

(1955) 02 CAL CK 0017
In the Calcutta High Court
Case No : A.F.A.D. No. 30 of 1949

Ganga Vishnu Swaika

APPELLANT

Vs

Machine Manufacturing Co. Ltd. and Another

RESPONDENT

Date of Decision : 09-02-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Land Acquisition Act, 1894 — Section 10, 11, 12, 13, 14

Citation : AIR 1955 Cal 503 : (1955) 1 CALLT 324 : 60 CWN 233 : (1956) 2 ILR (Cal) 679

Hon'ble Judges : S.R. Das Gupta, J; Mallick, J

Bench : Division Bench

Advocate : Sen Gupta, Arabinda Guha and Nagendra Nath Bose, for the Appellant; Amarendra Nath Bose, N.C. Talukdar and Nagendra Mohan Saha, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Das Gupta, J.—This is an appeal against a decision of the District Judge, Howrah, reversing the decree of the Munsif, First Court, Howrah.

2. The appellant filed a suit for a declaration that a particular drain is a public drain and he has a right to discharge water from his land through the said drain. The drain in question was comprised in dags Nos. 2512 and 2514 of mouza Belur. The plaintiff's case was that the same was a public drain of the locality and the plaintiff has an unobstructed and indefeasible right to discharge the surplus water of his factory into the same.

The plaintiff had also a factory on his own land immediately to the north of the said dags and has got a pucca drain in his land through which he had been discharging the surplus water of his factory into the said public drain. The said dags being dags Nos. 2512 and 2514 along with other lands came to be acquired by the Government under Chap. VII of the Land Acquisition Act, for the purpose of making it over to the defendants for the use of their factory therein. After the

Government had acquired the said land it entered into a contract with the respondents and in pursuance of the said contract made over the lands in question to the respondents.

The respondents thereafter obstructed the said public drain and the present suit was instituted by the appellant in respect of the said obstruction. It would be necessary at this stage to refer to the plaint in order to understand the nature of the case with which the plaintiff came to Court. The plaintiff in para. 12 of his plaint states that the defendant 2 (respondent 2 before us) who is an influential member of the Union Board and is the Managing Director of the defendant company is going to enclose the public drain within his compound wall and obstruct the plaintiff's drain which the defendants have absolutely no right to do.

Then in para. 14 of the plaint it is stated that the defendants have no right to close the public drain of the locality although they claim to have acquired in the absence or interested parties the sub-soil of the Dags 2512 and 2514, thereby closing plaintiff's factory and creating an unbearable nuisance in the locality inasmuch as the huge quantity of black putrid water of the Bally Municipality will collect in the locality causing an unbearable nuisance and as such the plaintiff is entitled to a declaration and injunction as prayed for.

In the prayer portion of the plaint the plaintiff claimed declaration that Dags 2512 and 2514 constitute public drain of the locality carrying the water of the Bally Municipality and for a drain that the defendants be restrained permanently from filling up or closing the said drain. There were also prayers for a temporary injunction and for mandatory injunction directing demolition and removal of the structure or obstruction, if any, from the said public drain.

In the written statement filed by the defendant it was stated that although the drain in question was an old drain, it was a village drain and that the disputed drain became the absolute property of the defendants free from all incumbrances and claims and the question of injury to the plain tiff was irrelevant.

3. Upon these pleadings the parties went to trial. Issues were framed to which it is not necessary for us to refer in detail. It would be sufficient to say for the present purpose that there was no issue regarding the nuisance which has been caused to the plaintiff individually for such obstruction.

4. The trial Court held in favour of the plaintiff and granted a decree. The decision of the trial Court was reversed on appeal and it is against that decision that the present appeal has been preferred to this Court.

5. Dr. Sen Gupta appearing on behalf of the appellant raised a number of points before us. In the first place, he urged that the drain in question could not become the property of the respondent free from all incumbrances. He urged that in view of the provisions of Section 41 of the Land Acquisition Act the effect of Section 16 of the said Act was displaced.

It should be stated at this stage that Section 16 of the. Land Acquisition Act

provides that when the Collector has made an award u/s 11, he may take possession of the land, which shall thereupon vest absolutely in the Crown free from all incumbrances. The word "Crown" has been substituted by the word "Government" by the Government of India Adaptation of Indian Laws Order, 1937, and since the Constitution of India has come into force on 26-1-1950, the land in question vests in the State for which the property has been acquired.

Section 41 is included in Chap. VII of the Land Acquisition Act. The heading of the said Chapter is "Acquisition of Land for Companies". u/s 38 which is the opening section of that Chapter the Provincial Government may authorise any officer of any Company desiring to acquire land for its purposes to exercise the powers conferred by Section 4 of the Act. Sub-section (2) of the said section provides that in every such case Section 4 shall be construed as if for the words "for such purpose" the words "for the purposes of the Company" were substituted.

Section 39 which is in the said Chapter is important for our present purpose. It provides that the provisions of Sections 6 to 37 (both inclusive) shall not be put in force in order to acquire land for any Company, unless with the previous consent of the Provincial Government, nor unless the Company shall have executed the agreement hereinafter mentioned.

Section 40 lays down that such consent shall not be given unless the Provincial Government is satisfied by an inquiry Or on a report of the Collector that the purpose of the acquisition was to obtain land for the erection of dwelling houses for workmen employed by the Company or for the provision of amenities directly connected therewith or that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public.

Then comes Section 41 and it is upon this section that Dr. Sen Gupta relies for the purpose of his present argument. The said section provides that if the Provincial Government is satisfied after consideration of the report, if any, of the Collector, or on the report of the officer making an inquiry that the purpose of the proposed acquisition is to obtain the land as mentioned therein and that such work is likely to prove useful to the public, it shall require the Company to enter into an agreement with the Provincial Government providing to the satisfaction of the Provincial Government for the following amongst other matters:

"(5) Where the acquisition is for the construction of any other work, the time within which and the conditions on which the work shall be executed and maintained, and the terms on which the public shall be entitled to use the work."

Dr. Sen Gupta's argument is that Section 41 displaced the operation of Section 16 and that this is because of the fact that in Sub-section (5) of Section 41 it is stated that in the contract which is to be entered into the terms on which the public shall be entitled to use the work shall be specified.

6. Dr. Sen Gupta contends that the agreement in the present case between the

Government and the Company limits the right of the Company in the said lands; in other words, the Company does not get the land free from all incumbrances but only gets the land with the conditions which are imposed by the agreement. In other words, Dr. Sen Gupta's contention, as we have understood it, is that although the land may vest in the Government free from all incumbrances, the Company does not get it free from all incumbrances but the rights of the Company are limited by the terms of the said agreement.

It is difficult to accept this contention of Dr. Sen Gupta. In the first place, if by virtue of the acquisition of the land in question by the Government the incumbrances which had been subsisting on the said land come to an end, then I do not see how it can be contended that a particular incumbrance is still subsisting because the Government in granting the land to the Company under the said section has not mentioned anything about the said encumbrance in the agreement which it entered into with the Company.

The incumbrances if they come, to an end must come to an end for all time to come and for all purposes; in other words, the effect of Section 16 is that the land becomes freed from the incumbrances and if the land is freed from incumbrances then anybody who gets that land must also get it free from such incumbrances. I am unable to accept this part of Dr. Sen Gupta's argument.

There is another answer to this argument of Dr. Sen Gupta and that is to be found in the provisions of Section 39 itself. Section 39 provides that the provisions of Sections 6 to 37 (both inclusive) shall not be put in force in order to acquire land for any Company, unless with the previous consent of the Provincial Government, nor, unless the Company shall have executed the agreement hereinafter mentioned.

The provisions of this section indicate that till the conditions mentioned therein are fulfilled the operation of Sections 6 to 37 remains in abeyance but after the said conditions are fulfilled, the provisions of Sections 6 to 37 become applicable. In this case both the provisions have been fulfilled i.e., the sanction of the Government has been obtained and the agreement has been executed between the Government and the Company. That being so, the provisions of Sections 6 to 37 which include Section 16 become operative. That being so, I hold that this ground taken by Dr. Sen Gupta must fail.

7. The next ground taken by Dr. Sen Gupta is that Section 16 does not apply to public right. I should mention that although at the beginning of his argument Dr. Sen Gupta tried to support that proposition but in the end he had to give it up and restrict himself only to the question which I shall presently indicate.

Before doing that I should mention at this stage that the learned District Judge has elaborately dealt with in his judgment the question as to the difference between a public right and a private right and has come to the conclusion that the right of the plaintiff in the present case is not a public right in the sense in which it should be used and in that view of the matter has held that the right of

easement cannot be claimed by the plaintiff.

In our view the discussion as to whether at not, this particular right is a public right or a private right becomes wholly immaterial for the purpose of deciding the present case. The right of easement whether it belongs to the public or to the private must come to an end in view of the provisions of Section 16 of the Land Acquisition Act.

A public right is in that respect in the same position as a private right and this has been the result of decisions to which Mr. Bose in his argument referred to us. It is not necessary to refer to or deal with those decisions in view of the fact that Dr. Sen Gupta also conceded before us that it does not matter whether " the right in question is a public right or a private right.

But then he contended before us that such a right is not an incumbrance to which Section 16 is applicable. Dr. Sen Gupta conceded that if we hold that it is in "incumbrance", then the same has been extinguished. But he urged that it is not an incumbrance, but is a right to continued flow of water into the drain and this right cannot be extinguished under provisions of Section 16 of the Land Acquisition Act.

I am unable to see any force in this contention. In my opinion, it is quite clear that the right which is claimed is a right of easement and it is an incumbrance. It is the right to have the water discharged through the land of the other side and that right in my opinion comes within the purview of Section 16 the Act and the land becomes free from the said incumbrance. As I said before I am unable to accept this contention of Dr. Sen Gupta as well.

8. I now come to the last of the contentions of Dr. Sen Gupta raised before us in this appeal, and the way in which he formulated this point is as follows: Dr. Sen Gupta contended that a person has always a right to do what he is entitled to do but subject only to this that he must not in asserting his right cause nuisance to others.

In applying this principle to the present case Dr. Sen Gupta contended that the defendant can no doubt stop the flow of water but in doing that he cannot cause nuisance to his neighbours. In this case as a result of the stoppage of the drain there had been stagnation of the water on the land of the plaintiff and thereby a nuisance has been created. The defendant may be entitled, to stop the flow of water through his land, but if in doing that he causes nuisance to the plaintiff, the plaintiff is entitled to bring an action on nuisance.

If it were necessary for us to go into this question, we would have certainly done so. But in the facts of this case a decision on this question becomes unnecessary. It appears from the pleadings to which I have already referred that no case has been made by the plaintiff that there has in fact been a nuisance. The case of the plaintiff is that the defendants are threatening to commit nuisance.

In other words, in the paragraph of the plaint to which I have already referred

what the plaintiff has stated is that the defendant is about to commit a nuisance. i.e., to stop the flow of water and thereby to commit a nuisance. In the prayer portion of the plaint the plaintiff has nowhere asked for the removal of any nuisance already created, but the claim of the plaintiff is merely for a declaration in right and for an injunction.

We find from the records that after the filing of the suit an application was made for an injunction. The case made in the said application for injunction was not a case of nuisance already committed but a case of threatened nuisance. I would refer to paragraphs 6 and 7 of the said petition where the plaintiff has stated that if the drain in suit is blocked in any way, it will create an unbearable nuisance in the locality and that the defendants have no right to block or close the public drain in suit.

This statement clearly shows that the drain has not been blocked, but it is going to be blocked and an injunction is necessary for that purpose. I should also mention that neither in the trial court nor in the lower appellate court any case of nuisance had been made on behalf of the plaintiff and none of the courts below had been called upon to deal with this question. In this state of affairs we will not be justified in allowing the plaintiff to raise this contention for the first time in this appeal.

9. The result is that all the contentions raised by Dr. Sen Gupta fail.

10. Before concluding my judgment I should mention that the lower appellate court has held that this suit as framed is not maintainable; in other words, the learned Judge has held that the plaintiff should have filed the suit in a representative capacity and this suit filed by the plaintiff in his individual capacity is not maintainable.

Dr. Sen Gupta contended that the view taken by the learned Judge as aforesaid should not be accepted and he referred us to Section 91, Civil P. C., and contended that if any special damage has been caused to a particular party as a result of nuisance to the public, then he can alone file a suit for the removal of that nuisance.

Mr. Bose appearing on behalf of the respondent relied on a decision of this Court given in the case of -- Surendra Kumar Basu Vs. District Board and Another, , where it has been held that in order to maintain a suit by an individual member of the public for the removal of a public nuisance, proof of special damage suffered by such individual beyond what is suffered by the public at large is necessary.

In the said case there is a further observation, although may be in the nature of an obiter dictum", that proof of special damage is necessary even if a suit is brought in a representative capacity under Order 1, Rule 8, Civil P. C. In this case Mr. Bose contended before us that special damage has not been proved. In this view of the matter the suit as framed would not be maintainable, but it is not

necessary for us to base our decision in this appeal on this question as we have already held that all the grounds urged by Dr. Sen Gupta in support of this appeal must fail.

11. In the result, therefore, this appeal is dismissed with costs.

Mallick, J.

12. I agree.