
(1965) 01 CAL CK 0008
In the Calcutta High Court

Nalin Ghosh

APPELLANT

Vs

Ananta Pada Modak

RESPONDENT

Date of Decision : 15-01-1965

Acts Referred:

Registration Act, 1908 — Section 17(1), 2(6)

Stamp Act, 1899 — Section 35

Transfer of Property Act, 1882 — Section 123, 40, 54, 6(c)

Citation : 69 CWN 503

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : Bankim Chandra Banerjee, Arun Kumar Dutt and Narayan Ranjan Mukherjee, for the Appellant; Shyama Charan Mitter and Shyama Prasanna Roy Chowdhury, for the Respondent

Final Decision : Allowed

Judgement

P.B. Mukharji, J.—This second appeal raises the controversy between an easement and a licence. It involves the construction of a certain

document as well as the interpretation of some sections of the Transfer of Property Act, Registration Act and the Stamp Act. It will be appropriate

to summarise the relevant facts giving rise to this appeal.

2. The Plaintiff in the suit purchased a certain land from one Haridas Chatterjee, by a registered document dated the 8th June, 1925. Sometime

after the purchase, on the 25th February, 1926, there was an agreement between Haridas and the Plaintiff on an ordinary piece of paper on a

stamp of one anna whose material portions may be translated as follows:

(a) You have since the purchase of the land from me built a pucca house where you are now living.

(b) As there is no outlet for the water from your house you have made a drain connecting it with my land over which you are flowing the water

from the house across my land to a tank or a doba in my land.

(c) As I raised objection to such right to the flow of water from your house upon my land into my doba but as you prayed for such a permission on

the ground that there was no other outlet for you, I have agreed to allow you to do it on payment of the consideration of Rs. 5/- for which I am

giving you this receipt.

(d) I shall not object to this flow of water and even if I do my objection will not be valid.

3. About seven years later, on the 28th August 1933, the Defendant purchased another portion of the land from Haridas Chatterjee which contains

this tank or doba.

4. The Defendant has objected to this flow of water.

5. On or about 9th June, 1953 the Plaintiff instituted this suit for declaration of his right to discharge the flow of water of his house to the doba of

the Defendant by the existing pucca drain of his house as shown in sketch map attached to the plaint for injunction. This suit had a chequered

history. The learned Munsif decreed the suit in the first instance holding that the Plaintiff had the right to discharge the flow of water as alleged.

There was an appeal and the appeal was allowed and the suit was dismissed. Against the judgment of the lower appellate Court a second appeal

was filed to this Court which was allowed and the appeal was sent back to the lower appellate Court for fresh hearing on the evidence already on

record and to decide the appeal in the light of the observations made by this Court. Niyogi, J. who remanded the case observed inter alia that the

learned Subordinate Judge had not come to any specific or positive finding that the document dated the 25th February, 1926 which is marked

Exhibit 3 was in fact executed by Haridas or that it was prepared collusively in collusion with Haridas and the present Respondent. Niyogi, J. also

observed that the lower appellate Court had not come to any finding on the point whether the water mentioned in that agreement was rain water

only or foul water. Lastly, the learned Judge also observed that the particular document, Exhibit 3, was not inadmissible for want of registration. In

that view of the matter Niyogi, J. allowed the appeal and sent the case back to

the lower appellate Court for a fresh hearing on the evidence

already on the record and directed the learned Subordinate Judge to decide the appeal in the light of the observation made in the judgment and in

accordance with law.

6. After remand the lower appellate Court came to the conclusion that the suit was rightly decreed by the learned Munsif and he dismissed the

appeal with costs. He found that the agreement dated 25th February, 1926 marked Exhibit 3 was genuine. He also found that that agreement in

Exhibit 3 meant unqualified water and was not confined to rain water only but included foul water. He came to the conclusion that the Plaintiff had

the right to discharge such foul water to the doba of the Defendant through drain on the basis of the grant contained in Exhibit 3 as above.

7. As against this finding there was a second appeal by the Defendant.

8. Three main points are for consideration in this appeal. The first point is what is the nature and character of this agreement dated 25th February,

1926. The second point is what is the scope and ambit of such an agreement. The third point is whether the lower appellate Court followed the

directions in the order of remand.

9. The first question raises the most important question in this appeal. The terms of the agreement I have quoted above. For the Respondent it is

contended that this is an easement. It was created by Haridas. It is a kind of covenant running with the land and, therefore, it binds the Defendant

who was a transferee of Haridas.

10. This question is - is it an easement or is it only a permission or a licence. When the land was sold to the Plaintiff it was a vacant land and the

Plaintiff's deed of sale dated 8th June, 1925 did not grant any such easement. The question of discharging foul water from the Plaintiff's house

arose after he had built the house. The agreement of the 25th February, 1926 clearly recited the cause of origin of this claim. It establishes certain

facts very clearly. The fact is that Haridas did not grant this easement now claimed by the Plaintiff at the time when the Plaintiff purchased this land

from Haridas. The second fact is that when after building upon the land the Plaintiff tried to discharge the foul water over Haridas's drain and doba

there was objection from Haridas. The agreement recites that as quoted above.

11. On a reading of the whole agreement dated 25th February, 1926 it is plain and apparent that Haridas was creating, transferring, and granting

the right on a nominal fee of Rs. 5/-. In other words, it was a licence or a permission to discharge the water on payment of a consideration of Rs.

5/-. The language of the agreement appears to suggest that it is nothing more than a permission. The language of the agreement appears to suggest

that it is nothing more than a permission. The language of the agreement also suggests that it was not a case of perpetual easement but a personal

contract between Haridas and the Plaintiff. It does not use the language as ""for ever"" or ""binding the future generations, sons and heirs and

successors"". No such words are in the agreement. Indeed the permission in writing and charging of a fee for that permission indicate that it was not

a permanent grant of any kind of easement. Indeed these facts show that intention was just the contrary. It was to avoid the creation of such a

claim of easement and specially when that permissive user is for a consideration, however nominal. That shows that it prevents accrual of any

claims for the right of easement.

12. The essence of a licence is clear: A licence originates in permission while an easement originates in a grant prescription. An easement cannot

usually arise out of permission, apart from grant. Permission, apart from grant, on the contrary usually negatives the case of easement. Where one

person grants to another a right to do something on the immoveable property of the grantor, which in the absence of such right would be unlawful

then such right does not amount really to an easement at all or even to an interest in the property. That right is called a licence. It is unconnected

with the ownership of the property by which I mean it is unconnected with the ownership of the property of Haridas. A licence is purely a personal

privilege and does not go with the land involved independently of the person involved. It is elementary law that a licence does not create an interest

in the immovable property. No doubt sometimes in law a licence and an interest in immovable property may be so inseparably granted together

that creates confusion but then no such blending is here possible either on the facts or on the terms of the agreement quoted above. No doubt the

right to discharge polluted water into another's water course or send water across of neighbour's land by an artificial water course such as in (1)

Harvey v. Walters, LR 8 CP 162, and (2) Wright v. Williams, 1 M & W 77, can be easements as noticed by Gale on Easement, 13th Edition, at

page 32. But even then the question here is not whether the said right can in law be a matter of easement or not but whether this agreement of the

25th February, 1926 and on its terms and language and on the facts can be called an easement. As pointed out by Gale on Easement in the same

edition at page 49 that a licence is only a contractual and not a proprietary right and is not binding on a successor in title of the licensor. In my view

on the interpretation and construction of the agreement dated 25th February, 1926 marked Exhibit 3 in this case the subject matter in dispute is not

an easement at all but a mere permission or a licence which was granted on payment of Rs. 5/- subsequent to the deed of sale dated 8th June,

1925 which is the root of title of the Plaintiff and which carries or recognises no such right in the Plaintiff to discharge foul water.

13. In that view of the matter, the other question about registration of an easement, is strictly speaking no longer material for the purpose of

disposing of this appeal. It has been contended on behalf of the Appellant that if it was easement then it required registration u/s 54 of the Transfer

of Property Act which says that in the case of "intangible thing", a transfer can only be made by a registered instrument irrespective of the limit of

value whether it is beyond or below Rs. 100/-. Reliance is also placed on Section 2(6) of the Registration Act which defines immovable property

to include "any other benefit to arise out of land". It is contended that a right to discharge the water of the house through somebody else's land into

somebody else's doba is a benefit arising out of the land of the Plaintiff.

14. Mr. Mitter for the Respondents, however, has relied on two decisions: one from Madras High Court and the other from Allahabad High

Court, to show that while transfer of an easement may require registration, the creation of an easement does not. According to his argument the

agreement of the 25th February, 1926 created an easement and did not transfer one. The Madras decision on which he relied is (3) Musunoori

Satyanarayanamurti v. Chekka Lakshmayya, reported in 57 Mad L J 46. Madhavan Nair, J. at page 47 of that report observed:

Section 54 of the Act taken along with Section 6(c) would appear to contemplate the transfer of an existing easement as distinguished from the

creation of the imposition of a new easement. It is clear that there is a distinction between the transfer of an existing easement and the creation or

grant of a new easement. The transfer of an existing easement is the act of the dominant owner and is inseparable from the transfer of the dominant

heritage, while the creation of a new easement is the act of an owner imposing a burden on his property. On this reasoning the grant of an easement

does not involve such a transfer of ownership in immoveable properties as is contemplated by Section 54 of the Transfer of Property Act.

15. Mr. Mitter also relied on the Allahabad decision in (4) Bhagwan Sahai v. Narasingh Sahai ILR 31 All 612, already noticed by Madhavan

Nair, J., in the Madras decision.

16. This point is not free from doubt. It may be necessary in an appropriate case to consider this question fully. The distinction between creation of

an easement and transfer of an easement requires fuller discussion in the light of the clear language of Section 54 of the Transfer of Property Act

read with Section 2(6) of the Registration Act. No owner of a property just creates an easement for the pleasure of it, in the sense of imposing a

burden on his property without any purpose. This creation is always with a view to transfer that creation and an owner of a property who has a

right to prevent somebody else's water coming on his land, when he grants that right to that other person he not only creates an easement but he

also transfers it to that other person. I cannot think of creation of an easement without a view to its transfer and as at present advised I am unable

to accept such a distinction as an ultimate answer and for establishing the proposition that creation of an easement without transfer, which in my

view is not practically conceivable, requires no registration in any circumstance.

17. There is no Calcutta decision exactly on this point. Reference, however, may be made to the decision in (5) Sital Chandra and Ors. v. Mrs.

A.J. Delaney, 20 CWN 1158 . There a Division Bench of this Court observed that the provisions of the Transfer of Property Act had no

application to the creation of an easement for the simple reason that the Act was not intended to deal with that topic. But then that observation was

entirely an obiter for the simple reason that the Court observed at page 163:

It is perhaps unnecessary to consider whether a right of way is included in the words ""in the case of a reversion or other intangible thing"" in Section

54 of the Act, because on the materials on the record it would be impossible to say that the transaction amounted to a sale. The real question is

whether the transaction amounted to "a gift of immoveable property" within the meaning of Section 123 of the Act. What we are about to say,

however, is as applicable to Section 54 as to Section 123.

18. Obviously, therefore, that observation was an obiter because what the Court was considering in that case was not a point u/s 54 of the

Transfer of Property Act at all but a point of gift u/s 123 of the Transfer of Property Act. In that context it was observed by the Division Bench

there that no writing was necessary for the imposition of an easement and in that respect neither Section 54 nor Section 123 of the Transfer of

Property Act made any change in the existing law. In other words, it could be done by parole but then that again is not a point before me in this

second appeal. The question is not whether it could be done by parole. The question here is whether when there is actually a formal writing it

requires to be registered on the ground that it deals with an "intangible thing" like an easement, in the shape of a right to discharge water on

somebody else's land and whether such a writing would require registration u/s 54 of the Transfer of Property Act read with Section 2(6) of the

Registration Act. Even here the Calcutta decision observed that where a right of way was created in writing, Section 2(6) of the Registration Act

might require registration but not, if the value of the right was less than Rs. 100/-. Apparently the reason for such an observation was that the right

of way was expressly mentioned in Section 2(6) of the Registration Act. But then the Calcutta decision did not go further to say that the other

benefits arising out of the land mentioned in Section 2(6) of the Registration Act could include other easements other than the right of way. An

easement undoubtedly is an interest in immoveable property and then the question may have to be considered in a future date whether u/s 17(1)(b)

or (c) of the Registration Act it is registerable or not, and if so, within what limits. Except indicating what I have stated before I do not propose to

pursue this matter because as I said before the appeal is disposed of in the instant case on the fact that it is not an easement at all, but a licence or a

permission at best and, therefore, it was personal between Haridas and the Plaintiff and could not bind the land in question so as to affect a

transferee such as the Defendant Appellant.

19. There are other difficulties on the way of the Respondent in this case. Section 40 of the Transfer of Property Act provides for the burden of

obligation imposing restriction on use of land or of obligation annexed to ownership but not amounting to interest or easement. In the third

paragraph of Section 40 of the Transfer of Property Act it is expressly stated that such right or obligation may be enforced against a transferee with

notice thereof, or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the

right or obligation nor against such property in his hands. The question then becomes a question in this case that the Defendant is a transferee for

consideration and according to him he says that he was without notice of the right. In support of the contention of the Defendant Appellant being

without notice he says that there was no registered document, and therefore no search in the registration office would have been able to discover

this easement. The evidence on record shows he made normal enquiries before purchase but did not come to know of any easement affecting the

property. When the Appellant bought this land in 1933 it could not be known that there was such an easement of this nature. Indeed it shows how

great a confusion in the law of registration will be created by an unqualified view that creation of easement does not in any circumstance require

registration for in that case hundreds of easements can be created over a land about which there will be no record in the registration office and

people buying the land will be at the mercy of unknown easements. It is possible to spell out a notice in the facts of this case by the argument that it

has been going on for so many years. The Defendant purchased the land in 1933 but the Plaintiff brought the suit in 1954. But that again is a

question of fact which has not been established because the Appellant submits that he did not exactly know what was the right that was claimed,

how it was being done and that actually foul water which really caused harm was only discharged recently. But then these are questions of fact and

I do not think that the either party should be allowed to go into such disputed questions of fact in the second appeal, nor do I think that they are

necessary having regard to the view that I have taken.

20. The lower appellate Court felt difficulty with regard to the agreement of 25th

February, 1926 which shows that it is only a one anna stamped document. For some reason or other, the learned Subordinate Judge impounded it. Intricate questions arose whether such a document could be at all impounded. Section 35 of the Stamp Act containing the provision for instruments not duly stamped being inadmissible in evidence specially exempts an instrument not being an instrument chargeable with a duty of one anna. Now this document, Exhibit 3, dated 25th February, 1926 was such an instrument charged with one anna stamp. Mr. Mitter for the Respondents said that this was really an "Agreement" under Article 5 of the Stamp Act. I do not think he is right there. The document itself says that it is a "receipt" and describes it as a receipt as will be seen from the terms quoted above. If it was a receipt with one anna stamp then it could not have been impounded and turned into either an Agreement under Article 5 or a Conveyance under Article 23. Even then that is not the end of the difficulty of the lower appellate Court. Assuming that the impounding and the penalty were correctly made, the question is from what date the document will be effective. On that point Mr. Banerjee for the appellate relied on the following observations of Lord Dunedin in (6) Lachmi Narayan Agarwalla v. Braja Mohan Singh, 51 IA 332, at page 334:

It is clear to their Lordships that the proviso (a) of Section 35 of the Indian Stamp Act, 1899, is of equal ambit with the body of the section, and that just as an instrument cannot be acted upon - that is to say, nothing can be recovered under it unless it has a proper stamp - so by the proviso if there is not a proper stamp it may be put on afterwards on payment of a penalty, and the instrument then becomes effective.

21. If it "then" becomes effective according to Lord Dunedin, the fact here is it was impounded in 1954 but that was long after the purchase of the Defendant Appellant and he could not be said to have been notified with it.

22. Finally on the ambit and scope of the agreement Mr. Banerjee for the Appellant has argued that the language does not permit discharge of foul water. According to him on a proper interpretation it will only mean discharge of water in the ordinary course which is not foul or full of organic matter or night-soil. For this purpose he relied on the Division Bench decision of this Court in (7) Raman Chandra Das Dalal v. Bhola Nath Hati, 33 CWN 189. It lays the proposition that the discharge of foul effluent into a

drain through which there may be a presumed grant of running water is not permissible in law as it imposes an extra burden on the servient tenement. The decision is also an authority for the proposition that in case of excessive user of an easement the aggrieved party may render such user impracticable but he has not the right to obstruct the exercise of the user in its entirety. There it was a case of right to carry water. It was held that the right was confined to the flow of ordinary water or rain water at best.

23. Mr. Mitter for the Respondent did not oppose this construction. He contended this proposition, that on the construction of the agreement in this case it meant water but not foul water. In that view also the learned lower appellate Court was wrong.

24. Finally, it was argued by Mr. Banerjee for the Appellant that the lower appellate Court's judgment cannot stand because the limits and directions of orders of remand of this Court had not been observed. In developing this argument he submits that the lower appellate Court did not come to a definite finding on the question as to whether the said Exhibit 3 was antedated or not in collusion with the Plaintiff. No doubt that was a clear direction of the order of remand. But then the lower appellate Court has come to a finding that the document is genuine in the sense that it was executed by Haridas. It may not be enough answer to Mr. Banerjee's point on this branch of the argument. But I shall read this finding that the document was genuine to include that it was found to be genuine by the lower appellate Court not only on the point that the executant rightly executed the document but also of the date of the document. I shall leave it at that. It is unnecessary to pursue this matter further.

25. For the reasons stated above and on my finding that this is not an easement but a permission or a licence at best, this appeal must be allowed.

The lower appellate Court's judgment is set aside.

26. There will no order as to costs in this appeal.

27. Leave to appeal under Clause 15 of the Letters Patent was prayed for but refused, because of the Division Bench decision in (7) Raman

Chandra Das Dalal v. Bhola Nath Hati, 33 CWN 189.