
(1954) 01 CAL CK 0012
In the Calcutta High Court
Case No : A.F.A.D. No. 160 of 1949

Bhupati Bhusan Mondal and Others

APPELLANT

Vs

Jadunath Ghosal and Others

RESPONDENT

Date of Decision : 25-01-1954

Acts Referred:

Easements Act, 1882 — Section 1, 28, 35

Citation : AIR 1955 Cal 70 : 58 CWN 814

Hon'ble Judges : G.N. Das, J

Bench : Single Bench

Advocate : Hari Prasanna Mukherjee, for the Appellant; Lala Hemanta Kumar, Sudhir Kumar Dutta and Rebati Nath Sarkar, for the Respondent

Judgement

G.N. Das, J.—This is an appeal by the plaintiffs and is directed against the decision of Sri B. M. Ray Chaudhury, learned Subordinate Judge, Birbhum dated 15-11-1948, affirming the decision of Sri Durgadas Bose, Munsif, 1st Court, Bolpur, dated 28-2-1945.

2. The suit out of which this appeal has arisen was for a declaration of the right of easement viz., to exercise the right of irrigation from a reservoir called Kanai Chowdhury's Bundh and described in schedule Ka to the plaintiff and for certain other reliefs. The right of irrigation is claimed in respect of the plots mentioned in schedule Kha of the plaintiff, the servient tenement being the reservoir described in Schedule. Ka includes three cadastral survey plots being Dags Nos. 13, 108 and 110. Plots 13 and 110 are said to be the watery portion of Kanai Chowdhury's Bundh, the embankment being C. S. Plot No. 108. The plaintiffs' allegation is that the right of irrigation was being exercised from time immemorial by certain channels existing at the south-east and the north-east corners of the bed of the said tank. The plaintiff's claimed a right of irrigation by presumption of a lost grant.

It is necessary to state the prayers in the plaintiff which run as follows: (a) that the three plots in Schedule Ka be declared to form part and parcel of Kanai

Choudhury Bundh; (b) that plots Nos. 13 and 110 be declared to be the reservoir and the plaintiff's right of irrigation in respect of the land in schedule Kha with the water of the reservoir be declared; (c) that the defendants be restrained from converting any portion of the lands in schedule Ka into arable land or to transform it by making "nullas" or digging pits or in any other manner or to interfere with the exercise of the plaintiffs' aforesaid right of irrigation; (d) that a mandatory injunction be issued against defendants Nos. 9 and 10 to restore the 12 or 13 bighas on the North of plot No. 13 to their former condition; and that a prohibitory injunction restraining those defendants from cultivating the area be issued.

3. Several written statements were filed by different sets of defendants. It is necessary to set out the written statements of defendant Nos. 1 to 3, the principal contestants in the suit. The defendants' case is that plot No. 13 is "Puratan Patit" (ancient waste) and was so recorded at the time of the Cadastral Survey operations; that there was a clear line of demarcation between this land in plot No. 13 and the "Jalkar" situated and lying in plot No. 110. On these pleas several issues were raised. The learned Munsif decreed the suit in part and gave certain declarations to which I shall advert hereafter. Against the decision of the learned Munsif the plaintiffs took an appeal. The learned subordinate Judge who heard the appeal maintained the decision of the learned Munsif.

4. The findings reached by the learned Subordinate Judge are that the entire C. S. Dag 13 is covered by the boundaries of Kanai Choudhury's Bundh; that at one time the two C. S. Plots 13 and 110 formed one vast tract so as to form one and single reservoir; that the reservoir was never re-excavated within living memory with the result that the borders of plot No. 13 towards the North and West gradually silted up and consequently became dry; that the accumulation of water in the eastern portion of plot No. 13 is not accidental and that some portion of plot No. 13 is normally submerged under water during the rainy season; that during high rains, water of the reservoir swells and possibly reaches the eastern, northern and southern limits of C. S. plot No. 13; that the right of irrigation has been exercised from a time beyond human memory and that the plaintiffs other than plaintiffs 6, 9 and 35 acquired the right of easement under lost grant in respect of plots of schedule Kha other than those stated in the judgment; that all the plaintiffs other than plaintiffs 6, 9 and 35 have the right of irrigation; and that the suit is liable to be dismissed as against defendant No. 9.

5. Against the decision of the learned Subordinate Judge the plaintiffs have filed the present appeal. The defendants Nos. 1 to 3 have filed a cross-objection.

6. After hearing learned Advocates of both sides I have come to the conclusion that the finding of the lower appellate Court that the right of irrigation declared by that Court must be traced to a lost grant is correct. The Courts below have however misappreciated the effect of this finding. The view of the Courts below is that the right of irrigation can be exercised only in respect of that portion of C. S. Plot 13 which remains normally submerged under water, viz., the portion in C. S.

Plot 13 enclosed by letters C, N, O, P, Q, R in the Commissioner's map, marked as Ext. 15. The Courts below have misunderstood the ambit of the right of an easement based on lost grant.

7. This brings me to a discussion of the extent of the right of irrigation in case of lost grant. The legal conception underlying an easement based on a lost grant is that the Court presumes a grant or agreement between the owners of the dominant tenement and the owners of the servient tenement. As a fiction of lost grant is raised when the exercise of the right is traced back to a time beyond human memory, it is often impossible to lead direct evidence of the terms of the grant or agreement. The terms of the grant or agreement have to be inferred.

8. Learned Advocates appearing on both sides did not draw my attention to any judicial decision which has laid down the extent of such a grant or agreement.

9. On general principles, the extent of an easement based on a lost grant must be determined with reference to the probable intention of the parties to the grant or agreement and the purpose for which the grant was imposed or acquired. In the absence of proof of such intention or purpose, the extent of a grant or agreement must be determined by the ambit of the enjoyment of the right at the time when the grant was first made or the agreement was first reached. This view is in accordance with what is enacted in Section 28(e), Easements Act (5 of 1882). I am not unmindful of the fact that the Easements Act (5 of 1882) has no application in the province of Bengal. It has however been held that in Provinces where the Act is not enforced, reference to the provisions of the Act is permissible -- Jangbahadur Singh Vs. Thithar Singh (A); -- "Daw Gyan v. U. Maung Maung" AIR 1936 Rang 58 (B).

10. In the present case according to the finding of the learned subordinate Judge the whole of C. S. Plots 13 and 110 originally formed the site of Kanai Choudhury's Bundh and that in course of time the Bundh has been covered with silt in the northern and the western portions; that in the month of December when the Commissioner held a local investigation, only the portion of C. S. Plot 13 enclosed by the letters C, N, O, P, Q, R and to C. S. Plot 110 were found to be covered with water. The learned Subordinate Judge inferred therefrom that this was the extent of the reservoir. The learned Subordinate Judge however found, as I have already stated, that during the high rains, the whole of C. S. Plots 13 and 110 became submerged and formed one continuous sheet of water.

11. As the grant was made at a time beyond living memory, direct evidence is not available; an inference has to be drawn as to the extent of lost grant. In my opinion, it may be reasonable to infer that at the inception of the grant, the right of irrigation was exercised in respect of the entire sheet of water which existed at the time in C. S. Plots 13 and 110 and was not obviously limited to the portion of C. S. Plot No. 13 enclosed by letters C, N, O, P, Q, R and C. S. Plot 110. The right of irrigation must also have been exercised whenever it was necessary to do so for the purpose of preserving the crops which were grown on the land of

Schedule Kha. The declaration made by the Courts below that the reservoir of water is limited to C. S. Plot 110 and to the portion of C. S. Plot 13 enclosed by letters C, N, O, P, Q, R, is, therefore, not justified. Such a declaration is contrary to the aforesaid ambit of the grant and may result in rendering the exercise of the right of irrigation wholly, impossible, to case the water level rises above the water line marked by letter C, N, O, Q, R, in Plot No 13 and it becomes necessary to exercise the right of irrigation.

12. In my opinion, the declaration should be varied and it should be declared that the plaintiffs other than plaintiffs, 6, 9 and 35 are entitled to exercise their right of irrigation in respect of the plots of schedule Kha as mentioned in the decree of the trial Court in respect of the continuous sheet of water which may be found to exist in C. S. Plots 13 and 110 when such exercise of right become necessary for preserving agricultural crops at present grown in the lands of schedule Kha in respect whereof the right of irrigation has been declared in the Irrigation Record Ex. 9.

13. The right of irrigation should be exercised by the course indicated in the Irrigation Record Ex. 9 for irrigating those plots of schedule Kha of the plaint as recorded in the said irrigation record, that is, all the plots of schedule Kha excluding the plots enumerated in paragraph 3 of plaint and the plots to which the claim of the plaintiffs Nos. 6 and 9 relates.

14. I have now to consider the terms of the order of injunction. A dominant owner is entitled to an injunction restraining the servient owner from disturbing the exercise by the dominant owner of his right of easement. It is well settled that a servient owner cannot so deal with his property as to render the easement right acquired by the dominant owner incapable of enjoyment or difficult for enjoyment. A similar view was taken in the case of --"Hall v. Swift" (1838) 44 R. R. 728 (C), where the stoppage of of the flow of water was caused by the planting of twigs at the embouchure of a stream. At the game time no man can, by prescription, acquire such a right of easement as will destroy all the ordinary uses of the servient property. -- "Moonshee Zumer Ali v. Mt. Doorgabun" 1 W.R. 230 . But in case of an express agreement or a grant Of a right of easement, the question will depend on the terms of the grant or the agreement, and the above rule will not apply. In the present case where the right is based on a lost grant, the grantee will only acquire such rights as are necessary for the enjoyment of the right of irrigation and cannot claim the exercise of those rights in such a way as would be inconsistent with the ordinary use of the servient property unless there is interference with the exercise of the right of easement. Judged by these principles the order of injunction granted by the Courts below has to be varied to a certain extent.

15. The order of injunction, in my opinion, should be in the following terms. Defendants Nos. 1 to 3, 4, 6 and 7 are restrained from transforming the area above declared to be subject to right of irrigation into culturable land if this interferes with the right of easement of the aforesaid plaintiffs. It must be

understood that only the defendants 1 to 3, 4, 6 and 7 are restrained from constructing any "nulla" or other contrivance for drawing out water out of the area declared above and transforming the said land in any way as will interfere with the right of easement declared in plaintiffs' favour, but that the defendants shall be at liberty to cultivate as much as is possible to cultivate by simply enclosing the same by "ails" necessary for cultivation. The other claims of the plaintiffs in excess of those decreed above must stand dismissed. The order for costs made by the Courts below will stand.

16. The appeal and the cross-objection are disposed of accordingly. As regards the costs of the appeal and the cross-objection, parties will bear their own costs in this Court.