

(1942) 05 CAL CK 0004
In the Calcutta High Court

Panchanon Ray and Others

APPELLANT

Vs

Fazlur Rahman Chaudhury and Others

RESPONDENT

Date of Decision : 21-05-1942

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8

Citation : AIR 1942 Cal 505

Hon'ble Judges : Biswas, J

Bench : Division Bench

Judgement

Biswas, J.—This is an appeal by the plaintiffs in a representative suit instituted under O. I, Rule 8, Civil P.C. The plaintiffs purport to sue on behalf of the inhabitants of four villages, and ask for a declaration of a right of boat passage and certain consequential reliefs. The right is claimed over a stretch of water which is described in the plaint as a baor, and which they say appertains to a zemindary mahal bearing touzi No. 399 of the Nadia Collectorate. There is a rough sketch given in the plaint, which shows that the baor is a semicircular channel, and skirts the plaintiffs' villages on one side, and the defendants' lands on the other. It has an outlet at two ends towards the south into a river called the Kapotakshi, which flows east to west, forming as it were a chord to the semi-circle. It is said that the western outlet has been silted up, so that the only communication with the river now is by the other opening at the eastern end.

2. The plaintiffs' case is that this eastern end was recently obstructed by the defendants who put up a dam across the channel, first with a bamboo fence, and then with an iron netting, and that this had the effect of interfering with the right of boat passage which the plaintiffs and their co-villagers had been enjoying in this water-course from time immemorial. The defence is a complete denial of the right claimed. It is stated that the baor is the private property of the owners of the touzi which they have let out in putni, and that the defendants hold it as part of their mourashi mokarari tenure under the putnidars. They accordingly claim the right of exclusive user of the baor, and as since obtaining settlement they

have thrown into it large quantities of spawn with a view to the rearing of fish, they maintain they are fully entitled to take all necessary protective measures to prevent the escape of fish into the river Kapotakshi. The defendants do not object to the plaintiffs using the water as riparian owners.

3. Both the Courts below dismissed the plaintiffs' suit, except as to the right to use the water as aforesaid, which is decreed on the ground that it is not opposed by the defendants. Hence the present appeal. The right which is claimed in the suit is in essence a right of way, but no clear-cut or definite case is made in the plaint as to the basis of the claim or the mode of acquisition of the right. The right is variously described as an "easement of necessity," a "prescriptive easement," a "customary easement," an "easement acquired by user from time immemorial" and an "easement based on lost or implied grant." This is probably the reason why the Courts below say that reading the plaint, it is difficult to make out what the plaintiffs claim or do not claim. The substantial allegation is that the plaintiffs, meaning thereby the inhabitants of the villages concerned, have been enjoying the right "from time immemorial," "openly," "peaceably," "without interruption" and "as of right." As the Full Bench pointed out in the well-known case in *Chuni Lall v. Ram Kishen* 15 Cal. 460 (F.B.), in India, as in England, there are three distinct classes of rights of way. First, there are private rights of way vested in particular individuals or in individual owners of particular tenements : these are easements proper, and commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons or certain portions of the public, such as the freemen of a city, the tenants of a manor; or the inhabitants of a parish or a village : such rights may be regarded as quasi-easements, and commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of the public at large, and the source of these, when not created by legislative enactment, is dedication.

4. It appears that at the trial, notwithstanding the recitals in the plaint, the plaintiffs sought to make out a case under each of the three heads stated above, but in this appeal, Mr. Chakravarti on their behalf frankly conceded that in view of the nature of the suit as well as the findings of the Courts below, he could not support the claim of a private right of way, that is to say, of an easement founded on grant or prescription. He restricted himself accordingly to the other two grounds (1) that the right claimed was a public right of way, and (2) that it was a customary right. On both these points, the lower appellate Court, in concurrence with the Court of first instance, had also found against the appellants, but Mr. Chakravarti contended that in arriving at the findings the learned Subordinate Judge had failed to apply the correct principles of law. As regards the claim of a public right of way, apart from pointing out that there was not the remotest suggestion of dedication in the plaint, the learned Judge found that there was no evidence on record to show any dedication on the part of anybody at any time. The baor, he added, admittedly belonged to the zemindars, and it was necessary therefore to prove that if there was a dedication, it had

been made by the zemindars only, and not by the putnidars. This, he said, had not been shown.

5. This seems to be such a clear and definite finding that it is difficult to see how in the face of it the appellants could sustain their claim of a public right of way. As is well settled on the authorities, the question whether there has been dedication or not is one of fact, and has to be decided by the ultimate Court of fact with reference to the circumstances of the case: see for instance, the opening words of Lord Dunedin's judgment in *Rowley v. Tottenham, Urban District Council* 1914 A.C. 95 at page 99 and *Williams-Ellis v. Cobb* (1935) 1 K.B. 310. A finding on such an issue should obviously, therefore, be conclusive in second appeal. What nevertheless gave Mr. Chakravarti a chance to raise an argument on the point was a statement in the judgment of the learned Subordinate Judge to the effect that dedication could not be presumed from long user. This, it was said, was a misstatement of the law, and the finding was accordingly attacked as vitiated by this incorrect view. In other words, Mr. Chakravarti's contention was that the learned Judge must have arrived at his finding without any reference to the evidence of public user, and that as such, it could not be accepted as a proper or legal finding.

6. To say that dedication cannot be presumed from long user is undoubtedly to utter a proposition which cannot be supported. It would in fact be contrary to the settled law on the subject. Dedication, as the term implies, is a gift or grant by the owner of the land to the public of the right of way over it : it presupposes, therefore, an intention to dedicate--an *animus dedicandi*, as it is put, and one may add, it also requires acceptance by the public. Where the intention is expressed in words or writing, the matter admits of direct proof and presents little difficulty, but more often than not, that is not the case, and the authorities clearly establish that it must then become a matter of inference. The inference is obviously to be drawn from evidence of overt acts or conduct on the part of the owner of the land viewed in the light of surrounding circumstances, and there can be little doubt that such evidence is best furnished by proof of actual user by the public, from which public acceptance of the dedication may be likewise inferred : see *Halsbury's Laws of England*, Hailsham edition, Vol. 16, p. 218, Sections 259 and 260, pages 224-225, Section 270.

7. The learned Subordinate Judge cites the authority of a decision of this Court in support of his statement, *Surendra Nath Saha and Others Vs. Harendra Kumar Saha and Others*, , but that was a case of a *cut de sae*, and all that was pointed out was that in such a case mere user by the public was not sufficient to raise an inference of dedication, but that it had to be further shown that public money had been spent upon it. This is quite in accord with the law as laid down in English cases (*Halsbury*, Vol. 16, pages 225-226, Section 272), and it certainly does not detract from the general rule, but only means that the rule requires qualification by reason of the nature of the *locus in quo*. To support the inference of dedication of a highway to the public, it is very important however to have

regard to the nature and extent of the user. For one thing, the user must be by the public generally, and not by a section of it, for, as Baron Parke observed in *Poole v. Huskinson* (1843) 11 M.& W. 827 at page 830, there cannot be a dedication to a limited part of the public. Such user, again, is not proved by merely showing access to or use of the passage by members of the public, as this may mean no more than that the public cannot be excluded without excluding the more limited class of persons who are really entitled or permitted to use the passage. What must be shown is that the user is as of right, that is to say, it must purport to be in exercise of a public right of way, and acquiesced in as such by or on behalf of the owner of the land against whom the presumption of dedication is to be made. The extent of the land-owner's acquiescence is in fact a material question, for to quote another dictum of Baron Parke in the same case in *Poole v. Huskinson* (1843) 11 M. & W. 827, a single act of interruption by the owner is of much more weight, upon a question of intention to dedicate, than many acts of enjoyment.

8. As regards the length of public user, the period is material only as one element from which the intention to dedicate may be inferred : there is neither a fixed minimum period which must be proved in order to justify an inference of dedication, nor a fixed maximum period which must compel such an inference. As pointed out by Romer J. in *Stoney v. Eastbourne Rural District Council* (1927) 1 Ch. 367 , quoting from Buckley J. in *Attorney-General v. Esher Linoleum Co.* (1901) 2 Ch. 647, it is dedication and not user that constitutes a highway; user is merely the evidence that proves the dedication. This no doubt pre-supposes the existence of an owner capable in law of dedicating, but it does not follow that such a person must be proved to be living within the period over which actual user is established. To hold otherwise would be to confuse user, which is only evidence of dedication, with the dedication itself. If the user is sufficient to raise a presumption of dedication, the dedication may well have taken place long before the first proved act of user. So long, therefore, as dedication may be inferred from user, it is by no means necessary that the evidence of user must go back to the date of dedication. This would explain why, where the origin of a way was accounted for, four years has been regarded as insufficient, but where other facts pointed to an intention to dedicate, 18 months has been held to be sufficient, and so too, in other cases six years and eight years (*Halsbury*, Vol. 16, p. 225, Section 271).

9. Such being the legal position, I think it must be held that the learned Judge in the present case did in fact misdirect himself in saying that dedication could not be presumed from long user, and in so far as there is evidence of user on record, his finding against dedication must consequently be set aside. I have looked into the evidence myself and cannot say that it is clearly of such an unequivocal character that it cannot legitimately give rise to a presumption of dedication. The matter must accordingly be remitted to the lower appellate Court in order that as the ultimate tribunal of fact on this question, it may consider the evidence as a whole and come to its own conclusion. A word of warning is perhaps necessary in

this connexion, and it is this that though proof of open, uninterrupted and continuous user may give rise to a presumption of dedication, the presumption is still one of fact, and not one of law. It must not be supposed, therefore, that if there is no evidence in rebuttal, the Court shall be bound to give effect to the presumption and hold dedication proved as a matter of course. This is a proposition which is now established on the highest authority, that of the House of Lords in *Folkestone Corporation v. Brockman* 1914 A.C. 338, overruling the contrary view which had been expressed by the Court of Appeal, by a majority, in that case: see also *Williams-Ellis v. Cobb* (1935) 1 K.B. 310.

10. Turning now to the alternative ground of claim on the footing of a customary right of boat passage, which had also been negated by the learned Subordinate Judge, Mr. Chakravarti's main criticism was directed to showing that the Court had applied a wrong standard as to the length of user which was necessary to establish a customary right. The learned Judge took the view that a custom to be valid in law must be shown to have had its origin beyond the period of living memory, and as in this case, the evidence of user did not go back to a period of more than 50 or 60 years at the most prior to the suit, he held this was wholly insufficient to establish the right claimed. An essential attribute of a valid custom is no doubt its remote antiquity, and it may be conceded that the English-rule as to the test of antiquity is as laid down in Blackstone's Commentaries, namely that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary. So that if any one can show the beginning of it, it is no good custom": see *London Corporation v. Cox* (1867) 2 H.L. 239, where Willes J. at page 259 said, "a custom originating within the time of memory, even though existing in fact, is void, at law." But even in England this statement has been qualified, and it has been held that where it is impossible to show a continued existence of the custom from a time preceding the memory of man, which, as is well-known, has long since been fixed at the year 1189, the commencement of the reign of Richard I, the Courts will support the custom if circumstances be proved which raise a presumption that the custom in fact existed at that remote date. Thus, in *Angus v. Dalton* (1877) 3 Q.B.D. 85, , Cockburn C.J. after referring to the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period which, after a generation or two, ceased to be within the reach of evidence, said:

The Judges provided a remedy by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from the time of legal memory, that is to say, from the time of Richard I.

11. To the same effect were the observations of Tindal C.J. in *Bastard v. Smith* (1838) 2 M.& R.. 129,:

As to the proof of the custom, you cannot indeed reasonably expect to have it proved before you that such a custom did in fact exist before time of legal memory, that is, before the first year of the reign of Richard I ; for if you did, it

would, in effect, destroy the validity of almost all customs; but you are to require proof, as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom.

12. In other words, if proof be given of facts from which it can be inferred that user corresponding to the alleged custom in fact existed at some time past, the existence of the custom from the remoter era will be inferred, and as Farwell J. observed in *Mercer v. Denne* (1904) 2 Ch. 534, :

Not only ought the Court to be slow to draw an inference of fact which would defeat a right that has been exercised during a long period, unless such inference is irresistible, but it ought to presume everything possible to presume in favour of such a right.

13. In India, there is express authority for holding against the application of the strict rules of English law governing the establishment of custom : see the observations of Lord Buckmaster in *Abdul Hussein Khan v. Bibi Sona Dero* AIR 1917 P.C. 181 . Reference may also be made to a more recent decision of the Privy Council in AIR 1941 21 (Privy Council) where Mr. Jayakar, delivering the judgment of the Board referring to the English rule as stated in Blackstone's Commentaries, observed that it was neither apposite nor useful, when applied to Indian conditions:

It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient ; but it is not of the essence of the rule that its antiquity must in every case be carried back to a period beyond the memory of man--still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district...It would, in their Lordships' opinion, create great perplexity in the already uncertain character of customary law to require that in every case the antiquity of a custom must be carried back to a period which is beyond the memory of man.

14. In AIR 1925 213 (Privy Council) , the existence of a local custom was supported by witnesses from their personal knowledge under 20 years, and also by hearsay evidence, and it was held that an "immemorial" custom was thereby established within the meaning of Section 2, Bengal Regulation 11 of 1825. Their Lord-ships expressly held that as to the date from which the custom is said to have prevailed, after the existence of the custom for some years has been proved by direct evidence, it can only as a rule be shown to be immemorial by hearsay evidence, and they go on to point out that it is for this reason that hearsay evidence is allowable for the purpose as an exception to the general rule.

15. There can be no doubt that the learned Subordinate Judge in this case failed

to apply the correct rule in appraising the evidence of user for the purpose of establishing the alleged customary right. There is no reason why 50 or 60 years' user might not, in the circumstances of the case be regarded as sufficient to indicate the existence of the right from a much remoter period. This was practically not disputed by Mr. Sen on behalf of the respondents, but his main answer was a finding in another part of the judgment to the effect that the plying of boats in the baor was permissive, which finding, if well-founded, would of course be enough by itself to dispose of the whole of the plaintiffs' case regarding a customary right of way. Mr. Chakravarti contended that this was a perverse finding, and not in accordance with the defendants' case as made in the pleadings or in the evidence. Without going so far as that, I am inclined to think that the learned Judge's approach to the evidence was not from the correct standpoint. In any case, I am of opinion that there is sufficient evidence on the record on which it will be for the Court to say, without insisting on too strict a standard as to the quantum of evidence, whether or not a customary right of way has been proved to exist. The question of a customary right of boat passage must also, therefore, be remitted to the lower appellate Court for further consideration in the light of the principles already indicated. As the case is being remitted to the Court below, I refrain from expressing any opinion on the evidence myself.

16. The result is that the appeal is allowed, the judgment and decree of the learned Subordinate Judge are set aside, and the case remitted to the lower appellate Court to be dealt with in accordance with law as directed above. Costs will abide the result.