

(1933) 08 CAL CK 0010
In the Calcutta High Court

Sheikh Fakir and Others

APPELLANT

Vs

Moslem Mandal and Others

RESPONDENT

Date of Decision : 25-08-1933

Acts Referred:

Citation : AIR 1935 Cal 253 : 155 Ind. Cas. 719

Hon'ble Judges : Nag, J; Jack, J

Bench : Division Bench

Judgement

Jack, J.—This appeal arises out of a suit for declaration of plaintiffs right to irrigate their lands ka (1) and ka (2) of the plaint, from the tank described in Sch. kha, by easement and prescription and as an ancient grant and also for an order of permanent injunction restraining the defendants from putting obstruction and further for compensation for loss caused by the defendants not allowing the plaintiffs to irrigate their lands from the tank. The trial Court decreed the suit in part against the contesting defendants 1 to 3 and ex parte against the rest, allowing the plaintiff to irrigate ka (2) land from the tank. This appeal is by the defendants as regards ka (1) land for which also the plaintiffs suit was decreed by the Court of appeal below. The lower appellate Court held that the plaintiffs were entitled to irrigate the land ka (1) in consequence of a grant from the landlord to be inferred from immemorial user, the finding being that the land ka (1) is being irrigated from the disputed tank from time immemorial.

2. This appeal is argued on the ground that to prove a lost grant something more than immemorial user must be proved, viz., it must be shown that there is no other source of irrigation of that land whereas in fact, in this particular case there is another tank Nutanpukur situated very close to the plaintiff's land and from which also they are accustomed to irrigate the land. Dattapukur from which they claim to irrigate is much further away. Further it is mentioned that the plaintiffs have not shown that they used the water of this tank as of right and there is no finding to this effect. In support of the theory that something further than

immemorial user must be shown, the case of Venkenna v. Swetachalapati Ramakrishna Ranga Rao Bahadur Guru 1931 PC 128 was cited but that case is no authority for this proposition. There it was held that where it was established that from a long period second crop was grown and the necessary water for it could not be had in ordinary years without erecting a dam such long continued user thus proved is sufficient to raise a presumption of a lawful origin of the right to do so in the nature of an arrangement between the parties. That is an example of how immemorial user may be proved indirectly, but it is still immemorial user from which the grant is referred; of course if long continued use may be explained in some other way than by a grant, the grant will not generally be inferred. But there is plenty of authority for holding that it is open to the Court to infer a grant from immemorial user alone when such user is open, as of right, and without interruption. In this case the finding is that this tank was re-excavated in 1322 by the defendants with whom it was settled in 1322 and the plaintiffs took water from the tank to irrigate their land both before and after this settlement and re-excavation. The fact that the plaintiffs took water after the re-excavation goes to confirm the inference that probably there was an original grant from the landlord allowed for at the settlement. It has been pointed out by the lower appellate Court that the patta by which the defendants received settlement has not been produced. It is suggested that the use may have been permissive but that does not seem very probable inasmuch as apparently there is no necessity for using the water of this tank as the closer tank could have been used. But the fact that there was no necessity does not of course show that there was no original grant.

3. For the defendants-appellants no alternative explanation of the immemorial user has been offered. They maintain that there was no such immemorial user but on that point we are bound by the finding of fact arrived at by the Court below. The learned Subordinate Judge relied upon the statement of P.W. 1 who spoke of user for forty years at least. His age is sixty eight and he says that from the time he reached understanding he remembers that the tank was so used. Another contention raised by the appellants is that by the re-excavation the user has been interrupted but that does not appear to have been the case because both before and after the excavation, the tank was so used and it appears that there is a channel leading from the tank up to the field though it is said that the channel was originally constructed for inflow of water from the fields to the tank.

4. Then it is suggested that inasmuch as on the plaintiff's land there is a pathway used by the public which is to be cut in order to irrigate from this tank, the public should have been made parties in this case as their right of way has been interfered with. But it has been found that this will not interfere with the right of the public to use the pathway and in any case the way is not a public way but rather one used by the public with the permission of the owner of the land. It is contended by the appellants that the existence of the original grants can only be presumed when there is no other way of explaining the facts. The question whether there was any other way of explaining the facts is an important

one for consideration when considering whether the inference of a grant can be drawn from immemorial user. But in this case no other way of explaining the facts has been suggested. The existence of another tank closer to the land than the tank in question of course disproves any right, of use by necessity. A point has been raised as to non-joinder of the daughter of the sister of the plaintiffs as a party. But it has been found that the plaintiffs sisters gave up her right on receiving. Rs. 150 therefore her daughter was not a necessary party.

5. Finally a point was raised as to the extent of the use of the water which was allowed. The Court of appeal below finds that the depth of the tank before excavation was four cubits. In 1332 the depth of the tank was increased from four cubits to nine cubits by re-excavation. The original user was based upon the tank when it was four cubits deep. The right which is now given by the decree of the lower appellate Court is to take water from the tank when the depth of the tank at its center is five cubits. That means the tank being now in consequence of the re-excavation nine cubits deep the plaintiffs have the right to use four cubits depth of water. Originally of course if the depth had been reduced by four cubits there would have been no water in the tank. Therefore on behalf of the appellant it is contended that the plaintiff's should not be entitled to take water from the tank so as to increase the burden on the subservient tenement. We think that there is some force in this contention. In these circumstances it will be right to allow the plaintiffs to take water from the tank at any time when its depth is six cubits or more at the center but not otherwise. With this modification this appeal is dismissed with costs.

Nag, J.

6. I agree.