APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. September 4 and 11.

BASAWESWARASWAMI BY DHARMAKARTHA A. PANCHAPPA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE BELLARY MUNICIPAL COUNCIL AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANTS), RESPONDENTS.*

Municipal Council—Adverse possession against—Nature of adverse possession—Right to a pial—Pial over a drain—Right of municipality to street, drains, etc.—Nature of the right—Right of Government—Adverse possession against Government—Length of possession—Pial, an encroachment or obstruction to drain, street, etc.—Right of municipality to remove encroachment, even when right to site of pial barred—No injunction against Municipal Council against right to remove obstruction—The Madras District Municipalities Act (IV of 1884)—Indian Limitation Act (XV of 1877), art. 146-A—Amending Act (XI of 1900)—Declaration.

A person can acquire a title to the site of a pial over a drain in a street vested in a Municipality by adverse possession against the municipality for the prescriptive period, which was 12 years before the article 146-A of the Indian Limitation Act (XV of 1877) was passed in 1900 under Act XI of 1900.

The right of a Municipal Council to the street and the drains is not a mere right of easement but is a special right of property in the site previously unknown to law but created by statute.

Although it is not open to the municipality to give up the rights of the public by any act of their own, that would not affect the capacity of a person in adverse possession to acquire rights which would affect the public.

The question whether possession has been adverse or not does not depend upon the needs or requirements of the owner but on the character of the occupation of the person in possession.

Fugitive or unimportant acts of possession would not be sufficiently effective to make the possession adverse.

Even if the Municipal Council had no right to the possession of the space above the drain but only a right of user for the discharge of its functions with respect to the drains, still the plaintiff as the person in possession of the pial would have a right to it against all but the true owner which was the Government in this case, but as against the Government the plaintiff had not established a title as he had not been in adverse possession for sixty years.

Although the plaintiff had acquired a title to the site of the pial by adverse possession as against the Municipal Council, the right of the latter to the drain under the pial had not been affected, and the Council was entitled to remove the

* Second Appeals Nos. 1331 and 1334 of 1910.

pial as an encroachment or obstruction under section 168 of the Madras District Municipalities Act.

The prayer of the plaintiff for an injunction against the Municipal Council could not therefore be granted, nor could the prayer for a declaration of title be granted, as it was only incidental to the substantial relief asked for, namely, an injunction which was refused.

Sundaram Ayyar v. *The Municipal Council of Madura* (1902) I.L.R., 25 Mad., 635, followed.

Rolls v. *Vestry of St. George the Martyr, Southwark* (1880) 14 Ch. D., 785 at pp. 795 and 796; *Municipal Council of Sydney* v. *Young* (1898) A.C., 457 and *Midland Railway* v. *Wright* (1901) 1 Ch., 738, referred to.

SECOND APPEALS against the decrees of N. LAKSHMANA RAO, the Subordinate Judge of Bellary, in Appeals Nos. 2 and 18 of 1907, respectively, preferred against the decrees of T. VARADARAJULU NAYUDU, the District Munsif of Bellary, in Original Suits Nos. 185 and 174 of 1905.

This is a suit by the owner of a house situated in a street in Bellary for a declaration of his right to a pial over a drain in the street and for restraining the Municipal Council of the town from removing it. The Secretary of State for India in Council was made a supplemental defendant to the suit. The plaintiff's case was that the site of the pialbelonged to him and had been enjoyed by him for more than sixty years, and that the Council had no right to cause its removal. The Council denied the plaintiff's right to the pial and the Secretary of State set up his ownership to the site. The issues raised the question as to how long the pial was in existence and whether the plaintiff acquired a title to the site of the pial by adverse possession and whether the Council had any right to demolish it. Both the lower Courts found that the street was dedicated to the public by the Government, that the houses were built on sites originally belonging to the Government, that the lands over which the pial stood was not part of the plaintiff's house, that the pial was constructed about the year 1883 or 1884, that prior to its construction there were loose slabs of stone which were used by the plaintiff for the purpose of vending various articles, but that the Municipal servants used to remove the slabs when necessary for the purpose of repairing the drain. The Municipal Council issued a notice, dated 11th October 1904, to the plaintiff to remove the pial on the ground that it was an encroachment, a projection or an obstruction. Hence thep laintiff brought this suit for a declaration of his title and injunction against Municipal

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Council. The lower Courts dismissed the suit holding that the plaintiff had not acquired a title by adverse possession. The plaintiff preferred a Second Appeal to the High Court.

J. C. Adam for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the first respondent.

The Honourable Mr. *T. V. Seshagiri Ayyar* for the second respondent.

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—This is a suit by the owner of a house in Bellary for a declaration of his right to a pial and for restraining the Municipal Council of the town from removing it. At the instance of the Municipal Council the Secretary of State for India in Council was made a party to the suit. The plaintiff's case was that the pial belonged to him and that the Municipal Council had therefore no right to remove it as it threatened to do. The Council denied the plaintiff's right to the site of the pial, and the Government set up its ownership to the site. The issues framed in the suit raised the questions, how long the suit pial was in existence, whether the plaintiff acquired a prescriptive title to the site of the pial if he was not the original owner, and whether the Municipality was entitled to demolish it.

Both Courts have found that the street was dedicated to the public by the Government. The houses were built on sites originally belonging to Government which it gave to the people when they were compelled to remove from houses occupied by them within the fort of Bellary.

The lower Courts also found that the land over which the pial stands was not part of the plaintiff's house. These findings are binding on us in Second Appeal. It has also been found by the lower Courts that the pial was constructed about the year 1883 or 1884, that prior to its construction there were loose slabs of stone which were used for the purpose of vending various articles but that the municipal servants used to remove these slabs when necessary for the purpose of repairing the drain. It was argued before us that the plaintiff's possession must be taken to date from the time when the loose slabs were in existence; but having regard to the fact that the slabs used to be removed when the municipality wished to do so it is not possible to regard the plaintiff's possession as having been effective until the present pial was constructed in 1883.

If the Municipality had the right to the space above the drain up to the portion occupied by the plaintiff, its right to possession was not disturbed, in an effective manner by the use of the loose slabs of stone. From 1883, however, the plaintiff must be taken to have obtained effective and exclusive possession of the pial. The learned pleader for the Municipal Council argued that this possession was not adverse to the Municipality, inasmuch as, for the purposes of its functions, it was not necessary for the Municipality to use the site of the pial. This contention I am entirely unable to accept. According to the decision in *Sundaram Ayyar* v. *The Municipal Council of Madura*(1) the street, which on the findings must be taken to include the drain, was vested in the Municipality for the purposes for which the Council was constituted. Their right was not a mere right of easement according to the view adopted by the learned Judges who decided that case, but was a special kind of property in the site previously unknown to the law but created by statute. This was also the view adopted by JAMES, L.J., in *Rolls* v. *Vestry of St. George the Martyr, Southwark*(2). See also the judgment of LORD MORRIS in *Municipal Council of Sydney* v. *Young*(3). *Sundaram Ayyar* v. *The Municipal Council of Madura*(1) regards a Municipal Council as having a right both to the surface of the street and to a portion of the soil beneath and the space above so far as would be necessary for the discharge of its functions as the authority bound to maintain, protect and repair the road. If then the Municipality was the owner of the site occupied by the pial in 1883 it must be taken to have been dispossessed by the plaintiff when he constructed the pial. Its right to possession would be extinguished when according to the Limitation Act in force a suit for possession instituted by it became barred.

As the law stood before 1900 the time within which the Municipality could institute such a suit was twelve years. In 1895 or 1896, therefore, the Municipal Council's right to the site of the pial became extinguished; and the rights of the public incidental to their right of way also became extinguished according to the view taken in *Sundaram Ayyar* v. *The*

(1) (1902) I.L.R., 25 Mad., 635. (2) (1880) 14 Ch. D., 785 at pp. 795 and 796.
(3) (1898) A.C. 457.

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Municipal Council of Madura(1). Although it was not open to the Municipality to give up the rights of the public or to affect the right of way possessed by the public by any act of their own, that would not affect the capacity of a person in hostile possession to acquire rights which would affect the public. See the judgment of BYRNE, J., in *Midland Railway* v. *Wright*(2). A similar principle applies in other cases. Thus a trustee cannot alienate trust property except in certain circumstances, but a person can acquire a right by limitation to trust properties by adverse possession. Similarly the trustees' office itself is *extra commercium* but the right to it may be acquired by limitation. Mr. Govindaraghava Ayyar drew attention to an observation of BENSON, J., in *Sundaram Ayyar* v. *The Municipal Council of Madura*(1), in support of his argument that the possession of the plaintiff was not adverse to the Municipality so long as the Council did not require the site for the discharge of its functions. But the question whether possession was adverse or not does not depend on the needs or requirements of the owner, but on the character of the occupation of the person in possession. It may no doubt be held that fugitive or unimportant acts of possession would not be sufficiently effective to make the possession adverse and that the license of the owner may be implied in such cases. But I cannot conceive what could be more effective occupation than building up the pial and occupying it exclusively. It must be taken to be now well established that although the soil may be in one person, another person may be the owner of a building above the soil, and that the right to occupy a portion of space above the soil may be acquired by limitation. See Lightwood's Time Limit on Actions, pages 17 and 18 and *Laybourn* v. *Gridley*(3). In *Midland Railway* v. *Wright*(2) it was held that the right to surface land over a tunnel could be acquired by prescription. In *Bevan* v. *The London Portland Cement Company Limited*(4), it was held that the right to a tunnel itself could be acquired by adverse possession. A similar view was held in *Mohanlál Jechand* v. *Amratlál Bechardas*(5) by a bench of which WEST, J. was a member. It must therefore be held that as against the Municipal Council the plaintiff acquired a right to

(1) (1902) I.L.R., 25 Mad., 635.
(2) (1901) 1 Ch., 738.
(3) (1892) 2 Ch., 53.
(4) (1892) 67 L.T., 615.
(5) (1879) I.L.R., 3 Bom., 174.

the pial by limitation on the expiration of twelve years from 1883 or 1884. I must observe that the view taken in *Sundaram Ayyar* v. *The Municipal Council of Madura*(1) that the right of a Municipal Council by virtue of streets vesting in it includes the right of possession was not questioned by any of the parties during the arguments. If the Municipal Council had no right to the possession of the space above the drain but only a right of user for the discharge of its functions with respect to the drain, the plaintiff's position, would even then not be worse, for as the person in possession of the pial he would have a right to it as against all but the true owner, namely Government in this case; and the Municipal Council would have no right to interfere with his possession or to demolish the pial. So far, then, as the right of ownership is concerned, the plaintiff's right must be taken to be established as against the Municipality. As against Government, however, the plaintiff has not succeeded in establishing a title. The presumption of title arising from possession is of no use to the plaintiff in this case; because it has been found that the ownership of the site of the drain belonged to Government before the plaintiff took possession of the site of the pial. Until 1883 either the Government or the Municipality must be taken to have been in legal possession of the site, and the plaintiff has not been in possession for a period of sixty years so as to acquire a title by limitation as against Government.

The next question is whether the plaintiff is entitled to an injunction restraining the Municipal Council from removing the pial. That question depends on the construction of section 168 of the District Municipalities Act. The right of the Municipal Council to the drain has not been affected by the acquisition of title to the pial by the plaintiff. According to section 168 the Municipality is entitled to "cause any projection; encroachment or obstruction made against or in front of any land in any public street to be removed or altered as they think fit." Now the pial must be regarded as an obstruction made in land in the public street. As it appears that the pial is only three feet above the drain, it must be regarded as an obstruction of the drain in the street. The right of the Municipal Council to remove an obstruction does not depend on its title or right to the possession

(1) (1902) I.L.R., 25 Mad., 635.

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of it, as is clear from clause (3) of section 163, which entitles a person lawfully erecting an obstruction to reasonable compensation for the removal. The right to remove is given in the interests of the public to prevent encroachment on public roads and is not dependant on the Municipal Council's ownership. The injunction must therefore be refused. No claim was made in the plaint for compensation, nor does it appear whether the pial itself had been removed at the date of the suit; it does not even appear whether it has been removed now. It was argued by Mr. Seshagiri Ayyar who appeared for Government that the Municipal Council had received the sanction of Government for the removal of the pial and had therefore the right to remove it, but the Municipality did not set up the plea that its act was justified by the orders of Government. Nor does it appear in what capacity, if at all, Government sanctioned the removal. I consider it somewhat extraordinary that after allowing the plaintiff to construct and occupy his pial for nearly a quarter of a century, the Municipality should claim to remove it without any compensation; and I take leave to doubt whether the Government would sympathise with and authorise such conduct on the part of the council. As the prayer for a declaration of title was only incidental to the substantial relief asked for, namely injunction, no declaration can be granted in this suit, as against the Municipality. The Second Appeal must therefore be dismissed with second respondent's costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant before us. The finding of the Lower Court is that he has been in possession of the pial in front of his house for only twenty-five or thirty years before the suit. This pial is built so as to cover the Municipal drain and is three feet high from the road level, the drain being 1½ feet in width. The lower Appellate Court found that the plaintiff has not acquired a prescriptive title to the land over which the pial in question projects, either against the Bellary Municipal Council in whom the street and the drain site were vested or against the Government and hence dismissed plaintiff's suit which was brought for an injunction against the Bellary Municipal Council to restrain them from removing the pial as an encroachment on the drain and road.

I shall first shortly consider the question whether the drain and road over which the pial is built belong to the Municipal

Council or the Secretary of State or both. In *Municipal Commissioners of Madras* v. *Sarangapani Mudaliar*(1) COLLINS, C.J. and PARKER, J., state as follows:—"The English maxim 'once a highway, always a highway' is based on the theory that the property in a highway is in the owner of the soil subject to an easement in favour of the public. In the case before us this legal fiction peculiar to English Law cannot arise, for there is no question of any easement whatever. *The street itself and the soil thereof is vested in the municipality in trust for the public.* Both are united in the same person, *i.e.*, in the proprietor;" and then they held that the defendant acquired a perfect title to a part of the road site which had been encroached upon by him more than twelve years before the suit brought by the Municipal Commissioners of the City of Madras to eject him from the encroached site. In that case, the learned Judges further stated that "when the Crown has once ceded property to an individual or corporation, the grantee of the property stands in respect of the property granted in the same position as any other proprietor," *i.e.*, they clearly held that the Government lost all right *of proprietorship in the street and the drain sites adjoining the street after they had once vested it in the municipality.* Next we come to *Sundaram Ayyar* v. *The Municipal Council of Madura*(2), where BHASHYAM AYYANGAR, J., dissented from the above decision in *Municipal Commissioners of Madras* v. *Sarangapani Mudaliar*(1), and introduced all the fine distinctions known to English Law and held that the Municipal Council did not become by the vesting of the street and the drains in it the full owner of the site or soil over which the street exists, that it did not own the soil from the centre of the earth *usque ad coelum* and that it had only the right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as was necessary to enable it to adequately maintain the street as a street. With the greatest deference I might be permitted to express some regret that the complications known to English Law were thus introduced into this presidency through this judgment of BHASHYAM AYYANGAR, J. The result has been as pointed out by that very learned Judge *himself that there sprang*

(1) (1896) I.L.R., 19 Mad., 154, App. 156. (2) (1902) I.L.R., 25 Mad., 635.

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up a sort of divided ownership between the Municipal Council and the Secretary of State, that there has been introduced different periods of limitation as against the Municipal Council and as against the Secretary of State and that further "the curious result" of the new article 146-A of the Limitation Act XI of 1900 would be that on the expiration of thirty years from the date of dispossession of the municipality, the Crown will have the land freed from the burden of the highway both the municipality and the man who had been in possession adversely to the municipality losing all their rights. However, it is probably now too late to go back on these distinctions which were based upon the view of the English and Scotch Law that the soil of public highways is presumed to be in the conterminous proprietors and that they merely allow the public to impose a servitude upon the highway, a view which need have no place in a country in which porambokes, streets, streams, waters, etc., almost invariably belong to Government till a private person is able to acquire a title by grant or prescription.

The plaintiff has acquired the right as against the municipality in the present case to have the pial fixed over to the drain site by enjoyment for twelve years (which was the period for the perfection of title by prescription even against a municipality before the Amending Act of 1900 was passed), for, his adverse possession against the municipality of this stratum of space at the height of 3 feet over the level of the drain began about 1880 and the twelve years' possession was completed in 1892; *Mohanlál Jechand* v. *Amratlal Bechardás* (1) and *Rathinavelu Mudliar* v. *Kolandavelu Pillai*(2); but so far as the Government is concerned, he has not had possession for sixty years before suit and hence his title against Government has not been perfected.

Now, even in the case of the municipality though plaintiffs' title to the stratum of space at the three feet height above the drain covered by the pial has been acquired by prescription the municipality has, under section 168 of the District Municipalities Act, 1884, clause (i), power to cause projections, encroachments or obstructions in any public street to be removed and the

(1) (1879) I.L.R., 3 Bom., 174. (2) (1906) I.L.R., 29 Mad., 511.

definition of "street" under section 3, clause (27), includes the drain space on either side of the street. There can be no doubt that though the municipality may not have vested in it the right to the space up to the sky over the drain and street, it must have had such a right at least up to a height of about twelve feet over the level of the street in order that it might properly exercise its powers of repairing, widening and altering cleaning and doing other duties in connection with the street and the drain. The pial is therefore clearly an encroachment, a projection and an obstruction in the street. They have the right accordingly to remove it and this suit for an injunction against their removal of such projection was rightly dismissed by the Lower Appellate Court. I would therefore confirm its decree though not on the grounds on which the Lower Court based its decision. The appellant must pay the costs of the second respondent, the Secretary of State. Second Appeal No. 1334 of 1910 follows.

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Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

K. L. C. T. CHIDAMBARAM CHETTY (PETITIONER), APPELLANT,

v.

V. V. R. NAGAPPA CHETTY AND EIGHT OTHERS (COUNTER-PETITIONERS NOS. 1, 2, 4 TO 10), RESPONDENTS.*

1912. September 3.

Provincial Insolvency Act (III of 1907), ss. 15, 16, 18, 19, 20, 22, 46 and 52—Official Receiver's order dismissing insolvency petition—No appeal direct to High Court—Practice—No interference in revision where other remedy open.

No appeal lies under section 46, clause (2) of the Provincial Insolvency Act to the High Court from the order of an Official Receiver dismissing an insolvency petition; but an appeal against orders passed by the Official Receiver lies, under section 22, only to the District Court. The language of section 22 read with section 52, clause (2) shows that such right of appeal is not confined to orders made under sections 18, 19 and 20, but extends to all orders of the Receiver.

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* Appeal Against Order No. 206 of 1910.