Case Note: Case concerning the existence of easementary rights over water flowing into land from an artificial channel. The Court ruled in favor of the existence of easmentary rights as the water from channel had been openly used by the landowners over a long period of time.

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IN THE HIGH COURT OF KERALA

Decided On: 06.07.1977

Tharur Panchayat and Ors.
v.
Kunchayi and Anr.

Hon'ble Judges:
T. Chandrasekhara Menon, J.

JUDGMENT

T. Chandrasekhara Menon, J.

1. Defendants 1 to 3 are the appellants in this second appeal which arises out of a suit filed by the respondents for an injunction to restrain the appellants and another from interfering with a water chal described as item 2 in the plaint and from trespassing into the northern portion of item 1 and for a mandatory injunction for restoration of the chal to its original condition.

2. Plaint item 1 belongs to the plaintiffs and they are in actual possession of the same besides other properties. Defendants 1 to 3, who are the appellants, are the President, Executive Officer and a Member of the Tharur Panchayat respectively, within whose limits the property is situated. It appears that a peon of the Panchayat is also impleaded as the 4th defendant in the suit. The Panchayat had purchased the northern portion of item 1 for conducting a shandy. The plaintiffs have raised objection to the construction of a market place in that property as it would obstruct the flow of water to the plaintiffs' paddy field in item 1 through the vellachal in item 2. It is alleged in the plaint that on 15-8-1969 the defendants filled up a portion of the chal. The varichal runs along the northern side of item 1 also. It is contended in the plaint that the plaintiffs and their predecessors-in-interest have been using this water flowing through the chal concerned for irrigation of their properties for over 100 years without interruption peacefully and as of right and to the knowledge of all concerned. The suit was brought forward on the allegation that the defendants have no right to obstruct the same.

3. Defendants 1 to 3 had contended in the suit that there is no varivellachal on the western side of the property purchased by the panchayat as alleged in the plaint. Their case was that the property was purchased for the public need of constructing a market and as there is no chal in existence there is no question of any one tampering with the chal. It was contended that item 2 is an imaginary item, and the plaintiffs cannot claim as easement right over a non-existent chal In the written statement the plaintiffs are put to strict proof of their claim to item 1.

4. The trial court held that the easement right claimed by plaintiffs over item 2 is proved, that the plaintiffs have title and possession over item l and that the attempted tampering is true and accordingly decreed the suit as prayed for with costs against defendants 1 and 2. The matter was taken up by the present appellant to the lower appellate court--District court, Palghat. The learned District Judge dismissed the appeal with costs confirming the decree and judgment of the trial court It is in these circumstances that the S. A. has been filed.

5. What was strongly contended before me by the learned counsel for the appellants was that the courts below have not really found the ingredients required to establish a case of easement. Even if the chal had existed and water flowed through that, it will not result in an acquisition of any easementary right on the part of the plaintiffs. It was urged that the Malampuzha canal is of recent origin and nobody has an easementary right to have the water from that canal flowing through a defined channel. As regards the question of fact, that is whether there is a defined channel as contended by the plaintiffs and whether the plaintiffs were using the water flowing through the channel for cultivation purpose in their properties, I do not think this court sitting in second appeal could interfere with the findings of fact entered into by the courts below.

6. The only question that has to be seriously considered is the contention of the appellant that even if the chal had existed and water flowed through that, it will not result in an acquisition of any easementary right on the part of the plaintiffs. It was pointed out by the learned counsel for the appellants that the right which may be acquired by a land-owner or which may exist as a natural right to conduct or to cause water, either from a natural or artificial source, to flow over the adjoining land of a neighbour, which may be an easementary right will not impose an obligation upon the dominant owner to continue the supply of water for the benefit of the owner of the land to which the water is discharged. He referred me to the following passage in John Leybourn Goddard's treatise on the Law of Easements, 6th Edn. pages 92 and 93:--

"Among rights which have relation to the flow of water, the right which may be acquired by a land or mine-owner, or which may exist as a natural right to conduct or to cause water, either from a natural or artificial source, to flow over the adjoining land of a neighbour, must be included. It is unnecessary to say more in this place than that such a right may exist, and that it is an easement. The acquisition of such an easement will not, however, impose an obligation upon the dominant owner to continue the supply of water for the benefit of the servient tenement; in other words, the servient owner does not by the continued reception of the water on his land, acquire an easement against the

dominant owner that the latter shall continue to supply him with the water in an unfailing stream."

The decisions referred to therein are Gaved v. Martyn (1865) 19 C.B.N.S. 732; Arkwright v. Cell ((1839) 8 LJ Ex. 201; Mason v. Shrewsbury and Hereford Railway Company ((1871) 6 Q.B. 578) and Wilson v. Waddell ((1876) 2 AC 95).

7. It was contended that it is well established that no easement rights can be acquired over water flowing in an artificial stream unless it is definitely established that it was constructed with a view to its being permanently enjoyed. In Arkwright v. Gell ((1839) 8 LJ Ex. 201) where a water-course was constructed with the sole object of getting rid of the water which had over-flowed the mines and prevented the owner thereof from digging out ore, it was held that as the flow of water in the artificial watercourse so constructed was necessarily to be of a temporary nature, no length of user could give a prescriptive right to a claimant to insist on the continuance of this water indefeasibly.

8. It was also contended that in the case of claims by prescription at common law or under the doctrine of lost grant, whether to light or to any other kind of easement, it is also necessary to show an enjoyment as of right. The following passage from the decision of Fitzgibbon, L.J. in Hanna v. Pollock (1900) 2 I.R. 664 671 was referred to:

"The whole doctrine of presumed grant rests upon the desire of the law to create a legal foundation for the long-continued enjoyment, as of right, of advantages which, are prima facie inexplicable in the absence of legal title. In cases such as this, where the grant is admittedly a fiction, it is all the more incumbent on the judge to see, before the question is left to the jury, that the circumstances and character of the user import that it has been 'as of right'."

9. What Mr. Viswanatha Iyer contended was that in the nature of the chal which is really only a pathway for the village folk to pass through, collection of rain water drawn from the adjoining lands and discharge of such water to the plaintiffs' land cannot result in the acquisition of a right as such in the plaintiff. Nobody could prevent the owners of land where the rain water is being collected and discharged to the pathway from preventing the discharge of water from the pathway, if he so desires. The Panchayat's primary duty would be to see that the pathway is kept as pathway. He also strongly urged that before the plaintiffs could succeed they will have to establish that the Panchayat or the predecessors-in-interest had knowledge of the right that is being put forward by the plaintiffs. The enjoyment of easement or even a right which might be acquired under the principle of lost grant must be one of which the servient owner has knowledge either actual or constructive.

10. In Sturges v. Bridgman (1879) 11 Ch. D. 852, 863 Thesiger L J, in delivering the judgment of the court of appeal had stated the Law governing acquisition as follows:

"The law governing the acquisition of easements by user stands thus: Consent or acquiescence of the owner of the servient tenant lies at the root of prescription, and of the

fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, nec vi nec clam nec precario; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbor of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contends and endeavors to Interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence." Again, in delivering his opinion to the House of Lords in Dalton v. Angus ((1881) 6 App. Cas. 740) Fry, J. said:

"In my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, first, the doing of some act by one man upon the land of another; secondly the absence of right to do that act in the person doing it; thirdly, the knowledge of the person affected by it that the act is done; fourthly, the power of the person affected by the act to prevent such act either by act on his part or by action in the courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as for example, in the case of light, some of these ingredients are wanting, but I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, in abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain, both from reason, from maxim, and from the cases."

11. This opinion of Justice Fry was accepted in Dalton v. Angus (1881-6 A.C. 740) by Lord Benzance in his speech in the House of Lords and stated that he was in "entire accord" with the opinion of Justice Fry; the opinion being also described by Lord Blackburn as "a very able one" -- ((1881) 6 App Cas 803, 823).

12. Peacock in his law relating to Easements, 3rd Edn. (1922) at p. 109 observes:--

"With reference to this topic an important question arises as to whether a servient owner whose natural rights have been restricted by the diversion of water from its natural course, or by the discharge of water on to his land, can require the dominant owner to continue the exercise of the easement, or in other words, whether he thereby acquires a reciprocal easement as against the dominant owner that the latter shall continue the diversion or discharge of the water.

The question has been fully discussed in the courts and it has been decided that the servient owner cannot acquire any such right."

13. In Wood v. Waud ((1849) 3 Exch. 748) Pollock, C.B. in the course of his judgment said:

"The flow for water of twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain for the purposes of agricultural improvements, for twenty years, could not give a right to the neighbour so as to preclude the proprietor from altering the level of the drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of a stream as a matter of right."

14. The right to discharge water over the land of others or to receive the discharge of water from the lands of others by means of water courses artificially created, is not a natural right of property, but may be the subject-matter of contract between the parties or be established like any other easement either by express grant or by prescription which presumes a grant. No doubt, it is distinct from water flowing in a natural channel, which arises as incidental to the ownership of land, and as such prima facie entitles each successive riparian owner to the unimpeded flow of water in its natural course, to its reasonable enjoyment as it passes through his land as a natural incident to his ownership of It. The right to water flowing to a man's land through an artificial watercourse must rest on some grant or arrangement, either proved or presumed from or with, the owners of the lands from which the water is artificially brought, or on some other legal origin. Wood v. Waud's case relied on by the learned counsel for the appellants is itself an authority for the proposition.

15. Mr. Venkatakrishnan, learned counsel for the respondents had pointed out that the law on the matter has been well defined and explained in the decision of the Privy Council in the case reported in R.P. Narain Sing v. K.B. Pattuk ((1879) ILR 4 Cal 633). The distinction regarding the right to water flowing through a natural channel and artificial watercourse is referred to in that case as follows:

"The above distinction seems to be now clearly established, for, although it was said by the court of Queen's Bench, in the case of Magor v. Chadwick (1840) --11 A & E 571 -- that it was no misdirection to tell the jury that the law of watercourse is the same, whether natural or artificial, it was held in the subsequent case of Wood v. Waud --(1849) 3 Exch. 748 which appears to their Lordships to be correctly decided, that this expression is to be considered as applicable to the particular case, and that as a general proposition it would be too broad. On the other hand, it appears to their Lordships that the proposition that a right to the use of water flowing through an artificial channel cannot be presumed from the time, manner, and circumstances of its enjoyment, is equally too broad and untenable. It was said by the court, in Wood v. Waud:--

"We entirely concur with Lord Denman, C. J., that the proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible; but on the other hand, the general proposition that under all circumstances, the right to watercourses, arising from enjoyment, is the same, whether they be natural or artificial cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation, or alteration, of a person's property, and presumably of a temporary character, and liable to variations."

In a case which occurred soon after this decision -- Greatrex v. Hayward --(1853) 8 Exch. 291--Baron Parks shortly states the principle thus:--

"The right of the party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse and the circumstances under which it was created,"

In the case then in question, the court considered that the watercourse was of a temporary nature only, and that no right had been acquired by an enjoyment of twenty years.

In the subsequent case of Sutclife v. Booth--(1863) 32 L.J. Q.B. 136--the court of Queen's Bench directed a new trial, on the ground that the jury might have been misled by the direction of the learned judge who tried the cause, to the effect that if the stream were an artificial one, no right whatever could have been acquired in it. The court held the direction was incorrect, "because (in the words of the court) "although it may have been an artificial watercourse, it may still have been originally made under such circumstances and have been so used, as to give all the rights that the riparian proprietors would have had, had it been a natural stream."

In that case the Privy Council pointed out that it had been proved that the water has been used and enjoyed for irrigating the mouzahe from a time beyond living memory. Therefore it appears to their Lordships that, from all these facts a presumption fairly arises that this enjoyment had an origin which conferred a right. The right claimed was to have certain villages belonging to him irrigated with the water flowing from a tal or artificial reservoir, constructed on the defendants' lands, and to compel the defendants to remove certain obstruction erected by them. The artificial reservoir had been fed partly by water which was brought from a natural river by artificial channels, and partly by the collection of the rainfall on the adjoining land.

16. In the light of the decision of the Privy Council I find no mistake committed by the courts below in allowing the right claimed by the plaintiffs.

The learned Munsiff in his judgment had pointed out, after a detailed discussion of the evidence:

"Under these circumstances it is predominantly clear that water is being used by the plaintiff through the chal for a pretty long period. When the plaintiffs are found to have been using the water peaceably, openly, and for more than the period prescribed by the statute it can be presumed that it has got a lawful origin. I am, therefore, inclined to hold that the plaintiff has got a right of easement to use the rain water flowing through the lane and that the defendants are not entitled to meddle with the way so as to create any obstruction in the flow of water."

The learned District Judge also has considered the question in the correct perspective. He points out the relevant portion in the Commissioner's report Ex-C4, where it is stated that:

"from the south-eastern corner of the northern road, water flows into the pathway and flows west. It is from there that the water also flows to the south, according to plaintiffs From the point B the Commissioner found remnants of a chal along the northern side of plaintiffs' property. Even during inspection, which took place in December, the Commissioner saw water flowing through the chal and pathway to the west." The learned District Judge concludes:
"All these circumstances lend strength to the evidence adduced on behalf of plaintiffs that water is being used for irrigation of their lands since over 35 years along the lane-cum-chal mentioned by them. The defendants have no case that such user was permissive. In the very nature of things, the user must have been open and continuous. It could only be as of right."

17. In the nature of the right that has been exercised by the plaintiffs it is impossible to say that the defendants or their predecessors-in-interest had no knowledge of the exercise of such rights and the right as has now been found by the courts below is certainly related to the pleadings in the case. In para 5 of the plaint it is stated:

(Translation of Paras 5 & 9 of the plaint) Para 5.

Therefore, the 1st and 3rd defendants with an idea of putting the plaintiffs to troubles and also to cause loss to him purchased the northern portion of the plaint schedule item No. 1 property for the Tharur Panchayat and published a notice in the Mathrubhumi daily on 7-7-1969 about their intention to convert the same into a market place. The plaintiffs thereafter understood the motive behind the said purchase of the 1st and 3rd defendants. Their idea being to prevent rain water and also the water from Malampuzha Dam coming through the plaint schedule item No. 1 drainage end the property alleged to have been purchased by the Panchayat. Therefore, the 1st plaintiff sent a complaint through registered post on 8-7-1969 to the Panchayat. Thereafter the 2nd defendant " without enquiring into the veracity of the petition sent a reply and opened a portion of the drainage on 15-8-1969. The said act of the defendants 3 and 4 was prevented by the plaintiffs and hence they withdrew from the place.

Para 9 of the plaint reads:

Para 9. The drainage shown in the plaint schedule Item No. 2 which passes through the western side of the northern boundary of plaint item No. 1 and alleged to have been purchased by defendants 1 and 2 is an ancient one. The water taken from the eastern side is a continuation of the water fall. The Water passing through the said drainage is highly essential for the plaint schedule Hem No. 1 and the plaintiffs are entitled to easement right and has been using it openly and under an easement right and the same has been used and enjoyed by the predecessors of the plaintiffs for more than 100 years. The plaintiff submits that the defendants had no right to prevent the same. It is further submitted that the drainage is taken upto Ravunny's kudiyirippu and also the Malampuzha canal. The water in the Malampuzha canal flows through the north western end of the property purchased by the Panchayat and the same is shown as item No. 2 in the plaint schedule. The same flows through the Ittil way and also the drainage.

18. On the basis of the pleadings and evidence in the case I have no hesitation in holding that the plaintiffs could certainly claim right of getting water flowing to their land through the water chal described as item 2 in the plaint. That part of the chal is also being used as a pathway cannot in any way detract from the right that the plaintiffs could claim. In the circumstances I affirm the decree and judgment of the courts below and dismiss the S. A.with costs.