
(1931) 02 MAD CK 0021
In the Madras High Court

Municipal Council		APPELLANT
	Vs	
Palakkal Velayudha Menon		RESPONDENT

Date of Decision : 02-02-1931

Acts Referred:

Citation : AIR 1931 Mad 531

Hon'ble Judges : Anantakrishna Aiyar, J

Bench : Division Bench

Judgement

Anantakrishna Aiyar, J.—The plaintiff instituted the original suit for a perpetual injunction restraining the Municipal Council of Calicut from interfering with the thodu (channel) on the western side of the plaintiff's property.

2. The case of the plaintiff was that the channel was his and that he was entitled to do what he liked with the same, and that for the convenient enjoyment of his land which is on the east of the channel he (the plaintiff) constructed what has been described as a "gate" across the channel. The

Municipal Council having by its proceedings dated 12th January 1924 passed a resolution prejudicial to the rights of the plaintiff in the lawful

exercise of his legal ownership of the property, he instituted the original suit for the relief of injunction claimed by him. The case of the municipal

council in para 3 of the written statement was that the footpath running north to south just to the west of the channel in question as well as the

channel were public properties "and as such under the control of the Municipality. The learned District Munsif who tried the suit framed two issues

in the case; (1) whether the water channel in question belonged to the plaintiff and (2) whether the plaintiff is entitled to the injunction claimed. He

held that the site of the channel B belonged to the plaintiff and, whether the path just to the west of the channel be regarded as a public street or a

private street, he was of opinion that the channel in question should be taken to be the property of the municipality as part of the street. He

accordingly dismissed the plaintiff's suit. On appeal preferred by the plaintiff the learned Subordinate Judge concurred with the finding arrived at by

the trial Court on the question of the ownership of the site covered by the channel BB. He however, was of opinion that the lane or the path just to

the west of BB could not be held to be either a public or a private street. He reversed the decision of the trial Court and granted the injunction

prayed for in the plaint. The defendant has accordingly preferred the present second appeal.

3. On behalf of the appellant the learned advocate argued that the lower appellate Court was not justified, in the circumstances, in recording any

finding on the question whether the lane or the path to the west of BB was a public street or a private street within the definitions contained in the

District Municipalities Act and that the way in which the lower appellate Court disposed of this part of the case was not satisfactory. On the other

hand, the learned advocate for the plaintiff-respondent sought to support the decision of the lower appellate Court by drawing my attention to

various passages in its judgment where it is mentioned that the channel was really not a definite one and that the same was used by the plaintiff for

his convenience only. As I propose to ask the lower appellate Court to frame a fresh issue on the question whether the lane or the path called A in

the proceedings is a public street or a private street within the definition contained in the District Municipalities Act, I am anxious not to say

anything which might in any way cause any embarrassment to the lower appellate Court in the ultimate discussion and decision of that question.

4. I think that, having regard to the pleadings in the case, the trial Court ought to have framed an issue on the question whether the path A is a

public street or a private street. The lower appellate Court has, in my view, discussed that question without having an issue on that point raised

specifically and without giving a proper opportunity to the parties to let in evidence on the question. As I said, I am anxious not to say anything on

the merits of that question, and therefore I do not propose to go through the various passages, to which my attention was drawn by the learned

advocates for the parties, in the judgment of the lower appellate Court. But I must make one observation. In the memorandum of grounds of

second appeal, ground 9 reads as follows. ""The learned Judge erred in making a local inspection"". If it is intended to negative the jurisdiction of an

appellate Court to make local inspection, then it is clearly untenable. Judges both of Courts of first instance and Courts of appeal, who have to

appreciate evidence and understand its bearing properly, are entitled, in proper cases, to make local inspection with a view not only to save time

with reference to the arguments in the case but also to enable them to follow intelligently, and understand the evidence in the case, vide Order 18,

Rule 18, Civil P.C. On the other hand, as I understood the argument of the learned advocate for the respondent, he laid great emphasis on certain

observations occurring in the judgment of the lower appellate Court which seem to be based solely (it was said for the appellant) on the result of

that Court's inspection of the locality in question. I must say that, though it is open to Courts who have to record findings on questions of fact, and

though it may also be proper for the Court in proper cases to make local inspection with a view to understand and follow the evidence in the case

and to appreciate it properly, I am clear that it is not open to a Court either of first instance or of appeal to base the Court's findings of fact solely

on the result of its local inspection nor without giving opportunities to the parties to let in counter evidence and explain what is recorded as the

result of the inspection. I am anxious to say that I do not understand the judgment of the lower appellate Court in the present case to be in any way

solely based on the result of its inspection; but as both the learned advocates who argued the case before me made remarks on the subject of local

inspection by Courts, I thought I should mention my opinion on the matter.

5. As I said, having regard to the pleadings in the case, I think the lower appellate Court should now be called upon to frame a distinct issue on the

question whether the path A lying to the west of the channel in dispute BB is a public street or a private street within the definitions contained in the

District Municipalities Act. The lower appellate Court will with reference to its decision on that issue, also consider whether the channel in question

appertains to any such street and vests in the municipality, before finally deciding the rights of the parties. I allow the parties liberty to adduce fresh

evidence on the above questions. It must be distinctly understood that the finding arrived at by both the lower Courts, viz., that the site of the channel BB belongs to the plaintiff, has been accepted by me, and that question is no longer available for discussion in the further hearing of this case. I reverse the decision of the lower appellate Court and remand the appeal for disposal, in the light of the observations contained in this judgment. Costs of this second appeal will abide and follow the result.