Case Note: The issue before the court was whether appellant was a riparian owner or not. The Court ruled in the appellants favor, observing that riparian rights are natural rights and do not arise out of prescription and that the small stream (‘khani’) can be considered to be a ‘natural stream’.

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IN THE HIGH COURT OF MYSORE

Decided On: 26.09.1972

Subraya Bhatta
v.
Lingappa Gowda and Ors.

Hon'ble Judges:
B. Venkataswami, J.

JUDGMENT

B. Venkataswami, J.

1. This appeal by the plaintiff in O. S. No. 497 of 1959 on the file of the Second Addl. Munsiff. Puttur. is directed against the judgment end decree, dismissing the suit, made by the Principal Civil Judge, Mangalore in A. S. No. 69 of 1966.

2. The material facts, briefly, are as follows:-- The suit has been filed for permanent and mandatory injunctions in respect of water flowing from a spring 'A' through 'khanis' AEX and AEF shown in the Commissioner's sketch marked as Exhibit A-3. The spring 'A' is situated in S. No. 4/1. which is a Government land. From there the water flows through S. No. 29/2 through 'khanis' AEX and AEF in the Commissioner's plan and is collected at point 'B', an artificial pond situated in the land of the plaintiff appellant bearing S. No. 33/14. It is the case of the appellant that the defendant 1 who is the owner of S. No. 28 has obstructed such flow by various acts, which it is unnecessary to set out in detail. Suffice it to state that S. No. 28 is at a much higher level than the pond 'A' and it is not apparent from the record whether the first respondent is a riparian owner in relation to such a natural flow of water. The suit was resisted on behalf of the defendants on several grounds, one of which is that the appellant was not a riparian owner and had not any riparian right to the use of such water. Since the decision in the appeal has been principally based on the answer to the question of riparian rights of the appellant, it is unnecessary to detail the other defences in the suit.

3. The trial Court decreed the suit end the lower Appellate Court reversed the said decree on the ground that the plaintiff-appellant was not a riparian owner and he not having established any other easementary right, must fail. Hence this appeal.

4. The principal argument, in support of the appeal, of Sri M. Gopalakrishna Shetty, the learned Advocate, is that it is plain from the Commissioner's sketch and reports. Exs. A-3, A-4 and A-5. that the spring and 'Khanis'. A. AEX and AEF respectively were all natural sources of water, and the fact that water was being collected at 'B' on appellant's land would not render the appellant a non-riparian owner. Further, his case fell sauarely under illustrations (f), (h) end (j), together with the second explanation, occurring in Section 7 of the Easements Act. He further submitted that the learned Civil Judge was in error in concluding that he was not a riparian owner and this was clearly based on a misconstruction of Exhibits A-3. A-4 and A-5.

5. On behalf of the first respondent. Sri M. R. Janardhgna, the learned counsel, contended that even granting that water was flowing naturally in the 'Khani', the appellant cannot have any right unless he has prescribed for it as an easement. In support of this proposition, he placed reliance on certain passages in Halsbury's Laws of England (Simond's Edition), Vol. 39 at para. 704 thereof, and Gale on Easements 13th Edn., at pages 183 and 188.

6. It is convenient to dispose of this contention of the respondent, before adverting to the one urged on behalf of the appellant. It seems to me that the enunciations relied on in Halsbury's refer to the acquisition of additional easementary rights by a riparian owner. This is not to say that even the natural right of riparian owner has to be prescribed for as in the case of an easement. If the view as urged by the learned counsel were to be accepted, it would be completely destructive of any such natural right. As can be gathered from Halsbury, an easementary right can be acquired as an additional riparian right and not in supersession of any such natural right The passage in question is:--

"704:-- Acquisition of additional riparian rights -- In addition to the natural rights incidental to the ownership of riparian land a riparian owner may acquire a right in the nature of an easement to the use of enjoyment of water in a known and defined natural channel, or to obstruct the flow thereof, by grant or prescription and the natural right aforesaid of any riparian owner is subject to any such right or rights lawfully acquired, and thus adverse to his right, by another or others. To maintain a claim to such an acquired right a riparian owner must either prove an express or implied grant, to himself or a predecessor in title, from the other riparian owners whose natural rights are thus adversely affected or must prove an uninterrupted enjoyment of twenty years by himself and his predecessors affording conclusive presumption of a grant. Where water course is not kept in repair, the owner of the land over which the water flows does not acquire a prescriptive right to the flow."

7. The passages in Gale on Easements summarise the law on riparian rights and it is sufficient to refer only to two of them for the purpose of the case on hand. They are at pages 188 and 189 of the above Volume and run thus:

"The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established. Each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases for any purposes of his own not inconsistent with a similar right in the proprietors of the land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the licence or the grant of the proprietor above....." and

"..,..... as laid down bv Mr. Justice Story, in his Judgment; in the case of Tyler v. Wilkinson, in the courts of the United States, as 'an incident to the land and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law'....."

8. It was mostly on the latter passage that reliance was placed by Sri Janardhana. It seems to me that it is of very little assistance to him. It refers to a claim of 'exclusive right'. There cannot be much doubt that such an 'exclusive right' has to be acquired as an easementary right only and not as a natural right. But in the instant case the claim of the appellant in regard to such a right has been negatived and no argument has been addressed before me challenging such finding. Hence, this contention cannot be of any avail to the first respondent,

9. On this aspect of the case, it is relevant to refer to an enunciation of the Judicial Committee of the Privy Council in Secy. of State v. Sanmdhiraju Subbarayadu, (AIR 1932 PC 46). wherein it is observed that a 'riparian right' is a distinct and separate from an easementary right in the strict sense of the term. The enunciation reads thus:--

"A riparian owner is a person who owns lands abutting on a stream and who as such has a certain right to take water from the stream. His right to the use of the stream does not depend upon the ownership of the soil of the stream and he can take water first of all for domestic use and then for other uses connected with the land of which irrigation of the lands which form the property is one. The right is a natural right and not in the strict sense of the term an easement, though in many cases it has been called an easement. In particular it is not capable of being lost non utendo and the maxim tantum prescrintum quantum possessum has no application."

10. I shall now revert to the contention of the appellant. The learned Civil Judge in allowing the appeal, has accepted a contention on behalf of the respondent herein which was to the fallowing effect:

"..... According to him, even if it is assumed that the channels "AEX" and "AEF" are natural ones, by no standard, they could be called natural streams and the lands of the plaintiff do not abut the said streams and therefore, he cannot be a riparian owner having riparian rights to the water flowing in the natural streams. I find considerable force in this contention of the learned Counsel ....."

11. The discussion in regard to it is to be found at the end of para. 18 of the judgment of the learned Civil Judge. It is relevant to set it out in full in so far as it is necessary. It reads thus:--

"..... Could it be said that just because water flows to the lands of the plaintiff at "X", the plaintiff is a riparian owner and as such, entitled to the entire water flowing from "A" through "AEX and AEF" I should think not. For, as already observed for a riparian owner, there should be a natural stream or river and the lands of the plaintiff should abut the said stream or the river. In the instant case, no such natural stream exists end what exists, are only Khanis which are described as natural khanis and in the said khanis, water flows and stops at point "X" in the plaintiff's land. As already observed, a riparian owner is a person whose lands abut a natural stream. No such stream exists here and no lands of the plaintiff abut such a natural stream. Therefore, the right of the plaintiff as a riparian owner would not arise."

12. It seems to me that the reasoning of the learned Civil Judge is faulty and, therefore, cannot be accepted. There is no doubt that spring "A" is a natural pond and water flows from it through khanis "AEX" and "AEF" on to the land of the appellant without any artificial aid. If the pond is repaired or some small repair is effected to the 'khanis' the flow of water would not on, that account cease to be natural. The learned Civil Judge was in error in thinking that a 'khani' though natural was not a stream. I fail to see the difference between them except for the fact that a 'Khani' is smaller than a stream. But on this account it cannot be said that the law governing the rights of a riparian owner stand qualified so drastically as to be not applicable at all for flow of water in 'Khanis' such as those concerned herein. Similarly, the fact that water has been collected in pond 'B' on the appellant's land would not in my view, render a person a non-riparian owner. It is clear from the fact on hand that the pond 'B' is an artificial one. Had it not been for it, it is reasonable to expect that water in the 'khani' would pass through the land of the appellant. Therefore, pond 'B' can only be thought of as an obstruction to the enjoyment of such water by a lower riparian owner as a natural right. He could perhaps make a grievance of it. The position of the first respondent is not similar to that of a lower riparian owner and he can make no grievance of it. Granting that he is an upper riparian owner, which he has not been shown to be, it would be his duty not to obstruct the flow so as to affect the right of the appellant, a lower riparian owner. Hence, the learned Civil Judge was clearly in error in his conclusion in that he hag incorrectly assumed that 'khanis' were not natural streams and that the appellant was not a riparian owner. Such an error, in my view, is not one merely pertaining to the realm of appreciation of evidence. It is one clearly based on certain asumptions which were unwarranted. Hence, the judgment based on such a conclusion cannot be supported.

13. It also seems to me that the facts of the case bring it within illustration (h), read with explanation to Section 7 of the Easements Act as contended for on behalf of the first respondent. The natural right of the appellant as a riparian owner, therefore, clearly deserves to be upheld.

14. But on behalf of the first respondent. It was pointed out by Sri Janardhan that the perpetual injunction would preclude the first respondent from for ever utilising the waters even though he might in fact be or might at some future time become a riparian owner himself. The injunction, it seems to me would not in any manner affect the right of the appellant as a riparian owner, if he is one. Beyond this, I do not think it is proper to say anything more, nor curtail or modify the injunction as requested.

15. In the result, this appeal succeeds and is allowed. The judgment and decree of the learned Civil Judge in appeal are set aside and consequently, those of the trial Court stand restored.

16. In the circumstances, the parties will bear their own costs in this appeal.