1957
Oct. 10,
Dec. 31

EVRIPIDES G. IOANNIDES AND ANOTHER, *Appellants*,

AND

RODOTHEA G. IOANNIDES, *Respondent*.
(*Civil Appeal No.* 4218).

Water—Water rights—Transfer of water rights—Water rights held independent of any spring or water course—Not subject to registration prior to enactment of Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231.

Immovable Property—Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, *sections* 2 *and* 39.

In 1914—1915 the father of the first appellant and the respondent transferred to each of them, by way of gift, approximately the same area of garden land which was partly irrigated by water flowing from a spring situate in another plot and not included in the property of either of the parties. Neither the spring nor the plot on which it existed was registered in the name of any person, but the father of the parties was entitled to the use of the water for 48 hours a week.

There was no evidence of any expressed intention on the part of the father, who died in 1926, relating to the use of the water, but there was evidence that the parties made use of the water for some 40 years uninterruptedly since the transfer of the respective gardens in their name, and that the water right in question was appurtenant to the gardens

The first appellant claimed that he was entitled to 30 hours per week and the respondent to 18 hours per week.

Held : (1) that, prior to the enactment of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, water rights, as distinct from the ownership of the spring and water courses, did not require registration, and that transfer of such rights could be effected without registration ;

(2) that, as the father of the parties did not reserve to himself the right of user of the water, he was deemed to have intended such right to pass with the lands irrigated by such water, and that this right did not form part of his estate when he died in 1926 ; and

(3) that, in the absence of any finding as to the extent of the respective rights of the parties, each party was entitled to the use of half of the water, *i.e.* 24 hours a week.

Appeal allowed. Judgment of trial Court set aside. Judgment entered in above terms.

The first appellant transferred part of his garden land to his grandson, the second appellant, after 1946. Water rights were for the first time included in the definition of ' immovable property ' in the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, which came into operation on the 1st September, 1946, and by section 39 of that Law no transfer of immovable property is valid unless such property is registered and the transfer is effected under the provisions of the Law.

Held : that as the transfer was not effected in accordance with the provisions of section 39 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, it was not a valid transfer, and the second appellant had no *locus standi* in the action.

Cases referred to :

(1) *Chakarto* v. *Liono* (1954) 20 C.L.R., Part I, 113.

(2) *Mousa* v. *Georghi Apostolides and others* (1899) 5 C.L.R. 6.

(3) *Olga Hji Louca* v. *Stella Savvides* (unreported) (Civil Appeal No. 4122, decided on Mar. 8, 1955).

Appeal.

The appellants appealed against the judgment of the District Court of Limassol (Zenon P.D.C.), dated 7th February, 1957, (Action No. 328/56).

M. Houry and A. Indianos for the appellants.

G. Cacoyannis for the respondent.

The facts of the case sufficiently appear in the judgment of the Court delivered by :

ZEKIA J. : Appellant-plaintiff No. 1 and respondent-defendant are brother and sister and own adjoining gardens which are partly irrigated by water flowing from a spring. The spring is on an independent plot, No. 1331, at Prodromos, and is not included in the property of either of the litigants. The dispute relates to the use of the water coming from this spring. The appellant No. 1 alleges that he is entitled to this water for the irrigation of his garden land as from noon of every Saturday till sunset of the following Sunday, and that the defendant is entitled to the use of the water of the said spring as from Friday sunset till Saturday noon. In other words, plaintiff No. 1's claim is for a declaration of right to the use of the water in question for 30 hours per week, leaving 18 hours per week to the respondent, in the order described.

The father of the litigants in 1914—1915 transferred by way of gift in the name of appellant No. 1 and respondent the properties partly irrigated by the said spring. A brother of the litigants was also given land property adjacent to the gardens of the litigants at the same time but from the evidence it is clear that the non-litigant brother did not irrigate his property from the above spring at any rate since the time of the transfer. The spring in question and

the plot on which it exists is not registered in the name of anybody but the use of the water flowing from this spring was, by a settlement reached in an action before Limassol Court on the 10th October, 1915, between the father of the litigants and the Bishop of Kyrenia, divided as follows:

> "Five days and nights of the said water each week will belong exclusively to Trikoukia Monastery *i.e.* on Monday, Tuesday, Wednesday, Thursday and Friday and the water for two days and nights, 48 hours, on Saturday and Sunday, every week will belong to Georghios Ioannides and his heirs."

George Ioannides is the father of the litigants. This arrangement was evidently approved by the Limassol Court and it was acted upon since that date. The said George Ioannides died in the year 1926 and there was no evidence before the Court of any expressed intention on his part relating to the use of the water of the said spring. But there was overwhelming evidence that the litigants made use of this water for the irrigation of part of their garden lands for 40 years or so uninterruptedly since the transfer in their name of the said gardens. The contentious point is as to how many hours each of the litigants is entitled to the use of the water. The trial Court as far as the division of the water between the appellant and the respondent is concerned found that the evidence adduced was not a reliable one although inclined to believe in part the defendant. Its finding is summarised in the following quoted portion of the judgment:

> "From the evidence, and the demeanour of the witnesses including the litigants, I come to the conclusion that the plaintiff and the defendant were using that water loosely, according to their needs, and that there was no fixed agreement between the two.
>
> I also came to the conclusion that that water was given by the late Georghios Ioannides to his three children—the plaintiff, the defendant and Ioannis Kokkalos, and that the plaintiff and defendant were using it exclusively, under a licence from the said Ioannis Kokkalos."

The view taken of the law applicable to the facts in this particular case appears in the following lines of the judgment:

> "The legal position as regards the rights over that water is that it was the property of the father until his death—that is to say, until 1926, because the three children to whom, as I have said, I find he gifted the water, did not possess and use it for the period of prescription, *i.e. ab antiquo* under the old Law and for 30 years under Ch. 231, before the death of their father. The gift was made in 1915 and Georghios

Ioannides died in 1926, and therefore they had not acquired prescriptive rights over that water before the death of their father. This being so, I find that the right to use the water for the two days of Saturday and Sunday, forms part of the estate of the deceased Georghios Ioannides. and neither the plaintiff nor the defendant have acquired prescriptive rights over it.

In the case of *Chakarto* v. *Liono*, 20 C.L.R., Part I, at p. 113, it was ruled that if brothers are co-owners of land by inheritance, and only one is in possession, such possession will not be adverse as against the brothers who are not in possession, because the brother in possession is presumed to be there with their consent. This principle was also confirmed in the decision of the Supreme Court, in Civil Appeal 4122 *Olga N. Haji Louca* v. *Stella N. Savvides*."*

From the evidence it is clear that the litigants were the only persons using this water for the irrigation of their property but the extent of land irrigated by each party as well as the number of hours each litigant was entitled for the use of the water flowing from the said spring were matters in dispute. The evidence regarding these points was conflicting. From the trend of the evidence one might infer that the plaintiff-appellant No. 1 made greater use of the water than the respondent, nevertheless it was a question primarily within the domain of the trial Court as to the credit to be given to such evidence and this Court is not justified to interfere with the finding of the trial Court, namely, that it was not satisfied with the evidence as to the alleged division of the water between the litigants. The Court, however, refused to declare that the parties to the action are entitled equally to the use of the water in question, because the ownership of the spring and/or the use of the water of the spring was vested in the estate of the deceased father and as there were other heirs than the litigants the Court thought could go no further than this finding.

In the first place it is relevant to ascertain the nature of the interest of the parties in the water in question. The water rights—as distinct from the ownership of the spring *i.e.* the land on which the spring emanates and the water courses and channels through which the water flows—did not constitute a subject for registration. In practice sometimes and when the parties interested applied for it such water rights were registered. The nature of a right to use water flowing from a spring is incorporeal in character (*Mousa* v. *Georghi Apostolides and others*, 5 C.L.R. 6 at page 11) and such right was not included either in the category of mulk property under the Law of 28 Rejeb,

* Unreported (decided on Mar. 8, 1955).

1291, which provided for the registration of such property or in the definition of immovable property under the Immovable Property Registration and Valuation Law, 1907, and its prototype of 1885.

For the first time, it appears, water rights were included in the definition of immovable property by section 2 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, where it is stated that the immovable property includes "(*d*) springs, wells, water and water rights whether held together with, or independently of, any land;". As we indicated earlier the land on which the spring exists is not registered in the name of the predecessor in title of the litigants. The use of the water flowing from that spring was however allotted to him, that is the 2/7ths of the water by settlement approved in an action by Court.

This right to the use of the water was not registered and the transfer of such rights was not regulated by any special law. It is further clear from the facts and evidence of this case that the water flowing from the spring during the 48 hours in the week was not used independently of the lands irrigated by the parties. In other words, the water right in question was to all appearances an appurtenance to the gardens irrigated by such water. The inference to be drawn in this case is that such water rights—enjoyed all along for the irrigation of the gardens, or part of them, gifted to the litigants by their father—were intended to pass to the transferees of the lands which enjoyed such water rights since the date of transfer. It seems to us untenable to hold that the transferor, the father of the litigants, in making a gift to his children of two pieces of garden to which the water rights were appurtenant reserved to himself the right of user of such water and that such right constituted part of his estate when he died in 1926. In the absence of any intention unequivocally expressed in some way or other to reserve such water right to himself, the only reasonable inference to be drawn is that the father intended such right to pass with the lands irrigated by such water. Reference is made by the learned President to a record made in the General Survey in 1923 showing that a non-litigant brother has also a share in the water in dispute, but according to the evidence of Loucas Fylis, a Land Registry Clerk, survey documents in 1920 showed that litigants had 1/7th each of the water in question. Indeed little reliance could be laid on such conflicting entries in L.R.O. books in the absence of an explanation indicating which of the two is correct. The Court refrained from adjudicating on the claim and counterclaim of the parties for the following reason. We quote:

> "This case is fought between the brother and sister who derived title from their father Georghios Ioannides and by no means they are the sole heirs. The deceased

left as his heirs also three daughters and one son and indeed if the water right in question constituted part of the estate of the said deceased the remaining children of the deceased are also interested in this controversy."

Under O. 9 r. 10 of the Civil Procedure Rules "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of the parties and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." The plaintiff No. 1's contention is that the right of irrigation from the spring at plot 1331 was given to him and his sister at the time the gardens, irrigated by such water, were transferred in their respective names. The evidence adduced in support is strongly corroborated by the fact that the water rights in dispute were during the lifetime of the transferor, the father, for 12 years and up to this day for another 30 years exclusively exercised for the irrigation of these two gardens. This establishes in our view that the intention of the donor of these properties was at the same time to part also with the water rights in question in favour of his said donees. As we said, the registration of the transfer of water was not necessary and transfer could be effected without registration. It was open to the trial Judge to see whether the water right transferred was co-extensive with the area irrigated by the transferees of the land and to find also whether there was an agreement or a division of the water between parties perfected by prescription or if there was an *ab antiquo* user. The Court from the evidence before it was not satisfied to come to a conclusion and indeed it does not clearly appear what was the extent of land irrigated by each litigant from this spring, and also the number of hours in which the water of this spring was conducted for irrigation to these lands were not ascertained. The father has given approximately the same area of garden to each litigant irrigable from this water.

We find therefore that litigants are entitled to a declaration of right to the water flowing from the spring in plot No. 1331 at Prodromos as follows: Respondent is entitled to the use of this water for 24 hours from sunset on Friday to sunset on Saturday every week and appellant No. 1 is entitled to the use of this water for 24 hours as from sunset of Saturday to sunset of Sunday every week.

The judgment of the trial Court is set aside and a judgment and order should be entered as above.

Although plaintiff No. 1 failed to obtain the declaration he sought, yet defendant complicated the issue and protracted litigation. In the circumstances, we think each party should bear its own costs both here and in the Court

below. The omission of reference to appellant No. 2, the successor in title of part of the lands originally gifted to appellant 1 by his father, is not accidental. From the evidence it appears that appellant No. 2 is the grandson of appellant No. 1 and is a minor. The transfer of land in his name by appellant No. 1, the grandfather, was effected after the year 1946. Water rights as we have already stated were for the first time included in the definition of " Immovable Property " by the Immovable Property (Tenure etc.) Law which came into force in 1946. By section 39 of the said law no transfer of immovable property is valid unless such property is registered and the transfer is also effected according to the prescribed procedure. This was not done in this case and appellant No. 2 therefore had no *locus standi* in this action.

Appeal allowed.
Judgment of trial Court set aside.