as, without detriment

to the dominant owner, to cause the servient owner as little inconvenience as possible. The mere convenience or whim and fancy of the dominant

owner is not the determining factor for the exercise of the accessory right. If the act proposed does not inconvenience or injure the servient owner,

there could be and normally would be no valid objection on his part. If the act proposed would cause substantial inconvenience to the servient

owner, then the question of justification on the part of the dominant owner would arise, when absolute necessity and not inconvenience would

alone provide the test. If the act is necessary for the enjoyment of the easement, the dominant owner in such cases has to suit his time and manner

to the reasonable convenience of the servient owner. The dominant owner should not increase the burden on the servient owner nor cause

unnecessary inconvenience and hardship to the servient owner. The time and manner of doing it must be such that the dominant owner, if he were

the servient owner and a reasonable man, would prefer to have it done.

11. As has been noticed above, the wall in question in this case is an open boundary wall and requiring periodical repairs like white-washing and

plastering for its due maintenance. It is an ancient wall and, according to the Plaintiff, it has been in existence for over thirty years. In my view, the

observations of the learned Judges with reference to the wall W3 in *Bhagavatula Subramanya Sastri v. Bhagavatula Lakshminarasimham* (1912)

16 I.C. 893 will not apply to the present ease as the wall in question there had been in existence for about, two years prior to suit and was referred

to as a new wall. No doubt Krishnaswami Nayudu J., in Second Appeal No. 796 of 1953 has observed that existence of the right does not

depend upon the age of the wall or the acquisition of the right by prescription but it is a right attached to the ownership of the wall itself. It is

unnecessary to consider this aspect of the matter in the present case and if it were I am bound by the decision of the division Bench even as

Krishnaswami Nayudu J., was.

12. My attention was drawn by the learned Counsel to a recent decision of Veeraswami J., in *Kamalammal v. Chakravarthy* ILR (1964) mad.

730. It was not necessary to discuss the question because the Court in that case was not called upon to decide whether this right of access was a

necessary easement that would attach to every wall. Therein referring to *Bhagavatula Subramanya Sastri v. Bhagavatula Lakshminarasimham*

(1912) 16 I.C. 893 the learned Judge has observed as follows:

In that case all that was held was that a house owner in order to repair his wall on his neighbour's side of the premises had the right to go to the

other side of the wall on the land of his neighbour, the right being in the nature of a necessary easement.

13. The question in the case before Veeraswami J., was a claim to access through a stair case inside the other party's house to repair a wall in the

first floor. This claim was denied pointing out that in *Bhagavatula Subramanya Sastri v. Bhagavatula Lakshminarasimham* (1912) 16 I.C. 893 it

was also held that the easement of access for repairs did not extend going over the neighbour's roof for the purpose. Whether the right of access

for repairs would be a necessary easement was not the subject of decision by Veeraswami J. In the view I take, and as the facts of the present

case differ from the facts of the decision in *Bhagavatula Subramanya Sastri v. Bhagavatula Lakshminarasimham* (1912) 16 I.C. 893. I prefer to

follow the decision of Krishnaswami Nayudu J., and hold that the Plaintiff in this case has the right he claims to go over the vacant space of the

Defendant to carry on repairs to the exposed northern wall. It may be rested as an urban servitude customarily enjoyed or on the facts of this case

as a grant implied from the existence of the wall for over twenty years at the very extremity of the property.

14. The trial Court while granting the decree has imposed limitations on the exercise of the right. The Court below has provided that the Plaintiff

should be allowed to exercise the right twice a year, once in January and once in June. I do not see any need for giving access twice during the

year for repairs. In my view as in *Bhagavatula Subramanya Sastri v. Bhagavatula Lakshminarasimham* (1912) 16 I.C. 893 it would be sufficient if

the Plaintiff is permitted to go on the Defendant's land for repairing the wall in question once a year. He must as provided by the trial Court give a

fortnight's notice in writing at the time when he intends to make the repairs. The repairs, as already provided should be between 9 a.m. and 5 p.m.

and shall not exceed four days in the year.

15. In the result, the decree of the learned Subordinate Judge is set aside and the decree of the trial Court is restored subject to the above

modification. In the circumstances of the case, I direct the parties to bear their own costs throughout.