

(1917) 07 CAL CK 0033
In the Calcutta High Court

Kaseswar Mukerjee and Others

APPELLANT

Vs

Annoda Prosad Patra and Others

RESPONDENT

Date of Decision : 19-07-1917

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11

Citation : 41 Ind. Cas. 863

Hon'ble Judges : Walmsley, J; Greaves, J

Bench : Division Bench

Judgement

Walmsley, J.—The plaintiff No. 1 is the proprietor, and the other plaintiffs are tenants, under him, of two villages Khasnan and Bishubera. To the east of these villages lie the villages of Sonamni and Gazipur, owned by the defendants. It is conceded that the plaintiffs' villages are higher than the defendants' villages, and that the natural flow of surface water from the former is eastwards over the latter. Formerly the surface water of the four villages found an outlet into a stream called the Banspati on the east of defendants' villages, but the bed of this stream has gradually risen until it is above the level of the fields lying to the west of it. A band separates Bishubera from Gazipur and Sonamni, called the "pakband", and another band lies between the two latter villages and the stream on the east. In each of these bands is a "hana" or opening through which the water used to flow: but both hanas were closed by the defendants several years ago. The plaintiffs sued for a declaration of their right to discharge their surface water over the defendants' villages, for a direction upon defendants to open the hanas, for a permanent injunction upon the defendants restraining them from closing the hanas, and for compensation.

2. The defendants denied the assertions made by the plaintiffs, but that attitude has been given up, and they now resist the plaintiffs' claim, on the grounds that the plaintiffs had no right to discharge the water on to their lands, that any right the plaintiffs may have had has been extinguished by the defendants' right to block the water exercised for a number of years, that the plaintiffs have lost the

right to sue for the enforcement of their right, and that the silting up of the stream has so changed the natural features of the 4 villages that the plaintiffs cannot discharge their surface water eastwards without ruining the defendants' villages.

3. The Court of first instance dismissed the suit; the Appellate Court decreed it in part. On appeal to this Court, the judgment of the Appellate Court was set aside and the appeal was remanded to be re-heard.

4. The Appellate Court has again decreed the suit in part, awarding to the plaintiffs a declaration that they have a right to discharge water from their villages to the east during the dry season, but denying them the, right to keep the hanas open throughout the year.

5. Against this decree the plaintiff No. 1 preferred a second appeal, but it was dismissed under Order XLI, Rule 11. The defendants also preferred a second appeal, and in response the tenant plaintiffs Bled a memorandum of cross objection under Order XLL, Rule 22. We are now concerned with this appeal, and the cross-objection.

6. The first question for decision is whether the plaintiffs as owners and occupiers of the higher ground had the right to discharge surface water on to the contiguous lower ground. On behalf of the appellants-defendants it is urged that there cannot be any such natural right. This contention, I think, is opposed to the view which has been taken by, this Court in a number of cases, viz. *Hameedoonnissa v. Anundamoyee Dossee* W. R. Full Bench Rulings 25 *Kopil Pooree v. Manick Sahoo* 20 WR 287 . *Imam Ali v. Poresch Mundul* 8 C. 468 pc: 4 Ind. Dec. (N. S.) and *Abdul Hakim v. Gonesh Datt* 12 C 323 at p 326 : 6 Ind. Dec. (N S.) 220. With-but alluding to these cases in detail it is enough to say that they distinctly recognize the right of the owner of higher land to discharge surface water over adjacent lower land, or as it is expressed in one of the judgments, a servitude of lower lands to receive the natural drainage of adjoining lands on a higher level. English cases have been quoted, but it is unnecessary to refer to them as the view taken in this country seems so well established. The only case mentioned before us which lends any support to the defendants is a Madras case, *Mahamahopadyaya Rangachariar v. Municipal Council Kumbakonam* 29 M. 539 547 : 1 M. L. T. 333 : 16 M. L. J. 582 but the circumstances were very different and I do not think that any help can be derived from that decision.

7. In my opinion, therefore, the plaintiffs had this right. It is urged, however, that even if they once had it, they have lost it. In the first place, it is said that the defendants have acquired by prescription a right to close the hana and keep the water from coming on their land. This argument fails on the finding of the lower Court; the closing of the hana is too recent for the defendants to have acquired such a right. Secondly, it is said that the plaintiffs cannot now sue for an order directing the hana to be opened, because it was closed more than six years before the institution of the suit. To this the answer is that the closing of

the hana constitutes a recurring cause of action. Thirdly, it is said that the change in the bed of the Banspati river has made it impossible for defendants' land to receive the water without very serious loss, and, therefore, the plaintiffs' right ought to be regarded as extinguished. In this connection it is pointed out that plaintiffs speak of their right as a right to discharge their surface water on to defendants' land through the pakband hana and then through the hana in the second band into the Banspati. If that were really the right belonging to the plaintiffs, the change in the bed of the Banspati would affect it very materially. But I think too much is being made of mere words: it is quite clear that the plaintiffs claimed the right to discharge their surface water into defendants' land, and then went on to state that, as a matter of fact, such water found its way through a second hana into the Banspati. I may add that it is for this reason that I have spoken of the pakband hana in these remarks, and that I think the decree should be limited to the opening of the pakband hana. If we leave out of consideration this quibble about the phrasing of the plaint, there is no force in the argument based on the change in the Banspati. It is very unfortunate for the defendants but the burden is not enhanced by anything that the plaintiffs have done, and, therefore, the plaintiffs still have the right which they claim.

8. The arguments put forward on behalf of the defendants were not tenable, and their appeal must be dismissed with costs.

9. With regard to the objection filed by the plaintiffs it is urged that the plaintiffs' right is not curtailed because natural changes have taken place. It is certainly difficult to understand how a Court can declare that they have a right to discharge water on to the defendants' land but that they may exercise it only in the dry season. The plaintiffs have not contributed in any way to the changes which have taken place, and they are entitled to continue the exercise of their right. It is for the defendants to take such steps as may be advisable to deal with the difficulties created by the rise in the bed of the Banspati. The decree must, therefore, be modified, but as the landlord's appeal was dismissed the declaration must be limited, so as to be for the benefit of the tenants and their successors-in-interest so long only as the tenancies exist.

10. I think, therefore, that the tenant plaintiffs' cross objection should be allowed as indicated above.

11. The decree will be to this effect, that the right of the plaintiffs to discharge water from the villages of Khasnan and Bishubera through the pakband hana on to the defendants' villages Sonamni and Gazipur is declared; that so far as the plaintiffs-tenants and their successors-in-interest are concerned, this right may be exercised at all times of the year so long as their tenancies continue to exist and that the defendants be directed to open the pakband hana within fifteen days from the date of this decree, and that if they fail to do so the plaintiffs-tenants be authorized to do so, at the expense of the defendants, and to recover the cost of doing so from the defendants; and that a permanent injunction be issued upon the defendants restraining them from closing the pakband hana. The

plaintiffs-tenants will recover their costs in the cross-objection from the defendants.