
(1921) 11 PAT CK 0009
In the Patna High Court

Henry Hill and Co. (Turkaulia) Ltd. and Another APPELLANT
Vs
Sheoraj Rai and Others RESPONDENT

Date of Decision : 25-11-1921

Acts Referred:

Easements Act, 1882 — Section 7

Citation : AIR 1922 Patna 9 : 64 Ind. Cas. 346

Hon'ble Judges : Ross, J;B.K. Mullick, J

Bench : Division Bench

Judgement

B.K. Mullick, J.—This second appeal arises out of a claim to a Jalkar or fishery in Mauza Madhuban within the Zemindari of the Bettiah Raj The 1st party plaintiffs, Messrs. Henry Hill and Company, are proprietors of an indigo factory trading under the name of Turkaulia Limited. They hold Mauza Madhuban under the Bettiah Raj by virtue of a Mukarrari Istimrari lease. The 2nd party plaintiff is a thikadar under the 1st party plaintiffs in respect of the Jalkar rights in Mauza Madhuban for the year 1325 F.S. at an annual rental of Rs. 516. The 1st and 2nd party defendants are occupancy raiyats and the 3rd party defendant is a Britdar or Lakheraj tenure-holder, in respect of certain plots of land in the Mouza which become heavily flooded during the rains every year. The 2nd party plaintiff claims the right to fish in the above plots and the defendants having resisted the erection by him of Baris and Chilwans, which appear to be machinery for catching fish, the plaintiffs seek the following reliefs:

- (1) For a declaration that they have by right of easement, pressription and custom the right to put up Baris and Chilwans;
- (2) For a permanent injunction restraining the defendants from interfering with them ;
- (3) For damages.

2. The Munsif and the First Appellate Court dismissed the suit. There was then a second appeal which was heard by a Single Judge of this Court, but before him

also the plaintiffs were unsuccessful. They have now preferred the present Letters Patent Appeal.

3. With regard to the question whether the right of fishery in dispute belong to the plaintiffs or to the defendants, the Munsif held that the right belonged to the tenants. On the other hand, the District Judge on appeal accepted the proposition that a right of fishery in an estate belongs to the proprietor just as the minerals below the surface belong to him and, that when land is settled with a raiyat for the purposes of cultivation, an occupancy right which may be acquired by the raiyat does not include a right of fishery over the land settled, unless such right is expressly included in the settlement." He held that the Bettiah Raj were the proprietors of the fishery and that it had not been shown that they had transferred their right to the plaintiffs.

4. The learned Judge of this Court on second appeal disagreed with the learned District Judge on the question of title, but he agreed that the District Judge's other two grounds for dismissing the suit were Bound, that is to say, firstly, that the plaintiffs were not entitled to get any declaration in the absence of the superior landlord, the Bettiah Raj, and secondly, that they had failed to prove their possession and enjoyment of the fishery right within the statutory period of limitation.

5. With regard to the Brit lands, the learned Judge of this Court was of opinion that the plaint did not disclose any cause of action as against the Britdar, and that on that ground also the suit against the 3rd party defendant had been rightly dismissed.

6. In the course of his argument before the learned Judge Mr. Manuk, the learned Counsel for the plaintiffs-appellants, asked for leave to withdraw the appeal with liberty to bring a fresh suit under Order XXIII, Rule 1 of the Code of Civil Procedure, but the learned Judge refused that prayer.

7. In my opinion the right of fishery in this case clearly belongs to the tenants. The ownership of free natural elements, such as air and water, and of all wild animals living therein is obtained by occupancy or appropriation. It is a right incidental to the ownership of the land upon which the air or the water lies, just as much as is the right to take the silt deposited by rivers or the lava thrown up by a volcano or the rain or snow falling from the sky. The question is, what are the respective rights of the superior landlord represented in this case by his lessee, the Mukarraridar, on the one hand and the defendants, the persons in physical possession of the land, on the other. The analogy drawn from sub soil rights is of no avail, for here the question is, whether the right to cultivate the surface carries with it all the rights arising out of and incidental to the ownership of the surface.

8. Now Section 23 of the Bengal Tenancy Act declare that an occupancy raiyat may use the land in any manner which does not materially impair the land or render it unfit for the purposes of the tenancy but shall not be entitled to out

down trees in contravention of any local custom.

9. Section 90 enacts that a landlord can enter an occupancy holding under certain conditions for the purpose of measuring it, and implies that he has no authority otherwise to enter without the raiyat's permission. The Act secures the raiyat a limited ownership in the soil and unless the landlord expressly reserves his right to appropriate the water and the fish which come upon his land during the periods of inundation, it seems to me that the raiyat's right to appropriate the same cannot be restricted. Such a restriction might be wholly inconsistent with the purpose of the tenancy, if it should affect the raiyat's right to drain the land for the purposes of agriculture, and the illustrations to Section 7 of the Indian Easements Act, which though not applicable to this Province is based on general principles, must, in my opinion, contemplate that where the land is tenanted, the tenant has the rights of the owner in respect of water passing or percolating over or through his land.

10. That the raiyat has substantial rights other than a mere right to cultivate is further clear from Act XI of 1825, which declares that the raiyat and not the landlord is entitled to alluvial accretions, and as has been observed in *Lopez v. Muddun Mohun Thakoor* 13 M.I.A. 467 : 14 W.R.P.C. 11 : 5 B.L.R. 521 : 2 Suth. P.C.J. 336 : 2 Sar. P.C.J. 594 : 20 E.R. 625, a deposit of silt directly upon the submerged site is at least as much an accretion and an annexation vertically to the site as it would be an accretion and annexation longitudinally to the site if it had formed the frontage to a river.

11. The position of the Britdar, who is a tenure-holder, is even stronger; he enjoys all the rights of his lessor and as between himself and the plaintiffs there can be no doubt that in the absence of any express reservations he is entitled both to the water and to the fish.

12. English cases on this point are not perhaps of much assistance, but *Jones v. Davies* (1902) 86 L.T. 447 : 66 J.P. 439 : 20 Cox C.C. 184 : 18 T.L.R. 867 is authority for the proposition that the right of fishery is part of the general right to the soil and water unless the lessor specially reserves it; and Lord Alverstone, C.J., deals with the proposition as follows:-- "I think the law on the point is correctly stated in Paterson's Fishery Laws in the passage that has been read, namely, that the right of fishery goes to the tenant under the lease and for the very good reason given by Paterson that the lessor could not without express power being reserved some on the lands or the banks of the stream to exercise the rights of fishing."

13. I think this is the law in India also. A proprietor can lease out a fishery without giving any rights to the soil or the bed upon which the water lies, and he can then let out the land subject to the rights of the lessee of the fishery. If, on the other hand, he lets out the land first, he cannot claim the right to the water and fish that come upon the land afterwards, A raiyat taking a lease of a fishery only cannot acquire an occupancy right therein, but if he takes a lease of a

holding of which parts are under water, then his right to the acquisition of occupancy rights in the entire holding, inclusive of the portion which forms the bed of the water, cannot be defeated. The landlord, of course, may reserve the right of fishery when letting out the land, but such a reservation is, strictly speaking, a re-grant of the right by the tenant to the landlord.

14. As to the Indian authorities cited in the Courts below, it is admitted by the learned Counsel for the appellants that none of them bear directly upon the point before us except the decision of Mr. Justice Sultan Ahmed in *Surendra Mohan Sinha V. Sarba Lal* 67 Ind. Cas. 69, where the learned Judge sitting as a Single Judge observes that the settlement of land carries with it the right to fish when there is water upon it. The present case is, therefore, chiefly one of first impression, but the result at which I have arrived is that there being no proof of any re-grant by the tenants to the lessors of the right of fishery, the plaintiffs must fail unless they can show that they have acquired that right either by adverse possession or by custom.

15. Now in regard to adverse possession the learned District Judge has not expressly determined the period for which adverse possession must be shown. In our opinion the right of fishery in this case is an interest in land and the period of limitation is 12 years under Article 144 of Schedule I of the Indian Limitation Act. it is not necessary for the plaintiff to prove user for 20 years which is required by Section 26 of the Act. The learned District Judge seems to have been of opinion that the question of adverse possession as against the raiyat and Britdar defendants did not arise, because the ownership of the fishery being still in the Bettiah Raj, the plaintiffs could not establish any title by adverse possession without making the Raj a party to the suit. In our opinion this was an erroneous view, and the plaintiffs were entitled to show that they had acquired a valid title as against the tenants irrespective of the title of the superior landlord. Moreover it is expressly stated in the plaint that the plaintiffs are in the enjoyment of the entire Zamindari right appertaining to Mauza Madhuban and there is no allegation in the written statements that the right of fishery was reserved by the landlord. In these circumstances it is not clear why the Bettiah Raj is a necessary party to this suit. In my opinion the lease of the entire Zamindari right carries with it the fishery right as well.

16. Then with regard to the question of custom, the learned District Judge finds that the oral evidence adduced by the plaintiffs is insufficient, but that the books and papers kept by the factory show that the fishery was regularly let out to the thikadars. The learned Judge, however comes to no definite finding whether the plaintiffs have proved a custom that the right to fish in the disputed area lay not with the tenants but with the superior landlord and his lessees. It is necessary for a proper trial of the case that there should be a clear and distinct finding upon this point also. Here again the learned Judge was doubtless influenced by the view that in the absence of the Bettiah Raj, the question of custom could not be raised; but as I have observed in dealing with the question of adverse

possession, that view, in my opinion, was erroneous.

17. Mr. Kulwant Sahay on behalf of the tenants urges that no case of adverse possession or acquisition of title by custom as against the tenants was made either in the Trial Court or before the learned District Judge, but, in my opinion, the point is directly covered by issues NOS. 2 and 3 and there is nothing in the pleadings to show that the plaintiff claimed to have derived his rights by adverse possession against the landlord. In my opinion the question was directly raised as between the plaintiffs and the tenants and the learned District Judge ought to have come to a finding upon it.

18. With regard to the Britdar defendant, it is true that paragraph 6 of the plaint does not allege any dispossession from plot No.15282 which comprises the Brit tenure, but in paragraph 2 the plaintiffs assert their right to fish over this plot and in paragraph 6 they assert that the Britdar defendant joined the other defendants in preventing them from fishing in plots Nos. 15285 and 15286 which comprise the holdings of these defendants. If the 3rd party defendant obstructed the plaintiffs with a view to exclude the plaintiffs from his lands also, there was a complete cause of action against him.

19. The result is that, in my opinion, the suit has been properly framed but there has been no proper trial in the First Appellate Court of two material questions, namely (1) whether the plaintiffs have acquired any right by adverse possession, and (2) whether they have acquired title by custom. The appeal will, therefore, be remanded to the District Judge for a clear finding upon the evidence already recorded as to both these points. The appeal will remain on the file of this Court and will be fixed for hearing on the 1st February 1922, by which date the findings should be returned to this Court.

20. Costs of this hearing will abide the result.

Ross, J.

21. I agree.