

(1938) 01 CAL CK 0023
In the Calcutta High Court

Jatindra Nath Mallick and Others

APPELLANT

Vs

Satya Kinkar Sain and Others

RESPONDENT

Date of Decision : 14-01-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 91

Citation : AIR 1938 Cal 366

Hon'ble Judges : B.K. Mukherjea, J

Bench : Division Bench

Judgement

B.K. Mukherjea, J.—This is an appeal preferred by some of the defendants and arises out of a suit commenced by the plaintiff for a declaration that the defendants have no right to draw water from a tank known as Manna tank for irrigating the several plots of land described in schedule (Kha) of the plaint. There was a further prayer for a permanent injunction restraining the defendants from using the water of the said tank for purposes of irrigation.

2. The plaintiff's allegations in substance are that the tank known as Manna Pukur, which is recorded as Dag No. 1212 in the settlement records was a khas tank of the landlords, and was never let out to a tenant on any previous occasion. In course of time it silted up and became almost dry. In 1333 B. S., the plaintiff took lease of the tank from the landlords in the benami of defendant 27, and in 1337 B. S. he excavated the tank and made it deeper at certain places. In 1340 B. S. the defendants took water from the said tank in the absence of the plaintiff and without his knowledge. They however expressed regret and the plaintiff did not take any further steps in the matter. But in 1341 B. S. they again took water, despite the plaintiff's objection which necessitated the institution of the present suit. The defence was that the defendants and their predecessors have been using water of the said tank from time immemorial, peacefully, continuously, uninterruptedly and as of right and had thereby acquired easement rights. The O.S. records, it is said, represented the true state of affairs and the plaintiff's story that the tank had become dry, and no rights of irrigation were

exercised in respect of the same was not true. The trial Court substantially believed the defence version, and passed a decree dismissing the main prayers of the plaintiff. In view however of his finding that the plaintiff had re-excavated some portions of the tank and made it deeper, the Munsif allowed the defendants to draw water up to a certain limit only, no rights being given over the portion which the plaintiff had re-excavated. Against this decision there was an appeal taken by the plaintiff to the lower Appellate Court. The Sub-Judge who heard the appeal, modified the decision of the Munsif on material points. The lower Appellate Court was of opinion, that from the evidence adduced on the side of the defendants, a presumption of immemorial user might be made, which would give rise to a presumption of lost grant. The Court held however that with regard to the plots, which were situated to the north and west of a pathway described in C. S. Dags No. 431 and 1124, this presumption would not arise, as these plots could not be irrigated from Manna tank without cutting a channel across the public pathway, which would amount to a public nuisance. In this view of the case, the Court of Appeal below gave the plaintiff a decree with regard to all the plots of land which were situated to the west of Dag No. 431, and to the north and west of Dag No. 1124. With regard to the remaining plots, between which and the tank in suit, the pathway did not intervene, the defendants were given a declaration of their irrigation rights, but these rights were to be exercised without digging any pit or channel, by the process which was known as melan in the locality.

3. It is against this decision that the present second appeal has been preferred. Mr. Das who appears in support of the appeal has assailed the propriety of the decision of the lower Appellate Court substantially on three grounds. He does not dispute the proposition of law, that no prescriptive right could be acquired to commit a public nuisance; but what he says, in the first place, is that in the present case the right that is claimed by the defendants, is claimed not on the basis of prescription but on a presumption of lost grant. He has argued in the second place that when the O. S. records, have recorded irrigation rights, in respect of the plots which lie to the north and west of the pathway, it must be presumed that the grant of irrigation rights was anterior to the commencement of the pathway, and the grant of the pathway was made subject to the irrigation rights. Lastly, it is said that the pathway was not a public highway but a mere village road, and any obstruction of the same would not amount to public nuisance, and would not repel a presumption of a lost grant. The first contention of Mr. Das cannot in my opinion be of much assistance to his clients. It is true that rights could be acquired by fiction of a lost origin, where, as in the present case, they could not be acquired by prescription. But no presumption of legal origin is possible when the circumstances are such that no lawful grant could be made. As was observed by Lord Loreburn L. C. in *Harris v. Earl of Chesterfield* (1911) AC 623 the principle of lost grant is itself based on good sense. The lapse of time gradually effaces records of past transactions, and it is certainly not proper, that people should be dispossessed from the property which they and

their predecessors had been enjoying from time immemorial simply because they cannot prove as to how it originated. It is for this reason that law makes the presumption that the original acquisition is lawful, unless it is shown that the grantees could not lawfully acquire that right or the facts show that it could not be acquired in the way which the law allows.

4. Now it is an established proposition that all grants must be subject to the right of the public and even the Crown cannot make a grant entitling a person to commit a public nuisance : *Attorney General v. Burridge* (1822) 10 Price 350.) If therefore the exercise of the rights which the defendants claim amounts to an infraction of the rights of the public, no presumption of their legal origin could properly be made. Mr. Das suggests in the next place, that the O. S. records which record the defendants' rights of irrigation, in respect of all the plots in suit, including those which are beyond the pathway would raise a presumption that the rights were legitimately acquired and consequently it might be presumed that they were acquired before any pathway came into existence. The C. S. records are evidence of the state of things in existence at the time of their final publication. The records do not say that the irrigation rights were based on ancient grant or immemorial user. They were undoubtedly recognized at the time when the records were prepared but we get no indication as to how, or when they were created. In the absence of any evidence adduced by the defendants, it would be difficult to say that from the C. S. records alone, a presumption could be drawn, that there was an ancient grant in respect of the irrigation rights prior to the existence of any pathway. This contention therefore cannot be accepted.

5. The third contention of Mr. Das raises a question of some nicety. The Munsif held that the pathway recorded in Dags 431 and 1124 was a village path over which the inhabitants of this particular village only had a right of way. He points out that the settlement plot No. 431 meets plots Nos. 411 and 455 on the north, and both these plots are paddy lands, plot No. 1124 on the other hand meets plot No. 882 on the west which is another pathway running east to west. From its position in the map, the Munsif concludes that the pathway was used as a passage for cattle and field-going people and there was no evidence of the Union Board asserting any right or control over it. The Sub-Judge in appeal expressed his opinion on the point as follows:

That it is a village pathway in the legal sense is also admitted. It connects at one end other village pathways and on the other a danga, which is used for pasture and across it to the fields. A glance at the map would show that it is the only outlet of the villagers to the northern and eastern fields. In my opinion a nuisance caused to the village pathway would be considered as a public nuisance, inasmuch as a village path is a public pathway though it is used generally by a section of the public.

6. This involves, to my mind a little confusion of ideas and the learned Sub-Judge had not clearly appreciated the distinction between a public highway and a village path. A village path comes under the description of the second class of

rights intermediate between public and private rights as pointed out in the well known case in *Chuni Lal v. Ram Kissen* (1892) 15 Cal 460. "These rights" as observed by Wilson J.,

belong to certain class of persons or certain portions of the public such as the free men of a city, the tenants of a manor, or the inhabitants of a parish or village, and have their origin ordinarily in custom. A public highway, on the other hand, exists for the benefit of all the King's subjects, and its source ordinarily is dedication.

7. This distinction, which has not infrequently been overlooked was emphasized by this Court in *Kali Charan v. Earn Kumar Sardar* 17 CWN 73 and *Harish Chandra Saha Vs. Harish Chandra Chuckerbutty and Others*, . An obstruction of a village pathway does not come within Section 91, Civil P.C. and if a person institutes a suit for establishing such rights no special damage need be proved: *Harihar Das and Others Vs. Chandra Kumar Guha and Others*, and *Harish Chandra Saha Vs. Pran Nath Chakraverty and Others*, affirmed in Letters Patent appeal in *Harish Chandra Saha Vs. Harish Chandra Chuckerbutty and Others*, . As the finding of the lower Appellate Court is vitiated by misdirection on a point of law, it is necessary, in my opinion, that the case should go back for a proper investigation of this point and this point only. It is not enough to say that there could be a public highway having no public place as any of its terminus. The entire evidence on the record relating to the position of the pathway, the purposes for which it is used and the people who use it, together with the entries in the Cadastral Survey records should be considered by the lower Appellate Court and a proper conclusion arrived at, as to whether the pathway in question is a village pathway or public highway. If it is found to be a public pathway, the previous decision of the lower Appellate Court would stand. If, on the other hand, it is found to be a village path-way, the rights to which are vested in the villagers only, no question of injury to public rights would arise. The Court would then consider as to whether having regard to this and other admitted facts of this case, a title by lost grant that is set out by the defendants was, to quote the language of the Judicial Committee, "in its nature practicable and reasonably capable of being presumed without doing violence to the probabilities of the case": vide AIR 1930 103 (Privy Council) . In any view of the case, the finding of the lower Appellate Court that the defendants could take water only by the melan process would stand. The judgment and the decree of the lower Appellate Court so far as they relate to the plots north and west of the pathway are accordingly set aside and the appeal sent back for re-hearing on the point mentioned above. No order as to costs in this appeal. Further costs to abide the result.