

Case Note: Case concerning the question whether an easement right by prescription could be acquired on waters in well in another's land. The Court recognised the social custom in India where rich people allows poor neighbours to fetch water from their well. It was further observed that such rights could be considered as a customary right and not an easement right.

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AIR1982All468

IN THE HIGH COURT OF ALLAHABAD

Decided On: 25.05.1982

Het Singh and Ors.

v.

Anar Singh and Ors.

Hon'ble Judges:

Deoki Nandan, J.

JUDGMENT

Deoki Nandan, J.

1. This is a defendants' Second Appeal in a suit for injunction restraining the defendants from interfering with the plaintiffs' alleged right to irrigate their fields from the well situate in the defendants' land. The right was claimed by way of a prescriptive right of easement acquired by more than twenty years uninterrupted user.

2. The trial Court found that the plaintiffs had such right in respect of plot No. 221, but not in respect of plot No. 222. The lower appellate Court has found that the plaintiffs had that right in respect of both the plots Nos. 221 and 222. The well was situate in plot No. 223. There is no dispute that the land and the well belonged to the defendants. The finding is that the plaintiffs have been irrigating their fields by taking water from the well in dispute for more than twenty years.

3. Without going into the merits of that finding and accepting it as a fact that the plaintiffs had been irrigating their fields by taking water from the well in dispute for more than twenty years, the question that arises in this Second Appeal is whether a right to do so by way of an easement could be acquired by prescription in view of the provisions contained in Section 17 of the Easements Act which is to the effect that a right to underground water not passing in a defined channel cannot be acquired as an easementary right by prescription under Section 15 of the Act. A right to draw water from a well is surely a right to underground water and it is not the case that the plaintiffs' right to enjoy water from their well was interrupted by something done by the defendants to the source of

water in the well which was through a defined channel, by doing something, such as drawing an excessive supply of water from their own well from the same underground source.

4. The case of Chheddu Singh v. Kewal, AIR 1963 All 122, was cited before the lower appellate Court but it distinguished the case by observing that the said ruling did not lay down that no right of easement for irrigation from a well could be acquired by prescription. That was a case of claim to irrigate land from a well which had fallen into decay and had dried up. The injunction claimed by the plaintiff was for cleaning and opening of the well for enabling him to irrigate his fields which was refused on the ground that the plaintiff must be deemed to have lost the right by non user for at least three years, and, at any rate, since they had other source of water, it was not a fit case for grant of an injunction. However, in the end, the Court observed (at p. 123) :

"Furthermore, I am very doubtful whether the plaintiff has established his right of easement. All that he has proved is that he has been drawing water from a well which did not belong to him. The mere fact that one person draws water from a well situate on another person's land does not create an easement. Under Indian Social Conditions a person owning a well is deemed to be under a moral or pious obligation to allow the poor or less fortunate inhabitants of the locality to draw water from his well. In almost every street in India the rich man's well is used by his poor neighbours for drawing water. I do not think that the law of easement was intended to disturb this excellent social custom by giving the drawer of water from another person's well right of easement. In my opinion, the presumption in view of social conditions should be that the right in all such cases is permissive and does not create an easement. The law of easement must be interpreted in the light of Indian Social Conditions."

5. The question whether a right to draw water from another person's well for purposes of irrigating one's fields could be acquired by way of easement by prescription was not gone into in that case nor was Clause (d) of the second para of Section 17 of the Easements Act noticed, but it was nevertheless observed that the right claimed by the plaintiff was not a right of easement but was something which people in India are entitled to do by custom. The present case is not a case of a claim to draw water from the defendant's well even by way of a customary right of easement.

6. Mr. M. C. Gupta appearing for the respondents relied on Section 7, Clause (aa) of the U. P. Zamindari Abolition and Land Reforms Act which says that nothing contained in the Chapter shall in any way affect the right of any person being a bhumidhar etc., of any land to continue to enjoy an easement or any similar right for the more beneficial enjoyment of the land as he was enjoying on the date immediately preceding the date of vesting. Section 7 of the U. P. Z. A. & L. R. Act is more concerned with the effects of vesting of the estates described under Section 6. For example, if the plaintiffs had been enjoying a customary right to irrigate their fields from some pond, which had vested in the State on the date of vesting, that right would have been protected under Section 7 (aa), but it has nothing whatsoever to do with the kind of right claimed by the plaintiffs in the present suit, namely, the right to irrigate their fields from the defendants' well.

7. Mr. M. C. Gupta then cited before me Pratap Singh v. Nand Kishore, AIR 1928 All 591 and Kamal Devi v. Dr. C. Khudadad, AIR 1936 All 522, Pratap; Singh's case (supra) was a case of a customary right of drawing water against the Zamindar. Such customary rights did surely exist. The case has no application to the facts of the present case. Kamal Devi's case (supra) related to the right to water-power which was claimed by way of easement. The case is also materially and basically different from the present case.

8. In the result, the appeal succeeds and is allowed. The decree under appeal is set aside. The suit is dismissed; but, in the circumstances, the parties shall bear their own costs throughout.

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