

(1953) 03 MAD CK 0029
In the Madras High Court
Case No : A.A.O. No. 107 of 1952

Rahima Bi and Others

APPELLANT

Vs

Vellore Municipal Council

RESPONDENT

Date of Decision : 19-03-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2), 35
Easements Act, 1882 — Section 32

Citation : AIR 1954 Mad 495

Hon'ble Judges : Panchapakesa Ayyar, J

Bench : Single Bench

Advocate : K. Bhashyam and T.R. Srinivasan, for the Appellant; P. Satyanarayana Raju and N.S. Srinivasan, for the Respondent

Final Decision : Dismissed

Judgement

Panchapakesa Ayyar, J.—This civil miscellaneous appeal raises an interesting question, namely, whether lands vested by Government in a municipality or other local authority will continue to be in the ownership of the Government or will be, like lands assigned by Government to private persons, in the ownership of the municipality or local authority, and whether the rules of prescription regarding the easements, ownership etc. claimed over such lands by private persons will be the rules applicable to Government or only those applicable to the municipality and local authority, and whether in a suit, brought against the municipality for an injunction restraining them from putting up a wall on such land, vested in them, on the ground that it is affecting the rights of the plaintiffs (private parties) to light, air, access etc., the Government is a proper and necessary party and can be directed to be added under Order 1 Rule 10 C. P. C., as held by the lower appellate court.

2. The facts are simple. Certain land belonging to the Government was vested in the Vellore municipality for the purpose of having a city market.

As long ago as at least 1874, it is alleged that a portion of this land, so vested in the municipality, was sold to certain persons, including the

appellants' predecessors-in-title, and they put up certain shops and carried on their trade therein. The city market, at the spot we are now

concerned with, did not have a wall, and there was ample frontage for these shops; but, as the municipality found that thieves were increasing in the

city market and the market had to be protected by putting up a high wall, they wanted to put up a wall 8 ft. high, some 7 ft. 6 inches from the

frontage of these shops, including the drain 1 ft. 4 inches broad, thus only leaving a frontage of 6 ft. 2 inches.

The threatened wall, 8 ft. high, would naturally modify the old amenities, though whether any legal rights are affected thereby had to be determined.

Three suits were filed against the municipality for an Injunction against the erection of such a wall on the ground that the right of access and free

flow of light and air were interfered with by this high wall so short a distance away. The appellants filed O.S. No. 521 of 1948, objecting to the

putting up of a wall within 25 feet of their shops, premises Nos. 15 to 20-A in New Sitting Street Bazar. The two other suits filed were O. S. Nos.

17 and 24 of 1949. The wall was completed in those two cases. Only the foundations were laid in this case.

3. The issues framed in O. S. No. 521 of 1948, which was vigorously contested by the Municipality, were those :

1. Whether the plaintiffs have got a natural right to have free access, by carriages, lorries etc., to get inside their shops and to have free and

unobstructed light and air on all the sides, as alleged in paragraph 6 of the plaint;

2. Whether the plaintiffs have acquired the said rights by prescription for a period of 70 years;

3. Whether the plaintiffs are entitled to the said easements as claimed;

4. Whether the Government is a necessary party to the suit;

5. Whether the plaintiffs are entitled to the injunctions asked for;

6. To what relief, if any, are the parties entitled?

3a. Similar issues were framed in the other two suits.

4. The District Munsif, Vellore, after considering the evidence, found, on issue (1) in O. S. No. 521 of 1948, that the plaintiffs had a "natural right"

to have free access by carriages, lorries etc., to get inside their shops and to have free and unobstructed light and air on all the sides as claimed by

them. I may add here that formerly there was a gateway 9 ft. 3 inches broad, through which carts could go to these shops. But, now, vertical stone

slabs have been put across that gateway at intervals, making it possible only for men with head loads to get across, and not for carts and carriages.

On issue (2), the learned District Munsif found that the plaintiffs had not acquired any easementary right by prescription against the Government

(the municipality had stated in their written statement that Government were the owners) by enjoying that right for over 60 years, taut that the right

had been acquired as against the Municipality by adverse enjoyment for above 40 years. After noting that the plaintiffs did not admit the ownership

of Government, he added,

I therefore find that irrespective of the question whether the disputed property belongs to the Government or not, and whether the plaintiffs can

claim to have prescribed for the easementary rights as against the"" Government also, I hold that tile plaintiffs are entitled to the protection of the

easementary rights claimed, by them"".

relying on certain rulings allowing the protection of even unperfected easementary rights as against strangers and third parties. On issue 3, he found

that the plaintiffs were entitled to the easement as claimed. On issue 4, he found that the Government was not a necessary party to the suit,

necessary in the sense that the suit should fail for non-joinder of Government. He relied on two reasons for this view, the first being that the

Government was not stated to have urged any objections to the rights claimed by the plaintiffs. That, of course, could only be found when they

were added as a party, or called upon to state whether they had objections or not to the rights claimed, and nobody did this. The second reason

relied on by him was that the land in question was "vested" in the defendant municipality which was therefore, evidently in his view, the "owner",

and there was no need to add the Government which had thus parted with the ownership.

On issue 5, he found that "the plaintiffs were entitled to the injunctions asked

for. He directed the defendant to keep 12 ft. of land as frontage, when building the wall, and also an opening 12 ft. in width, for providing access for carts etc., to the shops. He allowed the defendant municipality to build the wall, if it liked, beyond the 12 ft. space he prescribed, leaving an opening of not less than 12 ft. in width for egress and ingress. ""He gave an injunction restraining the defendant from building the proposed 8 ft. wall opposite the plaintiffs" premises within 12 feet. No mandatory injunction to pull down the wall was required in this case, as only foundation had been laid and the construction had not progressed further, in the other two suits there was a mandatory injunction to pull down the wall (which was already constructed).

5. The plaintiffs in the other two suits were content with the decree of the trial court, and the walls constructed in front of their premises were pulled down, and the litigation so far as they were concerned stopped. But the plaintiffs in this suit wanted more than the 12 feet space the decree of the trial court gave them, and filed A. S. No. 83 of 1951 in the Subordinate Judge's court, Vellore, and the municipality filed a memo of cross-objections. The learned Subordinate Judge, by his judgment dated 8-12-1951, set aside the trial court's decree in O. 6. No. 521 of 1948 and remanded the suit back to the trial court for fresh disposal in the light of the observations made by him, and after making the Government a party after giving them the necessary notice u/s 80 C.P.C.

According to him, in view of the contentions of the municipality that the owner of the property in question, on which the wall was sought to be raised, was the Government and that the property was vested in them only for certain specific purposes, the Government ought to have been added as a party in order to finally and effectually and completely adjudicate upon and settle all the questions involved in the suit, and that, the trial court's observation that irrespective of whether the property belonged to the Government or not, the plaintiffs were entitled to claim the easementary rights could not be sustained. He also considered that a remand was necessary as the law, as laid down in -- "Colls v. Home and Colonial Stores", 1904 AC 179 (A) and in -- Mahaboob Khan Sahib Vs. B. Govindarajulu Naidu, , knows of no such undefined "natural rights" to light and air or right to passage and did not know of any "natural rights" apart

from rights of easement with reference to light and air or right of passage, and that this aspect of the matter had also not received proper consideration at the hands of the learned District Munsif. The plaintiffs have filed this civil miscellaneous appeal against that order of remand.

6. Mr. Bhashyam, for the plaintiffs, raised five main contentions. The first was that the land in dispute belonged to the municipality and was vested in it, and that the "Government had no more ownership in it". The learned counsel for the Municipality replied that u/s 2(2) of the Madras Land

Encroachment Act all public roads and streets vested in any local authority should, for purposes of that Act, be "deemed to be State property", and that the same principle would apply regarding the other properties "like this property vested in the local authority for the purpose of a market. I

do not want to give any opinion on the point, because it might embarrass the trial court which will have to give a finding as to whether the Government or the municipality is the owner of the disputed land.

It is, of course, obvious, and was not disputed by either side, that the municipality may own lands of its own, like any private Individual, and it can be proved by the plaintiffs, if they like, that this property is one such property. It is not proper for me here to decide on Section 2(2) and similar

provisions of law, especially as the learned counsel for the Municipality would not concede that this land was "dedicated as a public street", as contended by Mr. Bhashyam. If it had been dedicated as "a public street", certain things would have to be proved before the municipality could

divert any portion of that street for other purposes, and the sanction of the Government also would be required for disposing of the land no longer necessary for a public street (See Ss. 163 and 164 of the District Municipalities Act). The mere fact of a sale of a portion of this plot to the

predecessors-in-title of the plaintiffs, in 1874, as alleged by the plaintiffs, will not by itself prove that this entire plot is a "private" land owned by "the municipality".

It may be that the Government, the owner slept over their rights, then, as often, Governments do. That will only make them lose the rights over the

plots covered by their negligence the fact remains that the defendant asserted that the land belonged to the Government and that the Government

were proper and necessary parties, and it could not be said to be a frivolous plea

to be rejected on the face of it without any further scrutiny, in view of S. 2(2) of the Land Encroachment Act etc. A Bench of this court has held in -- "Basaweswaraswami v. The Bellary Municipal Council", AIR 1916 Mad 613 (C), that a private person can acquire a title to the site of a pial over a drain in a street vested in a municipality by adverse possession against the municipality for the prescriptive period; but that as against the Government he cannot get that right without proving adverse possession for more than 60 years. Sundara Aiyar J. remarked, So far, then, as the right of ownership is concerned, the plaintiff's right must be taken to be established as against the Municipality. As against the Government, however, the plaintiff has not succeeded in establishing a title, Mr. Bhashyam argued that in view of that ruling, it was not necessary for the plaintiffs to add the Government as a party, as they were content with obtaining an injunction against the municipality, and did not want an injunction against the Government. He also relied on the ruling in -- "Municipal Commissioners v. Sarangapani Mudaliar", 19 Mad 154 (D) and the ruling in -- Nathalal Ramdas Vaghji Vs. The Nadiad Municipality, , for the position that a right by prescription by adverse possession can be claimed against the municipality by such possession for a lesser period than required against the Government, and that the Government need not always be made a party to such proceedings. But these were all cases of possession of lands or pials by private parties for more than the prescribed period against the municipality. They were not cases where the private parties had no possession. There was no right of injunction claimed "against the municipality" in respect of "land of Government vested in it", and "not enjoyed before then by private parties".

In other words, no right of Government had been taken away in land owned by it, like having a wall constructed on it at its will and pleasure, by itself or by its vestee, the municipality, and there was also no assertion by the municipality in those cases that the Government was the owner and should be made a party as in this case. The ruling in -- "Krishnayya v. Senary Municipal Council", 15 Mad 292 (P), relied on by Mr. Bhashyam, cannot apply to a case like this. There, a private owner claimed the right to put a roof over a structure standing on his own land. It was not a case where any right was claimed on land owned by Government, or land not in

possession of the private party, and the question to be determined there was whether the land over which a structure stood, and the roof was sought to be put, was his private property or not. Besides, in the case of structures and roofs, only Municipal regulations are involved. I am of opinion that none of these rulings will apply to a case like this, where the defendant contended that he was not the owner and that the owner was the Government. The addition of the Government as a proper and necessary party was essential for the proper decision of the case, under Order 1 Rule 10(2) C. P. C. and was clearly within the powers of the lower appellate court, even if the defendant Municipality had not asked for it.

7. The next contention of Mr. Bhashyam was at the Government, even if it was "proper party" not "a necessary party" for the determination of "the questions involved in the suit" under Order 1 Rule 10(2) C. P. C. I cannot agree. If the Government is really the owner, the Government would be not only a proper party, but "a necessary party" for completely adjudicating upon and settling all the questions involved in the suit. It will be strange in a question touching the right of an owner is to be decided by a court without his presence before the court.

8. The next contention of Mr. Bhashyam was that there are rulings holding that as against "a stranger" who interferes with the enjoyment of an easement, though not perfected by adverse possession for the prescribed period, a suit might be brought. Reliance was placed on the ruling of a Pull Bench of this court in -- Chinatalapati Venkatanarasimharaju Vs. Suriseti Ramaswami and Another, . That will not be the case here. In that case, what was decided was that where a right has not been acquired by enjoyment for the prescriptive period, there is ordinarily no right of action for interference, but that "in a very exceptional case", where access to the plaintiff's land would otherwise be cut off altogether, a suit might be maintained against a stranger on the principle propounded in -- "Jeffries v. Williams", (1851) 5 Ex. 792 (H), but "not otherwise".

It was held, therefore, that an action could not, be maintained in ordinary circumstances, and could be maintained only, in very exceptional cases, if the obstruction to user will have the effect of substantially depriving a person of the enjoyment of his property. This is not a case of such exceptional nature. It is significant that the Full Bench in that case said nothing

about the addition of the owner as a proper or necessary party

where the suit had been brought against a stranger and the stranger contended that he was not a stranger but a man holding the land under the

owner with certain specific rights, as this defendant-municipality did. Again, the addition of the alleged owner was easy and feasible here, and

adverse possession for a day less than 60 years will not do, as against him.

9. The next contention of Mr. Bhashyam was that the defendant-municipality really let in no evidence in support of its contention that the

Government was the owner of the disputed land, in spite of an issue having been framed, viz., whether the Government is a necessary party to the

suit, the burden of which issue lay on it, and that, for ought we know, the Government might not be the owner. Of course, this was a defect. But

the trial court never drew the inference, from the lack of such specific evidence, that the Government was not the owner. It went on the wholly

unsustainable basis ""irrespective of the question whether the disputed property belongs to the Government"".

As the learned counsel for the Municipality said, the Municipality relied on Section 2(2) of the Land Encroachment Act and various sections of the

District Municipalities Act and various statutory provisions giving the Government the right to resume that land vested in the Municipality, the right

to control the use of the land vested in the municipality, etc., and the general usage of adding the Government as a party in suits involving lands

vested in the municipality. Still D.W. 1 could have spoken a word about it. This defect will be met by depriving the municipality of its costs, even if

this civil miscellaneous appeal is dismissed, as I am going to do. Costs are the supreme panacea for all procedural ills.

10. The next contention of Mr. Bhashyam was that it would be better to send back the appeal itself to the lower appellate court for arriving at a

finding as to whether the Government is the owner of the disputed land (or only the Municipality) after allowing both sides to let in evidence

regarding it instead of upholding the lower appellate court's order remanding the suit to the trial court, simply observing that, if the Government had

been brought on record as a party defendant frivolously, even compensatory costs could be awarded against the municipality. I am not willing to

send the appeal back to the lower appellate court, setting aside the remand.

There is the other point regarding the so-called "natural rights" of access, light and air, on which also a remand has been ordered, and Mr. Bhashyam was not able to convince me that the remand order was unjust or unnecessary regarding that point.

Of course, under the rulings, there is "no such natural right" to light, air or access. "Natural rights" ended with the "State of Nature". Of course, what was meant is the right of easement including the easement of necessity which, in popular parlance, will be referred to as "a natural right". So

the ruling in Mahaboob Khan Sahib Vs. B. Govindarajulu Naidu, ", relied on by the lower appellate court, will only affect the "basis", of the rights

claimed by the plaintiffs and the "quantum." Much of the substance remains, namely, to what extent such easementary right to light, air and access

can be claimed. Any way, it is obvious that the remand regarding that matter must stand. When that is so, it is unnecessary to leave this question

regarding the ownership of the Government to the lower appellate court, and it will be better to leave it to the trial court itself, at the remanded

hearing.

Of course, both sides will be free to let in evidence at the remanded hearing, regarding the ownership of the disputed land, by the Government or

the municipality, and the exact extent of the easementary right which can be claimed by the plaintiffs, under the law, to light, air and access. I need

hardly add that the mere addition of the Government as a party, as per the lower appellate court's directions, will not mean that the Government is

proved to be the owner of the suit land or is proved to be interested in the suit, and it will be open to the trial court, at the remanded hearing, to

hold that they are not really the owners of this land and so are not necessary parties.

11. In the end, therefore, the civil miscellaneous appeal deserves to be and is hereby dismissed, but, in the peculiar circumstances, without costs.

12. No leave.