

(1998) 07 SHI CK 0017

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 427 of 1992

Padam Singh and Another

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 16-07-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Easements Act, 1882 — Section 7

Citation : (1999) 3 ShimLC 187

Hon'ble Judges : Surinder Sarup, J

Bench : Single Bench

Advocate : K.C. Chauhan and V.D. Khidta, for the Appellant; Ram Murti Bisht, Assistant A.G., for the Respondent

Final Decision : Dismissed

Judgement

Surinder Sarup, J.—This second appeal has been filed by the Plaintiffs against the concurrent judgments and decrees of the two Courts below dismissing their suit. The same was dismissed initially by the trial Court of Senior Sub-Judge, Solan vide judgment and decree dated 6.12.1991. The said judgment and decree has been affirmed in appeal taken by the Plaintiffs-Appellants before the learned District Judge, Solan vide judgment and decree dated 16.6.1992.

2. The case set up in the plaint was that there is a Khad known as Balyani Khad below village Sihardi. The same passes through the same village as well as the villages namely Sandrol, Lavi, Kiartoo and Jabli from one side and Basal, Pati Kalian, Pati Brahamanan, Dangri, Gara and Daryal on other side. Water of several small Nullahs/Choies falls in this Khad. A scheme for lifting the water was sanctioned by the Defendants-Respondents i.e. the State of Himachal Pradesh through the Collector, Solan and the Executive Engineer of the Irrigation and Public Health Department, Solan. Work was undertaken in hand for this purpose. The same gave rise to a suit at the instance of S/Shri Devi Singh and 20 other residents of village Daryali, Kothi Deora, Rohan, Dangri, Jabli and Pati Kalian, for

permanent injunction restraining the three Defendants-Respondents from implementing the water lift scheme from the said Khad. It was pleaded that the Plaintiffs-Appellants were having riparian rights to irrigate their lands and run their Gharats (Water Mills) through the water of this Khad. These rights were based on the Wazib-ul-arz, Naksha Riwayatpashi and Nakshajat Gharat. It was pleaded that in case the water lifting scheme is allowed to be implemented by the Respondents-Defendants, these rights of the Plaintiffs-Appellants would be adversely affected.

3. During the pendency of the suit, an application under Order 39, Rules 1 and 2, CPC for temporary injunction at the instance of the Plaintiffs-Appellants was filed and the same was allowed by the trial Court i.e. the Senior Sub-Judge, Solan vide order dated 22.5.1986, whereby the Defendants-Respondents were restrained from lifting the water from the Balyani Khad, ad interim. On appeal having been taken by the Defendants-Respondents before the learned Additional District Judge, Solan, the matter appears to have been sorted out to some extent between the parties. It appears from the record that all the original Plaintiffs except the two who are the Appellants therein, came to a settlement with the Defendants-Respondents before the learned Additional District Judge, Solan. The present Plaintiffs-Appellants S/Shri Padam Singh and Rati Ram were not agreeable of any terms. This fact appears to have been noted by the learned Additional District Judge, Solan, but, however, in view of the statement of the learned Counsel for the Plaintiffs he dismissed the suit as a whole as having been withdrawn, by his order dated 29.4.1987.

4. The present two Plaintiffs filed Regular Second Appeal before this Court i.e. RSA No. 312/87 against the above mentioned order of the learned Additional District Judge, Solan dismissing their suit as withdrawn. The appeal was allowed by this Court by judgment dated 1.9.1989 in the following terms:

In view of the situation noticed above, the present appeal deserves to succeed to the extent that the dismissal of the suit as withdrawn, shall not be operative as against the Appellants Padam Singh and Ratti Ram and it will be open to them to proceed with the suit by seeking necessary amendment.

5. During the pendency of the above proceedings, it appears that the Defendants-Respondents had completed the scheme in question and it had become operative in 1987 itself. In view of this development, the present Plaintiffs-Appellants were allowed to amend their plaint by adding the prayer of mandatory injunction also for removing of the obstruction and pipe line laid by the Defendants-Respondents for the purpose of lifting the water from the said Khad.

6. In the written statement, the Defendants-Respondents admitted the fact that the lands of the Plaintiffs-Appellants were being irrigated through the water in question. It was pleaded that the water of Saryadi Nadi has been tapped by them i.e. the Defendants-Respondents. There was a discharge of 9,60,000 gallons of water per day in the Khad from where the water has been lifted by them.

According to the written statement, the Plaintiffs-Appellants were owning 2.5 acres of land and the requirement of water is only 9,000 gallons per day. It was also pleaded that a number of Nullahs join the Khad in question. It was also pleaded that only 60,000 gallons of water per day is being lifted without any harm to the rights of the Plaintiffs-Appellants to irrigate their lands or run their Gharats. In other words, there was no infringement of the rights as pleaded in the plaint by the Plaintiffs-Appellants. Preliminary objections, as to maintainability of the suit, non-joinder of parties, estoppel, cause of action and mis-joinder of cause of action, were raised in the written statement.

7. On the pleadings of the parties, the learned trial Court framed the following issues:

(1) Whether the Plaintiffs got water supply to their lands and water mills from the water of Balyani Khad from time immemorial as a matter of right? OPP.

(1-A) "Whether the Defendants during pendency have obstructed the flow of water as alleged? OPP.

(1-B) Whether Plaintiffs are entitled to mandatory injunction? OPP.

(2) Whether Defendants have no right or interest title in the water of Balyani Khad? OPP.

(3) Whether Defendants are causing interference in the rights of the Plaintiffs? OPP.

(4) Whether suit is not maintainable? OPD.

(5) Whether suit is bad for non-joinder and mis-joinder? OPD.

(6) Whether the Plaintiffs are estopped from filing the suit by their acts and conduct? OPD.

(7) Whether the Plaintiffs have no cause of action? OPD.

(8) Whether suit is bad for mis-joinder of cause of action? OPD.

(9) Relief.

8. Issue No. (1) was decided in favour of the Plaintiffs-Appellants, while issues No. (1-A), (1-B), (2) to (4) were decided against them. Issues No. (5) to (8) incorporating the preliminary objections in the written statement were decided against the Defendants-Respondents. However, in view of the findings under substantive issues No. (1-A), (1-B) and (2) to (4), the suit of the Plaintiffs-Appellants was dismissed.

9. Their appeal before the learned first Appellate Court having met with the same fate has given rise to the present second appeal.

10. Learned Counsel for the Plaintiffs-Appellants has been heard at length, so also the learned Assistant Advocate General.

11. The finding in the impugned judgment of the learned first Appellate Court is to the effect that the rights of the Plaintiffs-Appellants to take water from the Khad in question for irrigating their lands and running Gharats are not disputed by the Defendants-Respondents. It has also been found that it is nobody's case that the Khad in question is private land or property of the Plaintiffs-Appellants. In other words, it vests in the State. According to the learned lower Appellate Court, the Plaintiffs-Appellants and other residents of the area only have a right to use the water, so also the Defendants-Respondents have a similar right. The right to irrigate and distribute the water entirely vests with the Government and the same is governed by Section 7 of the Easements Act. In this connection, Illustration (j) of Section 7 *ibid* has also been brought into consideration by the learned lower Appellate Court and in the considered view of this Court rightly so.

12. In paragraph No. 16 of the impugned judgment of the learned lower Appellate Court, the evidence led by the parties has been discussed and analysed. The finding in consequence thereof as rightly recorded by the learned lower Appellate Court is in the light of the legal principles, governing such type of cases. It is amply clear from the record that the Plaintiffs-Appellants have a right to reasonable water for running their water mills. In this connection, statement of DW-1 Assistant Engineer who appeared as a witness on behalf of the Defendants-Respondents has been taken into consideration. The same is to the effect that only 60,000 gallons of water per day is being lifted by the Defendants-Respondents. Therefore, after the lifting of the water by the Defendants-Respondents a discharge of water to the extent of 9,00,000 gallons per day is still available. The estimated requirement of the two Plaintiffs-Appellants for the purpose of irrigation of their 2.5 acres of land is 9,000 gallons of water per day, i.e. 1/100th of the total available discharge after the lifting of 60,000 gallons of water per day by the Defendants-Respondents.

13. The learned lower Appellate Court has also taken into account the admission of one of the Plaintiffs-Appellants i.e. Ratti Ram while appearing as PW-1 that five Nullahs join Balyani Khad in between the point from where water has been lifted by the Defendants-Appellants and the place where the lands and Gharats of the Plaintiffs-Appellants are situated. From this admission, the learned lower Appellate Court has rightly drawn the conclusion that some additional water thus becomes available to the Plaintiffs-Appellants due to joining of these five Nullahs. Consequently, no fault can be found with the further conclusion of the learned lower Appellate Court that it is thus established on record that inspite of lifting water from the Khad in question by the Defendants- Respondents, there is no infringement of the rights of the Plaintiffs-Appellants to have reasonable water for the purpose of irrigating their lands and running Gharats i.e. water mills. In these circumstances, both the Courts below have rightly declined the permanent injunction, as prayed for by the Plaintiffs-Appellants.

14. In fairness to the learned Counsel for the Plaintiffs-Appellants, he has first submitted that the rights of the Plaintiffs-Appellants to the water from the Khad

in question are protected from time immemorial in view of the entries in the Wazib-ul-arz, Naksha Riwayatpashi and Nakshajat Gharat. These three pieces of evidence on record have not been taken into consideration by both the learned Courts below, as per the plea of the learned Counsel for the Plaintiffs-Appellants. There is no merit in this arguments in as much as at the time of hearing, a pointed question was put to the learned Counsel by this Court as to how much is the requirement of the Plaintiffs-Appellants of water from the Khad in question for irrigating their lands as well as running their Gharats. This question assumes importance because the findings of the learned lower Appellate Court as reproduced above in this judgment is that 9,00,000 gallons of water per day is being made available to the Plaintiffs-Appellants for this purpose from the Khad in question and it is even after taking into account the quantity of 60,000 gallons per day which is being lifted in the scheme in question by the Defendants-Respondents. In this view of the matter, it was not necessary for the learned lower Appellate Court to advert to the entries in the Wazib-ul-arz etc., as from the facts and the evidence on record, no equity has been made out in favour of the Plaintiffs-Appellants for additional supply of water, over and above 9,00,000 gallons of water per day that is still available to them, notwithstanding the implementation of the lift water scheme by the Defendants-Respondents.

15. It has also been submitted by the learned Counsel for the Plaintiffs-Appellants that Illustration (j) of Section 7 of the Easements Act relied upon by the learned lower Appellate Court has no bearing or application to the facts of the present case. In support of this submission, he has cited some authorities. They may briefly be noticed. They are:

(1) Tukaram and Ors. v. Maroti Ganpat AIR (38) 1951 Nag 276.

(2) The State of Bombay Vs. Laxman Sakhambar Pimparkar and Others, .

(3) Goopla Kristna Yachendrupa Varu Bahadur v. Secretary of State and Ors. AIR 1915 Mad 372.

16. All these three authorities related to the interpretation and application of the provisions of the Easements Act. The said provisions only illustrate the right of owners of the land abutting a natural stream as regards the use of water for drinking etc. This is the general law in relation to the right of easement of water available to owners of land abutting a natural stream, as in the present case. Its application will depend on the facts and circumstances of each given case.

17. In view of what has been discussed above, this Court finds no illegality in the impugned judgment of the learned lower Appellate Court in so far as reference to the said right of easement is concerned. Consequently, the authorities relied upon and cited by the learned Counsel for the Plaintiffs-Appellants and referred to above, are not applicable to the facts and circumstances of this case.

18. Lastly, it has been urged by the learned Counsel for the Plaintiffs-Appellants that the site plan Ex. DW-1/A was not duly proved in accordance with law and

was thus inadmissible in evidence. The same has thus been wrongly relied upon by the two Courts below. Be that as it may, this Court has not taken the said piece of evidence into consideration while coming to the conclusion that in substance, the findings of both the Courts below, particularly the learned lower Appellate Court, are unexceptionable in the facts and circumstances of this case.

19. Before parting with this judgment, it needs to be reiterated what has been observed in paragraph No. 17 of the impugned judgment of the learned lower Appellate Court that the lifting water scheme implemented by the Defendants-Respondents is for the purpose of supply of drinking water to the residents of the nearby villages as also to the town of Solan. In other words, the same is for public convenience and interest. Indeed, in the present day context of water shortage all over the country, this lift water scheme is a sheer necessity, apart from being one of public convenience and in public interest. In view of this context, entries in the Wazib-ul-arz etc. sought to be relied upon by the Plaintiffs-Appellants cannot be allowed to prevail over the weal of the citizens as a whole, as against the interest of two persons i.e. the Plaintiffs-Appellants herein. This is more so because their pleaded right to use of water from the Khad in question for irrigation and running Gharats has not been infringed in any manner whatsoever.

20. For the reasons recorded above, there is no merit in this appeal. The same fails and is consequently dismissed. In the facts and circumstances of this case, there will be no order as to costs.