

(1939) 09 MAD CK 0019
In the Madras High Court

Visalakshi Ammal

APPELLANT

Vs

Gokuldas Dayal Sait (deceased) and Another

RESPONDENT

Date of Decision : 27-09-1939

Acts Referred:

Citation : AIR 1940 Mad 423 : (1940) 51 LW 30 : (1940) 1 MLJ 155

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—This appeal arises out of a suit filed by the appellant in the Court of the District Munsif of Salem for a

declaration that a drain adjoining the eastern wall of her house was her private property and that the defendant-respondent was not entitled to let

into the drain sewage from his house. The appellant is the owner of a house which fronts a main road within the Municipal area of Salem. The

respondent has also built a house fronting the same road. His property is separated from the appellant's property by a public lane. The respondent

applied to the Municipal Council for permission to carry two channels across this public lane and connect them with the drain on the appellant's

property. Permission was granted and as the result connections with the appellant's drain were made. The appellant objected, but the work having

been carried out she instituted the present suit. The respondent filed a written statement in which he averred that the drain on the appellant's

property was a public drain and that the Municipal Council had acted within its powers in sanctioning the connections.

2. The District Munsif held that the drain was the private property of the appellant and that the respondent had no right to discharge into it the

sewage from his house. Consequently, the District Munsif granted the appellant the relief which she sought. The respondent appealed to the District

Court of Salem. The District Judge concurred in the finding of the District Munsif that the drain was the private property of the appellant and that

finding is now conclusive. But even if it were not, there is no doubt that the drain lies entirely on the appellant's property except to the extent of a

connection which has been made with the public drain running in front of the two houses. Before the respondent made the connections complained

of the appellant's drain was used entirely for the purpose of draining the appellant's property. The District Judge allowed the appeal on the

construction which he placed on Section 61(1) of the Madras District Municipalities Act, 1920. He considered that the section operated to vest

the drain in the Municipal Council and consequently the Council had the power to allow the respondent or other neighbouring house-holders to

conduct the sewage from their houses to this drain. The District Judge, however, thought that it was necessary to ascertain whether the flow of

sewage from the respondent's house into this drain constituted a nuisance. This question had not been canvassed in the trial Court, but holding the

view that it was necessary to decide this matter, the District Judge called for a finding from the District Munsif. The District Munsif recorded further

evidence and reported to the District Court that no nuisance would be created. This finding was accepted by the District Judge, who thereupon

allowed the appeal.

3. The appellant contends that the District Judge has misread Section 61 and that on a proper construction of it and other relevant sections of the

Act the decision of the District Munsif was correct. Section 61(1) reads as follows:

All public streets in any municipality, with the pavements, stones and other materials thereof, and all works, materials and other things provided for

such streets, all sewers, drains, drainage works, tunnels and culverts, whether made at the cost of the Municipal fund or otherwise, in, alongside or

under any street, whether public or private, and all works, materials and things appertaining thereto shall vest in the Municipal Council.

4. Therefore all drains which are alongside a public street vest in the Municipal authority. But this must mean that a drain which is alongside a public

street is a drain which is there for the purpose of draining the street. It could

never have been the intention of the Legislature to vest in the Municipal Council a drain on private property which has nothing to do with the drainage of the street. If a drain on private property, constructed merely for the purpose of draining the private property, were to vest in the Municipal Council by reason of Section 61(1) it would mean the confiscation of private property without compensation. Where private property is taken away from the owner there must be words used in the enactment which clearly express the intention of the Legislature to give the power. The wording used in Section 61 (1) is certainly not appropriate for this purpose.

5. The definition of "public street" is to be found in Section 3(21). The expression "public street" means a street, road, square, court, alley, passage, or riding path, over which the public have a right of way whether a thoroughfare or not, and includes (a) the roadway over a public bridge or causeway; (b) the footway attached to a street, public bridge or causeway; and (c) the drains attached to a street, public bridge, or causeway and the land, whether covered or not by any pavement, verandah, or other structure which lies on either side of the roadway "up to the boundaries of the adjacent property whether that property is private property or property belonging to the Government". Therefore drains which are attached to a public street are included in the definition but the Legislature has been careful not to include land on either side of the roadway which lies beyond the boundary of private property.

6. Provisions regarding private drains are contained in Sections 138 to 144. It is unnecessary to refer to them in detail. It is sufficient to say that Section 138 gives the municipality the control over house drains within or without the premises to which they belong for the purposes of alteration, repair, cleansing and maintenance in proper order and provides for the charging of the expenses incurred in such matters to the owner of the property. There is no provision in the Act for vesting private drains in a Municipal Council although the Council can insist on private drains being used by others when the provisions of Section 141 of the Act apply. That section states that when the executive authority is of opinion that a group or block of premises a part of which is situate within 100 feet of a municipal drain already existing, or about to be constructed, may be drained

more economically or advantageously in combination than separately, the executive authority may, with the approval of the Council, cause the group or block of premises to be drained by the method which appears to the executive authority to be the best suited. But before any steps can be taken to carry out such scheme of drainage not less than 15 days notice shall be given to the owners of the property, of the nature of the intended work, the estimated expenses and the proportion of the expenses payable by each owner. When such a scheme has been carried out the owners for the time being of the premises constituting a group or block are to be the owners of the drains and are responsible for the expense of maintaining the drains in good repair and efficient condition. The learned Advocate for the respondent has in the course of the argument referred to the section and has suggested that it has application here. The short answer is that the Municipal Council did not purport to act under this section and the notice required by the section was not given. It was never suggested in the Courts below that this section had any application and it is quite obvious that it has not.

7. Section 61 does not give the Municipal Council the right to connect or sanction the connection of the respondent's drainage system with that of the appellant. The appellant's drain is her own private property. While the Municipal Council has the right to insist that it shall be kept in proper repair and order it has no power to impose any burden upon the appellant unless it be in circumstances which come within the purview of Section 141. This case does not come within the purview of that section. There is support for the view expressed in this judgment in the observations of Sadasiva Aiyar and Burn, JJ., in *Arunachala Chettiar v. Municipal Council of Mayavaram* (1919) 38 M.L.J. 222. There the Court had to consider whether certain drains attached to a public street and intended to carry off water falling on the street vested in the Mayavaram Municipality u/s 24 of the Madras Act IV of 1884, even though the site of the drains belonged to private individuals. The Court held that the drains did vest and pointed out that Section 3(27)(c) of the Madras City Municipal Act, 1904, made it clear that the drains should be attached to the street in order to vest them in the Municipality. Section 3(27)(c) provided that the term "public street" should include drains attached to the street and the lands

which lay on either side of the roadway up to the boundaries of the adjacent property, language similar to the language used in Section 3(21)(c) of

the Act which governs this appeal.

8. The learned Advocate for the respondent has drawn our attention to the decision of the Calcutta High Court, in Gunendra Mohan Ghosh v.

Corporation of Calcutta ILR (1916) 44 Cal. 689 and has suggested that the case is on all fours with the one now before us. The Calcutta case

was decided on the provisions of the Calcutta Municipal Act of 1899 which differs in important respects from the Madras District Municipalities

Act and the case lends no support for the respondent's argument.

9. For the reasons indicated the decision of the District Judge must be held to be erroneous and the decision of the District Munsif restored. The

appeal will consequently be allowed and the decree of the District Munsif's Court will stand. The appellant is entitled to her costs here and in both

the Courts below.