
(1955) 04 OHC CK 0008
In the Orissa High Court
Case No : S.A. No. 72 of 1953

Bishnu Patel and Others

APPELLANT

Vs

Kamal Lochan Rout

RESPONDENT

Date of Decision : 26-04-1955

Acts Referred:

Citation : (1956) 22 CLT 69

Hon'ble Judges : Narasimham, J

Bench : Single Bench

Advocate : B. Mohapatra, for the Appellant; G.K. Misra, for the Respondent

Final Decision : Allowed

Judgement

Narasimham, J.—This is an appeal by the Defendants against the concurrent decisions of the two lower courts decreeing the Plaintiff's suit for declaration of his right to take water from the Nazul tank of his village by lift irrigation (tend) for growing vegetables on his plots Nos. 16 and 19 of village Pandripathar in Sambalpur district and for other consequential reliefs.

2. The Defendants are the Gaontia and Panches of the Village. The Plaintiff's case was that he was entitled to take water from the Nazul tank of the village for the purpose of irrigating his crops on plots Nos. 16 and 19 and that in exercise of this right he on 3-1-47 fixed up a tenda for lifting water from the tank. The Defendants, however, objected to his taking water by lift irrigation, dismantled the tenda and refused to permit him to irrigate his vegetable crops. In consequence of their action his vegetables were completely damaged. Hence he claimed damages also. The Defendants while admitting that the Plaintiff had the right to take water from the tank for irrigating his lands by cutting the embankment, if necessary, denied his right to take water from the tank by lift irrigation. Hence they justified their action by saying that the Panches of the village they had -the right to control the use of the water by the cultivators of the village.

3. During the last settlement of Sambalpur district (Hamid settlement) irrigation statements (jalasinchan naksa) were prepared for each village showing particulars of all the sources of irrigation in the village with the numbers and areas of all the plots irrigated from them. The distribution of water from the irrigation reservoirs was noted by the settlement authorities to be invariably controlled by the village Panches (see, Hamid's settlement report). Any special custom in a particular village was noted in the appropriate column of the irrigation statement. Again, I notice that in the wajib-ul-arz it was recorded as follows:

The distribution of water for irrigation from Government tanks is controlled by the Lambardar and the Panches. The custom and the manner in which water is to be distributed has been recorded in the village irrigation statement.

The irrigation statements of Pandripathar village were proved in this case (Ext. C series) and from a scrutiny of the same it appears that the owners of plot Nos. 16 and 19 were entitled to irrigate their lands from the Nazul tank by cutting channels in the embankment (ghai) at three levels according to the level of the water in the tank. Doubtless, the statements do not expressly say that water could be taken from the tank by lift irrigation and the entire defence rests on this omission in the settlement records. In the khatians also it was mentioned against disputed plot Nos. 16 and 19 that they were "Khari pani". In respect of another plot, the settlement expression used was "bari khari pani" and on the basis of this difference in the expressions used Mr. Mohapatra built up an ingenious argument to the effect that where lift irrigation was permitted by the authorities for the purpose of irrigating a particular field the expression "bari khari Pani" was used whereas where only flow irrigation was permitted the other expression "khari pani" was used. There is, however, no authority in support of this interpretation placed on the aforesaid two settlement expressions. The mere addition of the word "bari" may show that at the time of the settlement that particular plot was used as "bari" and it cannot, in the absence of further materials, be held- to indicate the lift irrigation was permitted only in respect of that plot.

4. Thus the settlement papers show clearly that the Plaintiff was entitled to take water from the tank for irrigating the disputed plots. Doubtless, they further show that he could take water by cutting the embankment (ghais). It was urged that in the absence of express authority to take water by lift irrigation in the dry season the Plaintiff's right to use the water of the tank was limited to the cutting of a channel during monsoon season for the purpose of growing crops. I am unable to accept such an argument. Once it is recognised that the Plaintiff was entitled to use the water of the tank for the purpose of irrigation the mode of drawing out water must be left to his discretion so long as the right of the other villagers to use the water of the tank is not materially impaired. It is true that the settlement authorities took special care to note the right of some of the owners of lands to cut the embankment for the purpose of taking water. But this

is because cutting of an embankment may cause material damage to the embankment itself and may also open out a wide channel which may cause damage to others' fields. Hence, the express conferment of such a right might have been thought necessary. But the taking of water by other methods such as by *tenda* or by any other alternative method of lift irrigation is of a comparatively minor character and need not find a special mention in the settlement entry. It is true as pointed out in the *wajib-ul-arz*, that there was a local controlling authority for the purpose of preventing the rival cultivators from quarrelling with one another while taking water from the tank for the purpose of irrigation and for that purpose the *Lambardar* and the *Punches* were made the controlling authorities. In exercise of this controlling power they would undoubtedly be entitled to regulate the use of the water by the other cultivators of the village and they may, in special circumstances, be entitled to prevent one of the cultivators from taking more than his fair share of the water so as to affect the rights of others. But the extreme contention put forward on behalf of the Defendants to the effect that the Plaintiff had no right at all to take water by lift irrigation is not sustainable from the settlement papers. It also appears that the Plaintiff and his predecessors-in-interest were accustomed to take water by lift irrigation for more than twenty years. Moreover, on a previous occasion when a complaint was made against a cultivator of the village for having thus taken out water by lift irrigation the Deputy Commissioner refused to interfere. This is an instance to show that notwithstanding the absence of any special mention in the settlement entry the revenue authorities thought that lift irrigation was one of the normal methods for taking out water from a tank and so long as a cultivator had the right to use the water of the tank it did not matter very much as to how he took out the water.

5. I am therefore inclined to agree with the two lower courts that the Defendants were not justified in the present instance in dismantling the *tenda* of the Plaintiff and preventing him from taking any water from the tank and thereby causing damage to his crops. But I am unable to agree with the two lower courts that the *Punches* have no controlling power at all over the use of the water by lift irrigation by the Plaintiff. If such an unfettered right is conferred on everyone of the cultivators of the village who is entitled to take water from the tank, serious consequences may follow and it may be impossible he regulate the rights of the rival claimants. This seems to be the special reason why in the *wajib-ul-arz* the controlling power was vested in the *Lambardar* and the *Punches*. Doubtless, they are expected to exercise their controlling power reasonably having regard to the rights of other people and also to the convenience of the inhabitants of the village. The Defendants were under the erroneous impression that the Plaintiff had no right at all to take water by lift irrigation and as this has been shown to be not tenable they will be liable for the damages caused to the Plaintiff for the restriction of his crops. As regards the quantum of damages, for findings of the two lower courts have not been challenged before me.

6. While, therefore, affirming the judgments of the two lower courts would

slightly modify the declaration granted to the Plaintiff as follows:

It is hereby declared that the Plaintiff has got a right to take water from the Nazul tank of Pandripathar village by tenda or by any other kind of lift irrigation for the purpose of growing crops on his plot Nos. 16 and 19 subject to the general control and supervision of the Lambardar and the Panches of the village to regulate the use of the water in the interests of the village and the general convenience of the inhabitants of that village.

A permanent injunction should issue against the Defendants accordingly. The decree for damages to the extent of Rs. 40/- is maintained. Both parties will bear their own costs of this appeal; but the lower appellate Courts order for costs of the two lower courts will remain.

7. Appeal allowed in part.