
(1963) 04 PAT CK 0016
In the Patna High Court
Case No : A.F.A.D. No. 856 of 1961

Guhiram Gope and Others

APPELLANT

Vs

Uday Chandra Ghosal and Others

RESPONDENT

Date of Decision : 06-04-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Limitation Act, 1908 — Section 26

Citation : AIR 1963 Patna 455

Hon'ble Judges : K. Ahmad, J

Bench : Single Bench

Advocate : P.R. Das and Sudhir Chandra Ghose, for the Appellant; R.S. Chatterji, for the Respondent

Final Decision : Dismissed

Judgement

K. Ahmad, J.—The dispute in this case centres round the accumulation of water on the land of the defendants near the western edge of a tank in village Kherbara and its escape towards the plaintiffs' field in plot No. 707 on the south giving rise to the injury to its north-western al. This tank is recorded in the survey record-of-rights as plot No. 871 and is generally known as Puran Bundh. Originally, it belonged to one Sashi Bhusan Rai but in the year 1338 B.S. Sashi Bhusan Rai sold it to the defendants. The slope of the tank is on one side from west to east and on the other from south to north. The northern and eastern portions of the tank are, therefore, deeper than those on the south and west, and it is this latter part of the plot which is the watery portion of the tank.

So far as the western portion of the plot is concerned, that is much above the bed of the tank and is, therefore, described as its agal portion. The tank is fed by two water channels in plot Nos. 861 and 867. The former is on its south-western corner and the latter further north from the former. The overflow, if any, in the tank, drains itself out through a pyne in plot No. 934 which lies on its north-eastern corner. But the case of the defendants is that it has one more outlet and

that is in plot 914 on its north-eastern side. Immediately on the south-western corner of the tank is the agricultural holding of the plaintiffs in plot No. 707. This plot on its north has an al made by the plaintiffs which runs just on the south of the tank from west to east. Similarly on the western side of the plot there is a brick ridge made by the plaintiffs which runs from south to north.

2. Further, it appears that plot No. 871, as it now stands, is divided into two parts, the agal portion on the west and the watery portion of the tank on the east by means of an al running from north to south. It commences on the north from the southern portion of plot No. 914 and goes right up to the plaintiffs' plot No. 707 and joins its northern al.

3. The case of the plaintiffs is that this al was constructed about 5 or 7 years ago and originally it did not touch the plaintiffs' plot but there was a gap left between them which was about 30 cubits in length. Therefore despite the obstruction caused by this al to the general flow of the water from the west to the tank on the east, there was still a passage left through the gap by which the water even after accumulation by the side of the al on its west could finally flow into the watery portion of the tank. Subsequently, however, this gap, it is said, was reduced to 15 cubits and was thereafter closed altogether sometime in the month of Jeth 1364 B.S. with the result that since then the water that accumulates in the agal portion due to the aforesaid al cannot flow into the tank and rushes towards the paddy field of the plaintiffs on its south-western corner.

The grievance of the plaintiffs is that as a result thereof the north-western portion of the northern al has been to the extent of 10 to 15 cubits completely washed away and sand has been deposited in the field. Hence the suit for the declaration that the defendants have no right to put obstruction to the natural flow of water towards east and to divert the same towards the plaintiffs' plot No. 707. Further, there is also a prayer made for permanent injunction restraining the defendants from putting any other al within the tank and for a direction to remove the obstruction already caused in the flow of the water from the east to the watery portion of the tank on the west.

4. The defendants have denied the existence of any gap at any point of time between the field of the plaintiffs in plot No. 707 and the al of the defendants running from north to south. Their case is that originally the water coming from the west by the channel in plot 871 used to flow (sic) into the tank through plot 707. But immediately after the last survey and settlement operation, the plaintiffs on the western side of their plot constructed a big brick ridge running from south to north and this obstructed the natural flow of water of the said channel into the tank through the plaintiffs' plot. Therefore, the original owner of the tank, in order to protect it from the deposit of sand as a result of the direct flow of water into it from the west, got the aforesaid al constructed on the western side of the agal portion right up to the northern al of plot 707. Thus, since then, the bulk of the water accumulating near the al of the defendants used to flow mostly towards north and then used to pass out through the outlet in plot

914 and only the little water left thereafter used to flow into the tank through plot 707.

But subsequently in the year 1360 B. S. the owners of the land lying on the north of the tank including the plaintiffs placed a ridge on the southern boundary of those lands running from the defendants' al to the east. That, it is said, has now blocked the flow of water to the north and has divided it to the side of the plaintiffs' plot in the south. Therefore, according to the defendants, it is this diversion of the flow of water that has led to the damage done to the north-western ridge of plot No. 707 as claimed in the plaint. But it is said that thereafter the plaintiffs put another ridge in 1362 B. S. leaving a portion of the plot for the passage of water into the tank but that too failed to resist the flow of water towards the plaintiffs' field. The plaintiffs therefore, have now instituted the present suit with an ulterior motive to deprive the defendants of their right to protect their tank from the flow of sand into it by means of the aforesaid al constructed on their own lands from north to south.

5. Now both the courts below have concurrently found -

1. That the defendants' al in plot 871 was constructed only 5 or 7 years ago as claimed by the plaintiffs.

2. That there is no outlet of the tank in plot No. 914.

3. That the onrush of the water towards the plaintiffs' plot 707 on the south is due to the construction of the al in plot 871 by the defendants.

4. That the materials on the record do not lend support to the defendants' case. On the contrary, what is claimed by the plaintiffs is fully established.

6. And in view of these findings, the suit has been decreed by both the courts below and in support of their decisions, reliance has been placed on the rule of law as stated by Salmond in his Law of Torts (10th Edition) at page 522 and as laid down in Abdul Qayume and Another Vs. Fariudoon Mirza, . In the latter decision it has been held that:

"Although a person is not responsible for allowing the escape of things which are naturally on his land, he is responsible for causing their escape. He is not entitled to relieve his own land of a burden by casting it upon the land of his neighbour. Thus he is responsible for the escape of water from his land, if the escape is due to some embankment, channel for other artificial structure made or maintained by him there, or to any other alteration in the natural condition of his land."

In appeal before me, Mr. Das appearing for the defendants appellant has not challenged any of the aforesaid findings of fact and I think rightly as they now stand concluded in second appeal. But what learned counsel has submitted in support of this appeal is a three-fold contention :

(1) That the court below in applying the law as laid down in Abdul Qayume and Another Vs. Fariudoon Mirza, has failed to appreciate that here the initial mischief

was done by the plaintiffs themselves inasmuch as it were they who first constructed the brick ridge on the western side of their field in plot No. 707 and thereby obstructed the flow of water through their field and diverted it towards the agal portion of the tank, therefore, the defendants did no wrong in constructing the embankment in order to save their tank from the mischief caused as a result thereof.

(2) That the suit as constituted should have been held as barred by time u/s 26 of the Limitation Act.

(3) That in any view of the matter, the injunction granted by the court below is much too wide.

7. Now, before I go into these points, I think it would be very helpful if all the various facts that seem to have been found by the two courts below in the course of their discussion on the aforesaid findings are collected at one place. They are as follows :

(a) That the character of the two nalas in plot Nos. 861 and 867 is that of natural channels.

(b) That the water coming from those channels generally used to flow straight into the tank of the defendants across the aforesaid agal land and not through the plaintiffs' field in plot No. 707.

(c) That this direct flow of water from the channels straight into the tank was not the result of any diversion effected by the construction of a brick ridge on the west of the plaintiffs' land.

(d) That there is only one outlet for the exit of excess water in the tank and that is through the pyne on its north eastern corner in plot No. 934.

(e) That there has never been any regular passage for the flow of water from the agal land of the tank towards north in the direction of plot No. 914.

(f) That it is not the construction of any new als made on the southern boundary of the plots on the north in the vicinity of plot No. 914, but the defendants' embankment running right from the southern portion of plot No. 914 to the plaintiffs' northern al in plot No. 707, that has led to the diversion of the flow of water in the agal portion of the tank from west towards south in the direction of the northern al of the plaintiffs' plot No. 707.

8. Therefore, the aforesaid submission made by Mr. Das has to be weighed and judged in the light of these facts as finally found by the two courts below.

9. Now, so far as the first contention is concerned, that is based on the assumption that the initial mischief was done by the plaintiffs but both the courts below have negatived this part of the contention raised on behalf of the appellants, and have found that the water from the two channels flows straight into the tank through the agal portion and not through the plot of the plaintiffs

and as such the construction of the ridge on its western side did not in any way disturb the natural flow of water to the tank. Therefore, the very assumption on the basis of which the first contention has been supported fails.

10. Then I come to the other part of the submission that Mr. Das has advanced in support of this contention, namely, that the law as laid down in *Abdul Qayume and Another Vs. Fariudoon Mirza*, is not applicable to the facts of the present case. In my opinion, that part of his submission also is without substance. It is true that on the facts of this case it is established that the water in the agal portion of the tank is not brought or kept there by the defendants and much less for their own purposes. Therefore, to this extent it may be conceded that at least the rule of law as laid down in *Fletcher v. Rylands*. 1 Sm. L. C Edn. 892 is not applicable to the facts of this case, and in this regard Mr. DILR (1942) 2 Cal 299 as is fully supported by the following observation made in AIR 1938 289 (Nagpur) , namely, that

".....the maxim sic uteris tuo ut alienum non laedas which is illustrated in 1 Sm. L. C. 13th Edn. 892 comes into play only when a person for his own purposes brings on his land and keeps" there something which is likely to do mischief if it escapes as he is responsible for bringing and keeping it in his land he must be deemed to do so at his peril and would therefore be prima facie answerable for all the damage which is the natural consequence of its escape. But that principle cannot apply to the case of a man who cannot be held responsible for bringing the dangerous thing on his own land but is brought as a consequence of vis major or by an act of a third party."

That, however, does not dispose of the real claim that has been made out in the plaint. In the plaint what is asserted is that both the channels in plots 861 and 867, through which water from west flows into the tank across the agal portion, are natural channels and, therefore, the defendants have got no right to obstruct that flow by the construction of an embankment and thereby to divert it in the direction of the northern al of their field on the south. That being so, the question that in law arises for consideration is whether it is at all open to the owner and occupier of the tank to so construct a bundh or embankment right from the southern portion of plot 914 to the plaintiffs' northern al in plot 707 as to completely obstruct the flow of the water through those channels into the tank and thereby to divert the water accumulated as a result thereof towards the northern al of the plaintiffs in plot No. 707. In my opinion, the law on the subject is clear and the answer to this question has to be given in favour of the plaintiffs. In *Whalley v. Lancashire and Yorkshire Rly. Co.* (1884) 13 QBD 131 Brett, M. R. while dealing with the second group of cases cited before him, has observed :

"Then we come to the case of having property which is subject to this defect, that unless you can prevent the injury which the ordinary course of nature will bring upon it by transferring that injury to your neighbour's property, your property must suffer as the natural consequence of its position. That is the case of *Menzies v. Earl of Breadalbane* 3 Bli. (N. S.) 414 where property was so

situated with regard to a river that if the river was left alone with its ordinary flow of water, it must in the course of nature eat away the property or occasionally overflow it. If the owner of such property, in order to cure that defect, were to do something to his land which by turning the stream out of its ordinary course would throw that defect on his neighbour's land, he would, I think, according to ordinary principles of law, become liable to pay the damages this would occasion, and further be prevented from continuing to do it by an injunction."

And I think the law as enunciated here is applicable on all fours to the facts of the present case. No doubt the matter would have been different if the defendants had not constructed any artificial erection like embankment as here on their own land and the water in ordinary course of nature without any act on the part of the defendants had broken through their land on to the land of the plaintiffs. In that case the responsibility for the flow of the water towards the land of the plaintiffs would have been none against the defendants. Dealing with that class of cases, Brett, M. R., in the same judgment has made the following observation;

"But then it is suggested that if a person has not brought the danger on his land it makes a difference. So it does. If he has not brought the danger there, and without any act of his it breaks through his land on to his neighbour's land, I take it he is not" liable. In that case both have suffered from a common extraordinary danger, but one has suffered before the other, that is all."

Then looked at from another point of view also, I think the same conclusion is come to, namely, from the point of view whether the construction of the embankment in the present case was done by the defendants with a view to protect themselves from an injury which was not yet suffered by them or was done with a view to get rid of the consequences of the injury which had already visited them. In the present case, as found by both the courts below, the water coming through the two channels had already accumulated in the agal portion of the tank, that means, injury had already been suffered by the defendants and they in order to get rid of the consequence of that injury got constructed the embankment with a view to transfer that evil to the land of the plaintiffs. This, in my opinion, is obviously, as already referred to above, not permissible in law. Thus, looked at from any point of view, there is no escape from the conclusion that both on principle and authority the present case has been rightly disposed of by both the courts below in the light of the law as laid down in *Abdul Qayume and Another Vs. Fariudoon Mirza*, . So far as the decisions relied, upon by Mr. Das in support of this appeal in AIR 1938 289 (Nagpur) and *Shidramappa v Md. Yusuf* AIR 1920 Bom 207 are concerned, they are, I think, based on an entirely different principle, namely, that

"if an extraordinary flood is seen to be coming upon land the owner of such land may fence off and protect his land from it, and so turn it away, without being responsible for the consequences, although his neighbour may be injured by it."

11. In the case of AIR 1920 Bom 207 the water had accumulated on one side of the road due to heavy rainfall and by reason of the slope from that side to the other side of the road it had a leaning to flow on towards the road and then on to the land of the parties on the other side. In those circumstances, the defendants in order to avoid the over-flooding of their land caused a bundh constructed on the road and thereby saved the over-flooding of their land. But that in consequence led to a greater accumulation of water in the ditch falling in between the lands of the parties and to a greater over-flooding of the plaintiff's land situate on one of its banks. On those facts the court held that the accumulation of the water due to heavy rainfall on the east of the road was in the nature of a common threat to both the parties. Therefore, both had equal right to protect themselves against that water independent of the consideration whether the protective measure taken by one had the effect of transferring the injury to the field of the other.

12. Similarly, in the case reported in AIR 1938 289 (Nagpur) the, common danger or the common enemy was the heavy flood in a river on the opposite banks of which the lands of the parties lay. Therefore, the defendant in order to protect his own land from the influx of water erected an embankment and also dug a trench. The result of the construction of this embankment was that the stream was made to flow in its full volume and intensity along the boundary of the plaintiff's field which was on a lower level.

Thus, in neither of these two cases the danger apprehended was the result of any natural flow of water through any defined channel but the result of an abnormal flow of water in one case due to heavy rainfall and in the other due to flood. In the present case the water in the agal portion of the tank is received through the natural and usual channels and then get accumulated there due to the obstruction caused in its flow into the tank towards the east by the artificial embankment which has been raised there by the defendants. Therefore, to such a case the law as laid down in the decisions reported in AIR 1920 Bom 207 and AIR 1938 289 (Nagpur) is not at all applicable. Therefore both the submissions made by Mr. Das in support of his first contention have to be rejected.

13. The second point which has been advanced by Mr. Das in support of this appeal relates to the question of limitation as provided in Section 26 of the Limitation Act. Section 26 of the Limitation Act is on the question of acquisition of right to easements. The submission made by Mr. Das on the basis of Section 26 is that the embankment, which is the subject-matter of dispute in this case, was constructed by the defendants long time before two years from the date of the suit, and, therefore, the suit as instituted by the plaintiffs is barred by the rule of limitation as provided in Section 26. The concluding paragraph of Section 26(1) of the Limitation Act provides that-

"Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

But the finding given by the trial court is that the disputed embankment was completed in the month of Jeth 1957. Therefore, the suit having been instituted on 29-1-57 is within time even as contemplated by Section 26 of the Limitation Act. Secondly, this question of limitation does not seem to have been raised on behalf of the defendants in the court below. Therefore, on that ground alone, it is not open to be agitated any further in second appeal. Lastly, the right that the plaintiffs claim is not one of easement but is based on the law of tort or torts. That being so, the provisions of Section 26 of the Limitation Act, which relates, as already stated, to acquisition of rights to easements, have no application to the facts of the present case. Therefore, this contention of Mr. Das also fails.

14. Lastly, it has been submitted by Mr. Das that the injunction as granted by the trial court, which has been arrived by the lower appellate court, is couched in a very wide term. I think there is some force in this contention. The order passed by the trial court in decreeing the suit is in these words :

"It is hereby declared that the defendants have got no right to put obstruction to the natural flow of the tank towards east and to divert the water of the tank to the plaintiffs" plot No. 707 of mouza Kherbara. Defendants are also directed to remove the obstruction i.e. the disputed ridge within the tank within two months from the date of decree failing which the plaintiffs will do that through the processes of law. Defendants are also directed not to construct any other al within plot No. 871."

It is against the last direction given in the order namely that "defendants are also directed not to construct any other al within Plot No. 871" that the submission made by Mr. Das in regard to the injunction granted by the court below is directed. In law it is well-established that every owner and occupier of land has every right to use his land as may suit his convenience but this right is relative and not absolute. That means, in so using the land, its owner or occupier has to be careful that it may not add any unreasonable injury to the convenience of the other owner or occupier of the land other than that. Therefore, unless and until an injury is established, the owner or occupier of any other land has no right to object to the use made of his land by its owner or occupier. That being so, the last direction given by the trial court that the defendants should not construct any other al within plot 871 has to be modified in these terms that -

"The defendants are also directed not to construct any other al within plot No. 871 which may obstruct the natural flow of the tank towards east and to divert the water of the tank to the plaintiffs" plot No. 707."

15. For the reasons stated above, the appeal is dismissed but subject to the modification in regard to the relief for injunction as just stated. But in the circumstances of the case, there will be no order for costs.