PULLAMMA v. PRADOSHAM.

It was next argued that the plaintiff's vendor Thamma Narasimman stood by and allowed the fifth defendant to deal with the lands in question as his own exclusive property and that plaintiff is consequently estopped from questioning the mortgage to the seventh defendant or the proceedings taken to enforce it. This point is taken for the first time in the argument in second appeal and without any materials whatsoever on the record to support it. Under these circumstances we cannot permit such a contention to be taken at this stage.

We dismiss this appeal with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Best.*

1893. Oct. 20, 23, 24. 1894. May 4. Nov. 6. 1895. May 1.

ORR AND OTHERS (PLAINTIFFS), APPELLANTS,

*v.*

RAMAN CHETTI AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Easement by custom—Water rights—Landlord and tenant.*

The plaintiffs were lessees from a zamindar of his entire zamindari and were in occupation of lands depending for irrigation on a tank into which a natural stream emptied itself. The defendants were tenants in the zamindari, holding (under a lease prior to that of the plaintiffs) land supplied with water by an irrigation channel from the stream. The defendants erected a dam across the stream when it was low, and this had the effect of diverting all the water into the irrigation channel supplying their land. In a suit for an injunction that the dam be removed, the lower Appellate Court upheld a plea by the defendants that the dam had been erected in exercise of an established customary right of easement:

*Held*, that the customary easement asserted by the defendants was not unreasonable, and was enforceable by them against the lessees of the zamindar.

SECOND APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura, West, in appeal suit No. 337 of 1891, reversing the decree of S. Dorasami Ayyangar, District Munsif of Sivaganga, in original suit No. 15 of 1890.

Suit by the plaintiffs for the removal of a dam placed by the defendants across the Palar river. This river rises in the Karan-

* Second Appeal No. 1471 of 1892.

damalai hills, and, after flowing through certain Government villages, enters the Sivaganga zamindari, and ultimately empties itself into the tank of the village of Tirupatore, an ayan village in the zamindari. The defendants were in possession under a lease from the zamindar of the village of Surakudi, which did not abut on the river, but was irrigated by a channel from it, and claimed to be entitled by right of customary easement to erect the dam complained of. The plaintiffs were the lessees of the entire zamindari under a lease subsequent in date to that last mentioned, and they complained that the defendants' dam interfered with their supply of water.

The District Munsif passed a decree as prayed. On appeal the Subordinate Judge reversed this decree and dismissed the suit. With reference to the objection that as tenants of the zamindar, the defendants were not entitled to set up a right of easement as against either him or his representatives. The Subordinate Judge in paragraph 11 of his judgment, which is referred to by the High Court, made the following observations :—

"The next question is, whether this is also a customary ease-"ment. This is one of those customary rights of easement which "the villagers of Surakudi have acquired under section 18 of the "Easements Act. The District Munsif is wrong in considering "that this is unreasonable user. It is reasonable with reference "to the evidence in the case. He has quoted *Mathura Naikin* v. "*Esu Naikin*(1). That case refers to adoptions by dancing girls. "It was dissented from in *Venku* v. *Mahalinga*(2). Neither case "is applicable, in my opinion, to this suit. This easement refers "not only to the parties but also to the raiyats of the village. "The right to the enjoyment does not vest exclusively between "the zamindar and the lessees. The District Munsif is not cor-"rect in saying so. There are the raiyats of the village who are "permanent occupancy tenants, and who are entitled to the soil "subject to payment of tirwa. Their right to the tank channel "and the flow of water is co-extensive with that of the zamindar, "and there is no unity of interest in him (*Madras Railway Co.* "v. *Zemindar of Carvatenagarum*(3) ). In *Kristna Ayyan* v. *Ven-*"*catachella Mudali*(4) the interest of the tenant in insisting

(1) I.L.R., 4 Bom., 545.
(2) I.L.R., 11 Mad., 393.
(3) L.R., 1 I.A., 364, 385.
(4) 7 M.H.C.R., 60.

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"upon the condition of the supply of irrigation, as it had existed "before, was confirmed."

The plaintiffs preferred this second appeal.

Mr. *K. Brown* and *Tiruvenkatachariar* for appellants.

*Subramania Ayyar* for respondents.

JUDGMENT.—Appellants are the lessees of the zamindari of Sivaganga in the district of Madura and respondents are the prior lessees of a village in that zamindari called Surakudi. There is a river called Palar, which rises in the Karandamalai hills in the district and runs, first, through a number of Government villages and feeds the tanks situated therein. It then enters the zamindari and, after feeding a number of tanks through supply-channels, empties itself into the tank of the Tirupatore village.

Appellants represent the villages which depend for their irrigation on the Tirupatore tank, and respondents represent the Surakudi village. In November 1888, respondents put up a sand dam across the river, 94 yards in length, 1 yard in width, and ½ yard in height at the spot E in the plan, and thereby diverted all the water flowing down the river Palar into their supply-channel C, diminishing thereby the quantity which would otherwise be available for the Tirupatore tank.

Hence this litigation. The appellants' case is that respondents have no right to put up a sand dam across the river, that they are entitled to take into their channel C only so much water as naturally flows into it from the river, and that there is a masonry calingula at the head of the channel C to regulate the supply from the river.

Appellants prayed in their plaint that respondents might be directed to remove the sand dam at their own cost, and further to pay to plaintiffs Rs. 1,143, with interest thereon, as compensation for the loss sustained by them in fasli 1298 and subsequent mesne profits.

For respondents it is contended (i) that they have a right to put up the sand dam in question, and that such right is their natural right; they urge further (ii) that it is customary for owners of channels supplied by the river Palar and other rivers in the district to put up dams whenever the rivers run low and to divert the water into their channels; (iii) that, otherwise, no water will flow into those channels; (iv) that they used to put up such dams across the river Palar for more than twenty years and

divert the water into their channel; (v) that the dimensions of the dam are not correctly stated in the plaint, and (vi) that appellants have sustained no damage as alleged.

Six issues were tried in this case, the first three as to the right to put up the dam at E in the plan and to divert the river water into channel C, the fourth relating to the dimensions of the dam, and the fifth and sixth referring to the damages alleged to have been sustained by appellants.

The District Munsif considered that, as lower riparian owners, appellants had the natural right to the flow of the stream from the Palar into the Tirupatore tank without diminution, and that respondents had no right by custom or prescription to throw up a dam at E and divert the water into channel C when the river was low. He found that the damages sustained by appellants amounted to Rs. 150 and accordingly decreed payment of that amount by respondents. He also directed respondents to remove the dam.

Respondents appealed from this decision. On appeal the Subordinate Judge came to the conclusion that by custom and user as of right for more than twenty years, respondents had acquired a right to put up a dam of the kind mentioned in the plaint, and, reversing the decree of the District Munsif, dismissed appellants' suit with costs.

From this decree appellants (plaintiffs) have preferred this second appeal.

The first objection taken to the decree of the lower Appellate Court is that the Subordinate Judge has virtually resettled the issues and has omitted to come to a finding on the first issue. That issue raises the question whether the river Palar empties itself into the Tirupatore tank and whether plaintiffs have a right to the uninterrupted flow of the water of the said river into their tank. Referring to the undisputed fact that the river falls into the Tirupatore tank and flows over lands in Tirupatore, and to the rule of law as to the natural right of a lower riparian owner, the District Munsif determined the issue in the affirmative. In noting the points for determination on appeal in paragraph 5 of his judgment, the Subordinate Judge did not allude to the natural right of riparian owners. He evidently presumed that the river is a natural stream, and that the decision must depend mainly on the customary and prescriptive right set up by respondents. There

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is sufficient ground for the presumption. The plaint does not describe the river as being an artificial water-course. A natural stream is one which has a natural source and flows in a natural channel; such is the case of the Palar. It has its source in a hill and flows down in a defined natural channel till it falls into the Tirupatore tank. There is no suggestion in the plaint that any person had anything to do either with the creation of the supply of water at its source or with its flow in a defined channel. On the other hand, there is an admission in the plaint that respondents are entitled to so much of the river water as may naturally flow into their supply-channel C. In *Miner* v. *Gilmour*(1), Lord Kingsdown has explained the law on this point in these terms:—

"By the general law applicable to running streams every riparian "proprietor has a right to what may be called the ordinary use of "the water flowing past his land; for instance, to the reasonable "use of the water for his domestic purposes and for his cattle, and "this without regard to the effect which such use may have in "case of a deficiency upon proprietors lower down the stream. "But, further, he has a right to the use of it for any purpose or "what may be deemed the extraordinary use of it, provided that "he does not thereby interfere with rights of other proprietors "either above or below him. Subject to this condition, he may "dam up the stream for the purpose of a mill, or divert the water "for the purpose of irrigation; but he has no right to interrupt "the regular flow of the stream, if he thereby interferes with the "lawful use of the water by other proprietors and inflicts upon "them a sensible injury." As to what is a reasonable, though extraordinary, use, Lord Cairns propounded the law on the subject in *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*(2). "Undoubtedly the lower riparian owner is "entitled to the accustomed flow of the water for the ordinary "purposes for which he can use the water; that is quite consistent "with the right of the upper owner to use the water for all "ordinary purposes, namely, as has been said *ad lavandum et ad* "*potandum*, whatever portion of the water may thereby be exhausted "and may cease to come down by reason of that use. But, "further, there are uses no doubt to which the water may be put "by the upper owner, namely, uses connected with the tenement

(1) 12 Moore P.C., 131. (2) L.R., 7 H.L., 697.

"of the upper owner. Under certain circumstances, and provided "no material injury is done, the water may be used and may be "diverted for a time by the upper owner for the purpose of "irrigation. . . . Whether such a use is a reasonable use "would depend, at all events, in some degree, on the magnitude "of the stream from which the deduction was made for this purpose "over and above the ordinary use of the water."

We see no reason to think that the Subordinate Judge intended not to adopt the finding of the District Munsif on the first issue. The substantial question, therefore, is that raised by the second and third issues, viz., whether the customary right and the easement set up by respondents are established.

As regards the second issue, the Subordinate Judge explains it as raising for determination two subsidiary questions, viz., (i) whether there has been a usage of throwing a temporary sand dam across the river Palar, so as to divert the river water into the channel C as alleged by respondents, and (ii) whether there has been a similar usage with reference to other channels above and below the channel irrigating Surakudi.

We see no reason to think that, as argued on appellants' behalf, the framing of the issue is substantially defective. It sufficiently directs the attention of the parties to the question of usage as the foundation of a right of easement controlling the natural right of a lower riparian owner.

We are of opinion that due regard was had to the distinction between custom as the source of an easement, and an easement as a distinct right in itself. An easement is a right existing in a particular individual in respect of his land, whilst custom is a usage attached to a locality. Though a customary right belongs to no individual in particular, yet it is capable of being enjoyed by all those who for the time being own land in the locality to which the right attaches. The distinction is explained in *Mounsey* v. *Ismay*(1), and the rule of law is that if a custom is shown to exist under which individuals of a class may obtain independent rights in respect of their land which would be easements if acquired by grant or prescription, those rights are nevertheless easements, though acquired by reason of the custom.

(1) 3 H. & C., 486.

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On the question of custom or usage, the District Munsif found that it was not proved; but the Subordinate Judge, after discussing the evidence, both oral and documentary, relied on by both sides, comes to the conclusion that it is well established. His finding is that the usage is proved to have existed in respondents' village from before 1838, and that a similar usage has been proved to prevail in regard to thirty channels having dams across the Palar river, permanent or temporary, for irrigating lands in some thirty villages. This is a finding of fact which we must accept in second appeal. Several objections are urged against the finding on appellants' behalf, and we proceed to consider them.

The first objection is that the lands in Surakudi do not abut on the river Palar, and are not, therefore, riparian lands. The Subordinate Judge does not rest his decision on natural rights, which respondents, as riparian owners possess, but on the right of easement founded on custom and user for more than twenty years.

The second objection is that the custom found by the Subordinate Judge is unreasonable, since the right claimed is a right to obstruct the whole stream. It is not unusual in this country for each of those who own lands adjacent to streams depending upon them for irrigation to take water by turns either for a certain number of days or hours. The Subordinate Judge observes that the evidence shows that even when the dam is put up, water oozes through it and flows down the stream beyond the dam to the height of half a yard, and that the user is reasonable with reference to the evidence in this case. Even assuming that such user is not an incident of the natural right of a riparian owner, it cannot be treated as unreasonable as an incident of the right of easement based on custom and long user. It is quite possible that the villages depending for irrigation on the river Palar came under cultivation in times past subject to the custom.

The remark of the Subordinate Judge that there are two calingulas across the river so as to obstruct the whole stream when it is low is not without significance.

The third objection taken for the appellants is that the custom is indefinite, and that the Subordinate Judge has recorded no finding as to the dimensions of the dam. But he observes that appellants denied respondents' right to put up a dam at all, and did not take any objection to the dimensions of the dam mentioned in the plaint, and considers that no finding is necessary.

It appears, however, that the fourth issue was recorded and the question was thereby distinctly raised. The Subordinate Judge must be requested to submit a finding on the fourth issue.

Another objection is that as tenants of the zamindar, respondents are not entitled to set up a right of easement by custom. The Subordinate Judge has dealt with this objection in paragraph 11 of his judgment, and we consider that he has properly disallowed it.

There is nothing in the Easements Act to invalidate customary easements, and we are of opinion that the decision of the Subordinate Judge is right except as regards the fourth issue.

Before finally disposing of this second appeal, we shall call upon him to submit a finding on the fourth issue upon the evidence on record within six weeks from the date of receipt of this order, and seven days will be allowed for filing objections after the finding is posted in this Court.

[In compliance with the above order the Subordinate Judge submitted a finding, which was not accepted. On his submitting a revised finding, the High Court passed a decree dismissing the suit with costs throughout.]

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## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.*

SIVARAMAN CHETTI (PLAINTIFF), APPELLANT,

1895. April 1, 25.

*v.*

IBURAM SAHEB (DEFENDANT), RESPONDENT.*

*Foreign judgment—Decree* "in absentem"—*Submission to jurisdiction.*

The plaintiff brought a suit in the French Court at Karikal against the defendant, a British subject, resident in British India. The defendant employed a Vakil to defend the suit, but on the case coming on for hearing the Vakil stated he had no instructions, and an *ex-parte* decree was passed. An application by the defendant

* Second Appeal No. 1730 of 1894.