
(1926) 08 MAD CK 0035
In the Madras High Court

Mannattil Krishnah Nair

APPELLANT

Vs

Sivaramakrishna Pattar and Others

RESPONDENT

Date of Decision : 02-08-1926

Acts Referred:

Citation : AIR 1927 Mad 73 : (1926) 24 LW 691

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—The plaintiffs' case is that they as inhabitants of the village of Parali have a customary right to graze cattle on a paramba

belonging to the 3rd defendant's sthanam to walk across it, to perform certain ceremonies at the foot of the "arasu" or peepul tree on it, to perform

pradakshanam round the tree and use the tank therein for bathing purposes and that the 1st defendant who obtained a melcharath in 1911

obstructed the plaintiffs from enjoying the customary right and, therefore, they are entitled to a permanent injunction restraining him from obstructing

them in the enjoyment of their customary right. The District Munsif held that the customary right was not satisfactorily made out and dismissed the

plaintiffs' suit. On appeal the Subordinate Judge found in favour of the plaintiffs and granted a permanent injunction restraining the 1st defendant

from interfering with the enjoyment of the customary right. The 1st defendant has preferred this second appeal.

2. There is evidence in record to show that a tank existed in 1854 when the paramba was demised on kanom by the sthanam. The kanomdar was

in enjoyment till 1915, when the 1st defendant who obtained a melcharath in 1911 obtained possession of the paramba. The suit was laid on 16th

December 1916. There is evidence that for about 60 or 70 years the villagers of Parali used the tank for bathing purposes. The question is whether the inhabitants of Parali have acquired the customary right claimed by them. The tank is admittedly an irrigation tank. The evidence on behalf of the plaintiffs is that the inhabitants of Parali generally bathe in a river close by, and when the water of the river is muddy some of the people use the tank for bathing purposes, and funeral ceremonies are sometimes performed under the peepul tree. Is this evidence sufficient to make out the customary right in favour of the plaintiffs? The acts of the villagers of Parali seem to be of too fugitive a character to establish a customary right in their favour. The facts on record are not sufficient to establish a valid custom. It must be reasonable and it must be definite or certain. From the evidence it appears that when the water of the river is muddy some people go and bathe in the tank and some others prefer to bathe in the river. It is contended for the appellant that all sorts of people have been bathing in the tank; but Mr. Ramachandra Aiyar for the respondent contends that it is only the people of the Parali village and visitors to the village make use of the tank. This shows the indefiniteness of the customary right claimed by the plaintiffs.

3. It is not disputed that a customary right to bathe in a tank can be acquired by the residents of a village. But, in order to establish a customary right, the evidence must be clear and the enjoyment must be as of right for a long number of years. In considering the evidence regard must be had to the habits and customs of the people. When the water of a river in which people generally bathe is too muddy they may go to a neighbouring tank for their bath and nobody thinks of objecting to such user especially when it is an irrigation tank and that user cannot be said to be as of right.

It is a well-known thing in Madras for neighbours to take water from a tap in a private compound. Nobody can assert that it is done as a matter of right. It is by an implied permission that the water is taken; and when people bathe in an irrigation tank nobody thinks of objecting to it, for there is no loss caused to anybody, nor is there interference with anybody's rights. According to the evidence in this case, whenever water was wanted for irrigation purposes water was let out of the tank by low-caste people and Brahmins performed Punyavachanam before bathing in it. There is the

circumstance noticed by the District Munsif, viz., the plaintiffs' own men, "were in possession of the paramba and everything in it as kanomdars

during the time during which enjoyment was"--and such enjoyment could therefore be traceable to implied permission. I think the facts of this case

come within the principle laid down by Ayling and Odgers, JJ., in *The Taluk Board, Dindigul v. Venkatramier A. I. R. 1924 Mad. 197.*

4. As regards the customary right to go round the peepul tree and to perform funeral ceremonies under it, I do not think the customary right can be

claimed. It is extremely doubtful whether by a few people going round a tree in a private compound they can acquire a right to do so on behalf of

the whole village. It is not suggested that all the inhabitants of the village were in the habit of going round the tree it was only a few people who

went round the tree and only a few people performed funeral ceremonies under the tree. In *the Superintending Engineer, Bezwada v.*

Ramakrishnayya [1920] 12 L. W. 193 it was held that the right of going round a tree or worshipping a tree which is supposed to be the abode of a

deity cannot be acquired by merely going round the tree or worshipping it.

5. There is one objection which is fatal to the plaintiff's case. Granting for argument's sake that the plaintiffs have acquired a customary right to

bathe in the plaint tank and go round the peepul tree, the question is have they acquired such a right as against the jenmi of the paramba? It is in

evidence that the paramba was demised on kanom under Ex. C. in 1854 and that the kanomdar was in possession till 1915. Section 16 of the

Easements Act applies to the case. The obstruction was within three years of the 1st defendant's obtaining possession of the property. The 1st

defendant does not claim through the kanomdar of 1854 but claims directly from the jenmi inasmuch as he has taken a melcharth in 1911 and

obtained possession in 1915. The question is: have the plaintiffs made out a title against the jenmi? Mr. Ramachandra Aiyar meets this objection by

saying that one of the anandravans was aware of the user and, therefore, the sthanam must be taken to have been cognizant of what was going on.

The fact that a junior member of a Malabar tarward is either a consenting party to or was cognizant of the use of the family property in a particular

way by strangers would not necessarily bind the family or the karnavan. The 3rd defendant was the sthani at the time of the suit.

6. He filed a written statement disputing the right of the plaintiffs. Mr. Nambisan, who appears for the 46th respondent (the jenmi), supports the appellant's case. In these circumstances can it be said that the owner of the land (that is the jenmi), is precluded from contesting the right of the plaintiffs? So long as the kanomdar was in possession, the jenmi-mortgagor could not have objected to the former allowing people to bathe in the tank or to go round the tree in the paramba as the mortgagor not being in possession could not interfere with the user of the land demised so long as it is not detrimental to his interests. Mr. Ramachandra Aiyar's contention is that prescriptive right can be acquired against the mortgagor in the case of mortgage property and, therefore, a right like this could be acquired against the owner of the property (the jenmi).

7. No doubt in the case of a usufructuary mortgage under certain circumstances a third person may acquire a prescriptive right both against the mortgagee as well as against the mortgagor. But where the act done by anybody is traceable to permission from the mortgagee, either express or implied, the mortgagor cannot interfere with the person doing the act. People by going and bathing in an irrigation tank do not necessarily do anything which would be detrimental to the interest of the mortgagor, and, therefore, the mortgagor is not bound to interfere with the doing of such act, for the mortgagee is entitled to use the water in any way he likes so long as he does not cause damage to the land; and even if he causes slight damage he is only bound to put the property in the state in which it was when it was demised to him.

8. In Malabar kanomdars are entitled to improve the property demised to them by digging tanks, planting trees or doing anything which would come within the definition of improvements. Whether the tank was dug by the owner or by the kanomdar it is immaterial to enquire in this case.

There is no evidence that the jenmi of the property acquiesced in the use of the tank for bathing purposes by the villagers of Parali as of right. I

hold that the plaintiffs have not acquired any prescriptive right which would avail against the jenmi and the 1st defendant who has obtained a mortgage from the jenmi is entitled to obstruct the plaintiffs from using the tank.

9. There is one other point. The Subordinate Judge has granted a decree in respect of the grazing right claimed by the plaintiffs. No issue was

raised on this point and the Subordinate Judge has not considered the evidence regarding it, and in the decretal portion of the judgment he has included the grazing of cattle without paying attention to the evidence in the case. Mr. Ramachandra Aiyar conceded that there is only one witness who speaks to it. In any case the plaintiffs are not entitled to have the right to graze their cattle in the paramba. In the result the appeal is allowed and the suit is dismissed with costs of 1st defendant throughout.