
(1910) 09 MAD CK 0006
In the Madras High Court

Vibudapriya Thirthaswami and others APPELLANT
Vs
Esuf Sahib and Others RESPONDENT

Date of Decision : 05-09-1910

Acts Referred:

Citation : (1912) ILR (Mad) 28 : (1910) 20 MLJ 879

Hon'ble Judges : Wallis, J;Krishnaswami Aiyar, J

Bench : Full Bench

Judgement

Krishnaswami Aiyar, J.—The plaintiffs are trustees of a Hindu temple. They have instituted the action to restrain the defendants, who

represent the Mahomedan inhabitants of Udipi, by means of a permanent injunction from marching in procession through the portions marked III-

A and III-B in the plan, Exhibit WWW. The Subordinate Judge has given them a decree as prayed for as regards III-B. The defendants made no

claim to go in procession along III-B, and, as the respondents in the appeal before us, no attempt was made by them to object to that portion of

the decree. As regards III-A, the Subordinate Judge has restrained the defendants from going in procession with music and reciting prayers while

religious worship is going on in the plaintiffs' temple. Mr. Sundara Aiyar who argued the case for the plaintiffs, who are the appellants before us,

did not contest the right of the defendants to go in procession along III-A. But he argued against their right to go in procession with music or

repeating prayers at any time along III-A, whether worship was or was not carried on in the Hindu temple. Mr. Narayana Rao, for the

respondents, objected to the Subordinate Judge's decree restricting their right to go with music and reciting their prayers, to hours when there was

no worship going on in the Hindu temple. The right to go in procession with music was the principal bone of contention before us. No serious effort was made to impugn the finding of the Subordinate Judge that III-A belongs to the temple. We are not prepared to dissent from that finding. In addition to the evidence detailed by the Subordinate Judge we may advert to the fact disclosed by the plan and the evidence of the plaintiffs' witnesses Nos. 2 and 4 that there are traces of an old temple wall outside the limits of the street in question and on three sides of it. Starting then from the position that the subsoil of III-A vests in the temple, the next question is what rights the public have over the surface. III-A is a part of the big trunk road leading from Mangalore to Kalyanpur. It was the only road between those places till the coast road was opened less than forty years ago according to the plaintiffs' second witness. It is not in evidence when III-A was laid out. Its origin is lost in antiquity. The public has used it as a thoroughfare from time immemorial. Dedication must be presumed from the user as a highway, whoever was the owner of the soil at the time of the dedication. *Regina v. East Mark Tything* (1848) 17 L.J.Q.B. 177 S.C. 75 R.R. 653 and *Turner v. Walsh* (1881) 6 A.C. 636 decide that the Crown is no exception. There is no evidence in this case of dedication by the trustees of the temple. The general prima facie presumption of law in England is that the freehold of the road *ad medium filum* is in the proprietors of land on either side (see *Haigh v. West* (1893) 2 Q.B. 19 and *London & North Western Railway v. Westminster Corporation* (1902) 1 Ch. 269) and that when the road was originally formed the proprietors on either side each contributed a portion of his land for the purpose - *Holmes v. Bellinghan* (1859) 29 L.J.C.P. 132 and in *re White's Charities* : *Charity Commissioners v. The Mayor of London* (1898) 1 Ch. 659. This rule is carried out so far in England as to raise the presumption that the waste land on each side of the road is the property of the adjoining owners - *Steel v. Prickett* (1819) 2 Stark 463 and *Doe dem Pring & another v. Pearsey* (1827) 7 B.& C. 304. These presumptions are based upon the fact that property in land vests in private owners. Dedication therefore of a highway under the Common Law arises by the act of the private owner of the soil. It may be open to question how far these principles have any application to India where it is not the accepted theory that the property in land for which patta is issued is in the grantee of the patta from the

Government more than in the Government itself- Mobarak Shah v. Toofany ILR (1878) C. 206. (See, however, Balbir Singh v. Secretary of State

for India for Council I.L.R.(1899) A. 96.) In the case of waste lands at all events not included in a patta in ryotwari tracts the property has

unquestionably been treated as vest-ting in the Government. There is no reason to suppose that the dedication of III-A was originally made by the

trustees of the temple rather than that a common owner of the site of the temple and of the road founded the temple and gave it the site and

dedicated the highway to. the public. The argument of Mr. Sundara Aiyer assumed that the trustees of the temple must have dedicated the

highway. He then proceeded to con-tend that it was upon the defendants to show that the dedication was unrestricted, i.e., without any

reservation; that an unrestricted dedication ought not to be presumed as that would be contrary to the powers of trustees of a Hindu temple who

could not make a grant injurious to the interest of the temple ;and that, if there was a dedication without reservation, it would be invalid as

contravening the purposes of a Hindu religious foundation like the temple in question. Although the nature of the user is the only basis for

determining the extent of the dedication a general user in the case of a public highway would throw the burden of proving the reservation upon the

person contending for it. The law would not restrict the public to the exact mode of user of which there was evidence requiring the party pleading

an unrestricted right to establish it. In Ballard v. Dyson (1808) 1 Taunton 279 : 9 R.R. 770 Chief Justice Mansfield distinguishing between a public

highway and private way, observed that in general a public highway is open to cattle, though it may be so unfrequented that no one has seen an

instance of their going there; but the presumption would be for cattle as well as carriages. In the case of a private way, however, he was of opinion

that where there was no grant, usage alone indicated the extent. Although it seems to be the better opinion at the present day that there may be a

partial dedication of a highway, limited as to time or as to the extent of the user though not to a part of the public (see Glen on Highways, pp. 38,

39, Poole v. Huskinson (1843) 11 M. & W. 827 and Marquis of Stafford v. Coyney (1827) 7 B. & C. 257) there is no instance in which the

public being entitled to use the highway at all times and men and cattle and carriages being entitled to pass and repass, any restriction was imposed

on the manner of passing along the highway. It is true a highway is for passing and repassing, and it may amount to a trespass to use it for other

purposes. See *Reginay. Pratt* (1855) 4 E. & B. 860 : 99 RR. 792 *Harrison v. Duke of Rutland* (1893) 1 Q.B. 142 ; *Hickman v. Maisey* (1900) 1

Q.B. 752. Mr. Sundara Aiyar has not attempted to argue that marching in procession is an excessive use of a highway. That question,

notwithstanding the observations of Mr. Justice Bhashyam Aiyangar and Mr. Justice Subrahmanya Aiyar in *Vijia Raghava Chariar v. Emperor* ILR

(1902) M. 554 must now be deemed to have been set at rest by the decision of the Privy Council in *Sadagopa Chariar v. Krishnamoorthy Rao*

ILR (1907) M. 185 approving entirely of the judgment of this Court in *Sadagopa Chariar v. Rama Rao* ILR (1902) M. 376. And the two cases of

Kandasami Mudali v. Subroya Mudaly ILR (1909) M. 478 and *Mannada Mudali v. Nallaya Gounden* ILR (1909) M. 527 are explicit upon the

point. The presumption of complete dedication was affirmed in *Mannada Mudali v. Nallaya Gounden* ILR (1909) M. 527 by Benson and

Sankaran Nair JJ. when they said : "" There is no evidence as to the origin of the user nor is there any evidence that the dedication was subject to

any conditions."" Dedication would be assumed if dedication was possible - *Farquhar v. Newbury Rural District Council*.(1909) 1 Ch.12 Where

there has been a general user by the public a dedication without reservation would be presumed if that was possible. Mr. Sundara Aiyar's

contention that a dedication without reservation cannot be presumed to have been made by the trustees of a Hindu temple has not been supported

by references to the ceremonial or ritualistic practices of Hindu temples. It has undoubtedly been held that property vested in trustees cannot be

presumed to have been dedicated as a highway where such dedication would be contrary to the trust. See *Rex v. The Inhabitants of Leake*

(1833)5 B. & Ad. 469 : 39 R. R. 521 and *Neaverson v. Peterborough Rural Council* (1901) 1 Ch. 22 ; also *Pratt on Highways*, p. 23. But that is

not sufficient to justify a conclusion of no dedication when the user as a highway for all purposes is established and objection is taken only to

processions with music as opposed to the religious usages of the temple. It is enough, however, to say that as no evidence has been adduced in this

case that the procession with music of the Mahomedan inhabitants would contravene the purposes of the trusts of the Hindu temple there is no

impediment to the presumption of a dedication by the trustees of the highway unrestricted as to the mode in which the procession might be carried.

But, as pointed out already, we are not obliged by any evidence in the case to suppose that the highway was dedicated by the trustees of the

temple. If it was not, no question of the legality of an unreserved dedication can possibly arise. It follows that the Subordinate Judge was wrong in

granting the injunction as regards III-A. We must, therefore, dismiss the appeal with costs and allow the memorandum of objections in part by

dismissing the suit as regards the injunction granted in respect of III-A. But as the respondents have partially failed with reference to the

memorandum of objections, we make no order as to costs in regard to it.

Wallis, J.

2. I agree, and will only add that if it were proved that an unrestricted dedication by the trustees would be illegal--which has not been proved here--

--then a presumption in favour of a restricted dedication might arise as in *Grand Junction Canal Company v. Petley* (1888) 21 Q.B. D. 273 but

before such a presumption could be raised I think an illegality of the kind suggested would have to be very clearly proved.