
(1962) 05 PAT CK 0014
In the Patna High Court
Case No : A.F.A.D. No. 691 of 1960

Rachhaya Pandey and Others

APPELLANT

Vs

Sheodhari Pandey and Others

RESPONDENT

Date of Decision : 07-05-1962

Acts Referred:

Easements Act, 1882 — Section 15, 7

Citation : AIR 1963 Patna 76

Hon'ble Judges : N.L. Untwalia, J

Bench : Single Bench

Advocate : Mahabir Pd., Harihar Nath Sinha and A.C. Sinha, for the Appellant;
Lalnarayan Sinha, L.M. Sharma and Yadunath Saran Singh, for the Respondent

Final Decision : Dismissed

Judgement

N.L. Untwalia, J.—In this second appeal by the plaintiffs appellants the question involved is as to whether they have a right to discharge the drain water of their house on to the land of the defendants respondents. According to their case, in village Pisai in the district of Gaya, they have got their house standing on survey, plot Nos. 3272 and 32/3. They purchased these two plots with some dilapidated houses on them in the year 1927 and, after amalgamation, they claim to have constructed in or about that year a house in the two plots. Towards the north of the house of the plaintiffs there is a house in survey plot No. 3271 belonging to one Peyare Pandey and in between the two houses there is a Kola and the drain water of the plaintiff's house first passes in the Kola and then through the Kola the water drains out in survey plot No. 3224, the defendant's plot, after passing a gali in gairmazarua am plot No. 3229. That is to say, towards the west of the plaintiffs' house the water first passes through the gairmazarua am plot which is a path and then it goes on to the defendants' plot which is said to be lower in level from the plaintiffs' house plots and the path, gairmazarua am plot It is claimed on behalf of the appellants that since time immemorial the drain water of the house on plots 3272 and 3273 has been passing in this fashion, the natural

slope of the discharge of the drain water being towards the west. The defendants, out of enmity, are said to have obstructed the flow of the drain water of the house by blocking the western extremity of the lane with earth in November, 1955, as a result of which drain water has been accumulating in the house of the plaintiffs, near their house and also in the lane.

2. The defendant's case is that the flow of the drain water of the plaintiffs house is to the defendant's plot No. 3224. The flow of water of survey plot No. 3273 is on the gairmazarua am plot No. 3274 which is to the south of that plot and the flow of the water of the house standing on plot No. 3272 is on survey plot No. 3229 after flowing northward and passing through the drain in plot No. 3271. Their further case is that about 5 years ago the plaintiffs and Ram Pearey Pandey, the owner of plot No. 3271, made some arrangement among themselves and reconstructed their house leaving a narrow Koli in between their houses. After these constructions, plaintiffs constructed a pucca nali in the said Koli and began to discharge drain water of their house into that nali. This water after coming out of the Koli in gairmazarua am plot No. 3229 has been flowing to the north through that very gairmazarua am plot. Previously there was no well in the house of the plaintiffs and very little water used to flow to the said drain and the Koli in plot No. 3229, so it used to dry up either in the drain or in the said plot. About 2 years prior to the institution of the suit, the plaintiffs sank a tube well in the courtyard of their house and since then much surplus water of the house began flowing through the said Koli and plot No. 3223 which the plaintiffs wanted to drain out through the defendant's plot in question but they did not succeed.

3. The learned Munsif who tried the suit in the first instance held that the plaintiffs have been discharging the drain water of their house in plot No. 3224 peacefully, openly and as of right for more than 20 years without interruption, they as such, acquired a right of easement and are entitled to flow the drain water of their house in the defendant's plot through the gairmazarua am plot No. 3229. Hence he decreed the suit. On appeal by the defendants, the learned subordinate Judge has held :

"From the evidence on the record it will be observed that the plaintiffs have failed to prove the exact year of the construction of their house and of their drain and also the factum of their discharging their drain water in the defendant's plot No. 3224 peacefully and without any let or hindrance for more than 20 years. It will be observed that from their own pleadings and also from their evidence the plaintiffs have not been able to prove that they have been exercising the right of discharging the drain water in defendant's plot No. 3224 for more than the period prescribed under the law".

Apart from the finding on the question of fact against the plaintiffs, he has also held that the alleged prescriptive right of easement could not be acquired by the plaintiffs on account of the fact that admittedly the gairmazarua am rasta plot No. 3229 intervenes between the plaintiffs' house and the defendant's plot.

4. The learned Advocate-General appearing in support of this appeal attacked the finding of fact arrived at by the learned Subordinate Judge on the ground that by a misreading of the plaint and under a misapprehension he has held that the plaintiffs had not succeeded in proving that they have been discharging the drain water of their house for a period of more than 20 years. There is some force in this contention. It is no doubt true that in the plaint it has been pleaded that the drain water used to be discharged from the house in the two plots purchased by the plaintiffs even prior to their purchase or, in any event, the plaintiffs claim to be discharging water after construction of their house in or about the year 1927. The mere fact that the exact year of the construction of their house is not given is not of much consequence. But, in spite of the slight error being there, I find the learned subordinate Judge has really not accepted the evidence adduced on behalf of the plaintiffs in regard to their claim of discharging the drain water on to the defendants' plot. In my opinion therefore, the finding of fact arrived at by the learned Subordinate Judge is not such as can be said to be not binding on me in the second appeal.

It was also argued before me with reference to the judgment of the learned Munsif that the learned Subordinate Judge has not considered the various materials and reasonings on which rested the said judgment and he has reversed the decision of the trial court without considering them. There is some force in, this argument too and perhaps I would have remanded the case to the lower appellate court for a fresh decision, if I could be persuaded to agree to the proposition of law canvassed on behalf of the appellants.

5. The learned Advocate-General conceded that, because of the intervening gairmazartia plot between the dominant and servient tenements, the view of law taken by the court of appeal below that prescriptive right of easement could not be acquired is correct, and he was not basing his claim on behalf of the appellants on the said right. But he submitted that the defendants' plot being lower in level than the plaintiffs' plots, it must be held that the plaintiffs had a natural right of flow of water from their house plots on to the defendants' plot and the latter had no right to obstruct it. This right, counsel urged, is inherent in such properties and cannot be interfered with. In support of his contention, he placed reliance upon a Privy Council decision in *Giboons v. Lenfestey* AIR 1915 PC 165 and a decision of this court delivered by Rowland J. in *Rajpati Narain Singh and Others Vs. Kirat Narain Singh and Others*, . I am unable to accept this contention. Such, a natural right cannot be claimed for the discharge of the drain water of a house which includes not only the rain water but all kinds of water used for domestic purposes and may even include sewage water. The natural right for the flow of the water from a higher ground to the lower one is confined to the flow of natural water generally through natural streams or drains and under some very special circumstances through artificial streams or drains. It can never extend to the discharge of artificial water brought upon the higher land by artificial means, specially to the discharge of all kinds of water from a house. No case was cited before me where a natural right has been recognised for the flow

of such water.

6. The facts of the Gibbon's case AIR 1915 PC 165, decided by the Privy Council were that the lands of the plaintiffs, who was appellant before the Board, were on a higher level from those of the defendants respondents in 1872 a verbal agreement was arrived at between them for the drainage of water by a regular channel which was rebuilt in 1905. The respondents had closed the hole in the wall of the drain with the result that the waters gushed back and flooded in the premises of the appellant. The courts below had dismissed the suit for injunction and damages on the ground that the pleadings disclosed no cause of action. Lord Dunedin delivering the judgment on behalf of the Board held that the right could not be rested on the alleged agreement by the Law of Guernsey but "the right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude" to which this rule can apply; it is "a natural right inherent in property; it is a question of nomenclature whether it is or is not called a servitude". The law was thus enunciated : --

"Where two contiguous fields, one of which stands upon higher ground than the other, belong to different proprietors, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water which falls from the superior. If the water, which would otherwise fall from the higher grounds insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property".

It has been further observed in the said case :

"No doubt a proprietor may not build on the extreme verge of his property, and then throw water off his roof on to the neighbour's land; that would require the constitution of a servitude which the Romans called stillicidium, and English law calls "eaves-drop". But if the water from the roof of a building falls on the proprietor's own grounds, it does not cease to be natural water, but must be received by the lower proprietor as the water was received before the building was there".

It is thus clear that Gibbon's case AIR 1915 PC 165, was one which was concerned with the flow of natural water and the passages extracted from the Privy Council's decision rather go against the contention of the appellants.

7. Similarly, in my opinion, the decision of this Court in Rajpati Narain Singh and Others Vs. Kirat Narain Singh and Others, also does not help the appellants. In that case the plaintiffs having placed a dam across their plot 1616 stopped the flow of water from the defendant's takhta through that plot from south to north. In a proceeding u/s 144 of the Code of Criminal Procedure, there was an order against the plaintiffs directing them to remove the obstruction from the water. They, therefore, instituted the suit to declare their right to use their plot as they

chose free from any obligation to permit drainage across it from the defendant's takhta. The defendants, on the other hand, claimed a right for the discharge of water from their takhta over the land of the plaintiffs. When natural right was claimed on behalf of the defendants the argument put forward on behalf of the plaintiffs was that this right was restricted to the natural flow of water but the benefit of this right is lost to a party who collects the water of his land into a defined channel and seeks to discharge it at a particular selected point as in that case. This argument was repelled by Rowland J., relying upon a decision of the Madras High Court in *Kasia Pillai Vs. Ganesamuthukumarasamia Pillai*, and that of the Privy Council in *Gibbons's case* AIR 1915 PC 165. The Calcutta cases referred to by Rowland J. in his judgment, it would appear, were concerning the flow of natural water, as were the Madras case and the Privy Council case.

8. Dealing with the legal obligation of the lower heritor to receive foreign water brought by the upper heritor to the surface of his property by artificial means, Lord Watson in *John Young and Co. v. Bankier Distrillery Co.* (1893) A. C. 691 says at page 696 :

"The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water whether flowing in a definite channel or not., and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in aemulationem vicini. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of their property, which is the case here, and water artificially conveyed from a distant stream".

Relying upon the decisions of the Privy Council and the House of Lords aforesaid, *Coutts Trotter C. J.*, delivering the opinion on behalf of the Full Bench of the Madras High Court in *Sheik Hussain Sahib Vs. Pachipulusu Subbayya and Another*, has said that if the owner of the land at the lower level raises an obstruction to the natural flow of the water he will be restrained if it causes or tends to cause damage to the owner of that on the higher.

9. In AIR 1928 134 (Nagpur) it has been said by Kinkhede, A. J. C.

"The natural right of drainage thus covers only the right to allow rain water falling on land of naturally higher level to drain off by surface flow along whatever lines the water may find its way to the neighbouring land; but it does not include a right to pass the water which has come artificially thereon".

In a recent decision of a Bench of the Allahabad High Court in *Chadami Lal Vs. General Manager, Western Railway*, the question concerned was the right of an owner of glass factory for the discharge of the foul refuse water from his factory on to the railway land through a pucca drain. It was held with reference to the

provisions of Section 7 of the Indian Easements Act:

"This natural right of every owner of upper land is a well recognised right but it has its own limitations. If the owner of the land of the higher level claims to have acquired any easementary right which is a restriction on the natural right he has to establish the claim. The natural right which he can claim is only the limited right mentioned in illustration (1) of Section 7. That right can be claimed only in respect of water naturally rising in, or falling on his land and not passing in defined channels. He cannot claim a right to flow water in a defined channel like a drain as a natural right, nor can he claim a right to discharge that water on the lower land which does not naturally arise on his land or fall upon it". It is not disputed that such a right in Bihar cannot be claimed u/s 25 of the Limitation Act but can only be claimed on the principles embodied in the Easements Act although that Act is not applicable in terms to this State. Even though under certain circumstances a natural right can be claimed to the flow of natural water in a defined channel like a drain, I am definitely of the view that such a right cannot be claimed for the discharge of artificial water, such as, water used in a house for domestic purposes either through a defined channel like drain or otherwise except by way of easement, a right which has not been claimed before me on behalf of the appellants. I may also note here that in their plaint the appellants have not made it clear as to whether they are claiming the right in question as a right of easement or as a natural right. Be that as it may I have no doubt in my mind that the plaintiffs cannot succeed on the basis of their claim of natural right to discharge the water of their house on to the defendant's plot.

10. In the result, the appeal fails and is dismissed with costs.