
(1941) 03 MAD CK 0014
In the Madras High Court

The Madura Municipality

APPELLANT

Vs

K. Nataraja Pillai and Another

RESPONDENT

Date of Decision : 03-03-1941

Acts Referred:

Citation : AIR 1941 Mad 650 : (1941) 53 LW 656 : (1941) 1 MLJ 768

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This Second Appeal arises out of a suit for an injunction to restrain the defendant Municipality from constructing a

public latrine behind the plaintiff's fruit stall in Madura. Both the lower Courts have concurrently found that the erection of a latrine would constitute

a nuisance to the plaintiff and held that the plaintiff was entitled to the relief claimed. Hence this appeal by the Municipality.

2. The finding that the erection of a latrine is a nuisance to the plaintiff is a finding of fact and cannot therefore be challenged in second appeal. The

contention of Mr. Rajah Aiyar who appeared for the appellant is that under the District Municipalities Act the Municipality is empowered to

construct public latrines in suitable places and Section 145 of that Act confers on them such a right and that no action can lie against them. The

question is whether this contention is tenable. Section 145 of the District Municipalities Act runs thus:

The Council, shall, as far as the funds at its disposal may admit, provide and maintain in proper and convenient places a sufficient number of public

latrines and shall cause the same to be daily cleansed and kept in proper order.

3. The principle that is adopted in construing statutes which empower public

bodies to do works of public utility is thus laid down by James, L.J.,
in *Vernon v. Vestry of St. James, Westminster* (1879) 16 Ch. D 449 at 466:

Prima facie nobody is authorised to commit a nuisance, and nobody is to be held so authorised under an Act of Parliament unless it appears from

express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance....

If private rights are to be interfered with, they must be interfered with by express legislation....

4. The question in that case was whether the erection of a public urinal was a nuisance and whether it was open to the Court to restrain the Vestry

of St. James, Westminster which was a body authorised under an Act of Parliament to provide and maintain urinals in places where they might

deem such accommodation to be required, from erecting it. An injunction was granted in that case on the ground that the erection of the urinal

would constitute a nuisance so grave and so serious that the neighbours who sought the relief were entitled to the injunction prayed for. Cotton,

L.J., discussed the question as to when a statute might be deemed to authorize a nuisance. He observed as follows:

...we must look to the whole of the section and see whether it justifies their erecting and maintaining a nuisance. It is impossible to say that" an

urinal or water-closet must necessarily be a nuisance. If it could be made out that such an erection, wherever placed and however guarded, must of

necessity be a nuisance, then it would be true that the Act of Parliament had authorised a nuisance, and the Court could not have interfered; but

common sense tells us that it cannot be said that no water-closet or urinal can possibly be erected without being a nuisance. Therefore the mere

fact that an urinal is authorised to be erected does not necessarily or by necessary implication give Parliamentary power to do it if it is a nuisance.

Power to erect these conveniences is no doubt given to them, but subject to this, that they must not exercise it in such away as to create a

nuisance, because the section contains nothing to exempt them from the general law which prevents any one from erecting or maintaining a

nuisance.

5. The language of the section in that case was that:

It shall be lawful for every Vestry and District Board to provide and maintain

urinals in situations where they deem such accommodation to be required.

6. Mr. Rajah Aiyar contended that the language of that section was different from the language of Section 145 of the District Municipalities Act.

But I do not think that by the mere use of the word "shall" it was intended that the Municipality was authorized to commit nuisance. It may be

noticed that in *London and Brighton Railway Co. v. Truman* (1885) 11 A.C. 45 a case which I shall discuss at length later, the expression used in

Section 82 of the Act, 1 Vict. C. 119 was "it shall be lawful". Their Lordships of the Privy Council in that case held that Section 82 authorized a

nuisance having regard to the scope of the Act. Thus from the mere use of the words "shall" and "it shall not be lawful" it does not necessarily

follow that the statute intended in the one case to authorize a nuisance and in the other, not. What was the intention of the Legislature in any

particular Act is a question of the construction of the Act as pointed out by Lord Blackburn in *Metropolitan Asylum District v. Hill* (1881) 6 A.C.

193 It cannot be contended as pointed out by Cotton, L. J., that the erection of a urinal wherever placed must of necessity be a nuisance. The fact

that an obligation was imposed upon the Municipality to provide and maintain public urinals in convenient places would not empower them to erect

urinals in such a way as to create a nuisance.

7. Mr. Rajah Aiyar, relied on a number of cases which do not lay down anything in conflict with this principle. One of the cases relied on by him

was *Metropolitan Asylum District v. Hill* (1881) 6 A.C. 193 and he laid stress on the observations of Lord Watson as to the distinction between

permissive and imperative statutes. But the learned Lord himself explains when a statute can be deemed to authorize a nuisance. At page 212 he

remarks thus:

.... I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has

authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where

the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it

being an obvious or established fact that nuisance must be the result. In the

latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the person seeking to justify the nuisance.

8. It is not contended before me that the inevitable result of carrying out the provisions of Section 145 will be always the creation of a nuisance.

Mr. Rajah Aiyar, also relied upon *Biddulph v. The Vestry of St. George, Hanover Square* (1863) 33 L.J. Rep. Ch. 411 but that case is

distinguishable, because the finding there was that from the evidence as it stood it did not appear to be certain or probable that the works intended

by the defendants in that case would create in point of law a nuisance. Considerable reliance was placed by Mr. Rajah Aiyar, on *Muhammad*

Mohidin Salt v. The Municipal Commissioners for the City of Madras I.L.R.(1901) Mad. 118 and particularly on certain observations of the

learned Chief Justice in that case. The finding in that case was that no actionable nuisance had been proved. Moore, J., rested his decision solely

on this ground and remarked thus:

Taking the evidence therefore as a whole, it must, in my opinion, be held that no nuisance whatever has been caused to the plaintiff by the burial

ground. There is some evidence that the burning ground is a source of nuisance to a certain extent to any one occupying the plaintiff's premises....

The plaintiff in order to be entitled to either an injunction or damages must show that the injury suffered by him is not merely nominal but real and

substantial. This he has in my opinion failed to prove.

9. The learned Chief Justice also found that no actionable nuisance had been proved but he went on to observe that even if it were proved, the

City Municipal Act afforded the defendant Municipality a statutory immunity from liability. In arriving at this conclusion he" relied upon the language

of Section 392 of the Act which empowered the Municipality to acquire lands for burial and burning grounds and on Section 458 of the Act which

gave a right of action to any person aggrieved by the a failure of the Commissioners to perform a duty imposed upon them by the Act. He also

relied on two other sections of the Act which gave compensation for the land acquired and also for the injury done in pursuance of the power

exercised under the Act. Distinguishing the case in *Metropolitan Asylum District v. Hill* (1881) 6 A.C. 193 the learned Chief Justice remarked thus:

The present case may also be distinguished on the ground that, the Legislature in the present case clearly contemplated and authorised some

interference with private rights of property since Section 392 empowers the Commissioners to acquire land compulsorily for the purpose of

burning grounds. In the hospital case the Statute gave no power to acquire land compulsorily.

(The italics are mine).

10. In some cases the power to acquire land was taken as an indication that the Legislature authorised interference with private rights. No such

power of acquisition is given under the District Municipalities Act for the purpose of erecting urinals. The learned Chief Justice was of the opinion

that the case before him was governed by *London and Brighton Railway Co. v. Truman* (1885) 11 A.C. 45. But on facts that case was

distinguishable from the case in *Muhammad Mohidin Sait v. The Municipal Commissioners for the City of Madras* I.L.R.(1901) Mad. 118 and the

observations of the learned Chief Justice which seem to indicate that it is not, if I may say so with respect, do not appear to be correct. In the case

in *London and Brighton Railway Co. v. Truman* (1885) 11 A.C. 45 the Railway company was authorised to acquire 50 acres of land for the

purpose of erecting cattle sheds. Section 82 of the Act authorised them to purchase lands in such places as shall be deemed eligible and that

section was construed by the Earl of Selborne thus:

...although no exact site or local limits may be prescribed by the terms of the authority for the acquisition of that land, yet being directly subsidiary

to the general traffic of the line, it follows from the very nature of the purposes authorised that it must be land contiguous to the railway or some of

its stations, the local situation of the whole line of railway being within certain limits of deviation defined by the Act.

(The italics are mine).

11. Having given this interpretation namely, that the acquisition contemplated was within a limited area, the learned Lord held that the statute

authorised the nuisance and he summed up his conclusion thus:

When acquired it must become part of the railway and its appurtenances in exactly the same way as if similar loading and unloading places had

been made upon lands taken when the railway was first made, whether by

compulsion or by agreement. It would be (as it seems to me)

inconsistent and unreasonable to suppose that the Legislature intended land so acquired, for such purposes, to be separated, as to the legal

conditions of its tenure and use for those purposes, from the rest of the undertaking with which it would have become incorporated, and as to

which the rule, that what is authorised is not actionable, is acknowledged to prevail.

12. Lord Halsbury also expressed himself to a similar effect:

...it seems hardly to admit of argument that the statute intended such additional accommodation, when provided, to form part of and to be used

with the railway, and, if so, to share the immunity which the railway, in its original construction, would have enjoyed from actions levelled at its use.

It would be strange, indeed, if the Legislature could be supposed to have authorised the railway to commit a nuisance upto a certain point, to have

provided machinery for extending the railway and its use beyond that point, and yet to have allowed the further user to be open to an action to

restrain its use.

(The italics are mine).

13. Thus their Lordships having regard to the scope of the Act thought that the contemplated acquisition must share the same immunity which frees

a Railway company from liability for any commission of nuisance in the use of the functions with which the statute has entrusted them. The following

passage from Lord Halsbury's judgment makes this clear:

It cannot now be doubted that a railway company constituted for the purpose of carrying passengers or goods or cattle are protected in the use of

the functions with which Parliament has entrusted them if the use they make of those functions necessarily involves the creation of what would

otherwise be a nuisance at common law.

14. It is therefore doubtful whether the view taken by the learned Chief Justice in Muhammad Mohidin Salt v. The "Municipal Commissioners for

the City of Madras I.L.R.(1901) Mad. 118, that the City Municipal Act authorised the nuisance can be justified on the strength of the decision in

London and Brighton Railway Co. v. Truman (1885) 11 A.C. 45. However the observations are obiter.

15. It is unnecessary for me to refer to the other cases cited by Mr. Rajah Aiyar, as they do not carry the matter further. The view of the learned

District Judge is correct and the second appeal accordingly fails and is dismissed with costs.

16. Leave to appeal refused.