

(1949) 10 OHC CK 0004

In the Orissa High Court

Case No : Second Appeal No. 67 of 1946

Harihar Mahapatra and Others

APPELLANT

Vs

Hari Otha and Others

RESPONDENT

Date of Decision : 11-10-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), 80
Evidence Act, 1872 — Section 35

Citation : AIR 1950 Ori 257

Hon'ble Judges : Jagannadhadas, J

Bench : Single Bench

Advocate : S.K. Ray, for the Appellant; M.S. Rao and A.G., for the Respondent

Final Decision : Dismissed

Judgement

Jagannadhadas, J.—Plaintiffs are the appellants in this second appeal. They own only about 1/3rd of the lands in Inam village called Agulpada. Defendants 1 to 4 are owners of lands in the neighbouring village of Gopinathpur which also is an Inam village. They have been sued as representing all the Inamdars of that village. Defendant 5 is the Government of Orissa represented by the Collector of Ganjam. The rest of the lands admittedly belong to the Dharakote Estate. The dispute relates to the right of the plaintiffs to irrigate their lands from the waters of a channel known as Kochianala, by raising a cross dam on it. This Nala runs through the two villages of Gopinathpur and Agulpada. According to the evidence of one of the plaintiffs' witnesses, P. W. 3, Kochianala starts in Government villages and goes to Government villages, but passes through these two Inam villages. The case of the plaintiffs is that the Kochianala is the irrigation source of the wet lands in the Inam, village of Agulpada; that the irrigation rights were being exercised by putting up a cross dam and that there used to be a pucca masonry dam at a specified place in the channel for diverting water to their village; that the masonry dam was constructed at their cost; and that the water was being taken through a branch supply channel which is locally known as

Jhala. The pucca masonry dam is not admittedly now in existence having broken down some years ago and it is the plaintiffs' case that since then they had been putting up a temporary earthen dam lower down the site of the pucca dam whenever water was required for them. It is their case that in 1940 when as per their previous practice, they put an earthen dam defendants 1 and 4 and others interfered and that at their instance, the Revenue Inspector purporting to act on behalf of the Government, got the dam destroyed. They allege that the Government have no manner of right to restrict or regulate the water supply from this channel and the Revenue Inspector on behalf of the Government had no right to interfere with their putting up the cross dam for enjoying the rights of irrigation. The defendants deny that Kochianala is the irrigation source for Agulpada. They deny further that the plaintiffs have any right to put up a dam across the Nala. While they admit the existence of the old pucca masonry dam some years ago and the existence of the Jhala, taking off from the channel towards the plaintiffs' land, they allege that the dam was for the purpose of storing water for the use of men and cattle of Gopinathpur village and that the Jhala was only a surplus channel to drain off the excess water that may be flowing in the Nala and not a supply channel to Agulpada and that neither the dam nor the Jhala were ever used for irrigating the lands of Agulpada, In addition to this common defence, an objection was taken on behalf of the Government, defendant 5, that there was no proper notice for the present suit u/s 80, Criminal P. C. and that accordingly the suit was not maintainable.

2. Both the Courts below have dismissed the plaintiffs' suit and hence the second appeal by the plaintiffs,

3. The questions that arose on the respective contentions of the parties were: (1) Whether the suit is not maintainable on account of want of proper notice to the Government; (2) Whether the plaintiffs as owning Inam lands in Agulpada village were entitled to irrigate their lands from Kochianala; (3) Whether they have a right to put up a cross dam in the Nala for the purpose; (4) Whether the plaintiffs have established the right to take water by putting up the particular dam pleaded, viz., a pucca masonry dam at the site of the old dam.

4. On the first point, both the Courts below have agreed in holding that there was no proper notice and that the suit is not maintainable. On the second point, which was covered by issue No. 1, the learned Munsif gave a finding in favour of the plaintiffs; but when answering the third point covered by issue No. 3, he negatived the right to irrigate the lands by erecting a cross dam. As regards the fourth point covered by issue No. 2, he held that the plaintiffs have not established that they at any time constructed the old masonry dam as claimed by them and must be taken to have impliedly found that they had no right to irrigate by means of the particular masonry dam. The learned Subordinate Judge has concurred with the trial Court on all these points excepting that on point no. 2, he was inclined to think in disagreement with the Munsif that the plaintiffs have not made out that Kochianala was the irrigation source for wet lands of

Agulpada.

5. In the consideration of the merits of the case covered by points Nos. 2, 3 and 4 formulated above, both the Courts below have been greatly influenced by certain physical features of the situation. The lands in Agulpada are on a higher level than the bed of Kochianala. It would therefore appear that a considerably high dam impounding water to a high level would be required in order that the Agulpada lands may be served. It appears further that if the waters of the dam are impounded by a dam to that extent, some lands in Gopinathpur are submerged for some days in the year and also certain pathway and cart track leading from Gapinathpur village across the Jhala would remain submerged and practically unfordable for some days in the year. The liability to submersion as above stated is admitted on both sides, but the parties are at variance as to the extent and duration of the submersion.

6. The findings of both the Courts below on point numbers 2, 3 and 4 formulated above are, however, vitiated by two serious errors: (1) They have not correctly understood the nature of Inam proceedings and the value to be given to an entry like that in EX. 5, an extract from the Inam register of Agulpada which mentions Gopinathpur stream as irrigating the wet lands of Agulpada. (2) They have not correctly appreciated the law relating to the right to put up a dam across an irrigation channel.

7. Exhibit 5, as already stated, is an extract from the Inam register of Agulpada village. It distinctly mentions that Gopinathpur stream irrigates the wet lands of Agulpada. It is not disputed that the "Gopinathpur stream" referred to therein is the suit. Kochianala. That is what has been stated by the plaintiffs in their plaint and it has not been controverted. The third plaintiff as P. W. 2 has also referred to Kochianala as Gopinathpur Nala and his evidence in this behalf has not been challenged in cross- examination. The statement in EX. 5 referring to Agulpada village is as follows:

"Wet lands are irrigated by a bill stream known by the name of Gopinathpur stream. The soil is of a medium character generally. Dry lands are of a superior quality. The lands are cultivated annually. So scarcity of water is felt generally."

This statement is very clear and cogent evidence that at least as on that date, the wet lands of Agulpada were entitled to irrigation rights from the Gopinathpur stream alias Kohcianala.

8. The learned Munsif has indeed taken this into consideration and has found on issue No. 1 in favour of the plaintiffs" on the strength of this. But he has not appreciated the fall effect to be given to it. The appellate Court on the other hand has totally disregarded this. In paragraph 10 of his judgment he says as follows:

"As to the document Ex. 5, it simply recites that the hill stream Kochianala is the irrigation source for Agulpada lands. This in one way supports the plaintiffs" right

as claimed in this suit. Apart from the question as to whether noting the irrigation sources was or was not one of the points to be dealt with by the Inam Commission, it will be seen that this note itself does not show that the plaintiffs had a right to divert the water of this Kochianala to their lands far away therefrom to the west by raising any dam across it. It is both parties' contention that this masonry dam, the remains whereof are still existing on the spot, was constructed long long ago namely more than a century ago. If as a matter of fact this dam was constructed for purposes of irrigation, as contended on behalf of the plaintiffs, one would naturally expect this to have been specifically mentioned in the Inam register instead of noting only that the nala is the irrigation source for Agulpada lands."

9. This betrays a misconception of the nature of Inam proceedings and the effect to be given to such entries in the Inam register. The Inam proceedings are primarily concerned with the fixation of the quit-rent of the Inam lands with a view to offer to the Inamdar the enfranchisement thereof on condition of paying the quit-rent in perpetuity. The quit-rent is an annual payment to be made by the Inamdar to the Government for the release of its reversionary right in the unenfranchised Inam. To arrive at the figure of quit rent to be imposed what is usually done is to calculate, in the first instance, the revenue that the Government would have derived from the village in case the entire Inam lands were converted to raiyatwari and this is done by noting down the actual extent of the cultivated lands at the time and assessing them notionally to the appropriate rates payable thereon in comparison with the prevailing rates of assessment in neighbouring raiyatwari village or villages. For the purpose of that comparison, the nature of the soil, the sources of irrigation and the nature of the crop and another essential items of information have to be gathered and noted. Having once notionally assessed the lands with reference to the information so gathered, the quit-rent is fixed at a certain proportion of the assessment so made, the proportion varying with reference to the nature of the reversionary right of the Government as determined by various rules made in this behalf. It will thus be seen that the mention of irrigation source is one of the essential features of the entries in an Inam register, but the method and the manner by which that irrigation right is exercised, that is, whether it is by the construction of a dam or not is not ordinarily necessary; because it does not enter into the calculations regarding assessment. That the above is the normal procedure adopted in such matters can be seen from the elaborate note in Ex. 5 itself and particularly in para. 3 thereof. From the above explanation of the nature of Inam proceedings and the entries thereunder, it would be clear that the note as to the irrigation source of the wet lands of the Inam village at the time is a very cogent and relevant piece of evidence and that the non-mention of a dam is not in any way indicative of the non-existence of the right to take the water from the irrigation source by means of a dam. These Inam proceedings are referred to in *Arunachallam Chetty v. Venkatachalapathi* 43 Mad. 253 at p. 263 : AIR 1919 P. C. 82 as a great act of State by the Privy Council and the value to be attached to

such entries in the Inam register has been emphasised in various cases and it is unnecessary to elaborate this well-established position. Of course, they are not conclusive, but are strong pieces of evidence not to be lightly disregarded, excepting for solid and substantial reasons or on account of other rebutting or contrary evidence.

10. As regards the second point, namely, the right to take water from a recognised irrigation source by putting up a dam across it, the Courts below seem to have thought that the right is one which has to be substantiated by specific evidence, while, however, the correct position is that once the right of irrigation from a stream or a channel is made out, it is one of the ordinary modes of the exercise of such a right to put up a bund or a dam across it for the purpose of exercising that irrigation right. What, however, requires to be proved is not the right to put up a dam, but the nature, extent and duration of the dam so as not to interfere with the rights of the other persons lower down the stream. The proof of that will depend upon the established user in relation to the above matter. The law relating to this matter has been pointed out in *Secretary of State v. Ambalavana Pandara Sannadhi* 37 Mad. 369 (n) : A. I. R. 1914 Mad. 552. The law is stated as follows :

"It is next urged by the learned Advocate-General that the plaintiff's claim to erect a bund or dam up a river is unreasonable. The plaintiff is a riparian proprietor ; he has a natural right to use the water of the stream for irrigating the lands of his village, provided he does not thereby cause any material injury to the other riparian proprietors. What quantity of water he is entitled to take and how he is to take it for irrigating the lands must depend upon the circumstances of each case. Erecting a dam or bund across the bed of the river when it is low to raise the water to a sufficient height to divert it into an artificial channel for irrigation is one of the common methods in this Presidency of using the water of a stream by a riparian proprietor. That a dam may be erected when it is reasonably required for the use of stream water is recognised by the Judicial Committee (See *Miner v. Gilmour* 12 P. C. 131 : 7 W. R. 328 and *Debi Prashad Singh v. Joynath Singh* 24 Cal. 865 : 24 I. A. 60 P.C.)."

11. It must, however, be noted that while the right to put up a dam for the purpose of taking water from the irrigation source in a reasonable way to a reasonable extent to be measured with reference to the accustomed user is inherent in the right to get water from an irrigation source, once that is established it does not follow that there is necessarily a right to put up a particular dam like a masonry dam at a particular place. That is a matter to be established by positive evidence.

12. From the above statement of the legal position relating to the two important matters formulated at the outset, it would appear clearly that the entire appreciation of the case relating to points 2, 3 and 4 has been misconceived in so far as the physical features, circumstances and the inconveniences arising therefrom have been treated as almost the sole determining factors instead of

being treated as considerations which must be taken and read along with the other important circumstances of the case as pointed out above. In that view, therefore, I should have been inclined to set aside the findings of both the Courts below on points 2, 3 and 4 and remand the case for fresh disposal. A consideration of point no. 1, however, renders this course futile and makes it unnecessary for me to adopt that course.

13. On the question raised in point 1 and covered by issues 9 & 10 in the suit, whether notice u/s 80, Civil P. C., given to the Government is sufficient in this case and whether the suit is maintainable, if it is found not sufficient and valid, both the Courts below have held against the plaintiffs and have said that the suit is not maintainable on that ground, Admittedly, the suit notice given in this case, has been given not by the present plaintiffs, but by their father, who died prior to the filing of the suit. That such a notice cannot be availed of by the present plaintiffs has been laid down in various cases and it is enough to refer to *Bachchu Singh v. Secy. of State*, 25 ALL. 187 and *Mahadev Dattatraya Rajarshi Vs. Secretary of State for India*, .

14. No argument has been addressed to me why these decisions should not be followed. But an attempt has been made to get over the effect of the decisions by suggesting that the Government was not a necessary party to this case and that the appellants would be prepared to give up the Government and to confine the suit to reliefs against the other defendants. The case in *Kanailal Karmakar Vs. Governor General for India in Council and Others*, has been cited to show that the defect is one relating to the form of the plaint and that the result of that defect is for the Court to proceed under Orders 7 and 11, Civil P. C., and that in such a contingency, it will be open to the plaintiffs to give up the Government as an unnecessary party. Reference may also be made in this connection to *Secy. of State Vs. Amarnath and Others*, where it was found that the Secretary of State was only a pro forma party and that no notice was at all served on him but the course adopted was merely to expunge the name of the Secretary of State from the action. It is, therefore, argued that the Courts below were wrong in the view that they have taken that the suit is not at all maintainable and that it is open to the plaintiffs to give up the Government and that they are prepared to do so at this stage and to confine their relief to other defendants.

15. Apart, however, from the fact that this suggestion to give up the Government from the array of defendants comes at a very later stage in second appeal, I have come to the conclusion that this is not a case to which the cases cited above apply and that in this case, on the pleadings in the plaint and on the evidence on record, the Government cannot be dismissed out of the suit offhand as being an unnecessary party. The plaint in categorical terms mentions the cause of action which involves a Government officer, namely, the Revenue Inspector, In plaint para. 1, an assertion is made that the Kochianala

"flowing as it does through the whole Inam Villages on both sides of the channel, does not belong to nor come under the purview of the Madras Irrigation Cess Act

and the Government have no manner of right to levy cess or otherwise restrict or regulate the water supply from the said channel."

and the relief in the plaint is, in terms, asked as against all the defendants including the Government. A specific issue has also been raised, namely, issue 8 relating to the question of the rights of the Government in the channel. As appears from the evidence of one of the plaintiffs witnesses, namely, p. w. 3, the Nala, starts in Government villages and goes to Government villages, passing through the two suit villages Gopinathpur and Agulpada. In these circumstances, it is not possible to say without further investigation that any relief given in favour of the plaintiffs as against the other defendants in the suit would not affect the interests of the Government. I cannot therefore accede to the suggestion that the Government may be simply dismissed out of the suit and the suit is to be treated as one against the other four defendants and that the maintainability of the suit is to be upheld on that footing. The case in Noor Mohammad Vs. Abdul Fateh and Others, show that in such circumstances the plaint as a whole is to be rejected and not merely in part on the authority of the Privy Council in Bhagchand Dagadusa v. Secy. of State 51 Bom 725 : A. I. R. 1927 P. A. 176.

16. It appears to me therefore that the proper course to adopt in the circumstances of this case is to set aside all the findings of the Courts below against the plaintiffs and to reject the plaint as a whole and to dismiss the suit on the ground that the suit is not maintainable by virtue of the provisions of Section 80, Civil P. C. I may add that this course is also the one most in the interest of all the parties concerned. As stated at the outset, the plaintiffs are not the persons solely interested in the village of Agulpada and in the irrigation rights to the wet lands therein. The Rajah of Dharakote is entitled to the major interest therein. Irrespective of any question whether the Rajah of Dharakote was or was not a necessary party to the suit of present nature it is obviously undesirable that the rights relating to the use of Kochianala as the irrigation source for the wet lands of Agulpada should be decided in the absence of the Rajah of Dharkote and that the defendants should be exposed to the possibility of a fresh suit at his instance re-agitating the same matter.

17. For the reasons above stated, I set aside the findings of the Courts below on issues other than issues 9 and 10 and affirm the dismissal of the plaintiffs' suit on the ground of proper notice.

18. The appeal is accordingly dismissed with costs.