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Court : Allahabad

Decided On : Mar-20-1929

Reported in : AIR1929All497; 118Ind.Cas.521

Appellant : Partap Singh

Respondent : Hemraj and ors.

Judgement :

Pullan, J.

1. This is a second appeal in which the plaintiffs challenge the decision of the Subordinate Judge of Saharanpur reversing the finding of the Munsif of Saharanpur on a question of easement. The plaintiffs claim that they have for many years irrigated certain numbers from a well situate in the abadi plot No. 402. The channel leading from the well to the fields passes through plot No. 138 which belongs to the defendants, and the water is distributed from there to the fields of the plaintiffs. The view taken by the first Court was that the plaintiffs had proved their case. It is pointed out that the defendant Hemraj himself admitted that there was an old irrigation channel passing through his field and although he said that the plaintiffs made it six or seven years ago and had only used it once, this statement is an admission that the well was used for the irrigation of their fields and that the channel passed through his land. The first Court has also pointed out that the khasra of the year 1867 shows that most of the plaintiffs' plots were

irrigated from this well, and the same fact is borne out by the khasras of 1323 and 1324-F. The Munsif appointed a commissioner who made a report and his report was to this effect that if the plaintiffs' fields have been watered at all by this well, the water must have been carried by means of this nali across the street and the defendants plot. There is, therefore, ample evidence to show that the plaintiffs have irrigated their land from this well for a long period of years and that the only channel passes through the plaintiff's plot, and has been obstructed by the building recently erected by the defendant. The lower appellate Court did not doubt the evidence as to the previous irrigation of the fields from this well, but held that it was necessary for the plaintiffs to prove that the right was exercised within two years from the institution of the suit, and appears to have thought that in recent years another well has been used for irrigation of these fields. The view taken by the lower Court that the suit should have been brought within two years of the cessation of the exercise of right is not correct. The lower Court appears to have overlooked Section 26, Lim. Act and Expln. 2, Section 15, Easements Act. Both these sections lay down that nothing is an interruption in a right of easement unless there has been an actual cessation of the enjoyment by reason of an obstruction by the act of some other person. The mere failure to exercise the right for a period of two years does not extinguish a right of easement. This view has been expressed in the case of Gopal Chandra Sen v. Bankim Behari [1920] 29 C.L.J. 421. Apart from this error in law I am not prepared to agree with the lower appellate Court that the khasras of the years 1327 and 1331 F. clearly show that in those years plaintiff's plots were irrigated not from this well, but from another well.

2. The khasra of 1327-F shows that three of these numbers were irrigated by a well which was described as a well in No. 138. There is no well in No. 138 and this must refer to the channel passing through No. 138 from the plaintiff's well in No. 402. Some other numbers are mentioned as being irrigated by a well of which no number is given, and it cannot be said that this is not the well in question. In the year 1331 F. only one number is mentioned as being irrigated by a well. This certainly is not the well in suit, but the well in No. 249. But the mere fact that for one year the plaintiffs irrigated one number from another well does not affect their right of easement. Lastly I am not prepared to accept the finding of the lower Court on the value of a local inspection. The local inspection appears to have been

made in accordance with the wishes of the parties, and I have no doubt that the commissioner was well able to say that this was the only route by which water could be carried from the well to the plaintiff's fields. In my opinion the plaintiff's established their case and were entitled to the decree given them by the learned Munsif.

3. 1 allow this appeal with costs, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance.

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