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Court : Karnataka

Decided On : Dec-19-1960

Reported in : AIR1961Kant242; AIR1961Mys242

Judge : A.R. Somnath Iyer, J.

Acts : Code of Civil Procedure (CPC), 1908 - Sections 100 and 101 - Order 41, Rule 31

Appeal No. : Second Appeal No. 232 of 1957

Appellant : Krishna Shetty and ors.

Respondent : Xavier Misquith and ors.

Advocate for Def. : Shyamalapapu, Adv.

Advocate for Pet/Ap. : K.R. Karanth, Adv.

Judgement :

1. The question arising in the suit was whether the plaintiffs' land Survey No. 27/6A was receiving water from the watercourse, shown by the Commissioner in Exhibit A-11 as MIMI, on the contiguous land of the defendants, and whether the plaintiffs had acquired a right to the supply of water in that way from the reservoir, denoted by the letter P, in that exhibit.

2. Although it was disputed that the plaintiffs had the mulgeni rights in the land Survey No. 27/6A, the Court of first instance negatived the contention of the defendants that the plaintiffs were not the owners of that right But, on the question whether the plaintiffs had the right to take water to their land through the channel M1M1, the finding of the Court of first instance, which was against the plaintiffs, was reversed by the lower appellate Court.

3. The lower appellate Court, in coming to that conclusion, gave many reasons. It first believed the oral testimony given by P. Ws. 3 and 4 which, according to the lower appellate Court, had been corroborated by the admissions made by D. W. 2 who was a tenant of defendant 1. The evidence of P. Ws. 3 and 4, which the Sower appellate Court believed, although that evidence had not been believed by the Court of first instance was, that for a long number of years, the plaintiffs' land was receiving supply of water for the yenel crop, through the channel M1M1, and that such channel was in existence all along.

Although the Court of first instance did not believe the evidence of P. Ws. 1 and 2, for reasons which are stated in its judgment and to which it would not be necessary to refer in this second appeal, it did not set out any reason whatsoever for discarding the testimony of P. Ws. 3 and 4. But, the lower appellate Court did believe the evidence of P. Ws. 3 and 4 and the reason why it regarded their evidence as trustworthy was that their evidence was, to some extent, corroborated by the evidence given by D. W. 2. D. W. 2 who is the tenant of defendant 1 stated in his evidence that water used to flow into the plaintiffs' land from Survey No. 27/ 6B which belonged to defendant 1, although he modified that answer by adding that it did not flow through any definite channel. But, it was open to the lower appellate Court to believe the evidence given by P. Ws. 3 and 4, as it did.

4. From their evidence, the lower appellate Court reached the conclusion that the land belonging to the plaintiffs was receiving water from the channel M1M1, for such a long time that that user cannot but be attributed to a legal origin. It rested that conclusion obviously on the doctrine of lost grant.

5. The lower appellate Court was considerably influenced by the fact that before the year 1836, when the mulgeni right in regard to survey No. 27/0 was first

created, both survey Nos. 27/RA and 27/ 6B belonged to the same individual. Since it was not disputed by the defendants that the watercourse MMM was the watercourse through which the entire land was all along receiving water from the reservoir P, the view taken by the lower appellate Court was that when the land was divided into two portions, it was improbable that the supply of water to one portion of the land alone was discontinued and that the channel MMM was supplying water only to the other portion.

6. It cannot be suggested in second appeal that it was not open to the lower appellate Court to assess the probabilities in that way.

7. The lower appellate Court was also of the view that the case set up by defendants that water for Survey No. 27/6A was being received from some other source was not established and, in coming be that conclusion, it depended upon the fact that in Exhibit A-8, which was the reply sent by defendant 1 to the notice issued on behalf of the plaintiffs, those alternative sources of water supply were not referred to.

8. The lower appellate Court in coming Jo that conclusion also depended upon the Commissioner's report Exhibit A-9, in which the Com-missioner pointed out that that alternative source of water supply was not available to the land of the plaintiff's.

9. Mr. Karanth, on behalf of the appellants however, urged that the judgment of the lower appellate Court was not in accordance with law, inasmuch as it did not set out, as required by Rule 81 of Order XLI of the Code of Civil Procedure, the points for consideration arising in the case, and the reasons for the conclusions arrived at by the lower appellate Court; as required by those statutory pro-visions.

10. It does not appear to me that the judgment of the lower appellate Court is open to that criticism. Although it does not set out one underneath the other those matters which are referred to in Rule 31 of Order XLI of the Code of Civil Procedure --and it is seldom possible or necessary for a lower appellate Court to write its judgment in that mechanical way -- the judgment discloses that the lower appellate Court did understand and had before it the points for determination. The

judgment also set out those points and it cannot be suggested that it does not contain the reasons for the decision which it reached. It seems to me that the judgment of the lower appellate Court is as adequate and full as it should be.

11. It was, however, suggested by Mr. Karanth that the lower appellate Court did not refer, as fully as it should have done, to the contention that defendant 1, being the immediate landlord of the plaintiffs, it was not possible for the plaintiffs to acquire any right by prescription to receive water along the water-course MIML

12. I am not able to agree that the lower appellate Court did not consider that question. It did refer to the questions of law arising in this case, both In paragraph 4 as well as in paragraph 9 of its judg-ment, and, in my opinion, it was not possible for the lower appellate Court to take, on the facts which it found, any other view than that reached by it Here is a case where the evidence which if believed established the fact that for a long time, as long as nearly half a century, M1M1, was the watercourse through which the plaintiffs' land Survey No. 27/6 was receiving supply of water for the yenel (crop (13) Now, if that was the way in which the land was receiving water for the yenel crop, then, as the lower appellate Court thought, the long and continuous user of the right to receive water in that way was attributable to an origin which was legally possible. It is clear that, in a case like this, where a water course passes on the lands of more than one person, and the evidence establishes that water flowing in that watercourse is being used for a long time by more than one owner, a strong presumption arises that the watercourse was originally constructed by agreement of parties which may he either ex-press or implied.

14. If there are two contiguous lands, one of them belonging to the landlord and the other belonging to his tenant, and the evidence establishes that for many years, there was a watercourse on the bod belonging to the landlord through which water flowed into the land belonging to the tenant, and that water was being used by the tenant to raise his crops thereon, it is difficult to understand on what principle the fact that the watercourse exists on the land of the landlord can be an impediment to the acquisition of the right by the tenant to use that water under an agreement, either express or implied, which must be presumed in such cases.

15. Mr. Karanth, however, pointed out to me that in paragraph III (d) of the plaint, the plaintiffs rested their right to receive water from the disputed watercourse on many grounds, some of which are not quite consistent with the others, and he also panted out to me that that portion of the plaint was added by an amendment made long after the suit was instituted and after the suit had once been remanded by the lower appellate Court.

16. It is true that the plaintiffs, in that paragraph and in that part of the plaint, claimed user on 'mamool right by way of grant, lost or presumed By immemorial user and prescription, and also as a quasi-easement'. It is no doubt true that the plaintiffs based their claim to the user of water on more than one ground. But, if, any one of them is a good ground, as it is found to be by the lower appellate Court, the fact that more than one ground was made the foundation of the claim cannot be a reason for defeating it.

17. In my opinion, this is a case in which the finding of the lower appellate Court rested essentially upon its finding on a question of fact, which it recorded, on the basis of the evidence of the wit-nesses, which it believed, and upon the probabilities of the ease, which it was entitled to take into consideration.

18. That being the position, the defendants cannot ask me to disturb that finding of fact recorded by the lower appellate Court, in second appeal.

19. I accordingly, dismiss this appeal with costs.

20. Appeal dismissed.

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