

(1916) 02 MAD CK 0017
In the Madras High Court

Rangappa Naicker and Others

APPELLANT

Vs

Appala Raja and Others

RESPONDENT

Date of Decision : 16-02-1916

Acts Referred:

Easements Act, 1882 — Section 15

Citation : 33 Ind. Cas. 503

Hon'ble Judges : Sadasiva Aiyar, J; Moore, J

Bench : Division Bench

Judgement

1. Two portions of the argument addressed to us call for notice.
2. Firstly, the learned Subordinate Judge has dealt with plaintiffs' right to put up the disputed dam as a matter of limitation, relying on Krishna Aiyar v. Secretary of State for India 4 Ind. Cas. 1070 71 and other cases to the effect that proof of twelve years' enjoyment will transfer the burden of proof to the defendant. But those are cases of limitation, not of prescription; and the latter is in question here with reference to an easement or customary right. There is no question of a plea of lost grant. The lower Appellate Court, therefore, had to find for sixty years' enjoyment if plaintiffs were to succeed. We must now call on it to submit a finding on the question, whether enjoyment of the alleged right to erect a dam has been established for that period.
3. Next, the District Munsif found that the removal of the dam caused no material diminution in the supply of plaintiffs' lands. This finding was disputed by plaintiffs in first appeal, but was not dealt with in the lower Appellate Court's judgment. We think that Robert Fischer v. Secretary of state for India 2 Ind. Cas. 325 governs the case and that a finding on the point is

necessary before the lower Appellate Court's decision in

plaintiffs' favour can be sustained. The lower Appellate Court must, therefore, find on the issue whether the removal of the dam caused material

diminution in plaintiffs' supply.

4. No fresh evidence is necessary. Findings shall be due in six weeks. Ten days will be allowed for filing objections.

5. In compliance with the order contained in the above judgment, the Temporary-Subordinate Judge of Sivaganga submitted the following

Finding

6. I am directed by the High Court to submit findings on the following Issues:

(1) Whether enjoyment for a period of 60 years of the alleged right to erect a dam has been established by the plaintiffs?

(2) Whether the removal of the dam caused material diminution in plaintiffs supply?

2. 1st issue.--On a careful reading of the evidence, so far as it relates to this issue, and after hearing the arguments of both side Vakils, I have come

to the conclusion that this issue must be found against the plaintiffs.

* * * * *

8. 2nd issue.--It cannot be found also that the removal of the dam by the first defendant's subordinate did in any way diminish the supply of water

to which plaintiffs were entitled. * * * *

7. This second appeal coming on for final hearing yesterday and this day after the return of the finding of the lower Appellate Court on the issues

referred by this Court for trial, the Court delivered the following

JUDGMENT

8. In the remand order dated 28th July 1915, this Court expressly said There is no question of a plea of lost grant." The plaintiffs could, therefore,

only rely on the right by statutory prescription.

9. That right could be acquired only by proving enjoyment (whether 20 years or 60 years) within "two years next before the institution of the suit

wherein the claim to which such period relates is contested". See Muthu Goundan v. Anantha Goundan 31 Ind. Cas. 528 : 2 L W 1107. and?

Section 15 of the Indian Easements Act. The present suit was instituted in December 1908 and the plaintiffs' enjoyment ceased (by the cutting of

the disputed dam under the orders of the Sub-Collector) in the beginning of 1906. Hence, the plaintiffs could not acquire any prescriptive right

under the Statute. Their enjoyment for 20 years under the provisions of the Limitation Acts of 1871 and 1877 before Act V of 1882 came into

force, cannot also give them any statutory right of prescription as all that enjoyment ended long before the beginning of the "two years next" before the suit was instituted.

10. We have, therefore, to set aside the judgment of the Subordinate Judge and restore the decision of the District Munsif dismissing the suit.

11. The plaintiffs, however, seem to have been dealt with rather hardly as a dam, the existence of which gave some surplus water to the tank

irrigating their lands, was removed after it had been in existence for five or six decades.

12. We, therefore, direct the parties to bear their respective costs throughout.