APPELLATE CIVIL.

Before Mr. Justice Dunkley.

1936
Mar. 10.

U PO THET AND OTHERS
v.
A.L.S.P.P.L. CHETTYAR FIRM AND ANOTHER.*

Easement—Natural right of owner to deal with water on his land—Natural flow of water from higher to lower land—Right of lower landowner to obstruct the natural flow—Right acquired by prescription.

Every landowner has a natural right to deal with his surface drainage water as he pleases; he can collect it and use it on his own land, or he can let it find its way by gravitation to his neighbour's land if that is at a lower level than his own land. The owner of the lower land may acquire by prescription, as an easement restricting this natural right, the right to prevent the natural flow of water from the higher land on to his own.

Debi Pershad v. *Joynath*, I.L.R. 24 Cal. 865; *Subramaniya* v. *Ramachandra*, I.L.R. 1 Mad. 335; *Wright* v. *Howard*, 24 R.R. 169—*referred to.*

Hay (with him *Tha Kin*) for the appellants.

Clark and *P. B. Sen* for the respondents.

DUNKLEY, J.—The first plaintiff-respondent is the owner of a holding of agricultural land of which the second plaintiff-respondent is the tenant. The defendants-appellants are the owners of a holding of agricultural land which is to the south of and contiguous to the holding of the first plaintiff-respondent. The plaintiffs-respondents instituted a suit in which they claimed certain rights of drainage from their land on to the land of the defendants-appellants, and it is out of this suit that the present appeal arises.

The reliefs claimed by the plaintiffs-respondents in their plaint were: (1) a declaration that they are entitled to drain the surplus water of their upper

* Civil Second Appeal No. 219 of 1935 from the judgment of the District Court of Hanthawaddy in Civil Appeal 24 of 1935.

land over the lower land belonging to the defendants-appellants; (2) issue of a mandatory injunction directing the defendants-appellants to remove the bund which had been newly erected on their land; (3) issue of a perpetual injunction restraining the defendants-appellants from obstructing the natural drainage of the surplus water from the land of the plaintiffs-respondents. The prayers therefore were, in effect, for a declaration of the natural right of surface drainage only.

The grievances of the plaintiffs-respondents were set out in paragraphs 4 and 5 of their plaint, which are as follows :

"4. That the owner of the said upper land the portion marked 'A' which is higher in level belong to the 1st plaintiff, has a natural right of draining the surplus water over the lower land the portion marked 'B' which is lower in level to that of the 1st plaintiff and the owner of the said upper land (the 1st plaintiff) and his predecessors in title, have also been continuously draining the surplus water of their upper land over the lower land for over twenty years until the defendants obstructed such draining at the end of July 1934.

"5. That while the 2nd plaintiff as the tenant of the 1st plaintiff cultivating and working the said upper land was draining the surplus water by making an opening as usually made for this purpose at the point marked 'E' in the boundary bund C—D lying between the said two holdings, at the end of July 1934 the defendants commenced to obstruct the draining of the surplus water of the upper land by closing the opening so made by the 2nd plaintiff and by erecting and raising a big (new) bund at a short distance from C—D in their said holding in the lower land and thereby caused serious damages to the cultivation of crops on the upper land."

The references E and C—D are to points marked upon a map which was filed with the plaint and

which is now Exhibit A on the record of the trial Court.

The plaint is not well worded, but it is clear that paragraph 4 thereof is merely an assertion of the natural right of the owner of higher land that water rising in or falling on his own land shall be allowed by the owner of adjacent lower land to run naturally thereto, and the averment in the last sentence of this paragraph, to the effect that this right has been exercised for over twenty years, was unnecessary. Every landowner has a natural right to deal with his surface-drainage water as he pleases; he can collect it and use it on his own land, or he can let it find its way by gravitation to his neighbour's land if that is at a lower level than his own land; but the owner of lower land may acquire by prescription, as an easement restricting this natural right, the right to throw water back to the land at a higher level. This easement is clearly defined in section 7 (*b*), illustration (*j*), of the Indian Easements Act. See *Wright* v. *Howard* (1); *Subramaniya Ayyar and others* v. *Ramachandra Rau and others* (2); *Debi Pershad Singh and another* v. *Joynath Singh and others* (3).

It is common ground that between the two holdings of the appellants and the respondents there is a boundary bund, which is marked C—D on the map, Exhibit A, and, so far as this bund C—D restricts the natural flow of the surface-drainage water from the respondents' land to the appellants' land, it is common ground that this bund has been in existence for twenty-five years at least, and therefore the appellants have acquired an easement to restrict the natural flow to such an extent as it may be restricted by the existence of this bund.

(1) R.R. Vol. 24, p. 169. (2) (1877) I.L.R. 1 Mad. 335.
(3) (1897) I.L.R. 24 Cal. 865.

Paragraph 5 of the plaint is mixed. The first part of the paragraph is a claim to an easement to make an opening in the bund C—D. The respondents resiled from this claim in evidence. The second respondent, Maung Tha Dun Aung, who actually cultivates the northern holding, stated in evidence as follows: "The statement in paragraph 5 of the plaint is not correct as I never made any opening at point E on the boundary *kazin* C—D. The statement that an opening is usually made at a point marked E in paragraph 5 of the plaint is not correct." So that the effect of his evidence is an abandonment of the claim to make an opening in the boundary *kazin* as an easement. The second part of paragraph 5 is an averment that the appellants have further restricted the natural flow of the surface drainage by raising a new bund inside their holding.

Five issues were framed by the trial Court, of which the real points in dispute were comprised within the first, second and fourth issues, which are as follows:

"(1) Is the 1st plaintiff's land higher in level than the defendants' land?

"(2) Has the 1st plaintiff a natural right of draining the surplus rain water collected in his land over the defendants' land?

"(4) Have the 1st plaintiff and his predecessors acquired any easement for over twenty years to make an opening of the common boundary *kazin* at the point marked 'E' in the boundary bund C—D in order to drain out the surplus rain water collected in their land over or into the land of the defendants as alleged by the plaintiffs?"

The findings of fact of the lower Courts are somewhat difficult to understand and are not accepted by either party. Levels were taken by an engineer, and they show that both holdings are slightly concave in shape, and that the boundary along the line C—D is, except at point E, somewhat higher than the

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centre of either holding. The levels taken show that the lowest point in the boundary is at E in plot No. 400 of the respondents' land. There is a shallow depression in the respondents' holding in plot No. 400, and the surface-drainage water from the respondents' holding collects there. The difference in level between the respondents' holding as a whole and the appellants' holding as a whole is very slight, but it would appear that, generally speaking, the appellants' holding is at a slightly lower level than the respondents' holding. So far as there is any natural drainage from the respondents' land on to the appellants' land, it must pass through the point E, which is the lowest level on the boundary between the two holdings, but this right of natural drainage must be subject to the right of the appellants to maintain the boundary bund at its ancient and original height, and the respondents could only acquire a right to breach this bund as an easement. The Subdivisional Court correctly found that no such easement had ever been acquired, and that the only right which the respondents had was a right that the surface drainage water from their land should be allowed by the appellants to run naturally on to their land at the point E. This is the finding of the Subdivisional Court which has been supported by the District Court on first appeal, and undoubtedly that finding is correct; but, nevertheless, the Subdivisional Court has by its decree granted to the respondents an easement to breach the bund C—D at the place marked E at a certain season of the year, and this decree has been supported by the District Court. The final paragraph of the judgment of the Subdivisional Court is as follows :

"Let there be a decree against the defendants declaring that plaintiffs are entitled to drain the surplus water from their land at the place marked 'E' in the bund C—D, the

boundary *kazin* of the plaintiffs' and defendants' holdings, by means of 'kadutpouk' (cr small opening) in the month of July and August in one year and that the defendants do remove the newly-erected bund in their holding and an injunction to restrain the defendants from obstructing the natural drainage of surplus water at the place marked 'E' in the bund C—D, in the two months of July and August."

The first part of this decree is not in accordance with the findings of fact in the judgment and cannot be supported, nor can the restriction in the rest of the decree restricting the respondents' exercise of their natural rights to the months of July and August. In regard to this last point a cross-objection has been filed by the respondents, and strenuous opposition to this cross-objection has been made by the appellants on the ground that no cross-objection to the decree of the Subdivisional Court was made by the respondents on first appeal. In connection with this matter there has been a great deal of argument regarding the meaning of Rule 33 of Order 41 of the Code of Civil Procedure, but when it is held, as I hold, that the first part of the decree of the Subdivisional Court, granting an easement to the respondents, is wrong, this contest becomes of no moment, and the cross-objection of the respondents loses its interest. The decree which should have been passed in favour of the plaintiffs-respondents should have been in the following terms:

(1) Directing the issue of a perpetual injunction restraining the defendants-appellants from obstructing the natural drainage of the surface water from the land of the plaintiffs-respondents on to their land, subject to the right of the defendants-appellants to maintain the boundary bund C—D in its ancient and original condition.

(2) Directing the issue of a mandatory injunction to the defendants-appellants directing the removal by

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them and at their expense of the bund newly erected by them in their land to the south of the boundary bund C—D.

A decree will be passed accordingly. As both sides have been partially successful in this appeal there will be no order as to the costs of the appeal or of the cross-objection. The order of the District Court regarding the costs of the first appeal and of the original suit will be maintained.

APPELLATE CIVIL.

Before Mr. Justice Dunkley.

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Mar. 31.

ARJUNDAS *v.* U KA YA AND ANOTHER.*

Limitation—Execution—Limitation Act (IX of 1908), article 182 (5)—Application for execution made to Court which passed the decree—Certified copy of decree filed—Prayer for attachment of property situate outside jurisdiction—Amendment of application—Dismissal of application—Fresh starting point of limitation—Subsequent application for transfer of decree—Jurisdiction of transferee Court to decide points of limitation—Civil Procedure Code (Act V of 1908), s. 38, O. 21, r. 26.

To attract the provisions of clause (5) of article 182 of the Limitation Act three conditions must be fulfilled: (1) an application must be made for the execution of the decree: or to take some step in aid of execution: (2) it must be made in accordance with law: and (3) it must be made to the proper Court.

Where a decree-holder makes an application for execution accompanied by a certified copy of the decree to the Court which passed the decree and asks the Court to attach and sell the debtor's land which is situate outside its jurisdiction, the Conrt ought not to dismiss the application without giving the decree-holder opportunity to amend it by praying for the transfer of the decree for execution to the Court in whose jurisdiction the property is situate. In any case the application satisfies the requirements of clause (5) of article 182 as having been made in accordance with law to the proper Court, for in order to attach property outside the jurisdiction of the Court which passed the decree an application must in the first instance be made to that Court. Consequently a subsequent application of the decree-holder for transfer of the decree made within three years from the date of the dismissal of his previous application is within time. The Court to which the decree is transferred can decide whether an application for execution made to itself is in time or not, but it has no juris-

* Civil Second Appeal No. 362 of 1935 from the order of the District Court of Thayetmyo in Civil Miscellaneous No. 4T of 1935.