

(1964) 05 OHC CK 0011
In the Orissa High Court
Case No : Second Appeal No. 309 of 1962

Khandeswar Champati and Others

APPELLANT

Vs

Gokulananda Jena and Others

RESPONDENT

Date of Decision : 08-05-1964

Acts Referred:

Easements Act, 1882 — Section 15, 18, 2, 22, 27

Citation : AIR 1965 Ori 91 : (1965) 31 CLT 177

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : R.N. Misra and R.C. Patnaik, for the Appellant; Advocate General and R.C. Ram, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, J.—Defendants 1 to 3 and 5 to 10 are the appellants. Defendant No. 4 has been expunged as he is dead. The suit has been filed against them under O, 1, Rule 8, Civil Procedure Code. Defendant 11 is the State of Orissa. Defendants 1 to 5 belong to village Luxmiprasad and defendants 6 to 10 to village Sahasapur. Plaintiffs 1 to 5 are residents of village Borigaon and plaintiffs 6 to 10 of village Betuli. Plaintiffs filed the suit representing the general public, and particularly the villagers of Borigaon and Betuli. The suit had been filed in respect of Schedules A and B of the plaint; but at the commencement of the trial, plaintiffs abandoned their case in respect of Schedule A. Plaintiffs' case with regard to Schedule B land is as follows:

Schedule B land constitutes a part of a Nala (water channel) through which water flows into the lands of the villagers of Betuli and Borigaon and several other villages. This Nala is in existence since time immemorial. When the Nala becomes dry, it also serves as a way for pedestrians and cattle. The Nala is sufficiently wide in which three or four bullock carts can simultaneously pass side by side. Plaintiffs, defendants and other villagers bring fuel, timber, paddy and other commodities by carts and other means on the Nala when it is dry and there

is no other alternate passage to serve the plaintiffs. Plaintiffs used the Nala for irrigation during rainy season and as a way during the dry season for much more than 20 years and have acquired prescriptive right of user since time immemorial.

Defendants wanted to dig a tank by including B Schedule land in its bed. With the permission of the Sub-Divisional Officer, Khurda, and the collector, Puri, defendants dug a tank including B schedule land in its bed. Plaintiffs carried the matter in appeal to the Board of Revenue but became unsuccessful. The suit is for declaration of plaintiffs' right of user of the Nala, recovery of possession and for a perpetual injunction. Damage of Rs. 1000/- was claimed against defendant 11.

2. Defendant 11 wholly supports the case of other defendants. Defendants 1 to 10 contested the suit alleging that the plaintiffs have no prescriptive or natural right to B schedule land either as a right of way or as a water passage. Various legal objections were raised contending that the suit was not maintainable being hit by Section 91, Civil Procedure Code, Section 6 of Orissa Act 1 of 1948 and Section 56 of the Specific Relief Act. It was further contended that as the disputed channel was a Government Nala, it was open to the authorities of the Revenue Department to change the location according to convenience and inasmuch as an alternate Nala with equal efficaciousness and convenience had been provided for, plaintiffs' suit is not maintainable and that there was no diminution of volume of water supplied for the purpose of irrigation. It was also averred that the plaintiffs' suit was barred by limitation.

3. Both the courts below have concurrently found that the suit is not hit by Section 91, C. P. C., Section 6 of Orissa Act 1 of 1948 and Section 56, S. R. Act and is not barred by limitation. The trial Court dismissed the claim for damages against which no appeal had been filed by the plaintiffs. The learned lower appellate Court held that the decree passed by the trial Court was capable of execution. Mr. Misra raised the identical objections in the first instance, but ultimately abandoned his argument against those findings. These questions must therefore be taken to have been conclusively decided against the defendants.

4. The learned lower appellate Court held that the plaintiffs have natural right to the water of the channel during the rainy season and customary right to use the channel as a path during the dry season when there was no water in it. Mr. Misra contested both the findings. He raised two contentions:

(i) In view of the plaintiffs' case that the channel serves as a natural passage for the general public and the plaintiffs used the passage as members of the general public, there, cannot be any customary right of user of the path even if plaintiffs' long user of the channel as a path is accepted; and

(ii) Plaintiffs have their lands at a long distance from the disputed site. They are entitled to the accustomed flow of water in the channel during the rainy season undiminished in quantity and direction. The alternative passage provided is equally efficacious and both the Courts below have decreed the suit without

recording a finding that the alternative passage is not equally efficacious and that it has affected the volume and the direction of the water to which the plaintiffs are entitled. Both the contentions require careful consideration.

5. There is no dispute that the Nala is being used as Rasta (Path) in the dry season when there is no water in the channel for a period longer than 20 years prior to the institution of the suit. It is also not disputed that a period of more than 60 years is not necessary to acquire customary right against the Government. By Section 2(b) of the Indian Easements Act, nothing contained in the Act shall be deemed to derogate from any customary or other right (not being a license) in an Immovable property which the Government, the public or any person may possess, irrespective of other Immovable property. Section 35 of the Indian Easements Act prescribing a period of more than 60 years in respect of property belonging to the Government has therefore no application to acquisition of customary rights against the Government see *Governor General in Council v. Awadhoot Balwant Rao* AIR 1946 Nag 228.

The position of law is well settled that if a right of way has been acquired from one point to another in a particular direction or according to a particular route, the servient owner cannot at his choice substitute another way between the same points by a different route which might be less convenient to the dominant owner. A right of way is limited to the part of the servient tenement over which it has actually been exercised *Dhundiraj Balkrishna v. Ramchandra Gangadhar* AIR 1922 Bom 107 and *Venkayya v. Sriramamurthy* AIR 1957 AP 975. The principle has full application in all cases of acquisition of right of way--whether by custom or by way of lost grant or by way of prescription.

The only point that requires serious consideration in this case is whether plaintiffs have acquired a right of way on the disputed portion in any manner, merely because the channel is being used as a way for over a period of more than 20 years in which a right of way is acquired. In the classic judgment in *Chunilal v. Ram Kisen Sahu* ILR 15 Cal 460 (FB), Mr. Justice Wilson analysed the principle thus:

"It may be useful to premise that by the common law of England there are three distinct classes of rights of way and other similar rights, First, there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, tenants of a manor, or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of all the Queen's subjects; and the source of those is ordinarily dedication.

It is unnecessary to enquire whether the mode of acquiring such of those classes of rights is necessarily the same in all cases in England and in India. But it is, I

think, important to remember that these three classes of rights exist in the one country as well as in the other."

This decision still stands as good law.

In AIR 1950 56 (Privy Council) their Lordships laid down that a customary right can exist in England only to inhabitants of a district and it cannot be claimed in respect of public at large. In that very case, their Lordships also observed that dedication is only known to English Law as something equivalent to an irrevocable license granted by the owner of soil to the use of the public. Dedication of a piece of land to a limited section of the public, such as, inhabitants of a village, is a claim unknown in law, and evidence limited to such special user would not justify a finding of dedication. This decision was approved in *Raja Braja Sundar Deb Vs. Moni Behara and Others*, .

Tested by the aforesaid principles, the finding of the learned Judge that the plaintiffs have customary right of way is on the face of it untenable, As I have already said, with reference to para 8 of the plaint, plaintiffs do not claim the right of way exclusively to themselves but claim it as members of the general public. Such a right can be acquired only by dedication. The acquisition of right of way by dedication was never pleaded and there is no finding of any of the courts below that dedication has been established. The finding that plaintiffs have a right of way on the basis of custom cannot therefore be supported.

The next point for consideration is whether to remand the suit on tin's ground or to dismiss it so far as the right of way is concerned as the plaintiffs never advanced a case of dedication in the plaint itself. After having given my anxious consideration to the matter, I am of opinion that the case must go back on remand to the lower appellate Court to determine on evidence whether a case of dedication has been made out. In this regard, as to Low assessment of evidence is to be done *Harisadhan De and Others Vs. Radhika Prosad Pandit and Others*, is instructive. The learned lower appellate Court would not permit fresh evidence and must come to a decision on the materials on record if the plaintiffs have established a right of way on proof of dedication. If the plaintiffs fail to establish such a case, the suit must be dismissed with regard to the right of way despite long user. In certain circumstances of long user, dedication may be inferred; but one test, which is essential and cannot be ignored, is that the user must be as of right. If the plaintiffs succeed in establishing a case of dedication, their suit is bound to be decreed as there cannot be alteration of the way to which plaintiffs have acquired a right.

6. It is now necessary to examine how Ear plaintiffs' right to irrigate their lands through the water of the channel has been affected by the inclusion of plot No. 96 in the tank and provision of an alternate channel through plot No. 95. Mr. Misra contended that as the channel belongs to the Government, plaintiffs can have no objection to the diversion of the channel effected by defendants. The contention is not sound. In AIR 1932 46 (Privy Council) their Lordships laid down

that the river belongs to such person or persons as have the ownership of the water for the time being at the place at which it is taken. The river only belongs to the Government when the solum (ground) of the stream belongs to the Government, and this happens either when the Government is proprietor of the lands abutting on the river on both sides or when the river is tidal and navigable. Indisputably plaintiffs have lands abutting the channel in their village and the Government has no land and that the channel is not tidal or navigable. It dries up during summer. In view of this position of law. Mr. Misra accepted the position that plaintiffs have the natural right to take water from the channel. It is well settled that the right of riparian owner to the use of the stream does not depend upon the ownership of the soil of the stream.

The right of riparian owner to take water is first of all for domestic use and then for other uses connected with the lands of which irrigation of the lands which form the property is one. There is, however, a difference in degree between those primary and secondary rights. In the aforesaid decision, their Lordships quoted with approval the following observations in *Mcartney v. Londondeny and Lough Swilly Rly. Co.* 1904 AC 301:

"In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary, but permissible, the limit of which has never been accurately defined and probably is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."

The aforesaid observations with reference to the return of the water were made while their Lordships were speaking of a diversion of the whole stream. This right of the lower riparian owner is a natural right and not an easement.

Mr. Ram places reliance on *Raja of Venkatagiri v. Raja Muddukrishna* ILR 28 Mad 15 in support of the contention that even though no greater quantity of water might eventually be carried into the plaintiffs' channel than it hitherto run into it, the new channel effected a material alteration in the mode of passage of the water in the defendants' lands into those of the plaintiffs, and that such a change the plaintiffs were entitled to object to. The facts of the Madras case do not (sic) apply to the present case. It was conversion of a collection of water which formerly flowed from a large tract of land at different points into a definite channel and might lead to consequences different from those which had been produced in the previous state of things.

Plaintiffs have no land abutting the channel at the different site. They have their lands abutting the channel a few miles down below and are only entitled to an undiminished flow of water in the same quantity and direction at the very place

where they exercise their right of irrigation in respect of lands abutting the channel. In course of argument, the following illustration was put to Mr. Ram:

The residents of a particular village A have lands on either side of a stream or river at a distance of 50 miles from the village B, the residents of which have riparian rights in respect of their lands abutting on the stream or river down below. The villagers of A divert the entire course of the stream on their own lands but allow the flow of water undiminished in volume and direction so as not to affect the riparian rights of the villagers of B.

The question is can the villagers of B object to such diversion?

Mr. Ram failed to cite a single decision in support of the contention that the villagers of B can raise a valid objection to the diversion. On the contrary, the principle seems to be well settled that the rights of a riparian proprietor, with respect to a stream are limited only by those of persons in a similar or analogous position with himself. Thus, where the same person is proprietor of the ground on both sides of a non-navigable stream he can change a channel as he pleases, provided he restores the water to the old channel before it leaves his ground and provided that it flows out of his ground into the lands below as it was wont to do, neither increased nor diminished in quantity, quality or direction, *Orr Ewing v. Colquhoun* (1877) 2 AC 839

In this case, at the disputed site, all the lands belong to defendant 11 (State of Orissa) and the villagers of Lakshmiprasad and Sahaspur, who have been sued under Order 1, Rule 8 C. P. C. and not to the plaintiffs. Defendants therefore can divert the channel at the disputed site provided they do not interfere with the riparian rights of the plaintiffs. In this view of the matter, it was imperative on the part of the Courts below to record a positive finding as to whether the alternative channel provided had affected the riparian rights of the plaintiffs. In para 9 of the judgment, the lower appellate Court records its finding as follows:

The learned Munsif after perusal of the evidence has come to a finding that the new "Nala" which has been excavated in line of the old "Nala" is not an equal substitution but a mere apology. I have also perused the evidence and I find no sufficient and satisfactory evidence to hold that the new "Nala" is equally effective as the old Nala. The plaintiffs have natural right to the accustomed flow of water through the "Nala."

In order that a finding of fact would be binding in second appeal, the Courts below ought to discuss the evidence fully in their judgments and should not simply say that they had perused the evidence and were satisfied about a particular conclusion. Mr. Misra prepared a paper book of the entire evidence and cursorily took me through the evidence. I am satisfied that on the question as to whether the alternate channel is equally efficacious and does not affect the riparian rights of the plaintiffs in allowing the flow of the water to proceed undiminished in volume and direction, there is abundant evidence. P. Ws. 1 to 8 and D. Ws. 1 to 10 have deposed on this point. My attention was also drawn to

certain admission in the evidence of P. W. 4. As this Court in second appeal is not a Court of fact, I do not propose to go through the evidence. It is sufficient to say that both the Courts below exercised their jurisdiction with material irregularity and acted contrary to law in merely saying without discussion of evidence that the alternate "nala" affects or infures plaintiffs" riparian rights.

It may be noted that plot No. 95 is a Gochar plot, and its exchange was sanctioned by the Government as mentioned in the written statement. In the plaint, no case was made out that the lands on which the alternate channel was excavated did not belong to the villagers of Lakhmiprasad and Sahaspur and the Government so as to constitute them as trespassers in respect of the lands on which the new channel was excavated.

To close up the discussion, defendants have right to change the direction of the stream through the newly excavated channel, provided the riparian rights of the plaintiffs down below at a point where they appropriate the water of the channel for irrigation is not affected by diminution of the flow of water in quantity and direction. The learned lower appellate Court must examine on the materials on record whether the alternate passage is equally efficacious. If it comes to the conclusion that by the excavation of the alternate channel, plaintiffs" riparian rights have not been affected, plaintiffs" suit is liable to be dismissed. If, on the other hand, it comes to the conclusion that the plaintiffs" riparian rights have been affected by the amalgamation of plot No. 96 in the tank and excavation of an alternate channel is not equally efficacious, plaintiffs are entitled to a decree.

7. As a result of the aforesaid analysis the case is remanded to the lower appellate Court on both the points. He must dispose of the case on these two questions only by recording clear findings as directed. If the learned lower appellate Court comes to the conclusion that the plaintiffs have acquired a right of way by dedication, the suit is bound to succeed even if the finding be that the alternate channel does not affect the riparian rights of the plaintiffs. If the plaintiffs fail to establish the right of way, but yet succeeded in proving that their riparian rights have been affected by the diversion and excavation of an alternate channel, their suit is bound to succeed. If, however, plaintiffs fail to establish right of way, and the Court comes to the conclusion that the alternate passage is equally efficacious and does not affect the riparian rights of the plaintiffs, plaintiffs" suit is liable to be dismissed.

8. In the result, the appeal is allowed, the judgment of the learned lower appellate Court is set aside and the case is remanded to it for disposal in accordance with law and the observations made above. Costs to abide the results.