
(1971) 04 MP CK 0008
In the Madhya Pradesh High Court
Case No : F. A. No. 180 of 1968

Durag Singh (Diwan)

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 27-04-1971

Acts Referred:

Easements Act, 1882 — Section 15, 16, 26, 27, 4

Citation : (1971) JLJ 777

Hon'ble Judges : N.C. Dwivedi, J;K.L. Pandey, J

Bench : Division Bench

Advocate : A. L. Halve, G. K. Lokras and N. S. Kale, for the Appellant; Kumari Rama Gupta, Dy. Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Pandey, J.—This is a plaintiffs" appeal against the dismissal of their suit for a declaration that they have a right to divert sufficient water of a nala through artificial channels by constructing temporary dams across the nala to irrigate some 60 acres of their land, for a permanent injunction restraining the defendants from doing any act calculated to diminish the quantity of water thus required and for Rs. 4,000 as damages for the loss caused to them by the wrongful interference of the defendants in the year 1963-64.

2. It is common ground that the plaintiffs were proprietors of village Zinda where they held 60 acres of sir and Khudkast lands as detailed in paragraph 1 of the plaint. These lands are now held in Bhumiswami rights. Through the village area courses from south to north a nala called Belia nala. It is not now disputed that at point EFGH, the State Government constructed in the year 1950-51 a regulator across the nala in pursuance of a scheme for providing irrigation under small projects. By means of this regulator, water used to be impounded towards the close of the rainy season by blocking the gates with wooden planks and earth. Admittedly, the plaintiffs have not used the water of this nala for irrigating their lands from 1963-64.

3. The plaintiffs' case, shortly stated, was this. For the last 75 years, the plaintiffs and their ancestors have been putting up every year a Kachha dam across the nala at point JKLM and then taking water of the nala through the artificial channel KNOP to their land described in para 1 and irrigating it. In this way, they had acquired a right to use the water of the nala in that manner by prescription or lost grant. But, for the first time in December 1963, the defendants fully closed the gates of the regulator down below with the result that the impounded water rose in level and prevented construction of the Kachha dam or use of water for irrigation through the channel KNOP. According to the plaintiffs, they suffered on this account a loss of Rs. 4,000 in the year 1963-64. On the basis of these averments, the plaintiffs claimed the various reliefs indicated in the opening paragraph.

4. The defendants denied that the plaintiffs had acquired any right, either by prescription or by lost grant, to use the water of the nala in the manner alleged. According to them, the State Government had absolute right to construct a Pucca dam at the place EFGH and it could not be questioned by the plaintiffs. Further, the regulator constructed in 1950-51 was in use ever since then and the plaintiffs had in that year taken water from the regulator and paid the tax prescribed for it. Ever since then, they had been negotiating with the State Government either to purchase the regulator or to be permitted to take water from it without payment of any tax. Thus their rights, if any, were interfered with as early in 1949 and their claim was long barred by time. They also denied that, in the year 1963-64, the plaintiffs had sustained a loss of Rs. 4,000 or at all for the reason that they could not use any water from the nala for irrigating their land.

5. While accepting the plaintiffs' case in regard to use of water from the nala in the manner alleged by them, the lower Court dismissed the suit on two grounds. In the first place the cause of action arose in 1949 when the defendants interfered with those rights and the claim was long barred by time. Secondly, the plaintiffs failed to prove that they suffered any loss in the year 1963-64 by reason of being deprived of the nala water for irrigating their fields.

6. Having heard the counsel, we have formed the opinion that the appeal must be dismissed, though for somewhat different reasons. Now, a right by prescription, as indeed a right by lost grant, can be acquired only against the person, who could grant it or who is in a position to acquiesce in or resist its acquisition as he likes. In other words, there must be a servant tenement owned or held by another person. Therefore, when both tenements are owned or held by the same person or persons, any easement by prescription cannot be acquired. This is indeed clear from the definition of easement as enacted in section 4 of the Indian Easements Act, 1882. In this case, admittedly the plaintiffs were the proprietors of the whole village and, in that capacity, they owned not only their sir and Khudkast land but also the nala and the channel through which the nala water was taken. Therefore, there could be no right either by prescription or by lost grant in regard to the use of the nala water for

irrigation in the manner alleged. If the plaintiffs irrigated their lands in the manner alleged, and we agree with the lower Court that they did so till 1930-31, that was merely an exercise of their ordinary right of property. This position continued till the Madhya Pradesh Irrigation Act, 1931 was enacted and brought into force on March 15, 1932. Sections 26 and 27 of that Act provide as follows:

26. All rights in the water of any river, natural stream or natural drainage channel, natural lake or other natural collection of water shall vest in the Government, except to the extent to which rights may have been acquired in water affected by a notification published u/s 27 prior to the publication of such notification.

27. When the State Government proposes to construct canal it shall publish a notification declaring its intention and indicating the site of the head-works, and thereupon no right shall be acquired against the Government u/s 15 or section 16 of the Indian Easements Act, 1882, in the water of any river, natural stream or drainage channel, lake or other natural collection of water, any of whose waters will supply the canal when constructed.

It was only on March 15, 1932 that all rights in the water of the nala vested in the State. Even assuming that the plaintiffs and their predecessors started prescribing a right of easement against the State Government, the period of 60 years had not completed in 1963-64 when the alleged interference took place. This is apart from the consideration that in the year 1951-52, the plaintiffs had paid irrigation rate for use of water impounded by the regulator and, thereafter, water continued to be so impounded inspite of their protests. We may, in this connection, refer to Ex. D-1 to Ex. D-3, all signed by the appellant 3. It follows that the plaintiffs have not acquired any right, either by prescription or by lost grant, to use the nala water in the manner alleged.

7. The plaintiffs have not alleged that they are riparian owners in respect of any part of their 60 acres of land. Indeed, there are indications that a long artificial channel is used for taking the nala water to that distant land, though the precise position is not clear. Since the claim in suit is not founded on the plaintiffs' rights as riparian owners, we should not be regarded as pronouncing any opinion thereon.

8. In the absence of the right claimed by the plaintiffs, they cannot complain of any obstruction or interference nor can they claim any damages on that account. We also agree with the lower Court that the vague unsupported self-serving evidence of Prahladsingh P. W. 1, which did not disclose the seed sown, the yield and the expenses required for the 60 acres of land in 1963-64, cannot be regarded as proving that the plaintiffs suffered any loss in that year.

9. The result is that this appeal fails and is dismissed. Costs here shall follow that event. Costs in the lower Court as ordered there. Hearing fee according to schedule.