Case Note: Case raising the issue as to whether a landowner through whose field an artificial stream was passing could have riparian rights over it. The court held that riparian rights could arise even in the case of an artificial stream as the stream may have been originally made under such circumstances, and have been so used. The Court held that there exists a presumption of the same and it is for the other party to provide evidence to the contrary, which they failed to do in this case.

This document is available at www.ielrc.org/content/e2601.pdf

IN THE HIGH COURT OF BOMBAY

Decided On: 17.09.1926

Yesu Sakharam Pujari
v.
Ladu Nana Savant Bhosale

Hon'ble Judges:
Shah and Fawcett, JJ.

JUDGMENT

Shah, J.

1. The second appeal No. 616 of 1925 arises out of a suit filed by the plaintiffs against the defendants complaining of the defendants having put up a certain dam in the stream called Redekond stream at the points A.B. The new dharan A B complained of is shown on the plan. The defendants apparently put up a dharan at A B and tried to divert water through the artificial channel in the south of the stream which is marked BCD E F G H I J. The plaintiffs apparently divert water from this natural stream at the dam L M which is lower down in this stream, and from the point M they take the water through an artificial channel which branches off in the north of the stream. It runs eastward and joins another channel called "Khulyachi Vali" in the north and then turns southward again towards the lands of the plaintiffs in that direction.

2. The defendants denied the plaintiffs' right to prevent them from putting up the dam A B, which they said was old, and they also claimed the right to have certain water to go down the points L M towards the point K in another dam K N which is further lower down in the stream.

3. In the lower Court these rival contentions were considered ; and the trial Court found that the plaintiffs had been taking water at the point M from the natural stream through the artificial channel in the north, which I have described, that the dam A B was a new construction and that the artificial channel lower down from the point B said to have been

constructed by the defendants was also a new structure. It was also found that it was the right of the plaintiffs to let such water near the point M down the stream as they considered desirable for the purposes of their lands further down the stream towards the south. The defendants' contention with reference to this point was disallowed with the result that a declaration was granted that the plaintiffs had a right to maintain a dharan shown at L M on the map and to take water from it in a channel to be maintained by them, and a permanent injunction was issued restraining the defendants from doing certain acts calculated to affect the plaintiffs' rights as mentioned in the plaint.

4. Defendants Nos. 1 and 3 appealed. The appellate Court found that the dam A B and the water channel running from the point B were new constructions and prejudicial to the rights of the plaintiffs. The lower appellate Court also found that the plaintiffs had clearly made good their case that they could open or close the outlet near M according to their own necessity regardless of the consent of the defendants. On these findings the lower appellate Court confirmed the decree of the trial Court and dismissed the appeal.

5. The same defendants have appealed to this Court, and in the second appeal it has been argued that the decision of the lower appellate Court is wrong. As regards the dam A B, it is found by both the Courts that it is a new structure, and this finding of fact has not been seriously challenged and cannot be challenged in second appeal. As regards the right of the plaintiffs to let water pass at the point M, though the finding has been questioned before us, it seems to me that it is really a question of fact, and the concurrent findings of both the lower Courts should be accepted. It appears from the judgment that when the plaintiffs for their own purposes allowed water to pass at the point marked dar(sic) in the channel branching off at point M, the defendants or some of them used part of the water. Without going into the question, I desire to make it clear that the decree of the lower appellate Court does not appear to me to prejudice in any way the rights of the defendants to use, as they may have hitherto done, when the plaintiffs allow water to pass at the cut marked dar (sic) in the artificial channel near the point M in the plan according to their necessity regardless of the consent of the plaintiffs. But the two findings of the lower appellate Court abovementioned appear to me to be decisive of this appeal. I would dismiss the appeal and confirm the decree of the lower appellate Court with costs without prejudice to such rights as the defendants may have to use the water according to their practice when it is allowed to pass out at the cut marked dar (sic) in the channel near the point M by the plaintiffs as indicated in this judgment.

6. In S.A. No. 706 of 1925, the same plaintiffs sued defendant Ganu Bapu Pujare to restrain him from taking water from the artificial watercourse of the plaintiffs which ran through the defendant's land S. No. 208, phalni II. It was alleged by the plaintiffs that the defendants had commenced to take water from the said water-course from December 1919. The suit was filed on December 17, 1919. The defendants pleaded that the dharan referred to in the plaint which would be the dam L M belonged to the Pujaris, Ghadis and Virs; that the plaintiffs had taken the place of the Virs ; and that the watercourse was prepared for the purpose of irrigating S.N. 208, phalnis 11 and 12 belonging to the Pujaris, S.N. 210, pot 3 belonging to the Ghadis, and S. No. 210, pot 2 originally belonging to the Virs and subsequently to the plaintiffs. By consent of parties the

evidence with reference to the points in issue in this suit was recorded in the principal suit, to which S.A. No. 616 relates. In that suit it was found that the defendants had never used in fact water from this water-course up to the time they were alleged by the plaintiffs to have commenced to use the water, and that it was not proved that the watercourse belonged to the Pujaris, Ghadis and Virs. On that basis the injunction asked for was granted in favour of the plaintiffs.

7. The defendant No. 1 appealed to the District Court, and the learned District Judge found in agreement with the trial Court that the alleged ownership of the Virs of Survey No. 210, pot 2 was not proved, and the putting up of the dam L M by the Ghadis, Virs and Pujaris appeared to him to be a myth. He also found that the lands of the defendants to the north of the Redekond were never irrigated by the pat water. The appeal was dismissed on the basis of these findings.

8. In the appeal before us these findings have been questioned. But the findings are based on evidence and must be accepted in second appeal. The real point in this appeal, which was not raised in the argument, but which was put to the learned pleaders appearing for the parties by my learned brother, is whether in view of the fact that the artificial watercourse passes through the land of the defendant, he would have a right to use the water passing in the water channel as a riparian owner would have a right to use if it were a natural stream, and if so, whether right is in any way negatived by the findings of the lower appellate Court.

9. It seems that in the lower Courts the presumption which may arise in favour of an owner through whose land the artificial water channel passes, as regards the right to use the water, was not brought to the notice of the Court. It seems to me that if this point had been properly brought to the notice of the lower Courts, the mere fact that the defendant had never used water before from this water channel, would not have weighed so much with the Courts, as it has done in fact.

10. I may mention, that we are concerned with the artificial water channel which is proved to have been used by the plaintiffs for a number of years, which branches off from the natural stream at the point M. It is in respect of this artificial watercourse that the question arises as to whether the defendant through whose land this channel passes has a right to use the water as a riparian owner would have, if it was a natural stream. The presumption in favour of the owner of the land through which the watercourse passes has been referred to in various decisions, and has been stated in Halsbury's Laws of England, Vol. XI, paragraph 613, at p. 315 :-

There is no natural right to water in an artificial watercourse. But a watercourse, though artificial in its nature, may have been originally made under such circumstances, and have been so used, as to give to persons through whose lands it flows all the rights which they would have had as riparian owners had the stream in fact been a natural one.

11. And further on in paragraph 615 it is pointed out:-

Where there is in existence an express grant of an easement or an express agreement relative to the construction and continuance of an artificial watercourse, the rights of all parties depend, of course, upon its terms. The rights of some of the parties may, however, be implied from the circumstances surrounding the execution of the agreement. In general, in such a case rights in the watercourse will not readily accrue apart from those given by the agreement.

12. The case which appears to me to approach the facts of this case is the case of Roberts v. Richards. (1881) 50 L.J. Ch. 297 As pointed out in that case the mere fact that the owner of the land through which the channel passes has not used the water for a long time is not necessarily fatal to his right to use the water. In the present case the findings of the lower appellate Court do not afford any answer to the presumption which exists in favour of the defendant as regards his right to use the water in virtue of this pat passing through his land. We do not know when this pat was constructed, nor do we know the terms of the agreement between the owners of the various lands through which the pat passes and the persons who constructed the pat as to the rights of the parties with regard to the use of the water. The practice as found by the lower appellate Court has been that the plaintiffs have been using water exclusively for their benefit. But it does not mean anything more than this that the defendant having no need to use the water up to 1919 had not used it. In the absence of any evidence as to the terms of an agreement between the parties when the pat was constructed, it can be fairly presumed, as pointed out in the case of Roberts v. Richards, that the defendants as owners of the lands would have such a right. We are not concerned in the present case with the exact extent of the use of water which the defendant is entitled to make. That point does not arise in this suit: and if it arises between the parties hereafter, it will have to be decided then. The present suit is based on the allegation that the plaintiff's have an exclusive right to use the water of this pat, and that the defendant has no right whatsoever.

13. Under the circumstances, we are of opinion that the plaintiffs' suit for an injunction against the defendant restraining him from using the water of this watercourse must fail.

14. I desire to add that, with regard to this new aspect of the case, we have heard arguments on both sides after the point was mentioned to the pleaders. We have also considered whether it is desirable or necessary under the circumstances of the case to have a fresh finding on the question arising on this aspect of the case. But we do not think that it would serve any useful purpose to remand the case on this point. The position of the parties with reference to this pat is clear, and on the findings there is room for the presumption to which I have referred. In view of that presumption in favour of the defendant, the plaintiffs' claim must fail. I would, therefore, allow the appeal, reverse the decree of the lower appellate Court and dismiss the plaintiffs' suit. As regards costs, the appellant will get the costs of this appeal from the respondents. The parties to bear their own costs in the trial Court and in the lower appellate Court.

15. As regards appeal No. 650, it is clear on the plan that this artificial watercourse does not pass through the land of the defendant in this suit. The land belonging to him is marked on the plan as S. No. 210, pot 3. That plot is a small triangle shown in the plan,

the apex of which comes very near the pat, but at no point does the pat cross defendant No. 3's land. There is no scope for the presumption in his favour as there would be in the case of a person through whose land the artificial channel passes. I would dismiss the appeal with costs.

Fawcett, J.

16. I agree. I would add, as regards the principle that has been mentioned in my learned brother's judgment as going in favour of the appellant in appeal No. 706 of 1925, that it has been applied in Mahanth Krishna Dayal Gir v. Mussamat Bhawani Koer (1917) 3 P.L.J. 51. where some of the main cases which have recognized it are cited. It has also been discussed in Peacock's Law relating to Easements in British India, Ed. 1904, pp. 220-222, and the conclusion come to by the learned author is that the principle is a reasonable one, which should apply also in India. Furthermore the Privy Council have recognized it in Maung Bya v, Maung Kyi Nyo. (1925) I.L.R. 3 Rang, 494, p. c. After referring to the ordinary rule that in the case of an artificial watercourse any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought, they go on to say (p. 506) :-

There is, however, a well-established principle of law..., namely, that a water-course originally artificial may have been made under such circumstances, and have been used in such, a way that an owner of land situate on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream.

Then the leading English cases in support of it are cited. Therefore, there is, in my opinion, the best authority for applying the principle in this case. The mere fact that it has not been brought to the notice of the two lower Courts should not stand in our way of applying it to a case, in which on the facts it is clearly applicable. No doubt the circumstances under which the watercourse was made may be proved, and it might be shown that as a matter of fact by agreement the owner of a particular land through which it passed was not to have the use of the water. Then of course that principle would not apply. But in the absence of any such evidence, I think the presumption clearly arises, and the burden of proving the contrary is upon the plaintiffs. They have not satisfied that burden, though evidence was adduced as to the construction of the watercourse. Accordingly, I think appeal No. 706 should be allowed and the plaintiffs' suit dismissed.

Note: This document has been provided online by IELRC for the convenience of researchers and other readers interested in water law. IELRC makes no claim as to the accuracy of the text reproduced which should under no circumstances be deemed to constitute the official version of the document.