

KULAIKADA
PILLAI
v.
VISWANATHA
PILLAI.

Bibee v. Abdul Kadir Bhujan(1) and the cases approved of therein, they are apparently in conflict with the above view of the effect of the provisions of the Code of Civil Procedure bearing on the point and if it is correct, it would follow that the Subordinate Judge had no power to reverse the decree as against the first and second defendants inasmuch as such reversal was not necessary to give relief to the appellant before him, viz., the third defendant who was disentitled to ask for anything more than the reversal of the decree directing him to refund the price, since, having sold the land, the right to claim present possession thereof had passed away from him so as to disentitle him to claim delivery.

I concur in the order proposed.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

AIYAVU MOOPPAN (PLAINTIFF), APPELLANT,

v.

SAWMINATHA KAVUNDAN AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1904.
September
15.

Riparian owners—Water rights for irrigation where stream flows through separate estates—Relative rights of upper and lower proprietors on the banks to the use of the water—Action to enforce rights—Absence of proof of damage.

A riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption and without substantial diminution caused by the upper proprietor, who may, for legitimate purposes withdraw so much of the water as will not materially lessen the downward flow on to his neighbour's land.

In order to support an action by one riparian owner to restrain another from diverting the water beyond his riparian tenement, it is not necessary that the plaintiff should prove that he has suffered any damage.

SUIT for an injunction. The District Munsif, who passed a decree in favour of the plaintiff, stated the facts as follows:—

The plaint sets forth that the plaintiff owns $2\frac{1}{4}$ kanis of nunja in the village of Muruvathore, Musiri Taluk, irrigated

(1) I.L.R., 31 Cal., 613.

* Second Appeal No. 565 of 1902, presented against the decree of H. G. Joseph, Esq., District Judge of Trichinopoly, in Appeal Suit No. 81 of 1901, presented against the decree of M.R.Ry. S. Ramasami Ayyangar, District Munsif of Kulitalai, in Original Suit No. 145 of 1900.

by the waters of Perumal Karattar, that he has all along been raising nunja crop thereon, that, besides the plaintiff's lands, about 20 acres of others' nunja are being irrigated by the same, that the defendants have no right to the waters of the said river, that they own only punja lands, that east of the said river, there is another channel, that, for irrigating their punja lands with its water occasionally, the defendants' punja lands have been assessed with water-cess, that on account of defendants' diversion of the waters of the Perumal Karattar into a canal newly dug by them on 21st December 1898 and in consequence of the necessary diminution of the water-supply to the plaintiff's lands, the plaintiff has incurred damages to the extent of 50 kalams, and that the defendants are diverting the waters of the Perumal Karattar by putting up a dam across it.

AIYAVU
MOOPPAN
v.
SAWMINATHA
KAVUNDAN.

On appeal the District Judge reversed the decree of the District Munsif and dismissed the plaintiff's suit, on the ground that the plaintiff had not sustained any damage.

Plaintiff filed this second appeal.

T. Rangachariar for appellant.

T. Natesa Ayyar for first and second respondents.

JUDGMENT.—We must allow this appeal. The District Judge has reversed the decree of the District Munsif solely on the ground that the plaintiff has not proved that he has sustained any damage. This is not sufficient for disposal of the case. A riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption and without substantial diminution caused by the upper proprietor who may for legitimate purposes withdraw so much only of the water as will not materially lessen the downward flow on his neighbour's land (*Debi Pershad Singh v. Joynath Singh*(1)). If, therefore, the defendants are riparian proprietors at the place where the bund is erected and along the course where the water is carried and distributed, they are entitled to take it and use it so, unless they thereby cause a diminution of the flow of water to the plaintiff's riparian tenement. The owner of a tenement adjoining a natural stream has however no right to divert water to a place outside the tenement and there consume it even though he does not thereby diminish the flow of water to the lower

ARIVAVU
MOOPPAN
v.
SAWMINATHA
KAVUNDAN.

riparian tenement (*McCartney v. Londonderry and Lough Swilly Railway*(1).

If, therefore, the diversion made by the defendants conducts the water of the river beyond their riparian tenement or if the diversion is made at a spot other than where the defendants' riparian tenement is, it is not necessary for the plaintiff to prove any damage or diminution in the water flowing to his riparian tenement in order to sustain his right of action.

In this case it is not found whether the defendants are riparian owners at the place where the diversion is made or whether the diversion is throughout within their riparian tenement or if it is carried beyond their riparian tenement at any point—all of which are necessary findings for the purpose of arriving at a proper determination of the rights of the parties. We therefore reverse the decree of the District Judge and remand the case to the lower Appellate Court for disposal according to law with due regard to the above observations. The costs will abide and follow the event.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

JAGANNATHA CHARRY (RESPONDENT), APPELLANT,

v.

RAMA RAYEE (PETITIONER), RESPONDENT.*

Specific Relief Act I of 1877, s. 9—Immoveable property—Actual and constructive possession—Landlord and tenant—Dispossession by third party—Suit by landlord—Maintainability.

A landlord holding possession through a tenant can bring a suit under section 9, Act I of 1877, to recover possession of property of which he has been dispossessed by the act of a third party.

Innasi Pillai v. Sivagnana Desikar, (C.E.P. No. 643 of 1903 unreported) followed.

LETTERS Patent appeal against the order passed by Davies, J., in the following terms:—

“There is no doubt to my mind that the only persons entitled to sue under section 9 of the Specific Relief Act are those in

(1) L.R., (1904) A.C., 301.

* Appeal No. 18 of 1904 under section 15 of the Letters Patent against the judgment of Mr. Justice Davies in Civil Revision Petition No. 424 of 1903.