

(1981) 09 AHC CK 0036
In the Allahabad High Court
Case No : Second Appeal No. 150 of 1974

Maheshwari Prasad and Others

APPELLANT

Vs

Munni Lal and Others

RESPONDENT

Date of Decision : 08-09-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Easements Act, 1882 — Section 18, 47
Uttar Pradesh Municipalities Act, 1916 — Section 225(2)

Citation : AIR 1981 All 438 : (1981) AWC 725

Hon'ble Judges : B.N. Sapru, J

Bench : Single Bench

Advocate : H.R.K. Trivedi and J.N. Agarwala, for the Appellant; V.K.S. Chaudhary, K.C. Srivastava and Girdhar Nath, for the Respondent

Final Decision : Allowed

Judgement

B.N. Sapru, J.—This is a plaintiff's appeal and is directed against an order of the lower appellate court whereby it dismissed the plaintiffs' suit for grant of a perpetual injunction restraining the defendants from interfering with the plaintiffs' right to draw water from the well in suit commonly known as "Raja Kunwa" situate in Mohalla Thatharaee Bazar, Banda City within the Municipal Limits.

2. The plaintiffs' allegations were that the plaintiffs were the residents of the said Mohalla in Banda city and the well was the only well situated in the Mohalla and that the plaintiffs as well as their predecessors-in-interest had been drawing water from the said well. It was alleged that one month before the institution of the suit the private defendants declared that they would get the well filled up and raise constructions over it on the ground that they had obtained the well from the Government for making constructions over it. It was also asserted that from the time immemorial the residents of Mohalla were drawing water from the said well. Subsequently by an amendment of the plaint it was pleaded that the well

had been constructed by Raja of Ajaigarh and dedicated for the benefit of the public.

3. The State of U. P. and the Municipal Board are arrayed as defendants but did not contest the suit. The private defendants in their written statement asserted that the well was situated in plot No. 5436 which was Nazul property and had been leased out to them for running an educational institution. It was also asserted that there was no right in the residents of Mohalla to draw the water from the well and in case there was such a right, it had been extinguished by time and it was pleaded that the water of the well was unfit for human consumption.

4. The trial court decreed the suit on the ground that the well had been sunk by Raja of Ajaigarh for the benefit of the public of the Mohalla who had been using it.

5. The lower appellate court had found, *inter alia*, that it was not established that the well had been sunk by Raja of Ajaigarh. It also found that the residents of Mohalla could not claim a right to draw the water from the well as a public right and, therefore, the well could not be held to be a public well. It further found that the Municipal Board had a right under the Municipalities Act by virtue of Section 225 by which it could require the owner of a private well to close it if the water was unfit for drinking purposes. It recorded a finding of fact that the water was unsafe for the use of human beings. It further found that water was being supplied in the Mohalla by the Municipal Board and that most of the plaintiffs had piped water supply. It found that the balance of convenience lay in favour of denying the injunction. It accordingly dismissed the appeal.

6. The plaintiffs being aggrieved have filed the instant appeal.

7. After the institution of the appeal both the contesting parties filed affidavits which showed that the lease granted in favour of the private respondents had been cancelled. It is true that the cause of action is determined on the date of the institution of the suit but the court can, in certain circumstances, take note of the altered circumstance since the institution of the suit.

8. The first question to be determined is whether there can be a customary right to draw the water from a well. The learned counsel for the appellant has relied upon a decision of Mr. Justice Dalai in the case of Partap Singh and Others Vs. Nand Kishore and Others, wherein it was held that where a tenant had been using the water of a kachcha well for irrigating his field, and on partition between the Zamindars the land in which the well stood came to the share of the defendant Zamindar and not to the share of plaintiff's Zamindar, and the defendant prevented plaintiff tenant from drawing water, he could acquire a customary right of drawing water against the Zamindar as such a right could be acquired by a tenant against his own Zamindar.

9. Various kinds of customary rights are recognised by the law in India. A right to draw the water from a well can be a customary right.

10. The learned counsel for the respondents have urged that the plaintiffs having come with a definite case after the amendment of the plaint that the Raja of Ajaigarh had constructed the well and dedicated it to the public, cannot now fall back on a customary right. On a strict construction of the pleadings, he is correct. However, the allegation also is that the people of the Mohalla had been drawing the water from the well from time immemorial, had not been deleted from the plaint. I would not deny relief to the plaintiffs on the ground that the plaintiffs had no customary right to draw the water from the well.

11. The lower appellate court held that since 1952 the respondents of the Mohalla had ceased to use the well after the introduction of the Municipal water supply and, therefore, whatever rights, if any, the plaintiffs had to use the water from the well, had extinguished. The learned counsel for the appellant has argued that by virtue of Section 47 of the Easements Act, an easement can only be extinguished if it is not utilised for 20 years. Since 20 years had not elapsed from the alleged date of disuse till the date of the institution of the suit, the learned counsel submits that the finding is wrong. The learned counsel is correct in this regard if, of course, a customary right is to be equated with an easement, Section 47 of the Easements Act would have applied. Since the appeal is being decided on the footing that the plaintiffs have a customary right the question of application of Section 47 of the Easements Act does not arise.

12. The learned counsel for the respondents have argued that the evidence of immemorial user is not admissible as it is hearsay evidence. In this connection he relies upon a decision of the Privy Council in the case of AIR 1941 16 (Privy Council) ; whereas the learned counsel for the appellants relies upon a decision of the Calcutta High Court in the case of Panchanon Ray and Others Vs. Fazlur Rahman Chaudhury and Others, . This Calcutta decision is based on an earlier decision of the Privy Council in the case of AIR 1925 213 (Privy Council) . In that case the Privy Council held that after the existence of a custom for some years had been proved by direct evidence, it could only as a rule be shown to be immemorial by hearsay evidence, and they went on to point out that it was for this reason that hearsay evidence was allowable for the purpose as an exception to the general rule. The case relied upon by the learned counsel for the respondents does not overrule the earlier decision of the Privy Council and as such hearsay evidence which has come in this case, is admissible.

13. The next question to be considered is whether in view of the fact that the Municipal Board was competent to close the well by virtue of the powers vested in it u/s 225 (2) of the Municipalities Act, an injunction could or could not have been granted. No order u/s 225 (2) of the Municipalities Act has been made by the Municipal Board. In the circumstances an injunction can issue restraining the private respondents from interfering with the plaintiffs' right to draw water from the well while preserving the right of the Municipal Board to pass an order u/s 225 (2) of the Municipalities Act.

14. A further question arises in this case as to whether in view of the evidence

on record that the water was unfit for human consumption, an injunction should issue in favour of the plaintiffs. The evidence is also to the effect that the water of the well is similar to the water of many wells in the villages and which is used for the consumption.

15. It is not the case of the contesting defendants that all the residents of the Mohalla have Municipal water supply. There are well known limitations on supply of water through taps on road. Thus people who draw water from the well will be put to inconvenience.

16. Taking into account the fact that while deciding the question of balance of convenience one cannot lose sight of the fact that if an injunction is granted, the educational institution will not be able to expand and as such the injunction should be refused. The expansion of education is a very important aspect of the State policy. However, the fact remains that at present the lease in favour of the private defendants respondents is no longer in force, They have no right to interfere with the customary rights of plaintiff's to draw water from the well. The grant of an injunction in the present circumstance is no precedent for granting an injunction in the event of a lease being granted of the land in question to the educational institution.

17. In the circumstances, the appeal is allowed and the impugned order is set aside. An injunction shall issue restraining the private respondents from interfering with the plaintiffs' user of the water from the well commonly known as "Raja Kunwa" situated in Thatharaee Bazar. It is, however, made clear that the power of the Municipal Board to have the well closed in accordance with the provisions of the Municipalities Act shall remain intact. As the circumstances have altered since the institution of the suit, there will be no order as to costs.