

Case Note: Case concerning the right of a lower riparian to divert a stream. The court ruled in favor of the existence of such a right as the upper riparian is not entitled to exclusive use of water. The diversion of water by lower riparian owner does not cause any diminution in quantity of water enjoyed by the upper riparian.

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AIR1981Ker102

IN THE HIGH COURT OF KERALA

Decided On: 14.01.1981

Dr. K. Anantha Bhat

v.

K.M. Ganapathy Bhatta and Ors.

Hon'ble Judges:

P.C. Balakrishna Menon, J.

JUDGMENT

P.C. Balakrishna Menon, J.

1. The 1st defendant in O. S. No. 25 of 1969 on the file of the Munsiff's Court, Kasaragod is the appellant in Second Appeal No. 1013 of 1976 and the plaintiff in O. S. No. 161 of 1968, of the same Court is the appellant in S. A. No. 1015 of 1976. O. S. No. 161 of 1968 is for a permanent injunction to restrain the defendants from diverting the water of a natural stream into a well belonging to the 3rd defendant.

2. The defence to the suit is one of denial of the plaintiff's right to the use of the water in the natural stream. The defendants also deny that they are diverting water from the natural stream into a well or tank in S. Y. No. 557/4.

3. O. S. No. 25 of 1969, is by the 3rd defendant in O. S. No. 161 of 1968 and his son. They are the owners of the property in RS. No. 557/1 and RS, No. 557/4. The natural stream enters RS. 557/1 from the south and flows further north. It touches RS 557/4 belonging to the 1st plaintiff at the northwest portion of the property.

4. The relief claimed in the suit is for an injunction restraining the defendants therein from constructing any katta or embankment across the natural stream, or from taking water therefrom. The katta is being put up touching RS, 557/4 which would have the effect of accumulating the water in the stream along RS 557/1 and upwards. The plaintiffs claim exclusive right to the water in the stream and pray for an injunction restraining the defendants from diverting the water from the stream by putting up katta across the same. The 1st defendant in O. S. No. 25 of 1969 is the plaintiff in O. S. 161 of

1968. He is contesting defendant in O. S. No. 25 of 1969 and a joint written statement is filed by defendants 1 and 3. The other defendants in O. S. No. 25 of 1969 are the owners of the property on the west of the natural stream south of the property of the 1st defendant in O. S. No. 25 of 1969. Their land is at the same level as the land of the plaintiffs on the opposite bank of the natural stream. The contention of the first defendant in O. S. No. 25/1969 is that he is the owner of the property in R. S. 555/2-D on the western side of the natural stream, entitled to the use of water of the stream for irrigating his areca garden in R. S. 555/2D, and also the paddy fields in R. S. 555/2A, 2B and 2C belonging to himself and others by diverting water from the stream. For irrigating the areca garden and the paddy fields, the construction of a katta across the natural stream is necessary and that is the accustomed way of diverting water from the stream. Such construction does not in any way affect the plaintiff's right to the natural use of the water in the stream for the reason that the katta is to be put up at the lower reaches of the natural stream very much lower down the property of the plaintiffs. No damage is done to their property by the use of water by the first defendant in O. S. No. 25/1969, or by putting up a katta across the stream. The plaintiffs are not entitled to the exclusive use of the water in the stream, the first defendant is also entitled to the water to irrigate his lands. He has also set up a right of easement to construct a katta across the thodu at a point down the stream touching the north-western corner of R. S. 557/4 which will not in any way affect the plaintiff's use of the water in the stream. In paragraph 11 of the written statement of defendants 1 and 3 they have denied the plaint allegation that they have no right to put up a katta across the natural stream. It is further stated that the katta is constructed to conserve-water in the stream and the water so accumulated is diverted to the garden in R. S. 555/2D by means of a sluice in the south-eastern side of the garden and then the water is led by means of a Voli.

5, Both the suits were jointly tried and evidence was taken in O. S. No. 161 of 1968. The trial court gave separate judgments in both the suits. There is only a common judgment by the lower appellate court. The second plaintiff in O. S. 25/69 is the son of the first plaintiff. He is not a party to O. S. 161 of 1968. A commission was issued to identify the property of the plaintiff and the defendants and also to mark the disputed thodu and the point at which the katta is put up by the plaintiff in O. S. 161 of 1968 who is the first defendant in O. S. No. 25/1969. Ext. C1 is the plan submitted by the Commissioner. The natural stream is marked in the plan as 'C' bearing resurvey Nos. 556/2, 557/1, 557/2, and 589/3. It flows from south to north. It is admitted by both parties that it is a poramboke thodu, but a portion of it flows along R. S. 557/1 registered in the name of the second plaintiff in O. S. 25/69. R. S. No. 557/1 belonging to the second plaintiff in O. S. 25/69 is on the eastern side of the thodu and R. S. No. 557/4 belonging to the first plaintiff therein is on the east of R. S. No. 557/1. The northern end of R. S. 557/4 touches the natural stream. The first defendant in O. S. 25/69 is in possession of an areca garden in R. S. No. 555/2D. The paddy lands in R. S. No. 555/2A, 2B and 2C belong to the joint family of the first defendant in O. S. No. 25/69. From the plan Ext. C1 it can be seen that the plaintiffs in O. S. 25/69 are the owners of property at the higher reaches of the natural stream and the first defendant therein is the owner at the lower reaches of the stream. Defendants 2, 4 and 5 in O. S. 25 of 1969 are not interested in the contest in the suit, as they are owners of R. S. 558/1 and other lands adjacent to the property of the plaintiffs in

O. S. 25/69 on the western bank of the natural stream. Even though in the written statement in O. S. No. 25/1969 the defendants have not specifically put forward a case of riparian rights it is admitted by both parties that the stream shown in the plan is a poramboke thodu, and it is a natural stream. Hence, it is proper to refer the plaintiffs in O. S. 25/69 as the higher riparian owners and the first defendant as the lower riparian owner with reference to the natural stream. The suit O. S. 161/68 by the first defendant in O. S. 25/69 is dismissed by both the courts below on the finding that it is not shown that the defendants therein including the first plaintiff in O. S. 25/69 are diverting the water of the natural stream into a well marked "M" in the plan Ext. Cl and situated in R. S. 557/4 belonging to the first plaintiff in O. S. 25/69. The concurrent finding is that there is no connection between the natural stream and the well 'N' and there is nothing to show that the water from the stream is diverted into the tank or well marked as 'N' in Ext. Cl plan. The finding of the courts below is based on the Commissioner's plan and report submitted in the case which show no connection between the well or the tank marked 'M' and the natural stream. It is a concurrent finding of fact and I do not see any ground to interfere with the decision of the courts below dismissing O. S. 161 of 1968. The prayer in the suit was only against the draining of water from the natural stream into the tank or well in R. S. 557/4. That suit was therefore correctly dismissed by both the courts below on the finding that there is no evidence of any water being diverted to the well. True, an issue is raised in the suit relating to the right of the plaintiff to put up a katta at the point marked 'K', in the plan Ext. Cl. It is appropriately a matter for consideration in O. S. 25/69, wherein the third defendant in O. S. No. 161 of 1968 and his son who are the plaintiffs sought for a decree for permanent injunction against the plaintiff in O. S. 161/1968 and others from putting up any katta across the natural stream at the point marked 'K' in the Commissioner's plan Ext. Cl, and from making use of the water for irrigation of their lands on the western bank of the natural stream. Finding on this question is seen entered by the trial court in the judgment in O. S. 161 of 1968 and the same is adapted in a separate judgment in O. S. 25/69. In O. S. 25/69 the trial court held that the first defendant who is the lower riparian owner is not entitled to put up a katta at the point marked 'K' in Ext. Cl plan on the ground that he has not satisfactorily proved the right of easement set up by him in his written statement to put up a katta at the point for the purpose of irrigating his lands. Consequently, O. S. 25/69 is decreed in favour of the plaintiffs therein granting a permanent prohibitory injunction against the defendants from putting up a katta at the point 'K' and diverting water for their use of irrigating the lands on the western bank of the natural stream. This decision of the trial court is confirmed by the lower appellate court by a common judgment in the two appeals before it.

6. It is admitted by both sides that the thodu marked in Ext. Cl plan is a natural stream running from south to north. The plaintiffs in O. S. 25/69 are the higher riparian owners having lands on the eastern bank of the natural stream. The first defendant in O. S. 25/69 is a lower riparian owner having lands on the western bank of the natural stream. The other defendants in the suit are not lower riparian owners, and they are not interested in the katta being put up at point 'K' in Ext. Cl plan. In S. A. No. 1013 of 1976 this Court is concerned with the right of the first defendant in O. S. No. 25/69 to put up a katta or an embankment across the natural stream at the point marked 'K' in the plan for the purpose of irrigating his lands on the western bank of the stream. The prayer in the plaint is for a

permanent injunction restraining the defendants, their men and agents from putting up any katta touching or adjoining R. S. 557/4 or which would have the effect of accumulating water in R.S. 557/1 or otherwise interfering with the second plaintiff's exclusive user of the water in the stream. The relief claimed therefore is against a lower riparian owner putting up an embankment across the thodu to conserve water for the purpose of irrigating his lands. Since a portion of the thodu flows along R. S. 557/1, relief is claimed against accumulation of water in R. S. 557/1 relating to that portion of the thodu flowing along the said survey number. The law relating to the rights of owners of land on the banks of a natural water course for the use of its water is considered by this Court in the decision in *M. Kanna v. T. Chathu* (1973 Ker LT 124), and it is held in paragraph 5 of the judgment as follows :

"5. The plaintiffs as well as the defendants are riparian owners, the properties of defendants being adjacent to the stream at the higher reaches. The water in such a natural course is open to use by the riparian owner for all primary purposes, irrespective of diminution in the quantity of water resulting from such use. Domestic use, use for cattle, and such other purposes are primary purposes. But in diverting water for secondary purposes such as for irrigation or for running a mill the use by the riparian owner is subject to the restriction that such use shall not cause material diminution in the supply in the stream to other riparian owners. The rights of the other riparian owners should not be sensibly injured. Any riparian owner who seeks to use the water of a natural stream must use it reasonably keeping in mind that he is not entitled to exclusive user of the water of the stream and that the fundamental consideration is that the user by the other riparian owners should not in any way be prejudiced by the way he diverts, the resources to his own purposes. Section 7 of the Indian Easements Act recognises this right of every owner of immovable property. Section 7 (b) recognises the right of every owner of immovable property to enjoy, without disturbance by another, the natural advantages arising from its situation subject to any law for the time being in force. One of the natural advantages that is enjoyed by an owner of property which is situate adjoining a stream is to exploit the water of the stream for his own purposes subject to the limitation to which I have already referred. Illustration (j) in Section 7 runs as follows:

"The right of every owner of land abutting on natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners".

In the former part of this illustration the primary use is referred to. There is no limitation in the matter of the primary use. In the latter part of the illustration the secondary use is referred to. But that is qualified, that qualification being that no material injury to other like owners be caused. What exactly would be material injury to other riparian owners is the question which would then arise. As I said earlier, material injury would be caused to other riparian owners if their right to use the water of the natural stream, whether for primary or for secondary purposes is in any way materially affected. It would be materially affected if there is perceptible diminution in the supply of water to them. Such

injury may arise by reason of the volume of the water diverted by the upper riparian owner and also the mode employed by him to divert such water.

After referring to the decisions in (1897) ILR 24 Cal 865, 1904 AC 301, AIR 1932 PC 46, AIR 1934 Mad 583, AIR 1960 Bom 490, 1962 KLJ 45 and AIR 1969 Guj 276, this Court held :--

"7. What I have stated above, is sufficient for the purpose of this case. No doubt, an upper riparian owner can claim that to irrigate his paddy fields he is entitled to supply of water from the river or stream. He can even put up a bund across the course of the river for the purpose of diverting water for his fields. But one thing that must be remembered is that his acts should not in any way injure the other riparian owners who depend upon the water from the same stream and who have a right to expect water from the stream to irrigate their own lands. The stream must continue to flow without sensible diminution."

It is thus clear that the plaintiff in O. S. No. 25/69 who is the upper riparian owner with respect to the natural stream is not entitled to exclusive user of the water in the natural stream. He cannot complain of the user of the water by the lower riparian owner, and in law he has no locus standi to bring a suit against a lower riparian owner putting up a bund across the natural stream and diverting the water for purpose of irrigating his lands.

7. The present case relates to the natural right of a lower riparian owner to divert the water in a natural stream for irrigating his lands. A natural right is different from a right of easement. Every owner of land abutting a natural stream has a natural right to the user of water in the stream; such rights do not depend upon a grant or prescription, but are natural rights incidental to the ownership of the soil of the land abutting the stream.

8. In the present case, both the courts below have considered the question whether the first defendant in O. S. 25/69 has a right of easement to put up a katta at point 'K' marked in the plan Ext. Cl. That is not the real question that requires consideration in the case. The question for consideration is whether the plaintiff has proved his exclusive right to the use of the water in the stream ^ and whether he has a cause of action" against an owner of land on the lower reaches of the stream putting up a bund across the stream for the purpose of irrigating his lands. This question is not considered by both the courts below. There is evidence in the case that a katta used to be put up at the point 'K' for the purpose of irrigating the land in R. S. No. 555/2D. Ext. A1 dated 31-10-1957 is the partition deed in the first defendant's family. There is a reference to the katta to be put up at the thodu for the purpose of leading water to the land allotted to the F sharer. The person who was allotted share F is the first defendant in O. S. 25/69. The reference in the document is about the fcatta to be put up across the thodu in R. S. 555/1. The lower appellate court has found that the thodu referred to as in R. S. 555/1 in Ext. A1 is a mistake and it really refers to the thodu marked C in Ex. Cl plan which bears R. S. No. 556/2. There is therefore evidence in the case of the accustomed user of water by the putting up a katta across the thodu. True, this will not be sufficient to establish a right of easement, but as earlier stated, the real question in the present case is not one relating to an easement but a natural right of an owner of land abutting a natural stream to the use of

the water in the stream. The first defendant has pleaded a right of easement to put-up the katta across the natural stream and to divert water in the stream for purposes of irrigation. It was for the reason of such a plea that both the courts below were led to consider the question whether the first defendant has established a right of easement. In *Lal Mohamad Biswas v. Emajuddin Biswas* (AIR 1964 Cal 548) Mukharji, J. said at p. 551 :--

"In fact the danger of using the word 'easement' loosely was noticed in *Dovas-ton v. Payne* ((1795) 2 Hy and BL 527) where the son of a highway was said to be subject to an easement for the benefit of the public, but a public right of way cannot be an easement, for there was no dominant tenement. In fact *Scrutton L. J. in Taff Vale Ry. Co v. Cardiff Ry. Co.* (1917) 1 Ch 299 at page 317 pointed out that "Parliament and parliamentary draftsmen have used the term 'easement' in relation to various rights which no lawyer would describe as 'easements'."

In *Narayani v. Govindan* (1968 Ker LT 626) Raman Nair, J. (as he then was) in dealing with the right of passage along a public pathway stated:

"It is true that the plaint described the right it sought to enforce as an easementary public right of way and that the first court in decreeing the suit fell into the same error as if there could be an easementary right in gross. The lower appellate court gave the right its proper label in calling it a customary right".

There is no issue in O. S. No. 25 of 1969 relating to any right of easement, but the trial court decreed the suit and granted an injunction against the first defendant from putting up a katta at point 'K' in the water course on the basis of its finding in O. S. 161 of 1968 that the first defendant in O. S. 25/69 has not established a right of easement to put up the katta and divert the water of the stream for purposes of irrigation. The lower appellate court in paragraph 23 of its judgment has referred to the rights of the plaintiffs in O. S. 25/69 as riparian rights, but in referring to the rights of the first defendant, the court below has fallen into the same error as had happened to the trial court in holding that the first defendant has no right of easement to put up a katta at point K in the natural stream marked C in Ex. Cl plan of the Commissioner. The plaintiff being the owner of land at the upper reaches of the stream is not entitled to the exclusive use of the water. The only other question is whether he can prevent the lower owner putting up a bund across the natural stream, for the purpose of irrigating his fields. He has no such right according to me. There is no diminution in the quantity of water in the stream on account of a bund being put up by an owner at the lower reaches of the stream. I fail to understand how an upper riparian owner can complain against the putting up of a bund by a lower riparian owner for diverting the water from the stream for his use.

10. It should however be made clear that by putting up a bund at point K the first defendant is not entitled in any way to damage the land of the plaintiffs in Sy. Nos. 557/4 and 557/1. On account of the katta at K there will be conservation of water in the stream including the portion of the stream in Sy. No. 557/1. The plaintiff can have no objection for such conservation of water in the stream for the purpose of irrigation of the first defendant's lands. But such water as is conserved on account of the katta being put up

should not be allowed to inundate the land of the plaintiffs in R. S. 557/1 and R. S. 557/4. In putting up the katta at the point K, it is necessary that one portion of the katta will be touching the boundary of R. S. 557/4 but in making the katta, the first defendant will have no right in any way to damage the plaintiffs' land in Sy. No, 557/4. It is submitted by the learned counsel for the appellant that Sy. No. 557/4 forming the eastern boundary of the stream is at a much higher level than the stream, and it is a steep precipice at the spot on the bank of the stream. The apprehension of the plaintiff is that by inserting beams for the purpose of putting up the katta, the land in R. S. 557/4 is likely to get damaged and it may affect even the lateral support of the land itself. The defendant in exercise of his right to the use of the water in the stream has no right to damage the plaintiffs' land. To avert any such damage to the plaintiffs' property, the place where the katta is to be put up may have to be sufficiently reinforced by the first defendant in O. S. 25/69 with requisite holes that may be provided for inserting the beams of the katta. It is made clear that by putting up the katta no damage should be caused to the plaintiff's property in R. S. 557/4 at the side of which the katta is to be put up.

11. The decree of the courts below granting a permanent injunction against the defendants from putting up the katta at point K shown in Ext. C1 plan cannot therefore be sustained. The first defendant in O. S. 25 of 1969 is entitled to put up the katta in such a way as not to cause any damage to the plaintiff's property adjoining the thodu marked C in Ext. C1 plan.

The result is that in reversal of the decision of the courts below, S. A. No. 1013 of 1976 is allowed and subject to the above observations; in O.S. 25 of 1969 is dismissed. S. A. No. 1015 of 1976 is dismissed in confirmation of the decision of the courts below. In the circumstances of the case, the parties will bear their respective costs in these second appeals.

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