

Palanivel Goundan and ors. Vs. Muthu Goundan and ors.

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Court : Chennai

Decided On : Mar-30-1962

Reported in : AIR1963Mad131

Judge : Anantanarayanan, J.

Acts : [Easements Act, 1882](#) - Sections 7

Appeal No. : Second Appeal No. 223 of 1960

Appellant : Palanivel Goundan and ors.

Respondent : Muthu Goundan and ors.

Advocate for Def. : U. Somasundaram and ;P. Kothandaraman, Advs.

Advocate for Pet/Ap. : P.S. Balakrishna Iyer and ;P.S. Ramachandran, Advs.

Disposition : Appeal allowed

Judgement :

Anantanarayanan, J.

1. The second appeal is by the three plaintiffs in the courts below, who sued for a certain declaration of right and consequential permanent and mandatory injunctions relating to that right to take surplus water overflowing from the tank marked 'T' in the plan, as also the rain water from the natham site marked 'N'

along the channel marked 'B' to the pond or kuttai marked 'K', which is the private source of irrigation for the lands of the plaintiffs immediately to the south of that kuttai. The sole ground for determination in the second appeal is the manner in which these rights claimed by the plaintiffs are to be declared, delimited and decreed.

2. I might immediately state that the learned District Munsif of Namakkal, who tried this suit, apparently felt no difficulty in the matter. He decreed the suit for declaration and a permanent injunction as prayed for, holding that, as regards the mandatory injunction, there was really no need. The entire difficulty arises from the fact that the learned Principal Subordinate Judge of Salem, in first appeal, has reversed this decree and dismissed the suit. Learned counsel for the plaintiffs (appellants) contends, not without force and plausibility that upon the very findings of fact as given by the learned Subordinate Judge, and the law relating to artificial channels of this description, also set forth by the learned Subordinate Judge, in paragraph 9 of his judgment, the appellate court should only have confirmed the decree of the trial court, and should not have reversed it.

3. As I have stated just earlier, it seems impossible to deny that, on the explicit findings of the trial court and the first appellate court, the suit could not have been dismissed outright. Actually to dismiss the suit outright upon those findings is to misapply the law relating to artificial channels of the description found in this case, particularly where the lands are dry lands irrigable from a purely private source, and there is no question either of a Government Ayacut or of Governmental liability to supply water. The true problem is not whether the second appeal should be allowed or otherwise, for it could be irresistibly contended that the decree of the appellate court below is erroneous, and that it ought to be therefore reversed. The true question is whether the contesting respondents (defendants) are also not entitled to plead that, at least as a matter of Just and reasonable inference, their right to take water from this artificial channel as it passes through their lands, ought to be upheld. If it is found that the respondents also have right to take water from the artificial channel through the part of it constructed on their lands, a further question will arise of the limits of this user. These are the only difficulties in the second appeal.

4. The broad facts are not in dispute. The very statement of the facts indisputably established, will be sufficient to show that the suit could not have been dismissed outright on those facts. For instance, it is not in dispute that the pond or Kuttai 'K' is the exclusive private source of irrigation of the plaintiffs. The water in this pond is used for the irrigation of the lands of plaintiffs immediately to the south marked A-1, and A-4 in the plan. Not merely this. To the north-east of this pond 'K' we have the tank T. We have also a channel or water course connecting this tank T and the pond 'K' a course well defined along certain portions and less well defined along others, but the existence of which is indisputable. It has been found by the courts below that this channel is not a natural channel.

Indeed, it could hardly be otherwise, as the lands upon either side of the channel are on a higher level, and the channel is clearly the work of man. But this artificial channel passes through the lands of the defendants marked B-1 and B-2 in the plan. Overflow water from the tank T, as well as rain water flowing down from the natham site marked 'N' both run down into this channel and proceed to feed the pond at K. The pertinent questions are: (1) Is this a natural channel or an artificial channel; (2) who constructed it and when; (3) Have the plaintiffs established a right of easement to have their private source of irrigation, the pond K fed with water through this channel, without obstruction or impediment; and (4) have the contesting respondents any right to take any water from this channel, as it passes through their lands, for the irrigation of the lands marked B-1 and B-2 in the plan.

5. The principles upon which such rights should be determined, with regard to artificial channels as distinguished from natural channels, have been clearly laid down by the authorities, of which it is sufficient to refer to the judgment of Sundaram Chetti J. in *Narasimhulu v. Bhadrappa* : AIR1933 Mad10 . As the learned judge points out, the right to the enjoyment of a natural stream of water by the proprietors of appurtenant or adjoining lands, is an incident inherent to the soil itself, and such a right does not depend on prescription or upon a presumed or proved grant. But the matter is far different in the case of artificial water courses. In those cases rights can be advanced only on the basis of a grant, actually proved or presumed, or prescription for over the statutory period. Learned counsel for the respondents has drawn my attention to the judgment of Somayya J. Krishnaswami

Chettiar v. Pappi Naicker : AIR1944 Mad228 . But I find from that decision that it really related to wet lands or ayacut lands irrigable as such from a tank, and rights as between the upper and lower field owners. The decision might not have particular relevance to the facts of the present case.

6. In the present case, upon a scrutiny of the evidence which is conflicting and not uniform, the learned Subordinate Judge comes to this considered conclusion. He says

'It is thus seen from the evidence on the side of the appellants that the channel on B-1 and B-2 is in existence for about 25 years or more'.

The findings hence are, on this aspect, that the artificial channel has been in existence for at least 25 years, and that the plaintiffs have been utilising the water from this channel, flowing both as overflow from the tank T and as rain water from the Natham end, to replenish or augment the supply in their private kuttai K. The easementary right has been clearly established by prescription for over the statutory period. On these very findings, neither the defendants nor any other owner of adjacent property will have the right to obstruct the flow of water in the artificial channel, when water is flowing through it, in such manner as to prevent that water from increasing the supply of pond K.

7. In that sense, the appeal was erroneously allowed, reversing the decree of the trial court. The second appeal ought now to be allowed, restoring the decree of the first court. But the question is whether the contesting defendants are entitled to any modification by recognition of any right in their favour.

8. On a careful consideration of this matter, I am of the view that the defendants are also entitled, by application of the same principles of law, to take water from the artificial channel in the portion that flows through their lands, for the irrigation of their lands marked B-1 and B-2. It must be noted that defendants have been asserting that right, and that at least from and after 1957, there is definite evidence about the exercise of such a right. The point is that the artificial channel has been most clearly and satisfactorily formed in the portion of it running through the lands of the defendants. The channel could have been constructed only with the consent

and co-operation of the owners of those lands, whether the defendants or their predecessors-in-title. It is inconceivable that, at that time, the owners of B-1 and B-2 would have accepted, or aided in, the construction of such an artificial channel, without the intention that they themselves should benefit by the surplus water flowing from it. Otherwise, there was neither purpose nor benefit in constructing such a channel. The probabilities hence warrant a clear inference of a right, contractual in character, created at the time of the forming of the artificial channel itself, for the irrigation of lands B-1 and B-2 with water from the channel. The second appeal will accordingly be partly allowed as follows:

9. The decree of the first court will be restored, recognising the right of the plaintiffs to overflow water and water from the Natham flowing through the suit channel to augment supply in the pond marked K without impediment or obstruction as such from the defendants by cross bunding the artificial channel etc. But equally, the defendants will be permitted to take water from this channel through the portion of it flowing through their lands, for the irrigation of their lands, since such a contractual right can be inferred at least as clearly as the right of the plaintiffs to the surplus water. But since both the parties are entitled and the user of the plaintiffs extends to over 25 years, the defendants can so irrigate their lands, only without unduly or substantially affecting the overflow or surplus water, when such water is running, which will ordinarily augment the pond K. The second appeal is allowed in these terms. The parties will bear their own costs throughout. No leave.

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