
(2018) 04 OHC CK 0099
In the Orissa High Court
Case No : SA No.48 of 1993

RAGHUNATH MOHAKUDA

APPELLANT

Vs

GANAPATI GOUDA AND OTHERS

RESPONDENT

Date of Decision : 20-04-2018

Acts Referred:

Specific Relief Act, 1963 — Section 38

Citation : (2018) 04 OHC CK 0099

Hon'ble Judges : DR. A.K. RATH

Bench : Single Bench

Advocate : Subir Palit, Amitav Mishra, Ajit Parija, Jyotsnamayee Sahoo

Final Decision : Dismissed

Judgement

DR.A.K.RATH, J.

1. Plaintiff is the appellant against reversing judgment in a suit for mandatory injunction.
2. The case of the plaintiff is that one Bhaiga Gouda had three sons, namely, Gandu, Lochana and Dinabandhu. Gandu died leaving behind his two sons, namely, Mangala and Mohana, defendant no.4. Mangala died leaving behind his widow, Neta, defendant no.3. Lochana died leaving behind his two sons, namely, Chaudhury, defendant no.2 and Ganapati, defendant no.1. Dinabandhu died leaving behind his two daughters, namely, Rekhi, wife of the plaintiff and Malati. Bhaiga had excavated a tank over an area of Ac.0.60 dec. of land appertaining to old patta no.17 and survey no.40/IA/2, for irrigation. He installed sluice on the north east corner of the ridge of the tank. After his death, the ancestral property was partitioned. The suit tank remained joint. In the year 1960, Dinabandhu executed a registered gift deed in favour of the plaintiff. It was mentioned in the gift deed that the

plaintiff would have the right to use the water of the tank for irrigation purposes. All branches were enjoying the water of the tank. In 1976 settlement, the tank had been recorded in the name of Lochana, father of the defendant nos.1 and 2, Mangala, husband of defendant no.3, defendant no.4 and the plaintiff. While matter stood thus, the defendants put another pipe at the lower level of the tank to drain out the water to their lands. The plaintiff wanted to take water through the new pipe. On 06.01.1988, the defendants obstructed the plaintiff from taking water through pipe as a result of which, the seasonal crops had been damaged. He is sustained loss of Rs.8,000/-. The installation of the cement pipe on the southern ridge of the tank by the defendants prevented the plaintiff from taking water. The defendants have 5 to 10 bharanas of land adjacent to the tank. They could have taken water through the old sluice. With this factual scenario, he instituted the suit seeking the relief mentioned supra.

3. The defendants entered contest and filed a written statement denying the assertions made in the plaint. According to the defendants, Bhaiga excavated the tank. They denied the installation of any sluice made of brick in the tank by Bhaiga. Bhaiga used to take water from the tank for irrigation by cutting the ridge. After the death of Bhaiga, properties were partitioned. In the partition, the lands situated to the east of the tank fell to the share of Dinabandhu, whereas the lands situated to the south of the tank fell to the share of the defendants. Dinabandhu used to cut the ridge of the tank on the eastern side and the defendants cut the southern side of the tank for taking water to their respective lands. Subsequently, Dinabandhu constructed a sluice with stone on the eastern ridge. While matter stood thus, in the year 1954, Lochan and Gandu put a cement pipe at the place where the ridge was cut. The plaintiff was taking water to the land through sluice. The defendants have got 12 acres of land adjoining to the tank towards the south, whereas the plaintiff has got about 5 acres of land towards the east of the tank. After death of Dinabandhu, his illatum son in law, plaintiff stayed in the house. He was in litigating terms with defendants. He instituted the suit against the defendants and lost. The predecessor in interest of the plaintiff had never raised any objection to the action of the defendants in taking water by cutting the ridge prior to 1954 at the place, where they put the cement pipe. The suit tank is the joint property and as such the suit for mandatory injunction is not maintainable.

4. Stemming on the pleadings of the parties, learned trial court struck four issues. Parties led evidence, both oral and documentary, to substantiate their case. Learned trial court decreed the suit with a finding that the parties were taking water to their respective lands for irrigation through the north-east sluice constructed by Bhaiga. After construction of the southern side cement pipe by the defendants, the plaintiff is deprived of taking the water to his land through the eastern side sluice. The eastern side sluice of the tank was constructed by Bhaiga. The southern side cement pipe was not put in the year, 1954. The same is of recent origin. The defendants have no right to put the same. It further held that the parties do not in dispute regarding their joint possession over the tank. The defendants filed T.A. No. 06 of 1991 before the learned Subordinate Judge, Chatrapur. The learned appellate court held that the defendants have put the cement pipe in the year, 1988 to take water to their lands for the purpose of irrigation. The defendants have not acted mischievously to put loss of the property or to prevent from taking water through the old sluice. The defendants cannot be prevented from taking water through the southern side pipe. Held so, it allowed the appeal.

5. The appeal was admitted on the following substantial question of law:-

â??Whether joint owner of a tank is entitled to the injunction under Sec.38 of the Specific Relief Act where other joint owners take water from the tank by opening a sluice at lower level with the existing one continuing and thereby depriving the other joint owner of using required water on account of the existing old sluice being higher level ?

6. Heard Mr. Subir Palit along with Mr. Amitav Mishra and Mr. Ajit Parija, learned Advocate for the appellant and Ms. Jyotsnamayee Sahoo, learned Advocate on behalf of Mr. Manoj Kumar Mishra, learned Senior Advocate for the respondents.

7. Mr. Palit, learned Advocate for the appellant argued with vehemence that the suit tank is the joint property of the parties. There was a partition of the agricultural properties. The parties used to take water from the tank through the old sluice constructed by Bhaiga. The defendants constructed a new sluice as a result of which, the plaintiff had been deprived of taking the water from the tank.

8. Per contra, Ms. Sahoo, learned Advocate for the respondents submitted that there is an old sluice. Parties used to take water from the same. By

construction of new sluice, the defendants have not prevented the plaintiff from taking water.

9. In *Ayyaswami Gounder and others v. Munnuswamy Gounder and others*, (1984) 4 SCC 376, the apex Court held that in the absence of any specific

pleading regarding prejudice or detriment to the defendants-respondents, the plaintiffs have every right to use the common land and the common

channel. The right of co-ownership presupposes a bundle of rights. The only restriction put by law on the common user of land by a co-owner is that it

should not be so used as to prejudicially affect or put the other co-owner to a detriment. The apex Court quoted with approval the judgment of the

Madras High Court in the case of *Subbiah Goundan v. Ramaswamy Goundan and others*, AIR 1973 Madras 42, where it was held that the defendants

make use of the common channel for taking water from their exclusive well in S. No. 24 only during their turn of enjoyment of the common well. Such

use of the common channel, by no stretch of reason can be said to interfere with the right of the plaintiff in any way. Nor can it be said that the said

user of the channel by the defendants would in any way damage or weaken the channel. Unless the plaintiff proves that such use by the defendants in

any way interferes with his rights or that the common channel is being or is likely to be damaged or injured or weakened he cannot prevent the

defendants from making use of the channel during their turn of enjoyment of the common well by taking water from their exclusive well also which is

most advantageous and beneficial from their point of view. The defendants indeed are adopting a "dog in the manger" policy.

10. Reverting to the facts of the case and keeping in view the enunciation of law laid down in *Ayyaswami Gounder (supra)*, this Court finds that

Bhaiga, common ancestor, had excavated the tank for irrigation of his land. Though there was partition of the properties, but the tank was kept joint.

The parties used to take water through the old sluice constructed by Bhaiga. Defendants had constructed a new sluice. By the said construction, they

have not prevented the plaintiff from taking water from the common tank for irrigation. On an anatomy of the pleadings and evidence, the learned

appellate court came to hold that the new sluice installed by the defendants in no way causes any harm to the plaintiff's lands particularly when

everybody has got a right to use the water of the tank to irrigate their own lands. Since the tank remains joint between the parties, no co-sharer can

depend upon the mercy of the other to take water to his lands, nor any of them can prevent the other from using the water of tank for irrigation

purpose. There is no pleading or evidence that the defendants have misused the water of the tank. Placing the hume pipe on the ground level of the

tank by the defendants on the southern side to take water from the southern portion of the tank is never intended to put the plaintiff into wrongful loss.

The plaintiff has no right to prevent the other co-sharer from taking the water to their land for the purpose of irrigation. The defendants installed the

pipe to take water from the own land for the purpose of irrigation. They have not acted upon mischievously to put the loss of the property or to

prevent from taking water through the old sluice. There is no perversity or illegality in the findings of the courts below. In fact, the plaintiff is adopting

a "dog in the manger" policy. The substantial question of law is answered accordingly.

11. A priori, the appeal fails and is dismissed. There shall be no order as to costs.