

(1932) 08 MAD CK 0039
In the Madras High Court

Allam Narasimhulu and Others

APPELLANT

Vs

Gutta Bhadrappa and Others

RESPONDENT

Date of Decision : 23-08-1932

Acts Referred:

Citation : 140 Ind. Cas. 311 : (1932) 36 LW 688

Hon'ble Judges : Sundaram Chetty, J

Bench : Single Bench

Judgement

Sundaram Chetty, J.—These are connected appeals and arise out of a suit brought by plaintiffs (respondents) for a declaration that only the ryots of the lands within the ayacut of Solavani and Karicherlavari tanks are entitled to see the water flowing through the suit Solavani Channel and that the defendants have no right to use that water for cultivating as wet their lands on either side of the channel and for an injunction restraining them from taking the water of that channel to their lands for wet cultivation by putting up cross bunds or palmyrah spouts and also for directing the defendants to restore the channel to its original condition. Both the lower Courts have found the plaintiffs' contention to be substantially true and passed a decree in their favour granting the reliefs asked for by them subject to a (light qualification. Second Appeal No. 470 of 1920 has been filed by the 12th defendant, and S.A. No. 334 of 1920 by some of the other defendants.

2. Plaintiffs and others own about 400 acres of mamool wet land under the ayacut of Solavani and Karicherlavari Tanks. The source of supply for these tanks is Tammileru, which is doubtless a natural stream. From that stream the suit channel called Solavani Channel was cut in order to serve as a feeder to the aforesaid tanks. After these tanks become full, the water flowing through the suit channel used to be taken to two other tanks mentioned in the plaint. There is another tank called Kotta Cheruvu, to which water is supplied from Tammileru by means of a branch from Dendulur channel. It is found by both the courts below that the defendants' contention that the water from Tammileru flows through,

the suit channel into Kotta Cheruvu is false. Most of the defendants' lands lying on either side of the suit channel have been found to be dry, and it is only since 1917 or 1918 that the defendants have been trying to convert those lands into wet. The 12th defendant's land alone is found to be mamool wet, but the finding of both the lower Courts is, that that land is fed by Kotta Cheruvu and that no right to take the Water of the suit channel irrigating that land has been established. There is no doubt that the plaintiffs and others, who own wet lands under the ayacut of Solavani and Karicherlavari tanks, have permanent rights of occupancy therein, and the suit channel is a feeder for those two tanks. After a full consideration of the evidence and circumstances of this case, it is found by both the courts below that the ryots holding wet lands within the ayacut of Solavani and Karicherlavari tanks are entitled to the exclusive user of the water flowing through the suit channel and to the unobstructed flow of water through the same, in order to fill up the aforesaid tanks for the purpose of irrigating their wet lands within the ayacut. As observed by the learned District Munsif the rights so acquired can be traced to an implied grant by the zemindar and by reason of the long enjoyment of the entire quantity of water flowing from the suit Channel in the aforesaid manner, as of right, an easement by prescription or a customary right has been acquired even as against the zemindar. These findings are amply borne out by the evidence and must be accepted in these second appeals.

3. It is, however, contended that the suit channel should be deemed to be a natural stream and, therefore, the defendants, who own lands on either side of it, are entitled to riparian rights which could not be lost by mere non-user. The courts below have held that the suit channel is not a natural stream, but only an artificial water-course. That finding is challenged by setting up the contention that as the suit channel flows out of Tammileru which is a natural stream, it must also be taken to be a natural stream. But the opinion expressed by text-writers is against this contention. An artificial stream is a stream which flows at its source by the operation of men, or, if it flows at its source by the operation of nature, flows in a channel made by man. In the present case, water is made to flow in an artificial channel from a natural stream and such a channel is an artificial stream. (Vide page 327 of the Law of Riparian Rights by L.M. Doss). Where a stream is artificial and flows in a channel made by artificial means through the lands of adjoining proprietors, the rights of such proprietors are not prima facie the same as those of proprietors on the banks of natural streams. The right to the enjoyment of a natural stream of water belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself. He has a right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction. Such a right in no way depends on prescription or any presumed grant. But in the case of artificial water-courses the acquisition of rights in them must be by grant or prescription (Vide pages 106 and 107 of the Law of Waters by Coulson and Forbes, 4th Edn.). The same view is expressed in Gale on Elements (10th Edn.) at pages 274 and 275. The learned author says that in the case of an artificial water-course, any right to the flow of water must

rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which water is artificially brought or on some other legal origin. The contention of Mr. Raghava Rao for the appellants seems to be that by retention of the artificial channel having been cut from a natural stream, the owner of lands on either side of the channel must be deemed to have the same riparian rights as in the case of natural streams. But I think it is too broad a proposition which practically obliterates the distinction between a natural stream and an artificial watercourse; and even the decisions relied on by him do not support such an unqualified proposition. What those decisions appear to lay down is, that even in the case of an artificial water course, special circumstances may be shown to exist so as to confer all such rights as a riparian owner would have had in the case of a natural stream. In *Nuttal v. Bracewell* (1867) 2 Ex. 1 : 4 A.C. 714 : 36 L.J. Ex. 1 : 12 Jur. (N.S.) 989 : 15 L.T. 313 there were special circumstances for finding in favour of the acquisition of riparian rights in respect of an artificial stream. As a result of an arrangement between two riparian owners of lands abutting a natural stream, there was a diversion of the water of the natural stream through an artificial channel, ultimately returning the water to the natural stream without doing any injury to any one. It was considered that it was within the competence of a riparian proprietor to grant a portion of his rights to another, provided, the latter did not make an unreasonable use of the water so as to cause sensible injury to the higher or lower-down proprietor. In this case reference was made to *Sutcliffe v. Booth* 32 L.J.Q.B. 135 : 9 Jur. (N.S.) 1037 as an authority for the position that an artificial stream may be on the same footing as a natural one as regards rights of riparian proprietors. But it is clear from the decision in *Sutcliffe v. Booth* 32 L.J.Q.B. 135 : 9 Jur. (N.S.) 1037 that in order to acquire all the rights of riparian proprietors, it must be shown that a water-course, though artificial, was originally made under such circumstances and so used as to give the rights owned by riparian proprietors in respect of a natural stream. There is nothing in the decision of the Patna High Court reported as 43 Ind. Cas. 235 *Krishna, Dayal Girl V. Bhawani Koer* 43 Ind. Cas. 235 : 3 P.L.W. 5 : 3 L.P.J. 51 which goes beyond the limitations prescribed in the aforesaid English decisions. The facts established in that case led to the inference that even in respect of the artificial water course rights incidental to a natural stream have been acquired. Even in the decision in *Yesu Sakharam Pujari v. Lodu Nana Savant* 101 Ind. Cas. 330 : 51 B. 243 : 29 Bom. L.R. 291 : AIR 1927 Bom. 251 the same principle has been adopted. The ordinary rule that in the case of an artificial watercourse any right of the owner to the flow of the water must rest on prescription of grant from or contract with the owner of the land from which the water is artificially brought was held to be subject to a qualification which, as laid down by the Privy Council in AIR 1925 36 (Privy Council) is as follows:

There is, however, a well-established principle of law, namely, that a water-course originally artificial may have been made under such circumstances and have been used in such a way that an owner of land situate on its bank will have, all the rights over it, that a riparian owner would have if it had been a natural

stream.

4. It is clear from the above mentioned authorities, that unless the defendants establish circumstances under which the suit channel was made and the manner in which it was used so as to give rise to an inference that those who own lands on either side of this channel have all the rights of riparian owners as such, the contention put forward by Mr. Raghava Rao must be held to be untenable. As both the lower Courts have found, the water of the suit channel was never used for irrigating the lands on either side of it till 1917 or 1918 and it is only since then, attempts have been made to make use of the water in violation of the rights owned by the ryots having lands under the ayacut of Solavaii and Karicherlavari tanks.

5. I have therefore no hesitation to find that the defendants can claim no riparian rights in respect of the suit channel. It is also perfectly clear, that even assuming that they have such natural rights they were lost by reason of the acquisition of a right of easement to the exclusive user of the water of the suit channel and of the uninterrupted flow of the same to the said two tanks, acquired by the ayacutdars who own wet lands under those tanks.

6. Second Appeal No. 334 of 1930 is therefore dismissed with costs.

7. In the other appeal a special contention is raised on behalf of the 12th defendant by reason of his land being a mamool wet land. It follows from what I have stated above, that he can claim no riparian right by reason of his land abutting the suit channel. If so, he must prove that by grant of prescription or any other arrangement he has acquired the right to take the water of the suit channel for irrigating that land. Both the courts below have fully considered the evidence regarding the 12th defendant's claim and given an adverse finding. The learned District Munsif finds that there is no sufficient reliable evidence to establish that the 12th defendant and his predecessors have been taking water as of right from the suit channel for over the statutory period for irrigating the land purchased by him under Ex. VIII. The learned Subordinate Judge has taken the same view of the evidence and come to the same conclusion. The concurrent finding of both the courts below on a pure question of fact is to be accepted in second appeal, unless there are adequate grounds for interfering with it. Mr. T.M. Krishnaswami Ayyar pressed an argument in order to show that that finding is vitiated by a misconstruction of the sale deed, Ex. VIII, obtained by the 12th defendant in 1930, which may be deemed to be his title-deed for the land. I need hardly observe that if by reason of a mis-construction of an important document the courts below came to an erroneous finding on a question of fact, this Court can interfere in second appeal. It has therefore to be seen whether Ex. VIII was really misconstrued or not. The land sold under Ex. VIII is described as "Kotta Cheruvu (tank-fed) wet land called Verranna Cheru together with the usual facilities or conveniences for the irrigation of that lands. Doubtless, this land is described as wet land fed by Kotta Cheruvu. It is clear, as observed by both the courts below, that there is no mention of the suit channel as a source of

irrigation for this land. If the 12th defendant's case be true, one would expect mention of the suit channel in Ex. VIII, as an additional source of irrigation besides Kotta Cheruvu. It is argued that the suit channel may be brought under the description "the usual facilities or conveniences for the irrigation of that land." I find it very difficult to accede to this argument. Kotta Cheruvu is expressly mentioned as a source of supply for this land and it is stated that the land is sold "together with the usual facilities or conveniences for the irrigation of that land." The natural meaning seems to be that all the means of access of the water of Kotta Cheruvu to this land as usually held are available for the purchaser of this land; A proper construction of the description in this sale deed does not lead to the inference that the suit channel must have been meant as one of the sources of irrigation. I am of opinion that the appreciation of the oral evidence by both the courts below is not in any way vitiated by a mis-construction of this document. The finding of the learned District Munsif is also supported by what he observed in the locality at the time of his personal inspection. It is conceded by the plaintiffs that the water of Kotta Cheruvu was taken to the 12th defendant's land through a side channel and a small sluice and by means of a palmirah spout placed over the suit channel. There is, in my opinion no adequate ground for interference with the finding of the lower Courts.

8. In the result, Second Appeal No. 470 of 1930 is also dismissed with costs.