

(1977) 11 PAT CK 0012
In the Patna High Court
Case No : S.A. No. 608 of 1971

Babudhan Tiwary and Others	Vs	APPELLANT
Ramdhary Tiwary and Others		RESPONDENT

Date of Decision : 09-11-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Limitation Act, 1908 — Section 26, 28

Citation : (1978) 26 BLJR 166

Hon'ble Judges : Sushil Kumar Jha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sushil Kumar Jha, J.—Defendants 2 to 4 are the appellants. The heirs of original defendant No. 1, who died during the pendency of the action not having joined as the appellants, have been made respondent nos. 5 and 6 in this appeal. The plaintiffs in this suit are respondents 1 to 4 in this appeal. The appeal is directed against the judgment and decree of the 1st Additional Subordinate Judge, Arrah reversing the judgment and decree of the trial court which has dismissed the suit.

2. Respondents 1 to 4 had instituted the suit in a representative capacity under Order 1, Rule 8 of the CPC for a declaration that plot No. 522 of Khata No. 180 of village Basdiha was Gairmazrui land, wherein the plaintiffs along with the other members of the public had acquired the customary rights of passage, flowing of excess water, staying of Barat Parties holding meetings and also for assembling for the worship of lord Shiva, whose temple was situate nearby. The allegation was that the defendants encroached over the plot in dispute to the extent of four and half kathas shown by letters A.B.C. and D in the sketch map appended to the plaint. The relief prayed for was for the removal of the encroachment after removing the compound wall erected by the appellants and also for restraining the appellant permanently from interfering with the rights of the plaintiffs as also the other villagers. It may be stated here that the total area of plot No. 522 is

1.94 acres and it is admittedly recorded in the survey record of rights as Gairmazrua Am Rasta. Admittedly again, the house of the main defendants stands on their plot 524 which is contiguous north of the disputed plot 522. The other facts need not be given for the purpose of disposal of this appeal.

3. Suffice it to say that the defence of the appellants along with the original defendants No. 1 was that the entry in the survey record of rights relating to plot No. 522 was wrong. In fact, it was not a Gairmazrua Am Rasta Plot of land. These defendants had taken settlement of 4 1/2 kathas of land out of this plot from the ex-landlords. They had been coming in possession of the same by constructing a boundary wall over the area in question for over 40 years, and as much the plaintiffs suit ought to be dismissed.

4. The trial court dismissed the plaintiff's suit on the ground that the appellants had acquired title to the lands in dispute by adverse possession although the findings recorded on other issues were that the survey entry was correct, that plot No. 522 was Gairmazrua Am Rasta but only a portion of it, that sufficient space for passage still remains for the user of the villagers. The other rights of user claimed by the plaintiffs were, however, found not to have been established.

5. The lower appellate court has recorded the following findings-

(i) The defendants have failed to prove that the survey entry relating to plot No. 522 is incorrect.

(ii) The case of settlement pleaded by the defendants cannot be believed.

(iii) The rent receipts Ext. A series relied upon the defendants were not reliable. There is no doubt that the whole of plot 522 is Gairmazrua Am Rasta and the whole of it was being used by the villagers for the purpose of passage.

(iv) The plaintiffs have not been able to establish any other customary rights apart from the rights of passage.

(v) The defendants had not been able to prove acquisition of title by adverse possession as the boundary wall constructed over the disputed land was less than 12 years old. On the aforesaid findings, inter alia, the suit was decreed.

5. Learned counsel for the appellants contended that the court of appeal below had committed an error of law in holding that the onus lay on the appellants to prove acquisition of title by adverse possession within 12 years. On the contrary, it was submitted, it ought to have been held that the plaintiff's not having been able to prove their subsisting title or possession and user within 12 years the suit should have been dismissed. Learned counsel also rather half heartedly, argued that some materials discussed and reasons advanced by the trial court had not been taken note of by the lower appellate court. It may mention here straightway that so far as this last submission is concerned, nothing material could be pointed out to me in the trial court judgment which could have in any manner affected the reasons advanced by the lower appellate court.

6. To rest the first submission of learned Counsel regarding the question of limitation the relevant facts as found by the court below are that plot No. 522 stands recorded as Ghairmazrua Am Rasta in the survey record of rights and the villagers alongwith the plaintiffs have been exercising their rights of passage throughout on the whole plot. The defendants appellants had certainly made encroachment over an area of 4 1/2 kathas by constructing a boundry wall for their residential house situate in their contiguous plot 524. On these facts, the question is : what law is to be applied for the purpose of extinguishment of the plaintiffs right. I think it worthwhile to notice here some well established propositions of law on this subject. They may be summed up as these ;-

(i) When some members of a village sue in a representative capacity under the provisions of Order 1, Rule 8 of the CPC claiming a right of way or passage over any particular area on behalf of the entire body of the villagers, the right to be claimed is called a quasi-public right. Where the plaintiffs sues as a member of a limited class such as a body of villagers whose special rights have been infringed, it is called a case of invasion of quasi-public rights where no proof of any special damage as in the case of a public right in the full sense is required.

(ii) Obstruction of a public or village path way is a continuing wrong so long as the wrongdoer is associated with the obstruction, but it is so only unless and until the wrongdoer has himself acquired a right which renders his action no longer a wrong. Though this is so, there will be no right of suit where the continuing wrong has ceased to be a wrong.

(iii) In some cases the fact of the wrongdoer may amount to an act of dispossession of the plaintiff and others. It may yet merely be a case of continuing wrong. In such cases, although it may be a continuing wrong, the plaintiff cannot recover possession after the years because u/s 28 of the old Limitation Act, with which this case is governed, he himself has got no right left which he could enforce.

(iv) Where the obstruction does not amount to dispossession of the plaintiffs, either because it is not on the plaintiffs land, or because the plaintiff himself has only a right of easement as in the case of rights of way of villagers originating and perfected by custom, then in such cases, even though the wrong be a continuing one, there would be no right of action after 20 years. Where the defendants wrong has itself ripened into an easement, and this right of defendant is one subsisting within two years next before the date of the suit. This is by virtue of the provisions of Section 26 of the old Limitation Act.

(v) Trespass or obstruction may in some cases be continuing wrong and in some cases they may not be. Whether the wrong is continuing or not must depend upon the nature of the wrong itself and not upon the nature of the land over which it is committed.

(vi) Where a compound wall, platform (Chabutra) a part of a building etc. are put up as an act of obstruction by a wrong doer, and a suit is instituted by the

servant owner claiming to be the owner of the land in suit, his title will be lost by 12 years of dis-possession as was held by Harries, C.J. and Dhave, J. in the case of Akhauri Haliwant Sahay v. Deo Narain Mali ILR 19 Pat. 852 on the footing that it did not remain in the realm of a continuing wrong but amounted to completely ouster. Where, however, the suit is by a villager or a body of villagers for the enforcement of a quasi-public right of way, even the construction of or habitation in a building or over a platform constructed or the encroached portion may amount to a continuing wrong as was held by Fazl Ali and Meredith, JJ. (as they then were) in the case of Choudhury Bibhuti Narain Singh v. Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur ILR 19 Pat. 208.

7. So far as this court is concerned, it is also well settled that the entry in the survey record of rights with regard to the Ghairmazrua Am Rasta nature of the land has a great presumptive value and in view of the concurrent findings of both the courts below that such an entry in the instant case has not been shown to be incorrect, the right of way of the villagers over the plot in question must be held to have emanated either from dedication or lost grant by user since time immemorial. Whatever view may be taken, the plaintiffs and the villagers' right or passage over the entire plot 522 must be held to be established. That being so, since the plaintiff in the instant case, on the facts stated above, have sued for the enforcement and protection of their quasi-public rights, the question of their complete ouster will not arise as was in the case of Akahauri Haliwant Sahay v. Deo Narain Mali, (supra), wherein the landlord had been held to have sued for the enforcement of a right in his own personal capacity. The instant case will fall within the formula laid down in Choudhury Bibhuti Narain Singhs' case (supra). It must, therefore, be held that the plaintiff-respondents' first party right of way could be lost only after continued exercise of a right by the defendants appellants by construction of the compound wall for a period of 20 years so as to ripen their right into one of an easement itself subject to such user within 2 years as laid down in Section 26 of the old Limitation Act. In the instant case, therefore, while I approve of the observation of the lower court that the onus was on the appellants to prove that their right had ripened either by ouster or by continued obstruction yet applying the principles laid down in ILR 19 Pat. 208 the period of limitation would be not 12 years as the lower appellate court had held, but 20 years. The matter would have been different if the suit had been instituted not for the enforcement of a quasi-public right but for the enforcement of a personal right as in ILR 19 Pat. 852. In that event the 12 years period of limitation would have been rightly applied.

8. For the foregoing reasons if the lower appellate court has committed any error of law it has been rather to the advantage of the appellants. The decree cannot be said to be vitiated as such. I accordingly do not find any merit in this appeal. It is accordingly dismissed but in the circumstances parties will bear their own costs throughout.