
(1929) 05 PAT CK 0013
In the Patna High Court

Kartic Manjhi and Another

APPELLANT

Vs

Banamali Mukerji and Others

RESPONDENT

Date of Decision : 29-05-1929

Acts Referred:

Prescription Act, 1832 — Section 2

Citation : AIR 1930 Patna 7 : 124 Ind. Cas. 385

Hon'ble Judges : Fazi Ali, J;Chatterji, J

Bench : Division Bench

Judgement

Chatterji, J.—In village Hendaljuri there is a bandh (tank) called Buriband bearing plot No, 704, situated in a chawk called Bundgara chawk. The lands of the parties are situated to the west of this bandh separated by an embankment running north to south. There are three different outlets for water to pass from the tank through the embankment to the lands towards the west. They are described in the plaint "Una" "Cha" and "Chha" The northern-most outlet is called "Una" and is at the highest level. South thereof is the outlet "Cha" and further south is the last outlet "Chha" which is situated at about the southern end of the embankment and has the lowest level.

2. The case for the plaintiff is that every year during the rains when the bandh, is filled up with water the excess water flows out through the outlet "Una" and passes on to the lands to the west, while every year from the month of Jeth up to the month of Kartik the plaintiff irrigates his lands from the outlet "Cha" through a nullah to his lands. According to him the outlet "Chha" is not opened so long as water comes out through the outlet "Cha" but when water no longer goes out through the outlet "Cha" the plaintiff lets out water of Buribandh through the said outlet by removing earth and takes it towards the west over, his lands. It is asserted that neither the defendants nor any one else ever had or has any right to open the outlet "Cha" or to let out water of the said bandh, and that the plaintiff has been taking the water of the bandh in the manner described from the time of his father for over 40 years openly, as of right without any

dispute or objection and to the knowledge of the defendants and the public, and it is claimed that the plaintiff has acquired a permanent absolute right of getting the water of the aforesaid bandh for his lands in the manner stated above. It is, however, alleged that in September 1923, when the plaintiff was taking water into his lands through the outlet "Cha" and when the water was flowing out through it the principal defendants Nos. 1 and 2 unjustly and forcibly removed earth from the outlet "Chha" and let out water of the bandh through it. This action prevented the flow of water into particular lands of the plaintiff with the result that the yield became less than usual. On these allegations the plaintiff asks for a declaration that he has a right to take water from the bandh by the outlet "Cha" and that defendants Nos. 1 and 2 have no right to open the outlet "Chha" so long as water would flow through it and also the issue of a permanent injunction restraining the said defendants from opening the outlet "Chha" or letting out water through it so long as water flows through the outlet "Cha" A sum of Bs. 45 and odd is also claimed, as compensation for loss of yield.

3. The learned Munsif dismissed the suit. According to the judgment of the trial Court the plaintiff appears to have based his claim at the time of trial on a mutual agreement said to have taken place some 25 years ago. He, however, came to the conclusion that the tank water was used by both the parties but there was no satisfactory evidence that it was used by the plaintiff as a matter of right and rather that plaintiff used the tank water with the consent of the principal defendants Nos. 1 and 2. The learned Subordinate Judge allowed the appeal and passed a decree for Rs. 27 and odd for damages on a finding that the plaintiff had proved his right to take water in the manner alleged in the plaint.

4. In discussing the question of consent, he refers to the evidence of the plaintiff's witnesses that they saw the Mohana in question cut with mutual consent, but this he takes to mean that the Mohanas were cut to suit the convenience of both parties. His finding is expressed as follows:

The lands of both the parties are irrigated by the openings and it is natural that the Mohanas are opened according to the convenience of both parties, and Mohanas are opened by Mutual consent, that does not mean that the plaintiff gets his supply of water by lease and license.

5. He refers to the documents of title Exs. 1 to 3 proved on behalf of the plaintiff and showing the acquisition of 5-annaB ehare by auction-purchase, deed of sale and lease and states that pro forma defendants NOP. 3 and 5 owned 5 annas share as plaintiff's co-sharers in the said Chawk while the balance is owned by the principal defendants Nos. 1 and 2 who were the original mukarraridars of it. In deciding whether the plaintiff has the right to take water from the tank in the manner alleged in the plaint he makes the following observations:

It was contended on behalf of the respondents that in Ex. 2 the bandh is expressly reserved by the owners; so it must be inferred that the plaintiff did not get the right to irrigate the lands purchased and it is also pointed out to me that

the plaintiff's patta Ex 3 does not expressly give the plaintiff's right to irrigate. As I have shown above the lands enjoyed irrigation facilities at the time the plaintiff purchased and took settlement respectively. The irrigation facilities were an integral part of the incident of the land, plaintiff obviously took settlement or purchased with all the advantages that their vendors and lessors possessed. The plaintiff has besides given evidence of immemorial user and in the circumstances of the case an implied grant can be safely presumed. In fact the defendant admits that the plaintiff's lands in Bundgora chawk are irrigated but he wants to say that this is done by the water that passes through the "Una Mohana." I have no doubt that the "cha" and "chha" Mohana irrigates the kha and gha schedule lands of plaintiff. I find that the plaintiff has proved his right to take water in the manner alleged in the plaint.

6. Thus the decision, as I understand it, rests on: (1) the defendant's admission that the plaintiff's lands in Bandh Gora Chawk are irrigated from the tank, (2) the presumption of the implied grant from the evidence of immemorial user given by the plaintiff, and (3) the right to enjoy irrigation facilities on the severance of a tenement.

7. The defendant's admission relied on by the learned Subordinate Judge is that the surplus water of the tank passes through the channel to mouth of the embankment (evidently the outlet "Una") and this is used for irrigation purposes. He further states in close-examination that before he sold a share to the plaintiff and the pro forma defendants he used to irrigate these lands with the water of the tank by taking it through the northern channel, that is, the outlet "Una." He does not admit the use of water through "Cha" and "Chha" outlets in the manner alleged in the plaint. The decision, therefore, turns on the question as to whether a grant can be implied from immemorial user or presumed in law from the severance of tenement. It is urged by the learned Advocate on behalf of the defendants-appellants that the plaintiff cannot successfully claim a right of easement as he claims title to the tank in respect of the waters of which the right of easement is claimed. On this part of the case reference is made to the following observation in the judgment of the Munsif:

The plaintiff's evidence indicates that he poses to be the sole possessor of the tank and none can take water through the "Chha" outlet without his permission.

8. The Munsif further states that the plaintiff bases his right on the mukarari interest in the village and also that the plaintiff and his son challenged the Record of Rights (in which his interest in the tank had not been recorded) by saying that the said interest had not been recorded in it by mistake. If a person claims a right of irrigation by virtue of ownership to the tank he cannot per se claim it as an easement, but an alternative claim of easement and ownership is maintainable: *Narendra Nath Baruri V. Abhoy Charan Chattopadhyaya* 34 C. 51 : 4 C.L.J. 437 : 11 C.W.N. 20 : 1 M.L.J. 364 (F.B.). As stated by the Madras High Court in the Full Bench case of *(Pannala) Subba Rao Vs. (Parupudi) Lakshmana Rao and Another*, a man is not finally precluded from claiming the benefit of an

easement merely because in the course of legal proceedings he made an unfounded claim to be the owner of the servant tenement, however strong evidence of such a claim might be against him. While the mere putting forward of a wider claim in legal proceedings is not conclusive against a right of easement, yet the question *quo animo egerit*, to what purported character are the acts of user to be described is one which the Court must answer. The question in each case is one of fact as to whether the acts of user are referable to a purported character of owner or to the claim to an easement. Even in the case of an enjoyment from the time immemorial it would be equally necessary for the plaintiff to prove a user as of right as an easement as distinguished from a right of ownership. *Par Sargent, C.J., in Chunilal Fulchand v. Mangadas Govardhan Das* 16 B. 592. This aspect of the case has not been considered by the lower Appellate Court. On question of fact I should observe that the decision in *Chuni Lal's case* 16 B. 592 in so far as it tends to lay down that a claim to a right of easement cannot be established if a right founded on ownership is negatived, was rightly questioned by the Calcutta High Court in *Surendra Nath Singh v. Giridhari Singh* 62 Ind. Cas. 633 and by the Madras High Court in *Konda Reddi v. Ramaswami* 17 Ind. Cas. 112 : 38 M. 1 : 6 L.W. 564. The mere claim of the higher right of ownership does not prevent a person from acquiring the lesser right of easement provided he could show that he asserted certain rights over the servant tenement for the benefit of the dominant tenant belonging to him. The right of a plaintiff would depend upon the actual circumstances established by evidence and not upon an unfounded assertion of a claim.

9. It is next urged on behalf of the appellant that the plaintiff claims a right of tenancy and as such he can acquire no right of easement as against the landlord or as against another tenant under the same; landlord. Reference is made in this connexion to the case of *Kilgour v. Gaddes* (1904) 1 K.B. 457 : 73 L.J.K.B. 233 : 52 W.R. 438 : 90 L.T. 604 : 20 T.L.R. 240. This case lays down that an easement such as a right of way, cannot u/s 2, Prescription Act, 1832, be acquired by a tenant by user over land occupied by another tenant under the same landlord, even if that user has existed for the period of 40 years mentioned in the section. This is based on the principle, pointed out in *Gayford v. Maffatt* (1869) 4 Ch. A. 133 by Lord Cairns, that the tenant's occupation is in the sight of the law that of, his landlord, and when the tenant goes on to the adjoining land of that landlord he cannot be said to do so as "claiming a right" in respect of the supposed dominant tenement on behalf of the free holder, the supposed servient tenement being the free holder's own land. But as enunciated in, *Tinkori Pathak Vs. Ram Gopal Pathak and Others*, although a tenant cannot acquire a prescriptive right of easement inland belonging to his lessor, he may claim a right of easement based on immemorial user. This is on the principle laid down by their Lordships of the Privy Council in *Rajrup Koer v. Abdul Hossein* 6 C. 394 : 7 I.A. 240 : 7 C.L.R. 529 : 4 S. L.R. 7 : 4 Sar. P.C.J. 199 : 3 S. P.C.J. 816 : 4 I. J. 530 (P.C.) and *Ramessur Persad Narain Singh v. Koonj Behary Battuk* 4 C. 633 : 6 I.A. 33 : 3 S. P.C.J. 856 : 3 Ind. Jur. 179 : 2 S L.R. 194 (P.C.) that when enjoyment of a right

of easement has continued uninterrupted for a long series of years, such enjoyment should be attributed to a legal origin, and the Court should presume a grant or an agreement: see also *Madhab Dass v. Jogesh Chander* 30 C. 281. A tenant can, in India, establish his right to irrigate his fields from his landlord's tank by proof of open and continuous user from time immemorial. The case of *Mani Charter Checkerbutty v. Baikuntha Nath Biswas* 29 C. 363 : 9 C.W.N. 856 relied on by the appellant is distinguishable, because that related to the claim of an acquisition of easement by prescription by a tenant in other land of the lessor.

10. It is next urged that no fiction of lost grant should be presumed in this case by reason of long user by the plaintiff or his ancestor, because the earliest document showing acquisition of land by the plaintiff's ancestor in this chawk is of the year 1890. No minimum limit of time can be laid down which would justify the inference as to immemorial user it depends on the evidence and the circumstances of each case. In *Rambhai Dabhai v. Vallabbhai Jhavtrbhai* 62 Ind. Cas. 65 : 45 B. 1027 : 23 B.L.R. 422 user over a period of 35 years was considered to be sufficient to give rise to the presumption of immemorial user, but the difficulty in the present case is that this is a second appeal and the learned Subordinate Judge has not come to a positive finding of immemorial user by the plaintiff in the specific manner claimed in the plaint. The mere fact the plaintiff or his ancestor has been user of the water of the tank is not enough because his right to take water through the outlet "Una" is not disputed. The dispute is whether he has an unfettered right to take water through "Cha" so as to disentitle the owners (namely, defendants Nos. land 2) to open out the outlet "Chha" to irrigate their own lands so long as there would be water flowing through the opening "Cha." The evidence as stated in the judgment of the trial Court as also of the Court of Appeal has been led that there was a mutual arrangement some 25 years ago. This part of evidence would also have to be considered in arriving at a decision whether a grant by immemorial user can be implied in the circumstances of the case. The case must, therefore, go back so that the case of immemorial user may be properly considered and a clear finding arrived at on a proper appreciation of the entire evidence and the circumstances of the case. The learned-Subordinate Judge as I have shown in the quotation from his judgment proceeded on the footing that the plaintiff took settlement or made the purchase with all the advantages that their, vendors and lessors possessed. There is a dispute as to the extent of the plaintiff's share in the chawk in question but it is undisputed that the plaintiff and his co-sharers (defendants Nos. 3 to 5) have purchased two-annas interest of defendants Nos. 1 and 2 under Ex. 2 and have acquired a tenancy right under Ex. 3 to the extent of two-annas interest. Thus the plaintiff has at least two-annas interest in the chawk partly by purchase and partly by lease. There has thus been a severance of tenement and the question is what right the plaintiff would acquire on this severance of tenement.

11. It is argued on behalf of the appellant that no case of acquisition of a right of an easement of servient tenement was pleaded by the plaintiff in his plaint and

this case ought not to have been allowed to be raised in the Court below. It is true that this part of the case was not specifically set out in the plaint but the plaintiff filed his documents of title and when materials are placed on the record and the matter comes within the general issue No. 4 framed in the suit the learned Subordinate Judge cannot, be said to have overstepped the bounds of discretion in having allowed this part of the case to be agitated before him. But I regret to note that he has fallen into an error in applying the law on the subject. The law on the subject has been laid down by Erie, C.J., in the leading case of *Polden v. Bastard* (1866) 1 Q.B. 156 : 7 B. & S. 130 : 35 L.J.Q.B. 92 : 13 L.T. 441 : 14 W.R. 198 where he says there is a distinction between easements such as a right of way, or easements used from time to time and easements of necessity or continuous easements. The cases recognize this distinction and it is clear law that on a severance of tenements, easements used as of necessity or in their nature continuous will pass by implication of law without any words of grant, but with regard to easements which are used from time to time only they do not pass unless the owner by appropriate language shows an intention that they should pass.

12. The distinction has to be remembered between easements of necessity and easements necessary for the reasonable enjoyment of the part granted. On the grant by the owner of a tenement or part of that tenement a grant will be implied of (1) all those continuous and apparent easements which are necessary to the reasonable enjoyment of the part granted and which have been and are at the time of the grant, used by the owner of the entirety for the benefit of that part and (2) of all those easements without which the enjoyment of the part granted could not be had at all: see *Gale on Easements*, 10th Edition, page 114. The latter class are usually termed easements of necessity and the former class "quasi easements," Thus an easement of necessity means an easement without which the property retained cannot be used at all and not one merely necessary to the reasonable enjoyment of that property: *Union Lighterage Co. v. London Graving Dock Co.* (1902) 2 Ch. 557 : 71 L.J. Ch. 791 : 87 L.R. 381 : 18 T.L.T. 754 and *Morla Gangulu and Another Vs. Thata Jagannatham and Others*, . It was, therefore, the bounden duty of the Court to consider whether the right claimed is such that the plaintiff's lands could not be enjoyed at all without the same. If really the easement claimed is not one of the absolute necessity in the sense that without it the enjoyment of the part granted could not be had at all, but still, if it is a case of continuous and apparent easement necessary to the reasonable enjoyment of the part granted and which was at the time of the grant used by the owner of the entirety for the benefit of that part, the plaintiff will be entitled to succeed. But it would be necessary to come to a positive finding that the easement is continuous and apparent and was used by the owner of the entirety for the benefit of the part granted. The doctrine of implied grant does not confer any title to easements which are non-apparent and non-continuous. An apparent easement is one the existence of which is shown by some permanent sign which upon careful inspection by a competent person would be

visible to him. A non-apparent easement is one that has no such sign. A continuous easement is one whose enjoyment is or may be continued without the act of man. A discontinuous easement on the other hand is one that needs the act of man for its enjoyment.

13. It is contended on behalf of the appellant that an apparent and continuous easement is confined to a window or opening for light and air and cannot be extended to flows of water. This contention is not supported by any authority. On the other hand, the authorities point the other way. An easement of drainage falls within the definition of a continuous easement; *Chintakudy Parvatemma v. Lanka*, Sanyasi 7 Ind. Cas. 575 : 34 M. 487 : (1910) M.W.N. 571 : 8 M.L.T. 292 . The right to the flow of water along an artificial water-course is held to be an apparent and continuous easement; *Morgan v. Kirby* 2 M. 46. The existence of events (artificial channels) has been considered as an apparent, continuous and necessary easement in the case of *Morla Gangulu and Another Vs. Thata Jagannatham and Others*, . The observations of their Lordships of the Madras High Court in this connexion may be quoted with advantage:

The events might be closed for the sake of convenience after irrigating the plaintiff's fields as a temporary measure just as a drain may be closed for clearing silt or for repairs but this act being done for the proper enjoyment of the easement or in the course of the enjoyment of an easement which is continuous would not make the easement a non-continuous one.

14. The materials on the record of this case are insufficient for a correct decision as to whether this claim is one of absolute necessity or an apparent and continuous easement necessary for the benefit and enjoyment of the plaintiff's lands. In considering the second aspect it has to be determined if the plaintiff's lands used to enjoy waters at the time of the previous owner as now claimed. P.W. No. 2 Biran Manjhi deposes that he heard a talk between Mahendra Mukerji and the principal defendants for cutting the outlets about 25 years ago and states that "before that there was no outlet in the bandh," Therefore, the Court of fact has got to come to a decision whether there was an enjoyment in the manner claimed before the severance of the tenements in case the easement claimed is not one of absolute necessity.

15. In considering whether the plaintiff is entitled to a reasonable use of the water for irrigating his lands the Court will have to consider what should be considered reasonable in the circumstances of the case. P.W. No. 3 Baidyanath De deposes that "the defendant complained that the plaintiff had exhausted the tank by taking the entire water and as his fields were not irrigated he was compelled to take water through the southernmost channel. He showed me the fields that no water was there, I was impressed by my visit that the defendants had no other way for irrigating their fields and I said that the conduct of the defendants was bona fide."

16. P.W. No. 2 Biran Manjhi deposes that:

the plaintiff and the defendants used to take water from the bandh (tank) amicably.

17. P.W. No. 6 states:

I have seen the plaintiff's father defendant No. 3 as also defendants Nos. 1 and 2 in possession of the bandh. They took water through the three outlets according to their necessities.

17. Therefore the reasonableness of the claim according to the necessities of the parties might well be taken into account in considering the extent to which the plaintiff's right, if any, is to be declared. If necessary a commission may be issued for taking levels and rendering assistance to the Court on the subject.

18. It was lastly urged that the easement claimed is void as being uncertain in its extent because the quantity of water to be removed is not stated. The case of Clayton v. Corby (1893) 114 E.R. 1306 : 5 Q.B. 415 : D. & M. 449 : 8 Jur. 212 relied on by the learned Advocate for the appellant has no application to the facts of the present. That was a case of indefinite claim to take clay out of and from the plaintiff's close. Here the case is limited to water necessary for the irrigation of plaintiff's lands described in the schedule to the plaint. Thus it cannot be maintained that the claim is void for uncertainty. Be that as it may, it is abundantly clear from what has been stated above that the case has not been properly considered in the Court below and it is necessary for the ends of justice that the case should go back. If the Court of Appeal finds difficulty in determining the questions involved on the materials on the record, it will be open to it to remand the case to the trial Court for a decision with directions as to the taking of further evidence and the issue of commission for a correct appreciation of the points in controversy and the facts at issue. I may add that the case is preeminently one which should be settled amicably by the parties and if they cannot come to an agreement they may make a reference to arbitration. However, this is a matter for the parties.

19. In the result the appeal is allowed. The judgments and decrees of the Courts below are set aside and the suit remanded for decision according to law in the light of the observation made above. Costs to abide the result.

Fazl Ali, J.

20. I agree.