[FISHER, C.J. AND DICKINSON, ACTING P.J.]

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1923
March 22

HATTIJE ATTIEH HANIM AND OTHERS
v.
RATTIB IRIKZADE.

WATER RIGHTS—USER—CHANNEL—SURPLUS—ABANDONMENT—SALE.

Plaintiffs are the owner and tenants of Achelia chiftlik and they claim that Defendant be restrained from interfering with their water channels either within or without the lands of Achelia chiftlik.

The District Court granted an injunction restraining defendant as claimed.

From this judgment the Defendant appeals.

For Appellant *Howard, Acting K.A.*, and *Artemis.*

For Respondents *N. Paschalis.*

Howard: We do not claim a right to cut the water channels within the lands of the chiftlik, but we say that after the water has passed beyond those lands we are entitled to use it, as it has been abandoned by the owner. The owner, however, claims that she is absolute owner of the water even after it has passed her boundary. That she has the right, a right she claims she has continuously asserted, to sell to persons owning property outside the lands of the chiftlik. We say that no such right of sale can exist, as water is only an appurtenant to land, C.L.R., vol. 7, p. 1, *Papa Philippo v. Georgiades*, and runs with the land, C.L.R., vol. 1, p. 100, *Haji Loizo v. Fehmi.*

Court: We note that plaintiff claimed before the District Court that she has an interest in certain properties outside the chiftlik, in that she draws certain revenues therefrom in tithes since collected by Government on certain terms. The water irrigating these lands would increase her income because of the increased yield in the crops. Therefore in conducting the water unused in the chiftlik lands to these other properties she cannot be said to have abandoned it.

Judgment: Affirming the District Court judgment. In our opinion this appeal must be dismissed. The action was brought on 3rd April, 1915, by the owner, and the lessee of the Achelia chiftlik to restrain the defendant " personally or by his servants from interfering with the right " to the water of the river Achelia which water belongs to the plaintiff's " chiftlik of Achelia by title-deed, firmans, judicial judgments and legal " possession;" and on the 27th July, 1915, judgment was given by the District Court restraining the defendant " from interfering with any of " the channels and with any of the water flowing through such channels

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" whether such channels be main channels or subsidiary channels, " and whether constructed on lands the property of the said chiftlik or " lands otherwise owned, that conduct water from Achelia or Ezousa " river to Achelia chiftlik and beyond Achelia chiftlik to lands the " owners whereof pay tithes to the said chiftlik or pay rent for the use " of the said water."

The appeal came on for hearing on the 2nd March, 1923. In the course of the statements made by the advocate for the defendant at the settlement of the issues he said " During last April for the purpose " of irrigating our lands from the channel belonging to Dimi and at a " time during which Dimi villagers were watering their own lands, we " admit that we cut the water and conducted it into our lands and we " contend that in this way we enjoy the right of watering from time " immemorial," and the second issue settled was " Has the defendant " the right to water his lands situated at Dimi out of the surplus water " of the Achelia river without the consent of the owner of the chiftlik " or of its tenant ? " That is the important and decisive issue.

At the hearing of the action various documents were put in by the plaintiffs, including documents which had been successfully used by former owners and lessees of the chiftlik to substantiate their claim to the ownership of the water in the Achelia river, and some judgments from which certain facts may be gleaned. Some more or less formal oral evidence was given and ultimately the trial proceeded without further evidence on the basis of certain admissions.

The deduction to be drawn from all this seems to be that water from the Ezousa river is diverted, from the river, by a channel to the lands of Achelia chiftlik for the purpose of irrigating the lands of the chiftlik, thence it flows through the same channel to lands not belonging to the chiftlik but to lands from which they formerly took the tithe of certain crops, and to other lands where the defendant claims to use it as of right and without leave from or payment to any one.

Now although it is not contended that the right of the plaintiffs to as much of the water as is required for watering the lands of Achelia chiftlik is absolute, it is claimed by the defendant that, subject to his not interfering with that right, he cannot be interfered with by the plaintiffs in his use of the water.

There is no question here of riparian ownership on the part of the defendant. The question of the ownership of the water from the river which is brought into the channel referred to has been dealt with in several actions and in each case the Court has found that this water is the property of the owners of the chiftlik.

In order to reap the benefit of that ownership the channel was constructed, it must be presumed, by the owners of the chiftlik, and owned by them. That presumption is fortified by evidence that the water is carried to lands from which the owners of the chiftlik received tithe and by a statement in the judgment of the Supreme Court given on the 31st July, 1890, in *Mahmoud Eff. Irikzade & Rattib Eff. Irikzade*, lessees of the Achelia chiftlik *v. Rashid Terzi & Moulla Tahir Abdurrahman* of Dimi.

In that case the Supreme Court upheld the claim by the present appellant and another to restrain certain inhabitants of Dimi from interfering with the water in this same channel (there referred to as a whole as the Kakodisia channel), the plaintiffs basing their claim on the same right which the defendant now seeks to resist when put forward by the present plaintiffs. The statement referred to is as follows:—

" It is in evidence and it is not disputed by the defendants that this " Kakodisia channel produces crops of reeds which are of some commer- " cial value and that the owners of the chiftlik always cut and collect " them."

The result is that the water reaches the defendant's land owing to the construction of the channel by the owners of the water in the channel. It is, therefore, water which is at their disposal and the right claimed by the defendant cannot be sustained. In our opinion the judgment of the District Court was right and must be affirmed and the appeal must be dismissed with costs.