

1953

Present : Rose C.J.

V. VYTHILINGAM, Appellant, and K. VAIRAMUTTU,
Respondent

S. C. 244—C. R. Mallakam, 14,589.

Servitude—Use of a well—Does it include the use of the well sweep ?

A servitude giving right to a “ share of the water ” in a well does not include the right to the use of the well sweep if no mention of the well sweep is made in the grant.

APPEAL from a judgment of the Court of Requests, Mallakam.

C. Thiagalingam, Q.C., with *C. Vanniasingham* and *C. Shanmuganayagam*, for the defendants appellants.

T. K. Curtis, for the plaintiff respondent.

Cur adv. vult.

November 11, 1953. ROSE C.J.—

This matter concerns an alleged servitude involving the use of a well by the respondent on the appellant's land. The plaintiff respondent relied on a document P 1 dated 4th December, 1919, which states *inter*

alia—and the position is not disputed by the defendants-appellants—that the premises conveyed included a “share of the water in the well and the right of the usual way and watercourse”.

The appellants concede that the respondent is entitled to a share of the water in the well and the use of any aqueduct or water course that exists and to the necessary access to the well. The point at issue in this case, however, relates to the use of a well sweep which has been constructed upon the land of the appellants and which it is, no doubt, convenient for parties drawing water from the well to use.

It is to be noted that no mention of the well sweep is made in the Deed and it is not suggested by the respondent—and the finding of the learned Commissioner does not support that position—that there was sufficient evidence of prescriptive user of the well sweep.

The respondent contends that the right of way granted to him under the Deed P 1 must reasonably be construed as including the right to use the well sweep on the appellant's land. He further contends—and this may well be true—that he himself contributed to the expense of the reconditioning of the well sweep in question. Be that as it may, the only question with which I am concerned in this case is whether a servitude which includes the use of the well sweep has been established. Learned counsel for the respondent has referred me to an unreported judgment of de Sampayo J. (S. C. No. 182—C. R. Chavakachcheri No. 20,263¹) in which a similar dispute as to the use of a well and a well sweep was considered.

It is to be noted in that case that the question under consideration was the extent of the relief which was intended to be granted to the plaintiff by the original decree in the case. The original decree as drawn up by the Commissioner of Requests was to the effect that the plaintiff was entitled to draw water from the well in question and to use a certain path to go to and from the well. The Commissioner of Requests expressed his view that the decree merely gave the right to the plaintiff to draw water which he might do by means of a bucket and a rope or any other way and that he had no right under the decree to the use of the well sweep for the purpose of drawing water. De Sampayo J., after commenting on the fact that the dispute appeared to be trivial—as indeed it does in the case which I am now considering—pointed out that the decree in question was interpreting the judgment of his (de Sampayo's) own, and he proceeds to state “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”. The learned Judge, however, goes on to point out that some practical difficulties might arise if, for example, the sweep were to go out of order or were to require reconditioning; in which case he added the hope that the good sense of the parties might be sufficient to resolve such difficulties.

Now, it may well be that in the facts of that case the order in question was appropriate—it would, of course, depend entirely upon the nature of

¹ S. C. Minutes of February, 1916.

the evidence which was adduced in support of the servitude claimed. But unfortunately it does not seem to me to be sufficient for this court to rely upon the good sense of parties, when it is clearly its duty to adjudicate upon the parties' legal rights.

A servitude is a right that must, according to all the authorities, be construed strictly and I am attracted by the argument of learned counsel for the appellants that it would be wrong to permit the respondent, under the guise of exercising a servitude, to enlarge or extend his right which, according to the Deed P 1, comprised a share of the water in the well and the right of the usual way and watercourse, so as to cover the right to use a well sweep which is not mentioned in the Deed and which is the property of the appellants.

It may well be that the most convenient and practical way of drawing water from this well is by means of the sweep. The fact remains, however, that on the evidence adduced in this case no prescriptive user of the well sweep has been established and there is no finding by the learned Commissioner to the effect that it has.

It may well be that if the respondent has paid monies to the appellants for the erection of the reconditioning of the well sweep he might be able to maintain a claim on some contractual footing. I am, however, not concerned with that aspect of the matter. The only claim which was put forward by the respondent and was adjudicated upon by the learned Commissioner was this claim by way of servitude.

While I have a certain sympathy for the respondent in this matter I feel that it would be introducing a dangerous principle to assist him by extending his right, which is carefully defined in his Deed, to cover the well sweep.

That being so the appeal is allowed. The judgment of the learned Commissioner is set aside and judgment entered for the defendants appellants with costs here and below.

Appeal allowed.