

The Superintending Engineer Vs. Chituri Ramakrishna and anr.

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Court : Chennai

Decided On : Mar-11-1920

Reported in : (1920)39MLJ151

Appellant : The Superintending Engineer

Respondent : Chituri Ramakrishna and anr.

Judgement :

Sadasiva Aivar, J.

1. The defendant who is described in the plaint as a Government Officer, (namely, the Superintending Engineer, II Circle, D. P.W., residing at Bezwada) is the appellant before us.

2. This suit for injunction (among other reliefs) was brought against him because (according to the plaint) the defendant in his official capacity attempted to remove a dilapidated Ganapathi image which had been placed on a site which has been found by the Lower Appellate Court to belong to the Government. The image itself also has been found by that Court to belong to the Government. The Court however found (see paragraph 13 of its judgment) (1) that some sort of worship was being done to the said idol for a long time even when the idol lay half buried in the ground, it having been raised up and placed on a platform only in 1915 ; (2) that to establish a customary right, it was not necessary that there should be enjoyment for over 20 years or the like--(The lower Court further said 'even

supposing that the enjoyment claimed does not go so far back as to 1872 or 73, still I am of opinion on the evidence on record that there was sufficient enjoyment for the acquisition of the customary right by the plaintiffs') (that is the right to worship the idol at the place where it now stands). On these grounds, the Lower Appellate Court confirmed the permanent injunction granted by the District Munsif. Several grounds have been taken in the memorandum of second appeal but I shall deal with only three of them namely, grounds 7, 10 and 11.

7. The Courts below ought to have hold that the suit is barred for want of notice under Section 80 of the Civil Procedure Code. The cases relied on by the Lower Appellate Court do not apply and are not correctly decided.

10. The Lower Appellate Court erred in finding that the so-called customary right of the plaintiffs is made out.

11. There cannot be such a custom as is set up by the plaintiff. There is no legal evidence in support of the custom set up. The finding of the Lower Appellate Court in para 13 of its Judgment is unintelligible.

3. I shall deal shortly with grounds 10 and 11. I shall not go into the question whether a customary right in the Hindu public to worship an idol belonging to a third person and placed on a site belonging to that third person can be legally acquired or proved, as my mind is not quite made up on that point. Assuming that such a customary right can be proved by the fact that the owner of the site and of the idol had allowed such worship to be carried on for a sufficiently long time by the Hindu public, I am clear that the proof required by the Courts especially where the owner of the site and the idol is not a Hindu, must be very clear and strong. (The Government being neutral in religion is of course not Hindu in religion). The length of time must be considerable and the acts of worship must be very open and such as clearly indicate to the owner that the worshippers have claimed the right to carry on the worship openly and as a customary right. Paragraph 13 of the Lower Appellate Court's Judgment is vague and indefinite. It does not set out the particular acts of worship or the length of the enjoyment of the alleged right or whether the acts were such as to give notice to the Government that worship was carried on as of right. The District Munsif finds (see page 13, line 40 of the printed

papers) that it was in July 1915 that the platform for the idol was erected evidently by the department of Public Works itself and that the image which had been lying half buried was raised up and placed on the platform. The site of the idol had therefore been changed at least vertically. P.W. 2 himself says in September 1917: 'During the last 2 or 3 years, worship is being carried on on a grander scale'. Before that according to Exh. I cocoa-nuts used to be broken before the halfburied Ganesa by passing worshippers. Such worship is even done to peepul and margosa trees standing on District Board roads and Muncipal roads by some devout Hindus and it would be dangerous to hold that the Municipality or the District Board is not entitled to cut them down if such cutting is required to widen the roads or for any other lawful purpose. I shall however not express any final opinion on this matter and even if it is necessary to come to a conclusion on this point, I should hesitate to accept the vague finding of the Lower Appellate Court on the necessary facts to be proved and would call for a more detailed and definite finding as to the times, places, nature, extents and qualities of the acts of worship, As to the length of enjoyment required for the acquisition of a customary right also loosely called 'customary easement' I remarked recently,'that though no period is mentioned in the Limitation Act for the acquisition by the public of a customary right by long enjoyment Courts would be well advised if they require at least 20 years' uninterrupted and acquiesced enjoyment to establish such a customary right in the public the owner having knowledge of such an enjoyment' (see S.A. 722 of 1919).

4. Again it appears from Exhibit III (b) paragraphs 3 and 4 that the image of Ganesa had gone out of the proper form which the Agamas require for an image of one of the higher five deities, namely, Sun, Ambika, Vishnu, Ganesha and Maheswara to form an appropriate object of public worship. Paragraph 3 says: 'Further we have not got any kind of Dharmakarthiship to the stone image. We propose repairing the same as an act of charity to give proper form to the said image. Therefore we do not possess any kind of right. We therefore pray for orders to repair the same'.

4. Further by the words 'please' to consider we mean repairing only these, namely, the trunk, eyes, sacred thread hands, ears, legs etc.,

5. In fact it appears from the documentary evidence that a new trunk had to be ' provided ' for the idol. It is an arguable question whether an image like this which had been buried long under the earth and which was found in an excavation which was touched by other religionists and which belonged evidently to a Siva temple probably destroyed by Mussalman invaders can be claimed by any Hindu as an object of temple worship till it was properly repaired and Ashtabandhanam ceremony according to Agamas was performed for it. However, as I said, I shall decide this particular suit merely on the question of notice alone under Section 80 C.P.C.

6. On this question of notice I have expressed my opinion rather strongly in the case reported in Secretary of State for India v. Kalekhan 28 Mad. L.J.181 That case was no doubt a case where the defendant was the Secretary of State in Council and not a public officer as in this case. The Full Bench case in Koti Reddy v. Subbiah I.L.R. (1918) M. 792 in which both of us took part was a case against a village Munsif acting as public officer. In the above two cases, it was held that Section 80 should be strictly complied with by a plaintiff who brings any kind of suit against the Secretary of State or who brings a suit against a public officer in respect of any act purported to be done by the said public officer in his official capacity. In the present case, it is admitted that the two months' notice mentioned in the section was not given to the Superintending Engineer. It was however argued on the strength of some English decisions that where the relief claimed is one by way of injunction or where irreparable injury is likely to be caused if a rule nisi for an injunction is not at once granted, the notice required by the section was unnecessary. I expressed my dissent from those cases in Secretary of State for India v. Kalekhan 23 M.L.J. 181 and I have nothing to add to what I then said. No doubt, I confined my remarks to the case of a suit against the Secretary of State and added as regards the argument based on, irreparable injury, that 'if a suit against the public officer alone for an injunction could be brought without notice--(a position on which I reserve my opinion no irreparable injury to the plaintiff would be caused' if he took certain steps. Thus, it is clear that I did reserve my opinion on that point and did not mean to express any opinion to the effect that there was distinction on this point between the case where the suit is brought for an injunction against the Secretary of State and the case where a suit is brought

against a public officer for an act done in his official capacity. I do not think that any such distinction can be supported on the language of the Code. If serious hardship be sustained by a plaintiff in some cases on the strict language of the section the proper course is to appeal to the legislature to enact an exception to Section 80 to the following effect: 'Where in the opinion of the Court irreparable injury might be caused to the plaintiff if the notice required by the section is insisted upon as a preliminary to the entertainment of the suit, the Court may entertain the suit without such preliminary notice. In such a case it shall allow to the defendant at least two months from the date of the service of the summons for his appearance to answer the claim, in case the summons had been served within two months before the date fixed in the summons for his appearance.

7. It was finally argued by the respondent that the suit was brought not for an act done by the Engineer--defendant--but for a threatened act and therefore Section 80 does not apply. I entirely agree with the Judgment just now pronounced by my learned brother that a threat to do a future injurious action when that threat is conveyed through the preformance of an action such as speech, writing, sending a notice or message and so on is also within the intention of the legislature when it uses the word 'act' in Section 80. 'Acts' are, performed according to Indian philosophical notions by the body by the ten senses and by the mind (the eleventh sense) though only five of the senses are especially called Karmendriyas. (Two of the latter, namely, (1) 'hand' and (2) 'foot' include all muscular exertions (1) involving motion not involving change of place of the body as a whole and (2) involving locomotion). Modern legal tribunals and modern law are loath to attach liabilities to wrongful 'act' which is not accompanied by physical motion or physical sound or direct physical feeling which can be perceived by an ordinary man. Though it is said that even a cat can look with impunity on a king it may be that as the law develops even a Gnanendriaya act such as (say looking at the plaintiff in an insolent or threatening manner)., will be held by courts to give a cause of action for damages. There is a conflict of opinion in American courts whether mere nervous shock caused to the plaintiff (without any apparent external injury) resulting from a wrongful act gives rise to a cause of action. Spoken words of slander did not, according to the English Common Law give rise to a cause of action except in a limited class of cases but this Court extended the law of slander

in *Parvati v. Mannar* I.L.R. (1884) Mad. 176. I am not sure that with the spread among a considerable body of humanity of mesmeric (or as it is now called hypnotic) and other powers (now abnormal) among mankind and of the spread of evil influences (even though concealed from ordinary sense perceptions) exercised by such powers the law may not be obliged to recognize injuries caused by the wrongful activities of the Gnanendriyas and even of the mind Indriya. To come back from these remote (though interesting) speculations to the present case, paragraph 5 of the plaint in this case states that the cause of action arose when the defendant threatened to remove the image and the pandal. It is not denied that the threat was not a mere mental act which the plaintiffs learned by telepathy. The written statement states that final orders were passed by the defendant in August 1916 for the removal of the image and the pandal. It is not denied that the order was a signed and written order and was communicated to the plaintiffs by perceivable physical act or physical acts done by the defendant or by the agents of the defendant and that that was the threat which gave rise to the plaintiffs' cause of action, I therefore hold that Section 80 of the Civil Procedure Code is applicable to this suit.

8. In the result I agree that the decrees of the lower Courts should be set aside and the suit dismissed with costs throughout.

Spencer, J.

9. This suit was brought by two traders residing at Bezwada against the Superintending Engineer, D. P.W. II Circle, to obtain an injunction prohibiting him from removing the stone image of Ganesha situated on the canal bank by the side of the Hyderabad Road in Bezwada and from otherwise interfering with it or with the pandal over it. The prayer in respect of the pandal was refused and required no consideration by us. An injunction was granted by the District Munsif and on appeal his Judgment was confirmed by the Temporary Subordinate Judge and the defendant now appeals.

10. As above stated, the subject of the suit is a stone idol representing God Vinayakar or Ganesha the history of which appears in the Judgments of the Lower

Courts. This image appears to have been discovered when the main channel of the Kistna water works was widened in the year 1872 or 1873. It was placed in its present position by the Public Works Department as an ornament to the wall, and it has since become an object of worship to persons who trade along the canal in boat and to passers by. In 1915 (i. e. only one year before suit) a platform was built and also a temporary pandal was erected on festival occasions with the permission of the Public Works Department or the Municipality or both.

11. The District Munsif found that the idol and the site occupied by it belonged to the public who had acquired a right to it by continuous worship for a very long time and he therefore held that the plaintiffs had a right to worship it and were entitled to the injunction prayed for. The Subordinate Judge found that both the idol and the site were the property of the Government and he rightly rejected the plea advanced on behalf of the plaintiffs that the idol itself had acquired a right to the suit site by adverse possession. This claim seems to have been advanced upon the strength of the theory that an idol is a juridical person capable of holding property. The idea that an inanimate block of stone is capable of exercising personal rights of property is of course absurd but as pointed out in Mr. Ganapathy Aiyar's Religious Endowments, the theory is based on the idea that it is really the deity that resides in the image and thus it is the deity and not the image is the Juridical person. Mr. Ganapathy Aiyar observes at page 40 that it is only in an ideal sense that property can belong to an idol and the possession and management must in the nature of things, be entrusted to some person as a shebait or manager. In the present case there is no manager or trustee for the suit image. The Subordinate Judge based his finding for the plaintiffs upon the view that they had acquired a customary right to worship the idol at the place where it now stands and he has supported his opinion by reference to *Palaniandi Tevan v. Puthirangonda Nadan* I.L.R. (1897) M. 389. That was a case where certain persons residing in a particular village were held to be entitled to the use of water of a certain well by being in possession of houses in that village and residing therein. It was thus a case of a customary easement. The right of taking water is a well-known customary right recognised by law. See Halsbury's Laws of England Vol. X para 454. But I am not aware of any instance where it has been held that any interest or right of management in the property of another can be acquired by

continued acts of worship being shown to that property. It would be a dangerous doctrine to hold that a tree or stone standing in private premises could become subject to the control of the public or of any particular individual by the mere circumstances of acts of worship being performed by persons who see in that object the abode of a deity. Of course public rights of way may be acquired by access to such an object being left unobstructed for 20 years. But it is not a right of way that is claimed in this suit. Nor does this image fall within the scope of endowments as it is not a mosque, temple or religious establishment mentioned in Section 14 of Act XX of 1863. I am therefore unable to see what right of action the plaintiffs had to bring this suit.

12. Mr. Narayana Murti for the Respondents tried to bring the plaintiff's suit under the heading of a customary right. Customary rights are mentioned in Section 2 Clause (b) of the Indian Easements Act. They are distinguished from easements in that they may be possessed by the public or any person irrespective of any other immoveable property, whereas an easement is always appurtenant to a dominant heritage. It is admitted that this is not a case of an easement; nor does it fall within the class of profits a'prendre as there are no profits to be enjoyed in connection with the worship of this image. Nor does the plaintiff's suit come under the heading of a claim to a religious office as there is no religious duty to be discharged in connection with the image.

13. It is found by the Subordinate Judge that the image is the property of the Government whose servant the defendant is. If an idol is not attached to some public institution or religious foundation it must be the private property of some one owning the same, see page 41 of Ganapathi Aiyar's Religious Endowments. There is no other kind of property in an idol known to law. The idol itself is *caput mortuum*. Property dedicated to an idol and property endowed for religious purposes is *res sacra extra commercium* (not subject to alienation). Here we have no endowment, no dedication within the memory of man, nothing but a carved block of stone without even walls or a site to form a shrine for it. This is not one of those not uncommon cases of an interference with a general right of worship in which a particular person is prevented from worshipping at some temple or shrine by his fellow worshippers. As the plaintiffs have failed to establish that they have

acquired any interest in the subject of the suit such as would give them a right of control and disposal over it and as they have not shown how they are personally injured by any act or threatened act of the defendant, I am of opinion that their suit should be dismissed.

14. The suit is also bad in my opinion owing to the failure of the plaintiffs to give notice as required by Section 80 of the Civil Procedure Code. An attempt has been made to justify this failure on the ground that this is a suit based not on any act done by the defendant but to prevent an act threatened to be done by him, and reliance is placed on an observation in *Secretary of State v. Kalekhan* IL.R. (1912) Mad. 113 made by my learned brother where he assumed for purposes of argument that a suit may be brought against a public officer to obtain an injunction without notice. But he did not decide that notice was unnecessary; in fact he reserved his opinion on that point. It is clear to my mind that notice under the above section of the Code is necessary when a suit is instituted against the Secretary of State for India in Council or against a public Officer 'in respect of any act purporting to be done ' by him in his official capacity and I understand 'act' in this context as including 'words spoken or written which may cause the plaintiff to apprehend some injury in the future. If there was no such act it is not clear what ground the plaintiffs had to anticipate a threatened invasion of that supposed right so as to give an occasion for instituting this suit for an injunction. I would therefore allow this appeal and dismiss the plaintiffs' suit with costs; throughout.