

(1964) 03 MAD CK 0040

In the Madras High Court

Case No : Letter Patent Appeal No. 35 of 1963

Duraiswamy Reddiar and Others

APPELLANT

Vs

Chidambara Reddiar

RESPONDENT

Date of Decision : 24-03-1964

Acts Referred:

Citation : AIR 1965 Mad 348 : (1964) ILR (Mad) 621 : (1964) 77 LW 561

Hon'ble Judges : S. Ramachandra Iyer, C.J.; Venkatadri, J

Bench : Division Bench

Judgement

Ramachandra Iyer, C.J.

(1) The point that falls to be decided in this appeal filed against the judgement of Venkataraman, J, lies in a narrow compass. The appellant who

was the defendant in the trial Court is the owner of S. F. Nos. 132/2, 132/3 and 132/5 in the village of Elandalaipatti. Just to the south of S. F.

No. 132/5 there is Government waster land, S. F. No. 132/6 in which there is a well measuring about 8 cents. Adjacent to the well on the

southern side is the respondent's nanja lands S. F. No. 216/1. There is unimpeachable evidence in the case to show that the respondent had been

taking water from this well to irrigate his lands and that there are in existence permanent structures installed by him, on the well for the purpose.

Documentary evidence in the case also shows that the predecessors in title of the respondents had from the year 1907 been dealing with the well

as their own property. While so, in August 1953, the appellants tried to take water from this well to their lands lying on the north. The respondent

obstructed and immediately followed up such obstruction, with suit which has given rise to this appeal wherein he prayed for a declaration of his

title to the well and for an injunction restraining the appellants from using the well.

(2) The learned District Munsif on a careful consideration of the evidence in the case held that neither of the parties has any title to the well in

question. But he had no hesitation to accept the respondent's case that he had been in possession of the well. He also found that the appellant did

not and indeed could not have used the well for the purpose of irrigating their fields having regard to the slope of their lands. On these findings for

trial Court held that the respondent's possessory right over the well should be protected against intervention by the appellants who had manner of

right, title or concurrent possession of the well. Accordingly, that Court granted a decree declaring that the respondent had possessory title in

respect of the suit well and restrained the appellants by an injunction from interfering with the peaceful enjoyment by the respondent of the same.

There was an appeal against that judgment to the Subordinate Judge, Tiruchirapalli. The learned Subordinate Judge found that inasmuch as the well

did not belong to either of the parties and as it was always possible for the appellants to take water from the well there could be no declaration of

title nor any injunction on; the appeal was allowed and the respondent's suit dismissed. There was a second appeal to this Court from that decree.

Venkataraman, J., who heard the appeal pointed out the error of the Subordinate Judge in having proceeded to find as to enjoyment of the well by

the appellants, even when there was no plea to that effect in their written statement. The learned Judge also pointed out that the lower appellant

Court was labouring under a mistake in ignoring the possessory title of the respondent to the well. He accordingly set aside the judgment of the

lower appellate Court and restored that of the trial Court. Hence this appeal.

(3) Mr. R. Gopalaswami Aiyangar appearing for the appellants has contended that as neither the appellants nor the respondents had any title to the

suit well the user by the latter of the same for the purpose of taking water to his lands could only be regarded as an easementary right had been

perfected as against the Government, no protection could be given to the respondent. In this connection, learned counsel relied on the decision of

this Court in *Narasappayya v. Ganapathi Rao*, ILR 38 Mad 280: AIR 1916 Mad 801, where it was pointed out that incorporeal rights, such as

easements were not capable in an exact sense of being possessed; and that unless an easement had ripened into a prescriptive one, mere

enjoyment of the easement for any length of time, short of the full period of prescription could give no right for the enjoyer to maintain an action

against any person infringing such a user. Miller, J. In the course of his judgment observed-

The plaintiff has possession of the water when he gets it in to his channel but in no true sense has he possession of it before that. It is open to any

one to go to the pond and draw water therefrom and the defendant is not a wrong-doer as against the plaintiff; dishonesty apart, the case is parallel

to one in which one was being in the habit of stealing manure for his field from a farm yard finds one day that another thief has been beforehand

with him and taken the manure which he intended to steal. There could be no right of action in such a case.

It has been argued on the strength of these observations that as the property in the well has always been with the Government neither the appellants

nor the respondent could take water from the well under any claim of right. When, therefore, the respondent took water to his fields from the well

he merely committed a wrongful act; his title not having been perfected by reason of his such wrongful act, he could not prevent the appellants from

committing similar acts for the purpose of taking water to their own fields. This contention is sought to be reinforced by reference to a decision of a

Full Bench of this Court in Chinatalapati Venkatanarasimharaju Vs. Suriseti Ramaswami and Another, where it was held that a person who had

been using a particular way over land adjoining his for less than the prescriptive period could ordinarily have no legal title to complain, if he were

obstructed by a stranger. It was, however, recognised in this case that an action could be maintained if the obstruction to user would have the

effect of substantially depriving the person of the enjoyment of his property. The present case would come under the exception referred to above if

the appellants' act amounted to a deprivation of water to the respondents' lands.

But even otherwise we are of the opinion that the principle of the decision in the two cases cited, above can have no application to the present

case. The case for the respondent is, and that has been accepted by the learned Judge, that he was in possession of the well. It is not, therefore, a

bare easementary right alone that he has claimed. It may be that such possession has not been perfected into one of title as against everybody except the true owner. So long as the Government has not challenged the respondent's possession of the area of the well, it must be held that it cannot be open to any person not in possession of the property. The several documents filed in the case show that the predecessors-in-title of the respondent have been dealing with the property as if it formed part of their own property. That would prove that all along the respondent and his predecessors in title had been in possession of the well and that their right therein was not a mere right to draw water and put into a channel leading up to their lands. When so much is settled, namely, that the respondent and his predecessors-in-title have been in exclusive possession of the property, it must readily follow that the appellants who have no title of their own to the well cannot interfere with such possession. We, therefore, agree with the view taken by the learned Judge that the possessory title of the respondent should be protected. The appeal falls and is dismissed with costs.

(4) Appeal dismissed.