Privy Council Appeal No. 95 *of* 1945

A. R. Ramaswami Ayyar - - - - - - *Appellant*

v.

Hariram *alias* **Somasundaralal and others** - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1947.

Present at the Hearing :

LORD SIMONDS
LORD OAKSEY
LORD MORTON OF HENRYTON
MR. M. R. JAYAKAR
SIR JOHN BEAUMONT

[*Delivered by* LORD SIMONDS]

In the proceedings, in which this appeal is brought from a judgment and decree of the High Court of Judicature at Madras, the appellant's father as plaintiff claimed against a defendant since deceased, who is now represented by the respondents, an injunction to restrain him from entering upon certain land of the plaintiff and cutting the bund of a watercourse so as to interfere with his rights to water. All the facts which were necessary for the determination of the rights of the parties were clearly brought out in the trial of the case by the District Munsif at Ambasamudram and are fully narrated in his careful judgment. It is in their Lordships' opinion unfortunate that in the appellate Courts in India the real issue should have been allowed to be obscured by what was, as they think, a mistaken view as to certain passages in that judgment and particularly in regard to an admission which was thought to have been made by plaintiff's counsel in the course of the trial.

The substantial facts as found by the learned trial Judge do not appear to their Lordships upon a careful review of the whole evidence to be capable of serious dispute.

The plaintiff at all material times was the owner of about 184 acres of dry and wet lands in the village of Pudapatti. The wet lands were irrigated by the water of a private tank belonging to him called the Ramagopalaperi tank, which will be referred to as the R. tank. It had been built by an ancestor of the plaintiff and received water from a pond on the plaintiff's land by means of a channel marked A, B, C, D, E, F, G in the Government Survey Plan of Pudapatti village. The water from this pond known as Kuttikulam and hereafter called K. pond tends naturally to flow south. In order to divert this water along the channel eastwards into the R. tank the plaintiff's father had built a bund on the southern side of the channel in or about the year 1888 and in this way the plaintiff's father and the plaintiff after him had uninterruptedly enjoyed the water flowing from the pond for the cultivation of their land from the year 1888 or thereabouts until in the year 1936 the events happened which gave rise to this suit.

The defendant, one Chokkalal, who has as already stated, since died, was the owner of two small tanks known as the Vellayampatti and Panayankurchi tanks and hereafter called the V. and P. tanks in the

village of Idakal lying two miles to the south of Pudapatti. It is noteworthy that these tanks are not recognised in the Government Settlement records as sources of irrigation for Chokkalal's lands in Idakal. It is a matter of dispute, upon which it is not necessary to pronounce finally, whether these tanks were at any time connected by a watercourse or watercourses with K. pond. The relevant plans do not show any continuous stream and it is unlikely that there was a direct connection, but it may be assumed that so long as the water from K pond flowed southward some part of it found its way sooner or later into the V. and P. tanks.

In November, 1936, Chokkalal entered on the plaintiff's land and cut open the bund protecting the channel on its southern side with the result that the water from K. pond instead of flowing eastward along the channel took its natural course southward to or towards the V. and P. tanks. Thus the plaintiff was deprived of the flow of water which he and his father had so long enjoyed.

The plaintiff accordingly brought his suit against the defendant Chokkalal in the Court of the District Munsif of Ambasamudram and in view of the course which the proceedings have taken it is necessary to refer in some detail to the pleadings.

In his plaint which was dated the 2nd December, 1936, the plaintiff alleged that the R. tank had been in existence beyond living memory and was getting its supply of water through well defined channels and watercourses as shown in the Government Survey plan of the year 1908-12 and as recognised and affirmed by the Revenue Accounts including the Settlement Registers. He then averred that he and his ancestors had been in the sole exclusive and undisputed enjoyment of all the waters flowing through the said channel and watercourses flowing into the R. tank and to the entire water in the tank itself for over 60 years, that they had become so entitled " not merely by reason of their unchallenged and unchallengeable ownership but also by immemorial user, custom and prescriptive right." He then referred to the K. pond and averred " the said pond stands mainly on plaintiff's patta land S. No. 796/2 as shewn in the survey plan itself. The entirety of the aforesaid pond and its water had also been in the exclusive enjoyment and control of the plaintiff and his ancestors with a strong well defined bund on the south except for percolation and for a small overflow on the southern side during heavy rains when the entire water could not pass through the streams and streamlets leading to the plaintiff's tank. This overflow loses itself some distance lower down. There has at no time been any claim to the said pond or to the water therein and flowing thereout by any other individual and no such water has ever been utilised by any individual for purposes of irrigation or otherwise ".

This plea may be open to some criticism but it is clear that the plaintiff relied (inter alia) upon a prescriptive right to have the water from K. pond flowing along the channel to R. tank, a right which could only be effective so long as the bund on its southern side was maintained.

The defendant's written statement must now be considered and it will be observed that, apart from properly putting the plaintiff to proof of his case, the defendant relied substantially on allegations which in the course of the trial proved wholly unfounded. Thus he submitted that no portion of the water from the point marked A in the channel ever flowed eastward till about 7 years ago when the plaintiff clandestinely dug a channel diverting the flow of water eastwards. This allegation in different forms he reiterated. Then he said " The channel which is drawn from A and shewn as C, B, D, E is all new. All the water from the place marked A has been for upwards of 60 years flowing only southwards through the well defined watercourses shown both in the old survey plan and in the resurvey plan ". It is necessary to emphasise this aspect of the case, because, whereas the main and indeed the only real issue in the case was thus clearly defined as being when the bund was made and the water from K. pond diverted eastward from its natural course, an attempt was made upon the appeal to their Lordships Board to justify the cutting of the bund by the defendant by showing that, even if a bund had been

made as long ago as 1888, yet it had been increased in height at a much more recent date so as to divert the water in greater measure than before and thus deprive the defendant of at least some water that he had previously enjoyed. In their Lordships opinion it is not open to the defendant thus to justify his act, nor as it appears to them is there any evidence which would support such a plea.

The main issue being as thus described, the learned trial Judge came to certain conclusions of fact, which have already been indicated. It is sufficient to repeat that he found that the channel in question with its southern bund had been made as long ago as 1888 and had the effect of completely cutting off the water gathered in K. pond from flowing southwards and diverting it eastward to the R. tank. In using this language the learned Judge cannot fairly be taken as dissenting from the statement made by the plaintiff himself in his plaint and supported by his and the defendant's witnesses that some water at some time percolated or overflowed the bund and found its way southwards to the V. and P. tanks. The learned Judges of the Appellate Courts appear to give undue weight to this fact, which does not in any way tell against the plaintiff's right to maintain the bund and with it the flow of water to the R. tank.

The facts upon the main issue being thus found, it might have been supposed that that would be the end of the case. For as the High Court itself said " If really the channel was constructed in the year 1888 with the southern bund in its present form, viz.: high enough to prevent water from flowing southwards and turning the water eastwards, and if the plaintiff's father and himself had enjoyed this right from the year 1888, it would be a clear case of prescriptive right apart from a case of grant ". But, though these were just the facts which were found and, as their Lordships think, rightly found by the trial Judge, and though prescriptive right had been pleaded, yet the Appellate Courts in India have held that the plaintiff was not entitled to the relief granted by the trial Judge. The grounds upon which those Courts have proceeded are succinctly stated in the formal reasons which appear in the respondents' case upon this appeal. They are that the plaintiff gave up the case based upon immemorial user, prescription and customary right and that the District Munsif erred in allowing the plaintiff to make out in the case before him a new case based on an express grant, and that the defendant had no opportunity of meeting the new case of an express grant.

Upon the first question their Lordships feel some difficulty. It appears from the memorandum of appeal to the High Court that the advocate who appeared for the plaintiff in the first Court stated from his place at the bar that the case of immemorial user prescription and customary right had not been given up, and that the plaintiff, who was himself an advocate, had made an affidavit to the same effect which was not contradicted. This statement and affidavit were disregarded by the High Court. In such a domestic matter their Lordships would be reluctant to interfere, but it appears to them unlikely that an advocate having directed a volume of cogent evidence to the support of a plea of prescription should then have abandoned that plea, though he might well have given up immemorial user and customary right. It is not, however, necessary to dwell on this aspect of the case, for it appears to their Lordships that the judgment of the District Munsif, though in places its language may not be felicitous, is when read as a whole to be regarded rather as a decision that a grant must be presumed in favour of the plaintiff (which is itself the basis of prescription) than as a decision that there was any extant document which was itself an express grant. There is apt to be, and there has been here, some confusion. In his consideration of the case the trial Judge was rightly influenced by certain documents adduced in evidence by the plaintiff. These documents included the copy of a report made on the 29th November, 1888, by the acting Karnam of Pudupatti to the Tahsildar of Ambasamudram regarding the diversion, being this very diversion, made by the plaintiff's father, an

order made by the Tahsildar to the Karnam on the 25th February, 1892, and a further report made by the Karnam on the 28th February, 1892, in regard to the same matter, and the Government Re-survey plans and Resettlement registers. They afforded the strongest corroborative evidence of the facts of which oral proof had been given and put it beyond doubt that the Government had assented to the action of the plaintiff's father. It would be difficult to find a case in which a grant could be more easily presumed, so that when the learned trial Judge said " The facts as established in the case and adverted to heretofore tend to establish a right in grant to the plaintiff as per terms embodied in the Settlement Registers Exhibits C. and D. to take the waters of Kuttikulam through the defined watercourse . . . to his own private tank ", he was with sufficient accuracy stating the circumstances from which a grant could be presumed and the nature of that grant. That the documents or any of them were themselves express grants could not be maintained. In this their Lordships agree with the High Court. If there are passages in the judgment of the trial Judge which suggest that this was his view they must be disregarded. Upon the case as pleaded and upon the evidence his clear duty was to hold that the plaintiff had made out a good title by prescription and to grant him the appropriate relief.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and the judgment of the District Munsif restored. The respondents must pay the costs of the appellant of this appeal and in the appellate Courts in India.

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