

445 F.2d 276
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
HARRISON COUNTY, MISSISSIPPI, et al.,
Defendants, Eldon L. Bolton et al.,
Defendants-Appellants.

No. 31123.

|
June 24, 1971.

Synopsis

Suit to compel specific performance of contract with county with respect to use of artificially made sand beach and for injunctive relief against peace officers who allegedly discriminated against members of the general public in use of the beach. The United States District Court for the Southern District of Mississippi, William Harold Cox, Chief Judge, 265 F.Supp. 76 entered judgment for county and the United States appealed. The Court of Appeals, 399 F.2d 485, reversed and remanded and denied petition for rehearing, 414 F.2d 784. On remand, the District Court, William Harold Cox, Chief Judge, directed that permanent mandatory injunction be issued, and certain property owners appealed from dismissal of their petition for exemption. The Court of Appeals held that where property owners petitioned for exemption from injunction restraining interference with public use of beach, which Mississippi County had dedicated to public use in consideration of federal government's furnishing funds for construction of sand beach in waters of Mississippi Sound, on ground that beach fronting their property had never been under waters of Mississippi Sound and United States countered with documentary evidence that beach was artificially constructed on waters of Mississippi Sound and therefore was not subject to private ownership because of Mississippi Constitution, District Court should have heard evidence and resolved such issues.

Portion of judgment vacated and remanded.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

*276 Eldon L. Bolton, Jr., Gulfport, Miss., for Eldon L. Bolton, and others.

George E. Morse, Atty., Gulfport, Miss., Heber Ladner, Sec. of State, State of Miss., Jackson, Miss., Cooper C. Darby, Chancery Clerk, Harrison County, Miss., White & Morse, Gulfport, Miss., for defendants-appellants.

Robert E. Hauberg, U.S. Atty., Jackson, Miss., John D. Helm, Atty., Dept. of Justice, Washington, D.C., Shiro Kashiwa, Asst. Atty. Gen., Edward S. Lazowska, Edmund B. Clark, Attys., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Before COLEMAN, GOLDBERG, and DYER, Circuit Judges.

Opinion

PER CURIAM:

In *United States v. Harrison County, Mississippi*, 5 Cir., 1968, 399 F.2d 485, rehearing denied 5 Cir., 1969, 414 F.2d 784, this Court directed that a permanent mandatory injunction be issued by the District Court enjoining and requiring the faithful execution of a contract between the Board of Supervisors of Harrison County, Mississippi and the United States dated January 23, 1951, in *277 connection with the construction of a sand beach.

The District Court expeditiously proceeded to execute the mandate of this Court in a commendably careful and efficient manner. A part of the pre-injunctive procedure was that all parties in interest were notified that they had ninety days within which to register their objections to the injunctive decree prepared by the Court for final entry in the case. Five parties, corporate and personal, filed objections and, for reasons assigned, sought exemption from the provisions of the proposed injunction. The District Court passed on the objections and none of the parties have appealed except the Bolton interests.

The Boltons sought exemption on the ground that the beach fronting their property at the extreme eastern end of the twenty-six mile long beach constructed under the contract of January 23, 1951, had never been under the bottom of the waters of the Mississippi Sound and was thus not within the decision of this Court.

The petition was verified by an affidavit which asserted that the sand beach in question 'was never washed away and never went under water becoming bottoms of the Mississippi Sound. There was a sand beach in existence prior to, and subsequent to January 23, 1951, that was not

subject to the ebb and flow of the tide. It never washed away and never went under water becoming bottoms of the Mississippi Sound’.

The United States countered these allegations with documentary evidence tending to show that the beach in question had been artificially constructed on the water bottoms of the Mississippi Sound by the United States Engineers, or under their authority and direction, in 1936. This allegation, if true, would defeat the Bolton claim for the reason, as set out in our prior opinion, 399 F.2d at page 491 (citing § 95 of the Mississippi Constitution of 1890).

The District Court dismissed the Bolton petition for Exception without making findings of fact or conclusions of law as to whether or not the beach was constructed in 1936 as claimed by the Government or was a natural beach in existence on January 23, 1951, as claimed by the Boltons.

We are of the opinion that the District Court should have

heard evidence and resolved these issues and granted or denied the desired Exception as the facts might have warranted.

Without in any manner affecting the remainder of the judgment and decree of the United States District Court for the Southern District of Mississippi filed on October 8, 1970, (which, in fact, has become and is now a final judgment) we vacate only that portion of the judgment which disposed of the Bolton claim and we remand that issue to the District Court for its determination consistently with what has been said in this and our prior opinions in this case.

So ordered.

All Citations

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