

(1971) 03 MAD CK 0008

In the Madras High Court

Case No : Criminal R.C. No. 643 of 1970 (Crl. R.P. No.642 of 1970) Criminal M.P. 380 of 1971

T.K. Subramaniam

APPELLANT

Vs

Commissioner Salem Municipality, Salem

RESPONDENT

Date of Decision : 18-03-1971

Acts Referred:

Tamil Nadu District Municipalities Act, 1920 — Section 182(1), 313

Citation : (1971) LW(Cri) 167

Hon'ble Judges : K.M. Mudaliar, J

Bench : Single Bench

Advocate : T.S. Arunachalam, for the Appellant; K. Alagiriswami and The Addl. Public Prosecutor for the State, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Mudaliar, J.—The petitioner questions the propriety or correctness of his conviction for the offence of failure to remove the

encroachments under S. 182 (1) and 313 of the Madras District Municipalities Act, (Act v. of 1920) herein after referred to as the Act).

2. Four witnesses were examined to prove the prosecution case against the petitioner. P.W. 1, is the Building Inspector of the Salem Municipality

from 1065. From 1960 onwards, he has been the surveyor. P.W. 1 knew the petitioner. The building concerned in this case is in the Bazar street

Salem. The said building bears door No. 395 and is situate in T.S. No. 781. The Town Surveyor booked some encroachments in the Bazaar Street

and the connected file was referred to P.W. 1. Therefore, he inspected the site with the help of sketches, and notices, issued under S: 18 Sub-S.

(1) and (2) of the Act. P.W. 1 verified the measurements given in the sketches in

the file and found them to be correct. The reports of encroachment prepared by the Town Surveyor with the plan was produced. The report with sketch relating to the platform in front of the building is marked as Ex. P-1. Ex. P-2 pertains to the report about the steps. The report on the rolling shutter is Ex. P-3. Ex. P-4 relates to the R.C.C. sun-shades. Ex. P-5 relates to another sun shade put up on the rear side of the building. P.W. 1 verified the measurements in Ex. P-1 to P-5 and found them to be tallying with reference to the survey records. P.W. 1 found that the portions shown in red colours in the sketches on the reverse of Ex. P-1 to P-5 were encroachments on T.S. No. 781, the street poramboke vested in the Municipality. Ex. P-1 shows the encroachment by means of platform, measuring 14 1/2" x 3" 3"" in front of the building owned by the petitioner. This is shown in the sketch Ex. P-1 (a) of P.W. 1. The encroachment by steps, measuring 14" x 2 3/4" is shown in Ex. P-2 and the relevant sketch is Ex. P-2 (A). Encroachment to the extent of 12 3/4" x 1" by means of rolling shutter, covered by Ex. P-3 is shown in the sketch of Ex. P-3 A. P. W. 1 proved Ex. P-4 A and P-5 A also, the sketches relating to the R, CC sun shades. His further evidence is the notices of encroachment were issued by the Municipality and were signed by the Town Planning Officer for the Commissioner. The notice relating to Ex. P-1 and P-1A is Ex. P-1 B. It is the office copy of the notice duly attested by independent witnesses for affixture. Notice served by affixture and attested by witnesses in relation to the rolling shutter, covered by Ex. P-3 is Ex. P-3 B. Notice relating to the sun shade in the front is marked as Ex. P-5 B.

3. P.W. 1 took the notices for service to the accused petitioner; but the latter refused to receive them. These notices were therefore sent by registered post acknowledgment due. The registered letter concerning this was returned by the postal authorities as "refused". The relevant cover is marked in the case as Ex. P-6. The notices are not in the cover, but they are filed as Ex. P.1 to P. 5. Ex. P. 6 was the cover in which the notices refused by the accused-petitioner were sent. As the cover was received undelivered the notices inside it were taken to the spot and affixed. Ex. P. 1 to P. 5 are the office copies of the original notices affixed to the building. The accused sent a telegram in reply to the notices and a reply to the telegram was also given by the Municipality. The accused did not remove any

encroachment. The Municipality issued a notice for demolition of the encroachments under the original of Ex. P. 7. The original of Ex. P. 7 was affixed to the buildings and witnesses attested to this affixture.

Thereafter, a charge sheet was filed by the Municipality in this case. This is essentially the basic prosecution case that has been sought to be proved

by the testimony of three other witnesses (P.W. 2 to 4) who are the Panchayat Surveyor. Chairman and Town Surveyor. P.W. 1 admits that the

notice dated 5th December, 1967 to the accused petitioner, is not in the record in the court. But, in my view, that has no consequence whatever.

4. The plea of the petitioner is that the encroachments fall within the limits of his private land. The said building belongs to himself and his two

brothers. There are suits between them and the Municipality for the last 20 years. A civil suit regarding the encroachments in question has been

filed in the District Munsif's Court, one day later than the date of the complaint in this case; but no independent witnesses were examined on behalf

of the petitioner.

5. The learned trial Magistrate found that the evidence of the prosecution witnesses had been corroborated by the testimony of each other and that

the petitioner did not chose to prove that the encroachments were within his private land, by either oral or documentary/evidence. The defence

case is that the prosecution was time-barred as it was long after three months period from the date of notices dated 5th December, 1967, as

contemplated under S. 347 of the Act. His further case is that the notices dated 17th October, 1968, served by affixture on 18th October, 1968,

were only a second batch of notices issued just to get over the lapse of time fixed under S. 347.

6. I am in entire agreement with the finding of the trial Magistrate that the prosecution evidence is clear and consistent and that the material parts of

oral evidence of P.W's. 1 to 4 have been corroborated in all details. No material has been placed before the trial Magistrate for the purpose of

rebutting the prosecution case of the ownership of the land encroached upon by the petitioner. Considering the main argument that the prosecution

was launched beyond the period of limitation, the learned trial Magistrate, in paragraph 5 of his judgment, elaborately deals with all the aspects of

the matter and ultimately relies on the rationale found in In Re: Ramachandra

Chetty, , for repelling the contention of the defence.

7. The learned counsel for the petitioner argued that when notice was not served on the petitioner, there is no proper compliance with the

requirements of S. 331 of the Act. P.W. 1 states in his evidence that on 5th December, 1967, a notice approved by the Commissioner was taken

to the accused-petitioner for service. He refused to receive it and so it was sent by registered post, and even then it was returned by the post office

as ""refused"". Then the notice was taken and pasted on the door. The watchman of the accused was then present. The occupants of the house also

were there; but they did not come out when P.W. 1 went there. His further evidence is that he inspected the house in October 1968, after his

inspection in December 1967. There was no change in the building in October 1968. It has not even been suggested to P.W. 1, that the petitioner

did not refuse to receive the notice of 5th December 1967. According to the evidence of P.W. 1, the Salem Municipality issued a notice for

demolition of the encroachment under the original of Ex. P. 7, dated 19th October 1968 The original was affixed to the building and the affixture

was duly attested by witnesses. This part of the evidence of P.W. 1 has not even been challenged in cross-examination. I am prepared to hold that

the elements of S. 331(1) (a) and (d) of the Act have been completely satisfied by the evidence of P.W. 1. All that the S. requires is that the notice

must be given. The service of the notices may be affected by giving or tendering the said documents to the petitioner. But, what could the municipal

authorities do if the petitioner (according to the evidence of P.W. 1) refused to receive them? The concerned concerned authorities have got to fall

back on S. 331 (1) (d) of the Act. This argument has no substance and I have no hesitation in rejecting the same.

8. The only argument which was advanced in the court below, is the argument that the present prosecution is barred by limitation as prescribed

under S. 347 of the Act this argument was submitted in the court below which has rejected the same, and the same has been pressed again before

this court. There was no doubt the notice dated 5th December 1967 was sought to be served on the petitioner; but it was refused by the petitioner.

Then, the notice Ex. P. 7, dated 19th October 1968 for removal of the encroachments was served on the same date by means of affixture thereof.

The complaint by the Municipal authorities was received in the court on 30th October 1968. On 31st October 1968, the petitioner filed a suite

against the Municipality. I do not propose to reiterate the reasoning given by the trial Magistrate, in paragraph 5 of his judgment, in rejecting this

argument. It has been mainly argued that in view of the prior notice dated 5th December 1967, the subsequent dated 19th October 1968 (Ex. P.

7) served on the petitioner by affixture on the same date is only a ruse to get over the legal disability of the prosecution getting time barred. That

appears to be the essence of the argument. It is true (P.W. 1 states that the notices dated 5th December 1967 were taken to the petitioner for

service; but the petitioner refused to receive them. Then P.W. 1 inspected the house in October 1968 after his inspection in December 1967, there

was no change in the building or in the encroachments. Thereafter, Ex. P 7 was served by affixture on 19th October 1968; the question that falls

for determination is what is the starting point for calculation of the period of limitation. Is it the notice dated 5th December 1967, or is the notice

dated 19th October 1968 (which was served on the petitioner by way of affixture within the meaning of S. 331 (1 (d) of the Act" I am bound to

follow the ruling rendered by a Davidson Bench of this Court (Devadoss and Waller, J J.) in In Re: Ramachandra Chetty, The following extract

from the said ruling is illuminating:

The question then for consideration is whether there is anything in the Act that prohibits the issue of a second notice, when no action has, for some

reason or other, been taken on the first. I can myself see nothing that does so. The offence consists in the failure to obey a requisition issued by the

competent authority. If a particular requisition is not enforced, I can find nothing in the Act that prevents the Chairman from issuing another. If a

prosecution had been instituted on the first requisition and had failed or not been pressed, other considerations might come in, but that question

does not arise here"".

9. Applying the same logic, when in this case the requisition dated 5th December, 1967 was not enforced; I find nothing in the entire Act which

prohibits the issue of a second notice under Ex. P-7 dated 19th October, 1968. It is quite obvious that no action has been taken on the first for

some reason or other.

10. The learned counsel for the petitioner, Mr. Arunachalam, brought to the notice of this court that S. 166 of the Madras Panchayats Act

(Madras Act XXXV of 1958) is in pari materia with S. 347 of the Act, and pointed out that the following part of the section ""but nothing herein

shall affect the provisions of the Code of Criminal Procedure, 1898 (Central Act V of 1898) in regard to the power of certain Magistrates to take

cognisance of offences upon information received or upon their own knowledge or suspicion"" would not extend the period of limitation. In my

view, that is the proper construction; if it were otherwise, that would result pro tanto in a literal repeal of the period of limitation of three months

from the date of the commission of the offence. That could not have been the intendment of the Legislature when S. 347 was legislated. A similar

view was taken by me in Rajamani, In re. 1970 L.W. Cri. 49, The part of the section, as extracted above, makes mention of taking cognisance of

offences on information received, or upon their own knowledge or suspicion, by certain Magistrates. This has nothing to do with the extension of

the period of limitation whatever.

11. I have, therefore, no hesitation in holding that the prosecution of the petitioner is not barred by limitation as contemplated by S. 347 of the Act.

12. Some argument has been addressed by the counsel for the petitioner as well as the counsel for the Municipality in respect of the character of a

continuing offence in terms of S. 313 (2) and the proviso to S. 347 of the Act. On the proved facts of this case, such a question relating to a

continuing offence does not really arise.

13. The counsel for the petitioner sought for the production of same additional evidence in the form of the plaint in O.S. No. 1548 of 1968 on the

file of the court of the District. Munsif, Salem. Mr. Arunachalam contended that the plaint was filed on 3rd November, 1968 by the petitioner and

that the written statement was filed by the Municipality on 8th January, 1969. He sought to rely on some averments both in the plaint and in the

written statement. He stated that P.W. 1 was examined on 20th November, 1969, and the last witness P.W. 4 was examined on 22nd April,

1970. The petitioner was examined under S. 342 CrI. P.C. on the same date 22nd April, 1970. There was ample time for the petitioner to obtain

the certified copies of the plaint and the written statement, dated 3rd November,

1968 and 8th January 1969 respectively, and file them in the case

in which he was tried; or it was open to him to have examined the clerk in the District Munsif's Court to prove both these documents, the plaint

and the written statement, and if these documents had furnished any ground it was open to him to have advanced argument before the trial

Magistrate. It was still open to him to have filed an application under S. 540, Crl. P.C. before the trial Magistrate to examine the clerk in the

District Munsif's Court, as a court witness, or he could have examined the same person as his defence witness. None of these things were done

during the trial. He had plenty of opportunity to do one of these alternatives when the said documents had seen the light of the day by about 8th

January, 1969. I do not consider that there are sufficient grounds to permit the production of the additional evidence sought in C.M. P. No. 380 of

1971. That petition is accordingly dismissed.

14. The revision petition is devoid of merits. It is therefore dismissed.

15. Crl. M.P. No. 380 of 1971: In view of the judgment in Crl. R.G. No. 643 of 1970, this petition is dismissed.