Mahadeo and Another Vs Smt. Umaraj (Dead) and Others

Court: Allahabad High Court (Lucknow Bench)

Date of Decision: March 19, 1976

Acts Referred: Specific Relief Act, 1963 â€" Section 38

Citation: AIR 1977 All 283

Hon'ble Judges: K.S. Varma, J

Bench: Single Bench

Advocate: B.L. Shukla, for the Appellant; Vishal Singh, for the Respondent

Final Decision: Dismissed

Judgement

K.S. Varma, J.
The circumstances in which these two second appeals came to be filed are as follows:--

One Jagat Pal Singh filed a suit against Mahadeo, Devi Dayal Tewari, Gaya Prasad Tewari, Vijai Shankar Tewari, Rameshwar Tewari, Shrimati

Rajrani, Chandra Bhukhan Singh, Gajraj Singh and Sukhdeo Singh for a permanent injunction restraining them from obstructing the irrigation of

plot No. 195/1 and a few other plots from a well situate on plot No. 193/1 in village Naraulha, Pargana, Tahsil and District Rae Bareli. A sum of

Rs. 50/- was claimed on account of damages for the loss of crop. It is an admitted position that Jagat Pal Singh, Mahadeo and others defendants

are co-Bhumidhars of plot 193/1. The plaintiff has come to Court with the allegations that his Chak after the Consolidation operations now

includes plots 174, 393/3, 193/2, 194/1, 195/1, 196/1, 197/1 and 198/1 and the total area is 4 Bighas, 12 Biswas and 12 Dhurs. Before

Consolidation operations, plot 195/1 was in the tenancy of Sheo Shankar Singh, the brother of Jagat Pal Singh and this plot had always been

irrigated from the well in question for more than 25 years. It is further contended by the plaintiff Jagat Pal Singh that as joint owner, he is entitled to

irrigate his fields from the well on plot 193/1 and, in any case, he has perfected easementary right to irrigate his other plots by prescription. The

case of the plaintiff is that Mahadeo and Devi Dayal Tewari forcibly prohibited the plaintiff from irrigating the fields and as a consequence of that,

he suffered loss in respect of which he is entitled to damages. The plaintiff further contends that Gaya Prasad Tewari, Vijai Shankar Tewari,

Rameshwar Tewari and Smt. Rajrani, defendants 3 to 6 had joined hands with Mahadeo Prasad, Devi Dayal Tewari and Chandra Bhukhan Singh,

defendant No. 7, Gajraj Singh defendant No. 8 and Sukhdeo Singh defendant No. 9 were impleaded as pro forma defendants as they are also

co-sharers in the well in dispute.

2. Chandra Bhukhan Singh, Gajraj Singh and Sukhdeo Singh, defendants 7 to 9, filed a joint written statement and supported the claim of Jagat

Pal Singh plaintiff. Mahadeo and Devi Dayal Tewari, defendants 1 and 2 have contested the suit. They contested the suit on the ground that the

well in question was sunk by Merai, an ancestor of the contesting defendants and the plaintiff has no right in the well and by inheritance the

defendants are the owners of the well. They maintained that no other plots had been irrigated from the well. The defendants further contended that

the plaintiff Jagat Pal Singh is not entitled to any damages as he could irrigate his fields by canal.

3. The plaintiff Jagat Pal Singh in his replication contended that all the co-sharers had jointly got the well bored. He denied that his fields were

irrigated from the canal. On the basis of the above pleadings a number of issues were framed. One of the issues framed by the trial Court was

whether defendants 1 and 2 were the sole owners of the well. The trial Court while recording a finding on issue No. 1 held that it was an admitted

position that the well in question was situate on plot No. 193/1 and that there was no dispute that both the parties had a share in this plot. The trial

Court further found that the plaintiffs share in the grove in dispute was 1/16, the share of defendants 1 and 2 together was 1/4, that of defendant

No. 3 3/8, that of defendants 4 to 6 was % and the share of defendants 7 to 9 was 1/16. The trial Court further remarked that the shares indicated

above had been admitted by the plaintiff in his replication. The trial court while recording a finding on issue No. 2 held that since plot No. 195/1

was, admittedly, in the tenancy of the brother of Jagat Pal Singh till the Consolidation operation and that his brother also was joint owner in the well

there could be no right of easement when the servient and the dominant heritage vested in the same person. He, however, proceeded to decide

whether a right of irrigation by prescription had been acquired or not. The trial Court, on a consideration of the evidence of the parties, believed

the version of the plaintiff and concluded that if there was an easementary right which could be acquired, in the circumstances of the case, the

plaintiff had acquired the right to irrigate his fields from the well in question by prescription. The trial Court by its judgment and decree dated 12-

12-1966 decreed the suit filed by Jagat Pal Singh for a sum of Rs. 50/- as damages against defendants 1 and 2. The suit for permanent injunction

was also decreed and defendants 1 to 6 were permanently restrained from obstructing or otherwise interfering with the plaintiff"s irrigation on plots

174, 193/3, 193/2, 194/1, 195/1, 196, 197/1 and 198/1 from the well situate on plot 193/1, Aggrieved by the decision of the trial Court the

defendants Mahadeo and Devi Dayal Tewari filed an appeal before the District Judge, Rai Bareli. The appeal came up for hearing before the Civil

Judge, Rai Bareli who by his judgment and decree dated 9th May, 1967 allowed the defendants" appeal in part. The lower appellate Court

dismissed the suit of Jagat Pal Singh for permanent injunction in respect of plots other than plot No. 195/1. He, however, maintained the decree

passed by the trial Court in regard to damages and permanent injunction in respect of plot 195/1. Defendants 1 and 2 being aggrieved by the

decree of the lower appellate Court have filed Second Appeal No. 259 of 1967. Aggrieved by the decision of the lower appellate Court the

plaintiff Jagat Pal Singh has filed Second Appeal No. 261 of 1967. During the pendency of the appeal Jagat Pal Singh died and his heirs were

impleaded as appellants in the said appeal. Thus both the plaintiff and defendants 1 and 2 have come up in second appeal to this Court.

4. Shri B. L. Shukla, learned counsel for the appellants in Second Appeal 259 of 1967 contended that in the grove standing on plot 193/1 both the

plaintiff and defendants were co-sharers. The well in dispute also was situate on plot 193/1. He has contended that since the well situate on plot

193/1 was owned by the plaintiff and the defendants jointly, only that land could be irrigated by the well which was jointly owned by the parties to

the suit. He further contended that plot 195/1 was a plot which belonged exclusively to the plaintiff, and the plaintiff could not irrigate the plot which

exclusively belonged to him. He conceded that the grove which was jointly owned by the parties to the suit could be irrigated by the well but any

property in which the other co-sharers were not interested, could not be irrigated by the well. Mr. Shukla further contended that in respect of a

well which was jointly owned by the parties no easementary rights could be claimed by the plaintiff by prescription. His contention is that a

cosharer cannot acquire by user a right of easement against the other co-sharer as no person can have an easement in the land which he himself

owns. He contended that the easement and ownership cannot co-exist. On the other hand, it was contended on behalf of the respondents that the

plaintiff could acquire easementary rights by prescription and if this position is established then he can irrigate all the land in dispute from the well in

question. His contention is that if the parties to the suit are joint owners of the well, the plaintiff can use the water in any manner he liked and the

right included the right to irrigate other fields belonging to him. He further contended that the plaintiff had a right to the enjoyment of water as long

as it did not interfere with the use of the water by other joint owners.

5. Mr. Shukla, in support of his contention that out of the well which is jointly owned by both the parties only joint fields could be irrigated, relied

upon a decision given by the Madras High Court reported in Sivarama Pillai v. Marichami Pillai (AIR 1971 Mad 230). He submitted that the said

decision clearly established that the right to take water from the well could not be dissociated from the land and it was necessarily implicit in the

very idea of cosharership that the water in; the well was intended to be used only for lands which were irrigated by the common well and that none

of the parties would be entitled to take water from the well to irrigate any other land. A close reading of the decision referred to above would

indicate that the line of reasoning adopted by Shri B. L. Shukla is correct. As stated earlier, the position is undisputed that in grove 193/1 the

parties to the suit are co-sharers and they are also co-sharers in the well. The well is the common property and is for the beneficial and profitable

enjoyment of the land on which it is situate. It does not matter what label the parties give to their rights in the well but what is crucial is that in case

of land, the valuable right is the source of irrigation. The well is inseparably connected with the ownership of the land and the rights in the well

cannot be dissociated from the land, the right of the particular party to irrigate the land. The learned Judge deciding the aforementioned case,

namely, Sivarama Pillai V, Marichami Pillai (Supra) had, after considering various decisions of the Madras High Court, come to the conclusion that

the uniform trend of decisions of that Court was not to permit the co-owner to irrigate any land other than the one of which he is the co-sharer. The

learned counsel for the respondents was unable to cite any other decision on the point. After perusing the decision reported in Sivarama Pillai V.

Marichami Pillai (Supra), I feel inclined to agree with the line of reasoning adopted by the learned Judge in that case. The principle on the basis of

which he has held that the right of the co-owner of the well is confined to irrigation of the land of which he is a cosharer, is based upon very sound

reasoning and is in accord with common sense. A position can be envisaged when a co-shaver in order to irrigate his fields other than those of

which he is a co-sharer may utilize the major part of the water of the well for irrigating his own fields leaving the other co-sharers with insufficient

water to irrigate the fields of which the parties are co-owners. The principle enunciated in the aforesaid decision of the Madras High Court fully

accords with considerations of justice, equity and good conscience. After having heard the learned counsel for the parties, I am of the view that the

parties to the suit are not entitled to irrigate any plot from the well in dispute other than the land of which they are co-sharers and in this view of the

matter the plaintiff cannot irrigate plot 195/1 from the well situate on plot 193/1.

6. Mr. Shukla has further contended that there could be no acquisition of prescriptive right of easement in regard to a property which is jointly

owned by the parties. He contended that the well in question was jointly owned by the co-sharers and that all the co-sharers had the right to use

the water of the well for irrigating the fields jointly owned by them. He contended that if the parties are co-sharers in the right to irrigate, each party

would be in possession of that right and the exclusive use of the right of irrigation by one of the parties would not amount to an ouster of the right to

irrigate vested in the other party. In order to acquire right by prescription it has to be established that the person concerned exercised the right to

the exclusion of others. If the right to irrigate from the well is a right in which the parties to the suit are co-sharers, the mere exclusive use by one of

the co-sharers will not amount to an ouster of the other. Once it is established that the parties are co-sharers in respect of the right to irrigate then

unless any party establishes ouster of the other co-sharers, a prescriptive right of easement cannot be acquired. In the instant ease no evidence is

forth-coming on behalf of the defendants that they were exercising the right of irrigation in respect of the land of which they were not the co-sharers

by ousting the other co-sharers. In the absence of a plea of ouster, the plaintiff cannot be permitted to urge that he acquired the right to irrigate

other fields by prescription. The learned counsel for the respondents placed reliance on Section 19 of the Easements Act and contended that since

in proceedings under the U. P. Consolidation of Holdings Act, plot 195/1 had come to the plaintiff, as is clear from Ext. 14 which is Form 23

prepared in consolidation proceedings, he could establish easementary right regarding irrigation of the said plot by showing that his predecessors

were irrigating the fields for more than 20 years. In my view, this argument of the learned counsel for the respondents is incorrect. As stated earlier,

the parties to the suit were co-sharers in the right of irrigation and if no ouster was established, the plaintiff could not acquire easementary right by

prescription. Having regard to the view that I have taken, it is obvious that the plaintiff could not have a right to irrigate fields other than those of

which the parties are co-sharers. In this view of the matter, the plaintiff has no right to irrigate plot 195/1 or any other plot which he claimed in the

suit on the basis of having acquired a prescriptive right of easement of irrigation.

7. As a result of the findings recorded by me above, I allow Second Appeal 259 of 1967 and dismiss Second Appeal 261 of 1967. In

consequence of the findings recorded above, the suit filed by the plaintiff stands dismissed in toto. In the circumstances of the case, I direct that the

costs of both the appeals shall be borne by the parties.