

(1956) 01 MAD CK 0018
In the Madras High Court

Subramania Mudaliar

APPELLANT

Vs

Pachaiyappa Mudaliar

RESPONDENT

Date of Decision : 17-01-1956

Acts Referred:

Easements Act, 1882 — Section 18

Citation : AIR 1956 Mad 577 : (1956) 1 MLJ 570

Hon'ble Judges : Krishnaswami Nayudu, J

Bench : Division Bench

Judgement

Krishnaswami Nayudu, J.—The defendant is the appellant. The suit was for a declaration that the northern wall of the plaintiff's house

belonged to him exclusively and for an injunction restraining the defendant from preventing the plaintiff to enter into the defendant's premises for the

purpose of repairing that wall. The ownership of the wall was in dispute as the defendant contended that the wall in question belonged to him

exclusively. The finding of the lower appellate Court is that the plaintiff has established title to the wall and following the decision reported in

Bhagavathula Subramania Sastri v. Bhagavatula Lakshminarasimham 16 Ind.Cas. 893, the learned District Judge held that the plaintiff is entitled to

the right claimed by him to enter into the defendant's premises for repairing his wall but directed that he should be permitted to go in to the

defendant's land for repairing the wall in question once a year after giving one month's notice in writing of the time when he intends to make the

repairs and that the repairs must be made between the hours 9 A.M. and 5 P.M. and should not extend for more than one month. An injunction on

those terms was granted by the lower appellate Court to the plaintiff.

2. The defendant, appellant, now contends while questioning the correctness of the finding of the learned District Judge with regard to the

ownership of the wall in dispute, that such a right to enter into the defendant's 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 only evidence in the case

was that 25 years ago the plaintiff's men went into the defendant's property and repaired the wall in question. The decision in *Baghavaula*

Subramania Sastri v. Bhagavatula Lakshminarasimham 16 Ind.Cas. 893, may not be considered to have any direct application to the facts of the

present case. In that case a bench of this Court held that a house owner in order to repair his wall on his neighbour's side of the premises has the

right to go to the other side of the wall on the land of his neighbour and that such a right is in the nature of a necessary easement but that the

easement does not extend to going over the neighbour's roof for that purpose.

3. The learned Judges further held that a person has also a right of entry into his neighbour's house or land to protect his eaves which project over

the neighbour's house. There the plaintiff claimed the right to repair more than one wall by entering into the defendant's property and one of such

walls, W. 1 marked in the plan in that case, fell to the share of the plaintiff at a partition between the parties and it was held that the plaintiff was

undoubtedly entitled under the partition arrangement to enjoy that wall and that the repairing of the wall was necessary for its enjoyment. The

learned Judges, therefore, observed that they must look upon the right to go to the defendant's side of the wall to repair W. 1 as a necessary

easement and that the plastering of the wall on the defendant's side was necessary to keep it standing.

4. While dealing with another wall, W. 3, a newly constructed one by the plaintiff, it was observed that there was 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. In that view they

denied the right of the plaintiff to enter into the defendant's side and repair the wall he has newly put up. The learned Judges noted that

acquiescence on the part of the defendant would not amount to easement and that in the particular case there was no evidence of any customary

right to support the claim of the plaintiff with regard to wall, W. 3. In the present case there is no evidence to show that the wall in question is one

which fell to the share of the plaintiff, under a partition arrangement. It should, therefore, be considered whether there is an obligation on the part of

the defendant to permit the plaintiff or his workmen to enter into his property to repair his wall and to keep it in a good condition. 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 prescription or whether such an easement could be

considered as a right attached to the ownership of the property.

5. Peacock in his book, "" Law relating to Easements in British India "" (3rd edition) states that the term party-wall has been declared to be capable

of four different meanings. It has been found that where a party-wall has been declared to belong exclusively to one of the adjoining owners but is

subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements there is an obligation on the part of

the person who owns the wall to have it repaired and to keep it in good condition and that for that purpose access to the premises of the adjoining

owner is permissible. 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 owners' side are generally repaired by entering into the adjoining owner's

house and no reasonable neighbour would ever object to repairing of 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. I do not consider that to establish a right to enter into his

neighbour's property for repairing his own boundary or partition wall there is any need to acquire any prescriptive right, for repairs to such walls

would be carried out only periodically as and when there is necessity and therefore, such a right cannot be expected to be acquired by prescription

and since such a right to repair the boundary walls is being conceded by neighbours in towns it can only be considered as a customary easement

u/s 18 of the Easements Act and such a right could only be acquired by virtue of a local custom. Though in the present case there is no evidence

that there was such a local custom, the plaintiff cannot be denied the right to carry out repairs to his wall by entering into the defendant's property

as such a right is being recognised and permitted in towns where houses are situated adjoining each other and such right being exercised must be

deemed to arise in pursuance of a local custom. In the present case it should be held that the plaintiff had such a customary easement and in that

view I consider that the learned District Judge has come to the right conclusion in granting an injunction. However, I should observe that his right in

the nature of a customary easement must be exercised at such a time and in such a manner as not to cause any inconvenience to the defendant and

so the learned District Judge was perfectly justified in imposing certain conditions for carrying out the repairs of the wall on the defendant's side.

6. The result is the Second Appeal is dismissed but in the circumstances of the case there will be no order as to costs. No leave.