

(1968) 01 KAR CK 0002
In the Karnataka High Court
Case No : Second Appeal No. 465 of 1964

Narayana Balthilaya

APPELLANT

Vs

Venkatesha Balthilaya

RESPONDENT

Date of Decision : 12-01-1968

Acts Referred:

Citation : AIR 1969 Kar 6

Hon'ble Judges : A.R. Somnath Iyer, J

Bench : Single Bench

Judgement

1. The plaintiff appellant and his suit was for a declaration that he had a mamul right to take water from a channel on the defendant's land S. No. 71/7 for the cultivation of his land Survey No. 71/5 after the construction of a katta in the south-east corner of the defendant's land across the stream so that the water may flow in the direction of his own land. I am not concerned in this appeal with the right of way since the claim to that right was given up in the lower appellate court. The only question, therefore, that remained for the lower appellate court consider to consider was whether the mamul right asserted by the plaintiff was established.

2. The plaintiff examined a large number of witnesses in support of his assertion that there was a mamul right and the defendant examined himself and another witness in support of the allegation that the plaintiff was not raising any wet crop on his land but allowed it to lie fallow. Both the courts disbelieved the evidence given by the plaintiff's witnesses. The munsif recorded the finding that the mamul right pleaded by the plaintiff was not established, while the Civil Judge reached the conclusion that the prescriptive right, as he called it, asserted by the plaintiff was not established. So, the plaintiff's suit was dismissed.

3. In this appeal Mr. Narayana Rao made many criticisms of the judgments of the courts below. The first and the most serious complaint made against the judgment of the Civil Judge by Mr. Narayana Rao was that the Civil Judge entirely misunderstood the character of the plaintiff's suit. It was maintained that the

Civil Judge was in error in thinking that the plaintiff depended upon a prescriptive right while it was clear from the plaint and from the evidence that the right asserted by the plaintiff was a mamul right and not a prescriptive right.

4. Now, the plaintiff's forefathers and the defendant's forefathers were members of an undivided Hindu Family. At a partition between them, survey No. 71/5 fell to the share of the ancestors of the plaintiff and Survey No. 71/7 fell to the share of the defendant's ancestors. It is not the plaintiff's case that the water course flowing from the point where, according to him, he could erect a katta, to the point where, according to him, the water discharges, that is, the land bearing survey No. 71/5 is a natural water course. His allegation that he makes the water flow in that way by erecting a katta on the defendant's land makes it clear that the watercourse is an artificial watercourse.

5. About the origin of this artificial watercourse, there is no evidence. The only evidence produced by the plaintiff was that during a long period of time water was flowing along this artificial watercourse into the land of the plaintiff and that the defendant with the unmeritorious intention of depriving the plaintiff of the water which is the only source of irrigation deepened the channel and deviated the water into a bigger channel towards the west of the defendant's land whereas the plaintiff's land lies to its east.

6. It is a firmly established principle that the right to take water along an artificial watercourse running over the land of another is not a natural right of property but could be acquired either under a contract or by prescription which presumes a grant. The plaintiff did not plead that there was a contract or an agreement between the defendant and the plaintiff or their forefathers under which a right was created in the owner of survey No.71/5 to take water along the artificial water course on the land of the defendant or his forefathers. That being so and since that right is not a natural right of property the right could be acquired only by prescription which presumes a grant. This was the enunciation made by Whitmores (Edenbridge) Ltd. v. Stanford 1909 1 Ch. 427 in which it was observed that in the case of an artificial watercourse there is no presumption as to the ownership of the bed and that the right to take water along that artificial watercourse must either be founded on a contract or could be acquired by prescription. That being the true position and since the plaintiff did not found his right on a contract, the only method by which he could establish his right which he asserted was by proof of acquisition by prescription.

7. The employment of the phrase "mamul right" in the plaint does not alter the position to any extent since that expression means no more than that for a long period of time the plaintiff was receiving water into his land along the artificial watercourse. But in a suit to enforce the right to receive such water, the plaintiff can succeed only if it is proved that the right flows from a contract or from a right acquired by prescription.

8. The Civil Judge's judgment cannot therefore, be subjected to the criticism

that he misunderstood the nature of the right asserted by the plaintiff. But Mr. Narayana Rao submitted that what was missed by the courts below was that, according to the commissioner's report who submitted at least three reports, the plaintiff was growing at least one wet crop on the land and that that wet crop could not be grown except with the water discharged by the artificial watercourse. But in his report the commissioner stated that while that was the assertion of the plaintiff, the defendant stated that the wet crop was grown because the defendant depended upon water coming down from the hills to his land and on water which accumulated in the tank on the hill. It is true that the commissioner stated that that tank was in a state of disrepair, but when it came into a state of disrepair was not stated by him. It was for the plaintiff to prove affirmatively that he was growing wet crops because he was receiving water by the artificial watercourse, but the evidence which he produced in support of that theory was not believed by the courts below which recorded a finding that the plaintiff allowed his land to lie fallow. Even about the allegation that one wet crop used to be grown on the plaintiff's land there is no evidence which, in the opinion of the courts below was trustworthy.

9. Mr. Narayana Rao made the complaint that the two further reports made by the commissioner were not considered by the Civil Judge. It is true that they have not been referred to in the course of the judgment specifically, but when I look into these reports, I find that they contain nothing useful to the plaintiff. In one report the commissioner stated that he found some materials on one portion of the defendant's land at which, according to the plaintiff, there was a katta and those materials might have been used for the construction of the katta. The Civil Judge did not refer to that part of the commissioner's report and did not think that what was observed by the commissioner was true and that the plaintiff had erected a katta at any time before he instituted the suit. That part of the commissioner's report in which he stated that the defendant had diverted the water from a natural watercourse flowing from the East to the West into a bigger channel and that the diverted watercourse appeared newer than the watercourse upon which the plaintiff depended was no doubt not referred to by the Civil Judge, but that feature of the two watercourses does not establish a prescriptive right.

10. In support of the prescriptive right which the plaintiff described as mamul right, the plaintiff depended entirely on oral evidence and that oral evidence not having been believed by the courts below, the correctness of the findings on the prescriptive right is not open to discussion in this court.

11. What I have said so far is the end of this appeal. But Mr. Narayana Rao made the complaint that an application presented by the plaintiff in the court of the Civil Judge for the reception of additional evidence was unreasonably refused. He submitted that the plaintiff asked for the reception of three documents as additional evidence as those documents afforded valuable corroboration to the testimony of the plaintiff's witnesses. One of these documents is a certified copy

of a revenue record known as Cultivation Register relating to the year 1944-45 in which, according to Mr. Narayana Rao, it is stated that the plaintiff had grown a wet crop during that year. But the fact that he had grown a wet crop during one year does not afford such great corroboration to the testimony of the plaintiff's witnesses as Mr. Narayana Rao suggests. The other document was an endorsement from the Tahsildar that the cultivation register for the year 1950-51 was destroyed, but that is neither here nor there. The other is document which, according to Mr. Narayana Rao demonstrated that some land in the vicinity was occupied by the Armed Forces between the year 1944-47 and that such occupation was responsible for the plaintiff's land remaining fallow. But the plaintiff admitted that the land was occupied by the Armed Forces was half a mile away from his land and it is difficult to understand how the occupation of that land or any other land by the Armed Forces could constitute an impediment to the cultivation of the plaintiff's land.

12. Moreover, these documents which could have been produced in the court of the first instance were not produced and no satisfactory explanation was tendered for their non-production at the earliest stage.

13. I dismiss this appeal. But in the circumstances of the case, I make a direction that each party shall bear his own costs in all the three courts.

14. Appeal d dismissed.