

(2016) 07 AP CK 0025

In the Andhra Pradesh High Court

Case No : Second Appeal No. 1403 of 2011

Medapti Nagi Reddy

APPELLANT

Vs

Sathi Satyanarayana Reddy

RESPONDENT

Date of Decision : 21-07-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Easements Act, 1882 — Section 15, Section 17(c)

Citation : (2016) 6 ALT 450 : (2017) 1 AndhLD 264

Hon'ble Judges : Sri M. Satyanarayana Murthy, J.

Bench : Single Bench

Advocate : Sri N. Siva Reddy, Advocate, for the Appellant; Sri K. Sarvabhauma Rao, Advocate, for the Respondents

Final Decision : Disposed Off

Judgement

Sri M. Satyanarayana Murthy, J. - This appeal, under Section 100 of the Code of Civil Procedure, 1908 (for short, "the Code"), is filed by the defendant in OS No. 154 of 1989 whereby the suit was decreed declaring that the plaintiffs are entitled to let out the collected rain water or excess water from field to field from "P" marked property through D marked land and to drainage and also granted permanent injunction restraining the defendant from interfering with the right to let out water field to field and finally to drain. The Judgment of the trial court was confirmed in first appellate court in A.S. No. 26 of 1997.

2. The parties in the appeal will hereinafter be referred to as arrayed in O.S. No. 154 of 1989, for convenience.

3. The plaintiffs filed the suit for the above two reliefs contending that they are the owners of the land of an extent of Ac.1.98 cents in R.S. No. 140/2 of Mahendrawada Village, which was shown as "P" in the plaint plan and the defendant is the owner of the land of an extent of Ac.1.51 cents in R.S.No.140/3, Ac.0.96 cents in R.S. No. 39/1 and Ac.0.45 cents in R.S. No. 139/2, which was shown as "D" in the plaint plan. It is situated towards Southern side of the

plaintiffs" land and there is a land of Gowreswaraswamy deity, Komaripalem in an extent of Ac.2.45 cents in R.S. No. 141/1, towards Northern side of the plaintiffs" land. There is an irrigation canal known as Nalla Kalava, running from West to East and there is also another canal called as Pilla kalava emanating from the main canal running towards South and the canal passing by the side of deity"s land on the North-East and took turn towards Eastern side. There is an irrigation bode from the North-East corner of deity"s land running from North to South, stops at the land of the defendant. There is another irrigation bode towards North-West, which is also running towards South. These two bodes emanates from Pilla Kalava, which are flowing towards South touching the East and West Corners of deity"s land, running from the North to South and joins to Southern drainage channel. The irrigation bode on East is higher in level of the land of the plaintiffs.

4. There is a drainage channel towards South of the plaintiff"s land. The excess water from the deity"s land, from the land of the plaintiffs" and from the land of defendant, flows towards South from field to field and finally enters into drainage channel, thus, excess water being let out from field to field and thus running from "P" marked land to "D" marked land and into drainage. The water letting out through a vent in the field bunds, and accordingly, they are enjoying the right to let out or discharge the collected rain water or excess water through the land of one another for the last more than 50 years. It is also the practise that to let out collected water from field to field and finally to bode which joins the channel known as Pilla Kalava, which emerged from the main canal. Thus, the plaintiffs perfected their right of discharge or let out excess or collected rain water by prescription, but the defendant did not permit the plaintiffs to let out or discharge the water and objected by raising a bund across the water flow, therefore, the plaintiffs claimed the aforesaid reliefs.

5. The defendant filed written statement denying the material allegations while contending that in the plaintiffs" land, which is shown as A, A1, B1, B in the plan filed along with the written statement, there is a bode, as well as drainage adjoining to the land of respective adjoining owners, since a long time, likewise a bode towards Western side of defendant"s land is available to let out or discharge collected rain water or excess water. There was no practise of let out the excess water from the deity"s land to plaintiffs" land, from field to field towards South at any time and thereby the question of prescribing the right of easement under Section 15 of the Indian Easement Act, 1882 does not arise.

6. It is specifically contended that the excess water and collected rain water from deity"s land has been letting out towards the Eastern bode shown as A, A1, B1, B in the plan annexed to the written statement and as well as into the Western bode. It was the practise for more than 50 years, like wise, the plaintiffs and their vendors letting out the excess water, collected rain water into bode, which is towards Southern side shown as A, A1, B1 B in the plan annexed to the written statement and thereby the plaintiffs are not entitled to claim any relief in the suit.

7. The trial court framed as many as six issues, and during trial, on behalf of the plaintiffs, P.Ws.1 to 5 were examined, marked Exs.A.1 to A.7. On behalf of the defendant, D.Ws.1 and 2 were examined, but no document was marked.

Upon hearing the argument of both the learned counsel, the trial court passed a decree in favour of the plaintiffs.

8. Aggrieved by the Decree and Judgment of the trial court, the defendant preferred A.S. No. 26 of 1997, which was dismissed by Decree and Judgment dated 21.03.2003, affirming the Decree, recording concurrent findings.

9. Aggrieved by the Decree and Judgment in A.S. No. 26 of 1997 dated 21.03.2003 the defendant being unsuccessful preferred the present appeal raising the substantial question of law questioning entitlement of the plaintiffs to claim right of easement by necessity, to let out collected rain water, which cannot be prescribed under Section 15 of Indian Easement Act, 1882 (for short, "the Act").

In view of the grounds urged in grounds of appeal, the only substantial question of law is as follows:

"Whether plaintiff is entitled to claim easement by prescription to let out or discharge excess water or collected rain water from his field marked as "P" to the field of defendant marked as "D" in the plan under Section 15 of Easement Act?"

10. Undisputedly, the trial court granted the Decree declaring that the plaintiffs are entitled to let out the collected rain water or excess water from the plaintiff's "P" marked land to the defendants "D" marked land as per plan which lower in level also granted permanent injunction restraining the defendant from interfering with right to let out the collected rain water or excess water from plaintiff land to defendants land and to drainage bodes the same was confirmed by the first appellate court by its Decree and Judgment in A.S. No. 26 of 1997. The relief specifically claimed in the suit is to declare that the plaintiffs have a right to let out collected rain water or excess water through the fields of the defendant, therefrom bode, which connects Pilla Kalava, as they have prescribed their right under Section 15 of the Act.

11. Section 7 of the Act deals with easements restrictive of certain rights, wherein clause (a) deals with exclusive right of every owner of immovable property (subject to any for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto; Illustration (g) of Section 7 of the Act says that the right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel, and all water on its surface which does not pass in a defined channel.

12. Every land owner has a natural right to collect and retain upon his own land, the surface water passing over his land and put it to such use he may desire. The natural right of drainage to discharge surface water possessed by the upper heritor cannot be limited merely to the natural regulation of the water according

to the law of gravitation and it includes a right to collect in a body, all the natural surface water which may be found on a tenement and to discharge it down without causing more injury than it would have caused by its natural unregulated flow. The owner of the land on a lower level is under an obligation to receive surface drainage water from land on a higher level and at the same time, the owner of the land on lower level is entitled to conduct ordinary agricultural operations on it.

13. In *Gibbons v. Lenfestey*, AIR 1915 PC 165 the Privy Council held as follows:

"Where two contiguous fields one of which stands upon higher ground than the other, belong to different proprietors, nature itself may be said to constitute a servitude on the inferior tenement by which it is obliged to receive the water which falls from the superior. If the water, which would otherwise fall from the higher grounds insensibly without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is without the positive constitution of any servitude, bound to receive that body of water on his property."

14. Thus the natural right for the flow of water from a higher ground to the lower one is confined to the flow of natural water generally through natural streams or drains and under some very special circumstances through artificial streams or drains and it can never extend to the discharge of artificial water brought upon the higher land by artificial means specially to discharge of all kinds of water from a house. Thus, the owner of upper land is entitled to discharge collected rain water and excess water to the land of others through a defined channel, since right to discharge natural water is natural right but when it infringed the aggrieved person may claim appropriate relief.

15. The trial court placed reliance on a Judgment reported in *C. Venkatareddi v. Kotireddi*, AIR 1967 AP 81, wherein it was held that right of owner of a high land to drain off the natural surface water to the adjacent lower lands is incidental to the ownership of the land. The trial court also referred the Judgment of this Court reported in *Seshayya v. Seetayya*, 1956 ALT 778, this Court referring to Section 7 of the Act held that rights of every owner of upper land that water naturally raising in, or falling on the said land shall be allowed by the owner of the adjacent lower land to run naturally thereof, but excess water from the land cannot be allowed to flow into the land of defendants, since it is not surface water or natural water.

16. Based on the principles laid down in the above two Judgments, the trial court decreed the suit in favour of the plaintiffs. The first appellate court also affirmed the Decree and Judgment of the trial court on the same analogy without advertng to Sections 15 and 17 of the Act.

17. Section 15 deals with acquisition of easement by prescription. Right to discharge water can be prescribed by dominant owner over the land of servient

tenant. The right to discharge water, collected rain water or excess water from the land of upper owner to the lower land can be prescribed subject to limitation under Section 27 of the Limitation Act. A right by prescription to pass the surplus rain water by the owner of a particular land on another's land can be acquired, if it is proved that the water passed through a defined channel and not in different directions on the servient tenement. The discharge of water by an upper proprietor upon the land of the lower proprietor may create a right in favour of the upper proprietor, if the owner of the upper land is able to establish that he was discharging the collected excess water through a defined channel to the land of the adjacent lower land owner.

18. A natural right can be claimed regarding the flow of natural water in a defined channel under certain circumstances, but such right cannot be claimed for the discharge of artificial water either through a defined channel or otherwise except by way of an easementary right as held by the Patna High Court in a judgment reported in *Rachhaya Pandey v. Sheodhari Paundey*, AIR 1963 Patna 76. A right to discharge rain water through an artificial water course upon the land of another is a right which may be acquired either by long user or by express grant. If such a drain, the plaintiff must establish the enjoyment of easement as specified under Section 27 of the Limitation Act. The right to discharge rain water on the neighbour's roof can only be prescribed either by long usage or by lost grant.

19. In view of scope of Section 15 of the Act, if the plaintiff is able to establish that he is letting out excess water or collected rain water through a defined channel to the lower land for a period of twenty years, is entitled to claim declaratory relief. But discharge or letting out the water from field to field as alleged in the plaint and not through a defined water course or channel would not constitute easement by prescription under Section 15 of the Act. There is a clear bar under clause (c) of Section 17 of the Act to acquire such right by prescription. Section 17 of the Act deals with rights which cannot be acquired by prescription. According to it, easements acquired under Section 15 of the Act are said to be acquired by prescription and are called prescriptive rights. None of the following rights can be so acquired.

- a) a right which would tend to the total destruction of the subject of the right or the property on which if the acquisition were made, liability would be imposed;
- b) a right to the free passage of light or air to an open space or ground;
- c) a right to surface water not flowing in a stream and not permanently collected in a pool tank or otherwise;
- d) a right to underground water not passing in a defined channel.

20. The present dispute falls within the ambit of clause (c) of Section 17 of the Act. An identical question came up before the Division Bench of Orissa High Court in *Dharindhar Sahu and Others v. Bhagirathi Sahu and Others*, AIR 1956

Orissa 89 at 90. Wherein the Division Bench held as follows:

"Section 17(c) of the Act expressly says that no easement right can be acquired to surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise. Illustration G to Section 7(b) also speaks of the right of every owner of land to collect and dispose within his own limits, of all water under land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

Two principles thus emerge: firstly that an owner of land is entitled to collect and impound all surface water passing over his land and secondly, that no prescriptive right can be acquired in respect of such water against the servient owner. In other words, unless the water flows through a defined channel no right can be acquired either by lost grant or prescription to the use of such water."

21. The main feature of surface water is its inability to maintain its identity and existence as a water body. Water flowing into a field from a known channel and passing along the field onwards into another field though not over a confined track in the former field but along its whole area is not surface water as held by this court in Venkataramanaiah v. Subbaramayya, AIR 1959 AP 153 following the principles laid down by the Madras High Court in a judgment reported in Adinarayana v. Ramudu, AIR 1914 Mad. 507.

22. In Adinarayana referred to supra, the Madras High Court had an occasion to decide similar question and held that the chief characteristics of surface water is its inability to maintain and existence of water body.

23. Merely because water spreads itself over the upper field before it gets into the lower field, it does not fulfil the definition of surface water. If it flows in a well defined course into an upper land spreads itself over the whole field which is irrigated by it and then over the field ridge to another field or into an intermediate channel through which it comes into another field, it can be treated as surface water as held by this Court in Venkataramaiah referred to supra.

24. Here, the plaintiffs claimed both natural right of discharging rain water and excess water to the field "D" as shown in the plan from field "P". Such right is natural right and question of claiming easement by prescription does not arise, it is natural servitude. The other right is to discharge or let out excess water, such right cannot be acquired by prescription.

25. In the present case, the excess or collected rain water is to be let or discharge into the field of the defendant, as the collected water from the field of deity's land is flowing into the land of the plaintiffs, but not in a definite course of channel or a stream. In such case, the question of easement by prescription as contemplated under Section 15 does not arise in view of bar under Section 17 (c) of the Act, since the acquisition of such right i.e. letting out or discharge of excess water into the land of lower owner is impermissible, except by natural servitude of discharge natural surface water, but not collected water.

26. The trial court and the first appellate court without advertent to Section 15 and 17 of the Act, based on section 7 of the Act, granted decree in favour of the plaintiffs and against the defendant declaring that the plaintiffs are entitled to let out or discharge collected water from the plaintiff's field marked as "P" through defendant's land marked as "D" in the plaint plan and to do so by making one or two vents and also granted permanent injunction restraining the defendant from interfering with right to letting out the collected rain water or excess water.

27. On the other hand it is clear from Section 7 of the Act that such right can be prescribed only when the water is to be let out or discharged to the land of others through a defined channel or stream, not from field to field as claimed by the plaintiffs in the present suit. The trial court and appellate court did not consider the pleadings in the plaint, more particularly, to discharge the excess water from the field of plaintiffs to field of defendant, who is owner of lower land.

28. It is specifically pleaded that there is a practice of discharging collected rain water or excess water from field to field, not in a defined channel or stream. Therefore, the Decree and Judgment of the trial court and the first appellate court recognising the right of the plaintiffs to discharge the collected rain water or excess water from the land of the plaintiffs to the land of the defendant, lower land owner, cannot be prescribed under Section 15 of the Act. Both the courts have committed a serious error in granting Decree, in favour of plaintiff restraining the defendants from causing obstruction to collected excess water from the land of plaintiff to land of defendants. .

29. Section 17(c) of the Act does not prohibit the acquisition of easementary right regarding the trickling water from higher to lower plots in well defined channel as held by the Privy Council in *Baswantappa v. Bhimappa*, 64 IC 418. It is also clear from Section 17 (c) of the Act that such right to discharge excess water or collected rain water to the land of lower owner only for the purpose of discharging surface water and not any other water. But here the plaintiffs wanted to discharge or let out excess or collected rain water from their land, who is upper land owner to the land of the defendant, who is lower land owner without any defined channel or stream.

30. Therefore, in view of bar under Section 17(c) of the Act, the plaintiffs cannot acquire an easement by prescription under Section 15 of the Act and both the Courts did not consider the requirement to prescribe right to let out or discharge collected rain water or excess water in proper perspective and committed an error. Therefore, the Decree of the trial court and the first appellate court are liable to be set aside holding that in view of prohibition contained under Section 17(c) of the Act, the plaintiffs cannot acquire easementary right by prescription under Section 15 of the Act. Hence, the plaintiffs are not entitled to a decree as claimed in the suit.

31. In view of my foregoing discussion, the findings of the trial court and the first appellate court are in total ignorance of the law laid down by this Court, and

the provisions of Indian Easements Act, particularly, Sections 7 and 17 (c) of the Act. Hence, the appeal is liable to be allowed, answering the substantial question of law in favour of defendants and against plaintiff.

32. In the result, the appeal is allowed in part at the stage of admission, setting aside the Decree dated 30.04.1997 in O.S. No. 154 of 1989 passed by the Principal District Munsiff, Ramachandrapuram, and the Decree dated 21.03.2003 in A.S. No. 26 of 1997 passed by the Senior Civil Judge, Ramachandrapuram, to the extent of granting declaration of permanent injunction restraining the defendant from obstructing discharge of collected excess water to his land from the land of the plaintiff, and in the circumstances without costs.

33. Miscellaneous petitions, if any, pending in this appeal shall stand closed.