

(1905) 06 CAL CK 0016
In the Calcutta High Court

Gobinda Chandra Basu

APPELLANT

Vs

Kamijuddi Soyal

RESPONDENT

Date of Decision : 30-06-1905

Acts Referred:

Bengal Tenancy Act, 1885 — Section 188, 76

Citation : 17 Ind. Cas. 115

Hon'ble Judges : Pratt, J; Ghosh, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit instituted by a co-sharer landlord against a raiyat for the purpose of compelling him to fill up a tank which the raiyat had excavated in one part of his holding. It appears that, at the time when the said excavation was made by the defendant, there was already a tank in the holding in question. Notwithstanding this, the defendant dug some of the mal lands appertaining to his holding and after raising the level of the ground by earth of the said tank, planted certain trees on the same. The Court of first instance gave the plaintiff a decree, being of opinion that the digging of the tank in question was not consistent with the purposes for which the holding had been let out, and that it was not really an improvement within the meaning of Section 76 of the Bengal Tenancy Act. The lower Appellate Court, however, has set aside that judgment and dismissed the plaintiff's suit upon the grounds that the tank was dug for the purpose of providing good drinking water to the defendant and his people, that this was in no way inconsistent with the purpose for which the land was let out, and that the act of the defendant was an improvement within the meaning of Section 76 of the Bengal Tenancy Act. Referring to the matter of the other tank which existed at the time of the excavation of the tank in question, the Subordinate Judge makes the following observations: "Though before constructing the tank, there was another old tank near the defendant's house, there is nothing to show that it contained clear water fit for the purpose of drinking without any injury to health. Had it been so, the defendant would not spend a large sum of money in digging another new tank." Then, the

Subordinate Judge goes into the question, whether the plaintiff being, one of the landlords, could alone maintain the action, and, having regard to the provisions of Section 188 of the Bengal Tenancy Act, he has expressed the opinion that the suit could not lie at his instance alone without joining the other co-sharers. Another question was raised by the defendant and that was one of limitation. The Subordinate Judge has held that, inasmuch as the suit was not brought within two years from the date of the construction of the tank, it is barred by the two years' law of limitation as provided by Article 32 of the Indian Limitation Act.

2. Now, referring in the first instance to the question whether the tank dug by the defendant is an improvement within the meaning of Section 76 of the Act, it will be observed upon Clause (2) of the said section that the construction of wells, tanks, water-channels and other works for the storage, supply or distribution of water for the purpose of agriculture or for the use of men and cattle employed in agriculture are improvements within the meaning of the section until the contrary is shown. Now, in order to make that section applicable, it must, in the first instance, be shown that the tank in question was excavated for the purpose of agriculture, or for the use of men and cattle employed in agriculture. The Subordinate Judge has apparently not addressed himself to this matter. He seems to have considered that if the purpose for digging the tank was to supply good drinking water, it would be enough for the purpose of the section in question. Irrespective of this, we are informed by the learned Vakil for the appellant, and the learned Vakil for the respondent has not contradicted the statement so made, that there is absolutely no evidence upon the record that the tank in question was excavated for the purpose of providing the defendant and his people with good drinking water. If that is so, it is obvious that the requirements of Section 76 to which we have referred have not been complied with. Moreover, as we have already mentioned, at the time of the excavation of the tank in question, there was an old tank near the defendant's house. The Subordinate Judge seems to think that it was for the landlord to show that it contained clean water, fit for the purpose of drinking without any injury to health, and because he, the landlord, did not prove this, it must be taken that the tank in question was required for the purpose of providing good drinking water to the defendant and also for the purpose of agriculture; for, otherwise, as the Subordinate Judge says, the defendant would not have spent a large sum of money in digging the tank. We are unable to affirm this proposition as correct. If there was a tank near the defendant's homestead, the defendant might have improved that tank and made it fit for the purpose of providing himself with good drinking water. However that may be, it was, in the first instance, necessary for the defendant to show that this tank was required for the purpose of providing drinking water and for the purpose of agriculture. There is no evidence to that effect; and we think that the judgment of the Subordinate Judge, so far as this matter is concerned, cannot be supported.

3. So far as the second point is concerned, the learned Vakil for the respondent has very candidly admitted that the suit which the co-sharer landlord, the

appellant before us, has brought is not an act which falls within the scope of Section 188 of the Bengal Tenancy Act. The suit was, as already mentioned, for the purpose of compelling the defendant to fill up a tank which he had wrongfully excavated in one part of his holding and, in the alternative, for damages. The suit in question was not one which the whole body of the landlords is required or authorised to bring under the Bengal Tenancy Act. That being so, we hold that the Subordinate Judge is wrong in the view that he has expressed in regard to the applicability of Section 188 to this case.

4. Lastly, as regards limitation, Article 32 of the Indian Limitation Act provides for a suit against one who, having a right to use property for specific purposes, perverts it to other purpose, the limitation provided being two years from the time when the perversion first becomes known to the person injured thereby. All that the Subordinate Judge has found upon this matter is, that the suit has been instituted more than two years after the date of the construction of the tank. But that is not enough for the purpose of the Article in question. It must be found that the plaintiff landlord became aware of the excavation more than two years antecedent to the institution of the suit. The learned Vakil for the respondent, on the matter being put to him, admits that there is no evidence on the record showing that the plaintiff was cognizant of the excavation of the tank in question at any time more than two years antecedent to the suit. No doubt, it does appear that he is a resident of the same village where the holding of the defendant is situated. But it does not necessarily follow that he was aware of the excavation of the tank before the time when he says he became aware of it. Upon these grounds, we think that the judgment of the lower Appellate Court must be set aside and that of the Court of first instance restored with costs.