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Karathigundi Keshava Bhatta vs Sunnanguli Krishna Bhatta, 1945

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IN THE HIGH COURT OF MADRAS

Second Appeal No. 2456 of 1944

Decided on 09.11.1945

Karathigundi Keshava Bhatta

v.

Sunnanguli Krishna Bhatta

Hon'ble Judge

CHANDRASEKHARA AIYAR J.

Judgment. —

The defendant is the appellant and the question between him and the plaintiff relates to their respective rights to use the water of a *thodu* or channel passing to the east of their lands. The plan, Ex. P-8, prepared by ttie Commissioner, shows the relative positions of the fields of the plaintiff and the defendant and the *thodu.* The lower Courts have restricted the right of enjoyment of water of this *thodu* by the defendant in accordance with what they considered to be the true meaning of the *karar* or compromise that was entered into between the parties in the year 1913, Ex. P-l and a decree in o. S. No. 393 of 1912, a copy of which has been marked as Ex. P-4. The defendant does not seem to have any grievance against the decrees of the lower Courts in so far as they restrict him to use the water of the channel for particular lands belonging td him but not for other, lands which he has converted into garden after the date of the compromise. His chief complaint is that he has been wrongfully asked to close the pond "Y" in the field marked G H F E in the Commissioner's plan. A mandatory injunction was issued against him to close this pond on the ground that the water flowing north to south in the *thodu* was abstracted by the pond Y which the defendant had recently dug and that consequently there was a diminution in the supply of channel water which the plaintiff was entitled to use for his lands lower down.

Mr. Adiga urges on the authority of well-known cases in (1843) 12 M & W. 324[1] and (1857-59) 7 H.L.C. 349[2] that this portion of the decrees of the lower Courts is wrong, because the general rule is that the owner of a land has got a natural right to all the water that percolates or flows in undefined channels within his land and that even if his object in digging a well or a pond be to cause damage to his neighbour by abstracting water from his field or land it does not in the least matter because it is the act and not the motive which must be regarded. No action lies for the obstruction or diversion or percolating water even if the result of such abstraction be to diminish or to take away the water from a neighbouring well in an adjoining land. To this general rule an exception has, however, been incorporated by the decisions in (1871) 6 Ch.A. 483[3] and (1907) 1 K.B. 588,[4] which lay down the proposition that in drawing

[1] (1843) 12 M. & W. 324 : 13 L. J. Ex. 289, Action v. Blundell.
[2] (1857-59) 7 H. L. C. 349 : 28 L. J. Ex. 81 : 7 W. R. 685, Chasemore v. Richards.
[3] (1871) 6 Ch. A. 483 : 24 L. T. 402 : 19 W. R. 569, Grand Junction Cannal Co. v. Shugar.

subterranean water from the adjoining fields a man cannot draw off water flowing in a defined surface channel through that adjoining land. Lord Hatherley points out in the first of the two cases that

"if you cannot get at the underground water without touching the water in a defined surface channel you cannot get at it at all. You are not your operation, or by any act of yours, to diminish the water which runs in a defined channel..."

In the law relating to easements in India by Peacock the following passage occurs at page 292 :

"The general rule that a landowner has a natural right to divert or appropriate within his land, without regard to his neighbour, water percolating or flowing lit undefined channels must taken with this reservation, that if he cannot effect such "diversion or appropriation without appropriating water from a stream Sowing in a defined fennel, he may not do so at all."

This rule based on the two decisions referred to above applies in this country as well and lower Courts were justified in holding that as the pond Y had the effect of tapping water flowing in the channel, it is an actionable wrong that must be prevented by the issue of a mandatory injunction.

But the question still remains whether it to go so far as to direct the defendants to fill up or obliterate the pond altogether or whether it is enough to give instructions to secure that the *thodu* water is not abstracted into the pond by percolation. It is in evidence that the pond has got its own springs in the north and west. So a part of the water in this pond is the water to which the defendant is entitled. It is only as regards that part of the water that may come into it by means of percolation from the channel that the plaintiff can say that it should not be allowed. So I think it will be enough to substitute in the place of the mandatory injunction granted by the lower Courts, with reference to the pond 'Y' an injunction directing him so to cover the eastern side of the pond with cement mortar ….. prevent water percolating from the channel into the pond. He will carry out this work within three months from this date. In default the decree of the lower Court will stand affirmed.

Mr. Adiga raised a new point not taken in the Courts below relating to the amount of Rs. 150 awarded as damages. He said that the plaintiff could get damages in respect of the fields that were contemplated as entitled to irrigation from the channel water at the time of compromise but what he could not get damages in respect of fields which he might have recently converted into garden lands. He pointed out that while the compromise dealt with the plaintiff's fields of an extent of one acre and 62 cents, the plaintiff spoke in his evidence that three or four acres had been damaged, which proved conclusively that he was claiming damages for a larger area. This, however, is not a question that can be allowed to be raised now as it is a question of fact and cannot be decided without further investigations. Subject to the alterations indicated above in the decrees of the lower Courts with reference to the pond 'Y' the second appeal stands dismissed with costs. (Leave to appeal is refused).

C.R.K./D.R. *Order accordingly.*

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[4] (1907) 1 K. B. 588 : 76 L. J. K. B. 361 : 96 L. T. 573, English v. Metropolitan Water Board.