

(1937) 05 PAT CK 0002

In the Patna High Court

Rajpati Narain Singh and Others

APPELLANT

Vs

Kirat Narain Singh and Others

RESPONDENT

Date of Decision : 06-05-1937

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25

Criminal Procedure Code, 1898 (CrPC) — Section 143, 144

Citation : AIR 1938 Patna 71

Hon'ble Judges : Rowland, J

Bench : Division Bench

Judgement

Rowland, J.—The facts are stated in the judgments of the Courts below, and I do not think it necessary to repeat them here. As pointed out by the Subordinate Judge, the Munsif framed eight issues in the suit of which the important ones were numbers 6 and 7, namely:

6. Is plot No. 1616 the bakasht of the plaintiffs as alleged by them? If not, can the plaintiffs restrain the defendants from discharging water of their takhta through it?

7. Have the defendants any right to discharge water of their takhta through plots Nos. 1616, 1617, 1638 into 832?

2. On these issues, the Munsif had found that the entry in the Record of Bights was correct, that plot No. 1616 was gairmazruaam and was in fact a sota or water channel. He held that the plaintiffs were not entitled to restrain the defendants from discharging water of their takhta through this plot into the takhta of the plaintiffs, and he further held with reference to the other issue that the defendants had the right which they claimed to discharge the water of their takhta in the manner alleged. The Subordinate Judge acceded to the argument that the judgment of the Munsif was vitiated by misplacing the onus on the plaintiffs. The Subordinate Judge then proceeded into a lengthy disquisition on the law in the course of which he lost sight of the questions contained in the issues and failed to answer them. It is unfortunate that he has not succeeded in

appreciating the functions of the Court of first appeal. The duty of such a Court is to determine all the questions of fact necessary for decision of the issues. He may think that on a particular issue the burden of proof is on the plaintiffs or on the defendants and his view on that may affect his finding. Should that be so, he would do well to say what view he would take of the disputed question of fact had he placed the burden on the other party.

3. In this manner it is possible for the Court of first appeal to avoid all the unnecessary harassment to parties which is involved when in second appeal it is found that there is no ascertained set of facts to which the law can be applied. The Subordinate Judge's view of the law rests on the principle enunciated in *Hari Mohun Thakur v. Kissen Sundari* (1885) 11 Cal. 52 where it was said that the right to restrain an owner of land from exercising ordinary proprietary rights over his own land is of the nature of an easement differing from the ordinary rights of owners of land; the burden of proof would therefore lie on the party alleging such rights. He then said that the point to be decided was whether the defendants had got a right of easement to discharge the surplus water of their takhta; but the claim of the defendants was not a claim by way of easement over the land of the plaintiffs but a claim to a "natural right," the words used in the written statement.

4. In *Abdul Hakim v. Gonesh Dutt* (1886) 12 Cal. 323 it was contended that the right of the owner of a higher land to drain off its surplus rain-water through the adjacent lower ground is not an incident of the ownership of land in this country but can only be acquired by long user. Following a series of previous decisions, a Division Bench of the Calcutta High Court held that the contention was not well founded and that it was well established that such a right was an incident of the ownership of land in this country.

5. To the same effect was the decision in *Ramadhin Singh v. Jadunandan Singh* A.I.R.1915. Cal. 486. That was a case in which the position was very similar to the present proceeding which is now before us, if we substitute plaintiff for the defendant and the defendant for the plaintiff. The plaintiffs in that and the defendants in this are the owners on the south of the land which was at a higher level. The defendants of that case and the plaintiffs of this case have recently built a bund on their land so as to obstruct the water accumulated on the land of the plaintiffs in that case and the defendants in this case, from flowing towards the north through the land of the defendants in that case and the plaintiffs in this case. So the plaintiffs there, like the defendants here, alleged that they were entitled to have the water on their land discharged through the defendants' land; but this was not claimed as an easement. It was claimed as a right ancillary to their own property. The Judges said: "This raises the question whether there is any such right" and they answered that question in the affirmative.

6. A more exhaustive examination of the whole position was made by a Full Bench of the Madras High Court in *Hussain Sahib v. P. Subbayya* A.I.R.1926.

Mad. 449 where the English cases also are reviewed and the principle recognized 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 level.

7. Such is the right which the defendants are claiming in this litigation and I may at this point notice how the commencement of this litigation came about. About 1929 the plaintiffs having placed a dam across plot 1616 thereby stopping the flow of water from defendants' takhta through that plot from south to north, proceedings were taken at first u/s 144 and there, after u/s 143, Criminal P.C., which resulted eventually in an order absolute being made directing the plaintiffs to remove the obstruction from the water course plot 1616, and substantially this was the cause of action for the plaintiffs' suit to declare their right to use plot 1616 as they chose free from any obligation to permit drainage across it from the defendants' takhta. Dr. D.N. Mitter in support of the judgment of the Subordinate-Judge contended that it was really as an easement that the defendants have claimed to discharge the water of their takhta over the land of the plaintiffs and therefore it was not competent to them here to set up a higher title than they had alleged at an earlier stage in the proceeding. In support; of this he referred to *Mohendra Nath v. Nabin Chandra Ghose* A.I.R.1920. Pat. 195 where a Judge of this Court observed that

the right of easement and a natural right are two distinct rights, and where one is claimed, the other t...does not arise.

8. In the case before him, the learned Judge, declined to allow the plaintiffs who had claimed as an easement a right which they, failed to establish, to take advantage of a new case made for them by the Court. I do not understand his Lordship as having laid down in that decision any principle of general application.

9. In fact a Division Bench of two Judges had in *Abdul Hakim v. Gonesh Dutt* (1886) 12 Cal. 323 dealt with a case in which the right originally claimed was by way of easement, but it was found that the plaintiffs could put their case higher and succeed on the basis of natural right and they were allowed to do so. It has also been argued that the decisions may support the existence of a natural right to compel the owner of the lower level property to submit to a natural flow of water but that 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 this case. I do not find that this objection is substantial. *Abdul Hakim v. Gonesh Dutt* (1886) 12 Cal. 323, last cited, was one in which the plaintiff was discharging his surplus water through a particular channel and not generally over the whole surface, and the observation quoted from Lord Gifford in *Blair v. Hunter Finlay & Co*, 9 Court Sess. Cases, 3rd Series, Macpherson 207, in the Madras Full Bench case that the flow must not be increased by artificial means, although reasonable drainage operations are permissible, clearly do not go so far

as to say that the flow must be a flow permitted to go naturally over the whole surface; *Kasia Pillai v. Ganesha Muthu Kumarasamia Pillai* A.I.R.1929. Mad. 337.

10. The nature of the right was discussed by the Privy Council in *Gibbons v. Lenfestey* (1915) 2 AIR P.C. 165 where it has been expressly held that the owner of the superior tenement can in the natural use of his property for draining or otherwise improving it collect the water into one body and thus discharge it and the owner of the inferior tenement is without the positive constitution of any servitude, bound to receive that body of water on his property.

11. Such was the nature of the right claimed on which the Subordinate Judge was called on to adjudicate. It is clearly set forth in para. 11 of the written statement and was correctly appreciated by the learned Munsif on whom the Subordinate Judge has passed criticisms which are uncalled for. The attack on these alleged rights of the defendants by the plaintiffs is in para. 4 of the plaint where it is said:

Ancestors of the plaintiffs and also the plaintiffs have been irrigating their takhta in mauza Jhumathi openly and as a matter of right without any opposition and have acquired a right of easement and they have been enjoying the right for more than a period of twenty years and the plaintiffs have got absolute and indefeasible right of irrigation.

12. I find it necessary to send the record to the lower Appellate Court under Order 41, Rule 25, for determination of the issues which I have cited above in the light of the above observations. The Subordinate Judge was quite in error in thinking that the issues had been badly framed and that the Munsif had been under a misapprehension as to the nature of the case that he was trying. The Subordinate Judge will be asked to return the record as soon as possible and at the latest within two months.