

(1964) 03 PAT CK 0003
In the Patna High Court
Case No : A.F.A.D. No. 953 of 1962

Md. Hanif and Others

APPELLANT

Vs

Chamari Sao and Others

RESPONDENT

Date of Decision : 02-03-1964

Acts Referred:

Bihar Land Reforms Act, 1950 — Section 4

Citation : AIR 1965 Patna 328

Hon'ble Judges : K. Ahmad, J

Bench : Single Bench

Advocate : Government, Anwar Ahmad and Kamlapati Singh, for the Appellant;
B.C. De and Asghar Hussain, for the Respondent

Final Decision : Dismissed

Judgement

K. Ahmad, J.—The dispute in this case relates to the hiking of water from the Nala existing in village Bajrahi in plot Nos. 158, 153, 106, 107, 97, 11 and 6. The Nala originates on the south from river Morhar and, in the course of its flow from south to north, passes first through village Bajrahi, then through village Bharhi and thereafter it exhausts itself in village Ghortgbat. The defendants are tenants of village Ghorighat and the plaintiffs, who are appellants here, are the residents of village Bajrahi. The plaintiffs in their plaint prayed for the following reliefs:--

"(A) For a declaration that village Bajrahi only has the "right to take the water from the Nala existing in village Bajrahi bearing survey plot Nos. 158, 153, 106, 97, 41 and 6,

(b) For filling up and restoration of the site according to the survey map of the portion in survey plot No. 9 in which no Pyne existed, but a Pyne has been dug by the defendants.

(c) In the alternative for a declaration that the plaintiffs are the upper riparian owners and have got the right to irrigate their lands in village Bajrahi even by erecting grandis in the bed of the Nala.

(d) For permanent injunction restraining the defendants and other villagers and cultivators of Ghorighat from taking water from the Nala existing in village Bajrahi bearing survey plot Nos. 158, 153, 106, 107, 97, 41 and 6 and from irrigating the lands of Ghorighat with that water.

(e) For costs of the suit.

(f) For any other relief or reliefs that may be deemed fit and proper."

Both the Courts below have concurrently negatived reliefs (a), (b) and (d) and the decree under appeal in respect thereto has not been challenged before me by the plaintiff-appellants. But the two Courts below have, however, taken a contrary view in respect of the aforesaid relief (c). The trial Court held that the plaintiffs were entitled to "a declaration that the plaintiffs are the upper riparian owners and have a right to irrigate their lands in village Bajrahi even by erecting grandis in the bed of the Nala." Accordingly, the suit at the trial was decreed in part. In appeal, even that part of the finding given by the trial Court in favour of the plaintiffs has been reversed. The lower appellate Court has in regard to that relief, finally, found that "the plaintiffs have got no right to irrigate their lands out of the water of the Pyne in question, rather defendants have got such a right as they had acquired such right from time immemorial. I further hold that the plaintiffs had never acquired any right to irrigate their lands even as riparian owners of the lands in Bajrahi." Accordingly, the suit has been dismissed in full by the lower appellate Court. The plaintiffs, therefore, have now come up in second appeal to this Court.

2. It is not denied that originally, at one point of time, both the villages Bajrahi and Ghorighat were owned by a common Zamindar, Rameshwar Nath Singh. It appears that on the 5th Magh, 1274 Fs., corresponding to the year 1867, Rameshwar Nath Singh as the proprietor of village Bajrahi granted a Wajngast Sanad in favour of one Bibi Meharan, described therein as Malik Jagirdar Lakheraj Mauza Ghorighat, pergana Kunda. The original Sanad is in Hindi and has been brought on the record as Exhibit A. The official translation of: this Sanad reads as follows:--

"May Sri Jagarnathji help Sd. Maharaj Rameshwar Singh Seal of Kazi.

(I am) Sri Sri Ramchwarriath Singh possessed of High prowess malik Jagirdar .mil Lakhrajghat, perganna Kunda and Malik Zamindar of Mahal Taluke Dhapari, Perganna. Sherghati district Gaya. The Pyne of Mosstt Bibi Mehran Malik Jagirdar Lakhraj Mauza Gherighat, perganna Kunda has been flowing from very old times through village Bajrahi and has got several Mohanas in the river Morhar and occasions arise to take water from the said Mohanas with which the said mauza is always irrigated. Now this Sanad Wajugash is granted by the Hujur(me) to the aforesaid Malik and to her heirs and representatives-in-interest to the effect that if at any time, the Pyne and Mohana became out of order, she and they would cut Pyne and Mohana from any place and from anywhere as they like in the Maud of mauza Bajrahi. I or my heirs and representatives-in interest

neither have nor shall have any claim thereto. Save and except that Pyne which is flowing from the old times, no other Pyne shall be set up. On my behalf in Mauza Bajrahi aforesaid by putting up Pahwa in river Morhar. Therefore, I have executed this Wajugash Sanad, so that it may be of use when required. Dated 5th Magh 1274 Fs."

Thereafter the lands of village Bajrahi were given in Mokarrari by the same Rameshwar Nath Singh as proprietor of that village to one Rahmat Bibi under documents Exs. 2 series, all dated the 29th of Chait, 1283 Fs., corresponding to the year 1876. The plaintiffs, apart from being the residents of village Bajrahi, are the heirs and successors of Rahmat Bibi. In support of relief (c), the claim made by the plaintiffs is that the "petitioners owning lands abutting the natural stream, i.e. river Morhar as well as on both sides of the Nala are: the upper riparian owners and have got the preferential right to irrigate their lands in village Bajrahi" as the channel in survey plot Nos. 158, 153, 107 and 106 had been constructed in the raiyati lands for irrigation. In answer to that part of the case of the plaintiffs, the defence pleaded by the defendants was that the Pyne was not a natural stream but an artificial one and that the same had been constructed by the residents of village Ghorighat with the permission of the Zamindar of the village Bajrahi and that they had the exclusive right of taking water therefrom. Further, they also pleaded that the plaintiffs had no right to take water from it for any purpose. In support of this part of the defence, reliance was placed by the defendants on the aforesaid Sanad (Ex. A), dated the 5th March 1274 Fs.

3. The trial Court in dealing with this controversial part of the case has in paragraph 16 of its judgment found "that the present Mohana at Bajrahi was constructed" by the residents of Ghorighat. So the persons of Bajrahi "are not entitled to get the Mains filled up beyond the boundary of Bajrahi village". In appeal, this finding does not seem to have been challenged; on the contrary, from the discussion made in paragraphs 7, 21 and 28 of the judgment under appeal, it appears that it has been affirmed. That being so, both the Courts below have proceeded in disposing of the case on the assumption that it is an artificial channel constructed by the defendants under the grant made to them in the aforesaid Sanad (Ex. A) and that, from time immemorial, the defendants have been using the water of this Nala for irrigating the lands of their village. Mr. Lalnarain Sinha appearing for the plaintiff-appellants in this Court has not challenged any of these findings come to by the Court of facts. Therefore, their case has to be judged on the footing that the Nala or the artificial channel was constructed by the defendants by virtue of the grant made to them under the Sanad. Now, in law, it is well established as pointed out in *Kensit v. G. E. Rly. Co.* (1884) 27 Ch D 122, while quoting with approval the observation of the Privy Council in *Rameshwar Pershad Narain Singh v. Koonj Behari*, (1878) 4 AC 121 that "there is no doubt that the right "to the water of a river (flowing in a natural channel through a man's land, and the right to water flowing to it "through an artificial watercourse constructed on his neighbour's land, do not rest on the

same principle In ""the former case each successive riparian proprietor is, "prima facie, entitled to the unimpeded flow of the water" in its natural course, and to its reasonable enjoyment as "it passes through his land, as a natural incident to his "ownership of it. In the latter, am right to the flow of "the water must rest on some grant or arrangement, either "proved or presumed, from or with the owners of the lands "from which the water is artificially brought, or on some "Other legal origin:" that is to say, in one ease it would "be what we call by grant or prescription; in the other ease "it is natural right from the natural stream flowing "through a man"s land which gives him the rights incident "to the ownership of the land." The same view has been expressed in Coulson and Forbes on Waters and Land Drainage (6th edition) at p. 293 in these words:--

"The result of these authorities and of those at pp. 152-160 et seq, Chap. III ante seems to be that prima facie no riparian right exists, ex jure nature , on artificial watercourse, but that all the rights of riparian owners may be acquired by prescription on artificial watercourses, provided such artificial watercourses are of such permanent character and have been made under such circumstances and so used by the riparian proprietors as though they had been natural streams"

In (Allam) Narasimhulu and Others Vs. (Gutta) Bhadrappa and Others, , the learned Judge has usefully explained the law which the placitum has summarised in these words:--

"An artificial stream is a stream which flows at its source by the operation of man, or if it flows at its source by the operation of nature, flows in a channel made by man. Where water is made to flow in an artificial channel from a natural stream, such a channel is an artificial stream. Where a stream is artificial and flows in a channel made by artificial means through the lands of adjoining proprietors, the rights of such proprietors are not prima facie the same as those of proprietors on the banks of natural streams. The right to the enjoyment of a natural stream or water belongs "o the proprietor of the adjoining lands as a natural incident to the right to the soil itself. He has a right to have it come to him in its natural state, in flow, quantity and quality and to go from him without obstruction. Such a right in no way depends on prescription or any presumed grant But in the case of artificial water-courses the acquisition of rights in them must be by grant or prescription."

Thereafter, in Chada Mangiah and Others Vs. The Secretary of State for India in Council, , the learned Judges of the same Court have explained this part of the law in these words:--

"As Lord Atkinson points out in ILR 3 Rang 494 : AIR 1925 236 (Privy Council) , in the case of an artificial watercourse, any right of the owner to the flow of the water must rest on the prescription or grant from or contract with the owner of the land from which the water is artificially brought."

A similar question arose in this Court which was decided by Adami and Wort, JJ. in Rajniti Prasad Singh and Others Vs. Tokil Narain Puri and Others, . Therein,

their Lordships while dealing with the question observed:--

"The* first point that was argued is the question of what are the respective rights of the village which are on the banks of this Pyne Lord Justice Vaughan Williams in the case of Baily and Co. v. Clark, Son and Morland, (1902) 1 Oh D 649, having stated the rights of a riparian owner of natural stream goes on to slate the position as regards an artificial watercourse. He states:--

"If, on the other hand, this is an artificial watercourse, any right to the flow of the water must be based on some grant, whether in the nature of an easement or otherwise. The basis of every right to the flow of the water must be an agreement, expressed or presumed from the user with the owners of the land through which the stream runs"" Here, therefore, the Pyne being an artificial Pyne, the plaintiffs in the normal course cannot claim therein any right as that of an upper riparian owners as prayed for in relief (c) and, in fact. Mr. Lalnarain Sinha has not supported the appeal on that footing. Mr. Sinha, however, has pressed the appeal on altogether two new points which do not seem to have been agitated in either of the two Courts below.

4. The first submission made by Mr. Sinha is that though there was a grant given to the residents of village Ghorighat for constructing an artificial Pyne through the land of the plaintiffs but that grant did not in any way negative the right which the residents of village Bajrahi had therein as the owners of that land to take the water flowing in the Pyne for their own lands. In my opinion, this aspect of the matter takes us to the terms of the grant as made in the Sanad (Ex. A). I have carefully gone through it, and, in my reading, there is not the least indication made therein that there was any right reserved in favour of the maker of the grant to take water flowing in it for the irrigation of the lands of the village Bajrahi; on the contrary, the grant specifically states that:--

"The Pyne of Mosstt. Bibi Mehran Malik Jagir-dar Lakhraj Mauza Ghorighat, pergana Kunda has been flowing from very old times through village Bajrahi and has got several Mohanas in the river Morhar and occasions arise to take water from the said Mohanas with which the said Mauza is always irrigated. Now this Sanad Wajugish is granted by the Hujur(me) to the aforesaid Malik and to her heirs and representatives-in-interest to the effect that if at any time, the Pyne and Mohana became out of order, she and they would cut Pyne and Mohana from any place and from anywhere as they like in the land of Mauza Bajrahi. I or my heirs and representatives-in-interest neither have nor shall have any claim thereto."

This passage, in my opinion, lends support to the view that the grant made in favour of the residents of village Ghorighat was without any reservation and thereunder no right was left to the residents of village Bajrahi to take any water flowing in the Pyne. This, therefore disposes of the first contention of Mr. Sinha.

5. The second submission made by Mr. Sinha is that, in any ease, the right of easement which was granted under the aforesaid Sanad to the resi dents of

village Ghorighat ceased to exist on the vesting of the estate of village Bujrahi in the State of Bihar under the Bihar Land Reforms Act, 1950. In support of this submission made by Mr. Sinha reliance has been placed by the learned counsel on the provision of law as laid down in Section 4 (a) of the Bihar Land Reforms Act. Section 4 (a) of this Act provides:--

"4. Consequences of the vesting of an estate or tenure in the State.-- Notwithstanding anything contained in any other law for the time being in force or in any contract, on the publication of the notification under Sub-section (1) of Section 3 or Sub-section (1) or (2) of Section 3A the following consequences shall ensue, namely:--

(a) Such estate or tenure including the interests of the proprietor or tenure-holder in any building or part of a building comprised in such estate or tenure and used primarily as office or cutchery for the collection of rent of such estate or tenure, and his interests in trees, forests, fisheries jalkars, hats, bazars, mela and ferries and all other sairati interests as also his interest in all sub-soil including any rights in mines and minerals, whether discovered or undiscovered, or whether being worked or not, inclusive of such rights of a lessee of mines and minerals, comprised in such estate or tenure (other than the interests of raiyats or nder-raiyats) shall, with effect from the date of vesting, vest absolutely in the State free from all incumbrances and such proprietor or tenure-holder shall cease to have any interests in such estate or tenure, other than the interests expressly saved by or under the provisions of this Act."

Relying upon this provision of law, Mr. Sinha has contended that the right granted under the Sanad to the residents of village Ghorighat was in the nature of an easement and, therefore, in substance, in the eye of law, it was a sort of encumbrance on the estate and as such it ceased to exist on the vesting of village Ghorighat in the State of Bihar under the Bihar Land Reforms Act 1950. The word "incumbrance" has not been specifically defined in any of the sections of the Bihar Land Reforms Act, 1950, but there is a provision made in Section 2 (t) of the Act which says-

"(t) all words and expressions used in this Act but not defined in this Act and defined in the Bihar Tenancy Act, 1885 (8 of 1885), or the Chota Nagpur Tenancy Act, 1908 (Ben. Act 6 of 1908). shall-

(ii) in their application to the ,irea to which the Bihar Tenancy Act, 1885 (8 of 1885), applies, have the same meanings as in that Act. and

Therefore, in order to explain the implication of the word "incumbrance" my attention has been drawn to Section 161 of the Bihar Tenancy Act Section 161 of the Bihar Tenancy Act reads as follows:--

"161. For the purpose of this Chapter:--

(a) the term "incumbrance", used with reference to a tenancy, means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section;

(b) the term "registered and notified incumbrance, used with reference to a tenure or holding sold or liable to sale in execution of a decree for an arrear of rent due in respect thereof, means an incumbrance created by a registered instrument, of which a copy has, not less than three months before the accrual of the arrear, been served on the landlord in manner hereinafter provided:

(c) the terms "arrears" and arrear of rent" shall be deemed to include interest decreed u/s 67". Now, in this case, the lien, even if any. as submitted by Mr. Sinha, is not registered nor notified. Therefore, at best, what can be said to be applicable to the meaning of the word "incumbrance" in the present case is to be found in Section 161 (a) of the Bihar Tenancy Act only. But that sub-section, on the very face of it, proclaims that the meaning of the word "incumbrance" as therein is to be used for the purposes of only that chapter and that too with reference to the tenancy. Therefore, in my opinion, the implication of the word "incumbrance" as given in Section 161 of the Bihar Tenancy Act can have no bearing on the grant made under the aforesaid Sanad. No doubt, Mr. Sinha by analogy has tried to convince me that the word "incumbrance" as used in the aforesaid Section 4 (a) of the Bihar Land Reforms Act is to be understood in the same sense as defined in Section 161 of the Bihar Tenancy Act and by analogy has drawn my attention to the decision in Bholu Mian Vs. Sri. S.M. Islam and Others, . In my opinion that ease is quite distinguishable and does not throw any light on the implication of the word "incumbrance" as used in Section 4 (a) of the Bihar Land Reforms Act. Therefore, the second contention also as made by Mr. Sinha fails

6. In the result, therefore, I hold that the appeal is without substance. It is accordingly dismissed but, in the circumstances of the case, there will be no order for costs.