

1969

Present : Alles, J.

SINNATHURAI and another, Appellants, and THARMALINGAM
and another, Respondents

S. C. 130/68—C. R. Mallakam, 16563

Servitude giving right to a "share of the water" in a well—Whether it includes the right to use the well sweep—Servitude to use well sweep—Termination of it by non-user—Effect when a new well sweep is erected.

Whether a servitude giving co-owners a right to a "share of the water" in a well includes the right to use a well sweep erected to draw water from the well would depend on the facts of the particular case.

The servitude of using a well sweep may be terminated by non-user. If, therefore, a new well sweep is erected thereafter by a particular co-owner, it is not subject to a servitude in favour of the other co-owners of the "share of the water" in the well.

A PPEAL from a judgment of the Court of Requests, Mallakam.

S. Sharvananda, for the plaintiffs-appellants.

C. Chellappah, for the 1st and 2nd defendants-respondents.

Cur. adv. vult.

July 9, 1969. ALLES, J.—

The plaintiffs, husband and wife, who are the owners of Lots 2 and 3 in the plan marked "X", filed of record, have instituted this action against the defendants praying that they be declared entitled to the use of the well sweep that has been erected for

the well situated on Lot 6, for a share of the water from the said well and the right to use the way and water-course leading from the said well to their land. The 1st and 2nd defendants are husband and wife and the 4th to the 12th defendants have been made parties to this section as they have similar rights as the plaintiffs in respect of this well.

In the course of the trial, it was conceded by the 1st and 2nd defendants that the plaintiffs were entitled to a share of the water in the well with the right of way and water-course and the only issue that remained for decision was the plaintiffs' right to use the well sweep which was erected in 1966.

Lots 2, 3, 6 and other Lots originally belonged to three persons—Muthupillai, Kathirgamar, Arunasalam and his wife Kannathai. By an amicable division between these three persons by Deed No. 1204 of 1920 (P1), Lots 2 and 3 were allotted to Muthupillai, who donated the same by Deed No. 2230 of 1st May, 1947 (P2), to her daughter, the 2nd plaintiff. On P1 and P2, the plaintiffs obtained a share of the water in the well on Lot 6 and the right of way and water-course. The portion allotted to Arunasalam and Kannathai devolved on the 1st and 2nd defendants and is marked Lot 6. According to P1, Arunasalam and Kannathai obtained Lot 6 "exclusive of the share of the well and way and water-course belonging to other lands to the said well".

The plaintiff stated in evidence that her mother Muthupillai drew water from the well with the aid of the well sweep and irrigated her plantations, and that from the time she was eight years old, she and her predecessors used the well sweep. This evidence has not been challenged nor does the learned Commissioner disbelieve her evidence on this point. It has however been established, through the evidence of the 1st defendant, that since his marriage in 1956, the well sweep had fallen down and was not in use until a new well sweep was erected in 1966.

The learned Commissioner has accepted the evidence of the 1st defendant, in spite of a denial by the 2nd plaintiff and her witnesses, that the well sweep was erected by the 1st defendant and that the plaintiffs and the other co-owners did not contribute any share for the replacement of the well sweep. The non-user of the well sweep for a considerable period is supported by the fact that in September, 1960, the plaintiffs instituted Action No. 15804 in the Court of Requests claiming to be the sole and exclusive owner and possessor of the well sweep trees on the western side used as posts and praying for a declaration that they be entitled to erect a new well sweep and to use it to draw water from the well.

The learned Commissioner in his order in case 15804 made on 6th June, 1962 marked P5, held that no prescriptive user of the well sweep had been established by the plaintiffs, and on a strict construction of the Deed of Partition of 1920, held that although “on equitable grounds the plaintiffs should be permitted to erect a well sweep for the benefit of all concerned, a servitude is a right that must be strictly construed and the plaintiffs are not given such a right, when the other co-owners are objecting to the plaintiffs erecting any well sweep” In coming to this conclusion, the learned Commissioner has followed the decision of the Supreme Court in *Vythilingam v. Vyramuttu*¹ 55 N. L. R. 185 where it was held that a servitude giving a right to a “share of water” in a well does not include the right to use of the well sweep if no mention of the well sweep is made in the Grant. I find it difficult, however, to accept the *ratio decidendi* in *Vythilingam v. Vyramuttu* as being one of universal application, and in my view, whether a servitude giving a right to a “share of water” includes the right to use a well sweep, would depend on the facts of the particular case. In the present case, the evidence of the Surveyor, after inspection on a commission issued by Court, is to the effect that the well was about 28 feet deep and that to irrigate the fields from this well, a well sweep was required and that it would be difficult to draw water from the well without a well sweep. It is a well known feature in the Jaffna Peninsula that water is drawn from wells by the use of well sweeps and the surveyor who gave evidence in this case has stated that the wells he had inspected in the area all had well sweeps. From 1920 to 1956, water from this well had been drawn by the use of a well sweep. It is therefore inconceivable, that when the parties entered into the Deed of Partition in 1920, providing for the sharing of the water from the common well, they did not have in mind that the water was to be drawn by the use of a well-sweep. In this connection, I would refer to the observations of Sampayo, J. in the unreported case (S. C. 182 Chavakachchèri 20263—S. C. minutes of February 1916) cited by Rose C. J. in *Vythilingam v. Vyramuttu*. In a similar case where the question of the right to the use of a well and well sweep was considered, the learned Judge said:—

“I must say in regard to my own judgment in appeal on the previous occasion, that I never intended to restrict the plaintiff’s right merely to draw water. The well means not merely the actual hole in the ground but the entire arrangement by which it can be used. That being so, it seems to me that it is quite unreasonable to disconnect the well sweep from the well itself.”

¹ (1953) 55 N.L.R. 185.

Rose C. J. conceded that on the facts of the case referred to by Sampayo, J. the order in question might be appropriate and proceeded to consider the facts in *Vythilingam v. Vyramuttu* and held that in the absence of evidence of prescriptive user and on a strict interpretation of the grant which made no reference to the well sweep, a "share of water" in the well did not include the use of the well sweep.

In my opinion, therefore, on the facts of the present case, the learned Commissioner who delivered the order in Case 15804 was wrong when he held on a construction of the Deed of Partition that the use of water from the well did not include the use of the well sweep.

There are however, two insurmountable difficulties in the way of the plaintiffs succeeding in the present action. Firstly, although there is evidence of prescriptive user from 1920 to 1956, the well was abandoned from 1956 and the well sweep was not in use until 1966. Therefore there cannot be any question of the plaintiffs' claiming the right of user to this well by prescription. Learned Counsel for the appellant submitted that the servitude was in abeyance since 1956 and was revived in 1966. In view of the long period of time—10 years—and the fact that during this period the plaintiffs and other co-owners have used other wells in the neighbourhood for the purpose of drawing water, I am inclined to take the view that the servitude has been terminated by non-user.

Secondly, I am of the view that the defendants are entitled successfully to plead that the decree in C. R. Case No. 15804 operates as *res judicata* in the present case. Learned Counsel for the appellant sought to draw a distinction between the cause of action in C. R. Case 15804, which was for the erection of a well sweep and the use of water from the well, and the cause of action in the present case, which was for the use of the well sweep which had already been erected. In either case, the basis of the plaintiffs' rights would depend on the proper construction of the Deed of Partition—whether it permitted the use of the well sweep for the purpose of drawing water from the well. The learned Commissioner in Case No. 15804 adjudicated on this question and the plaintiffs, in the absence of any finding in appeal to the contrary, are bound by the adjudication in that case.

For these reasons I am of the view that the plaintiffs are not entitled to succeed in this action. The decree in the case is not in conformity with the judgment and does not state "that the plaintiffs are entitled to the share of the water in the well

situated in Lot 6 in the Plan marked 'X' filed of record and to the right to use the way and water-course leading from the said well to the plaintiffs' land". The decree will be amended to include these words. Subject to the variation in the decree, the appeal is dismissed with costs.

Appeal dismissed.
