

(1979) 03 PAT CK 0009
In the Patna High Court
Case No : A.F.A.D. No. 630 of 1976

Bibi Tahzibunnisa

APPELLANT

Vs

Dr. Syed Azizur Rahman

RESPONDENT

Date of Decision : 28-03-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 114, 35

Citation : AIR 1980 Patna 89

Hon'ble Judges : Lalit Mohan Sharma, J

Bench : Single Bench

Advocate : Mazhar Hussain, Raghiv Ahsan and Ahsan Shahabuddin, for the Appellant; Balbhadra Prasad Singh, S.S. Asghar Hussain, S. Shahabuddin and A. Salam, for the Respondent

Judgement

Lalit Mohan Sharma, J.—The plaintiff has filed the present appeal against the concurrent decision of the courts below dismissing her suit. She has claimed a decree for removal of certain obstructions, described in the plaint as genras and shown in the sketch map attached thereto which have impeded the facility of irrigation she is entitled to. She has also asked for a direction for filling up certain openings made by the defendant in the Pinds bearing survey plot Nos, 235 and 205 fully described in the plaint and for a consequent permanent injunction against the defendant.

2. The case made out in the plaint is that certain lands about 12 acres in area in village Beladih, fully described in Schedule I of the plaint belong to the plaintiff and have been irrigated with the water of a reservoir, Gordhoi Ahar, bearing plot Nos. 401 and 403 to 406 of village Khap, The Ahar receives its water from another reservoir, Tikrahiya Ahar, bearing survey plot Nos. 235 to 237 besides some other plots by cutting pind of the Ahar bearing plot No, 237/281. The plot Nos, 235 to 237 are recorded in the survey papers as Khajana Pani, that is, water reservoir and stored water extends on plot Nos. 238, 246 and 204 and 244, also which form the bed of the Ahar. It is said that the defendant wrongfully

put genras (obstructions) in such a way that water now cannot collect in Tekrahiya Ahar and he is attempting to convert the Ahar into paddy field. Since the schedule I lands belonging to the plaintiff are entirely dependent on this source of irrigation the plaintiff is suffering heavy loss. To achieve the same purpose, the defendant has also cut a portion of the pind of the Ahar which he is not entitled to do. The overt acts of the defendant have been explained in the plaint with reference to the map.

3. The defendant filed a written statement challenging the plaintiff's claim and pleading that Gordhoi Ahar is an independent storage of water depending on rain water and Thartha water from the eastern and southern side and the survey entry mentioning supply of water from Tikrahiya Ahar is erroneous. Slops of the land is from south to north and flow of water as mentioned in the survey records or in the plaint is not possible. The topography has been explained in paragraphs 8 and 9 of the written statement. The allegations made against the defendant to obstruct the flow of water have been denied.

4. The trial court held that the survey records dealing with the right of irrigation, which is also described as Fard Abpashi, was correctly prepared, but for more than 20 years before the institution of the suit, the flow of water from Tekrahiya Ahar to Gordhoi Ahar is stopped and for that reason the suit had to be dismissed. On appeal, the learned Additional District Judge, although not agreeing with all the findings of the trial court, confirmed the decree and dismissed the appeal.

5. Mr. Mazhar Hussain, appearing for the plaintiff-appellant, has challenged the decision of the lower appellate court on the ground that it has failed to raise the presumption of correctness of the Fard Abpashi which has vitiated its decision. He has also urged non-consideration of the vital materials by the lower appellate court, errors of record committed by it and other legal infirmities in the impugned judgment.

6. The relevant entries mentioned plot Nos. 235 to 237 as constituting Tikrahiya Ahar and the fact that water from this Ahar is taken by cutting plot No. 237/381. The entry dealing with Gordhoi Ahar indicates that about 10 acres of lands are irrigated therefrom. It is also mentioned in column 10 that water comes in this Ahar from plot No. 237. The learned Additional District Judge has taken a view different from that of the trial court on the question of the correctness of the Fard Abpashi. He has held that the entry was not correctly made but in so doing he appears to have adopted an approach which cannot be approved. He has said that although "the entries in the survey record of rights should be presumed to be correct but the entries in the survey record of rights would at best go to show the existing state of things at the time when the survey record of rights were prepared, which in this case, was about the year 1916" Mr. Hussain has taken serious exception to the manner in which the lower appellate court has disposed of the Fard Abpashi entries in favour of the plaintiff. Reliance has been placed on the decision in AIR 1936 83 (Privy Council) . This decision, however, does not appear to be quite in point. The document in question in that case was

dealing with the settlement of lands in the city of Lucknow and the Subordinate Judge held the document, that is, khasra, as the instrument completing or embodying the right. Interpreting it, the Privy Council held it to be an instrument of title.

7. Mr. Balabhadra Prasad Singh, appearing for the respondent, cited the decisions, in the AIR 1930 91 (Privy Council) and Brij Behari Singh v. Sheo Sankar Jha (1917) 2 Pat LJ 124 (DB) to show that an entry in the record of rights neither creates nor extinguishes rights and is a mere piece of evidence, rebuttable in nature. It is true that Fard Abpashi does not create right of irrigation, it only records such rights, but the main criticism against the judgment of the lower appellate court appears to be correct. If it can be disposed of by saying that the presumption arising out of it refers to the point of time when it was prepared, it will in substance, completely negative the presumption, rendering the preparation of the records a complete waste of energy. The records are prepared for future use by parties whose rights have been recorded therein and if a person challenges the same as having been prepared incorrectly, as has been done in the written statement of the present suit, the burden lies on him to prove it. The learned counsel for the parties also debated on the question whether a presumption in favour of the continuity of a state of facts is permissible to be raised or not. I would be content to refer to the decision of the Supreme Court in Ambika Prasad Thakur v. Ram Ekbal Rai (1966 BLJR 147) in which it was laid down that if a thing or state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and backwards may be drawn, although the presumption of continuity weakens with the passage of time.

8. The learned counsel for the parties, especially Mr. Balbhadra Prasad Singh appearing for the respondent, have taken great pains in explaining the topography of the land of the two villages in question with reference to the maps on the record, the Fard Abpashi and other documentary evidence, and it appears that the lower appellate court has not correctly appreciated them. The right asserted in the plaint is a customary right, the nature of which has been dealt with in many cases of this Court, Mr. Justice Noor in the case of Maharaj Hajam v. Jirjodhan Prasad Singh (1937 Pat WN 158) had emphasised the necessity of the Court taking care to ascertain the precise meaning of the terms used in such cases. He took pains to describe the expressions Ahar, Pind, Pet etc. The distinction between the right to the water of a river flowing in a natural channel and the right to water flowing through an artificial water course also has to be clearly understood. In the case Rameshur Pershad Narain Singh v. Koonj Behari Pattuk 1878 6 Ind App 33 the Privy Council pointed out the distinction observing that the second category of right must rest on some grant or arrangement, either proved or presumed from or with the owners of the land from which the water is artificially brought or on some other legal origin. In cases where there is evidence of long enjoyment of such a right, it has been held that it is the habit of a Court, so far as it lawfully can, to clothe fact with rights (See Ramanand Singh

and Others Vs. Suraj Prasad Singh and Others, . The origin may be lost in antiquity, but it is not destroyed thereby. The court of appeal below has failed to appreciate these principles and, therefore, could not consider the evidence on the records in the correct background. In fact, when this second appeal was taken up, the learned counsel attempted to argue the case on the basis of the principles dealing with the right of riparian owners with respect to natural water channels. On the second day of the argument, correct facts and relevant principles were appreciated. As it is not possible for me in this second appeal to reconsider the entire evidence, I am of the view that the matter should go back to the final court of facts on remand for dealing with the case again.

9. Mr. Balabhadra Prasad Singh suggested that the findings recorded by the court below are those on facts and should not, therefore, be interfered with. For the reasons mentioned above, it is not possible to accept the suggestion. Besides, the consideration by the lower appellate court of the other evidence also does not appear to be in accordance with law. One of the main reasons on which the Court has rejected several plaintiff's witnesses is that they stated about the slope of the land differently than the Commissioner's report. Mr. Hussain has urged that what is mentioned in the Pleader Commissioner's report should not have been assumed to be gospel truth, its probative value should have been examined before accepting it in order to judge the plaintiff's evidence. Apart from this aspect, the court below appears to have failed to appreciate entire topography of the area in question and the water course through which the water passes according to the case of the plaintiff. These are very important aspects which must be kept in mind while deciding a suit like the present one and they can be readily collected in the present case by a reference to the maps of the two contiguous villages, the Fard-Abpashis and other relevant documents exhibited in the suit. Having regard to the peculiar nature of this case, a mechanical reference to the oral evidence on which reliance has been placed on behalf of the respondents before me cannot be held to be a consideration of the evidence in the eye of law. I am, therefore, of the view that the case requires a fresh consideration by the court below.

10. Before I close, I would like to mention that when I put a pointed question to the counsel for the appellant to describe the nature of the right claimed by the plaintiff, he could not do so in precise terms. He said that the right of irrigation mentioned in the plaint should be considered as a condition of the tenancy of the land belonging to the defendant, but added that it may be considered as a customary right as described in many decisions of this Court dealing with the right of irrigation from Ahars. This would be a question on which the parties in the court below will be permitted to advance arguments.

11. For the reasons mentioned above, this appeal is allowed, the judgment and decree passed by the court of Appeal below are set aside and the case is remanded to it for fresh consideration in accordance with law. Cost of this second appeal will abide the final result in the case.