

(1925) 11 PAT CK 0014
In the Patna High Court

Thakurji Sri Jugal Sarhar and Others

APPELLANT

Vs

Raj Mangal Prasad and Others

RESPONDENT

Date of Decision : 11-11-1925

Acts Referred:

Easements Act, 1882 — Section 17
Limitation Act, 1908 — Section 26

Citation : AIR 1926 Patna 187

Hon'ble Judges : Mullick, J;Kulwant Sahay, J

Bench : Full Bench

Judgement

Mullick, J.—The plaintiffs in this litigation allege that a watercourse called the Mangrooha river, which flows past the villages of Madanpur, Azamgarh, Bachapur and Manik Chauk from north to south is a natural stream and that the plaintiffs who are the residents of Bachapur have from time immemorial obstructed it by a bundh or dam measuring 107 feet in length, 31 feet in breadth and 11 feet in height and that the defendants who are residents of Manik Chauk and Azamgarh have caused injury to them by cutting it. The plaintiffs accordingly ask: (1) for a declaration that the defendants are not entitled to cut the dam; (2) for a declaration that the plaintiffs are entitled to maintain and repair the dam; and (3) that the defendants should be restrained by injunction from interfering with the right of the plaintiffs to maintain and repair and from doing any acts harmful to them.

2. The Munsif found that the watercourse in question was not a natural stream. He also found that the plaintiffs had established that from time immemorial the dam in dispute of the dimensions claimed had been maintained by them for the irrigation of their fields. He accordingly decreed the suit.

3. In appeal the Subordinate Judge differed on all points. He held that the watercourse was a flowing river and that the defendants, the residents of Manik Chauk, had a right to use the water to the same extent as the plaintiffs and that the plaintiffs had no right to maintain a dam of the dimensions claimed for the

purposes of irrigation so as to diminish the supply to which the defendants are entitled. He found that in fact the dam in question completely deprived the defendants from any water at all.

4. Against this judgment the plaintiffs prefer the present second appeals.

5. Now the first question for decision is whether the water course is or is not a natural stream. The Munsif has found that the bed of the water course has been ploughed up and cultivated in several places and that there are already two dams existing to the north, one at Madanpur and the other at Majhaulia. Evidence was given by the plaintiffs to show that the water-course was fed by rainwater and apparently the view taken by the Munsif was that whatever may have been the original condition of the watercourse the channel at present consists of a series of pools which are filled with water only during the rains and to which the law of natural streams does not apply.

6. Now the Subordinate Judge has made a very inadequate examination of the evidence upon this point. He does not consider the grounds given by the Munsif for holding that no connected channel exists. Apparently the learned Subordinate Judge thinks that as the water-course is called a nadi it must be a natural stream. In my opinion there has been an error of procedure in the trial of this issue and the plaintiffs are entitled to a fuller examination of the evidence before the finding of the Munsif can be set aside.

7. The next point is whether assuming that this is a natural stream the plaintiffs have established a right to obstruct into the injury of the defendants. Now the law on the subject in this province is well settled. For ordinary purposes such as drinking and watering cattle the plaintiffs are entitled to appropriate if necessary the whole of the water; but for extraordinary purposes such as the irrigation of their fields they are entitled only to take so much as will not reasonably diminish the volume of water in the river. The plaintiffs, however, contend that they are entitled either by twenty years' user as of right or by prescription to appropriate the whole of the water for irrigation purposes. The defendants contend that such an absolute right cannot be acquired either as an easement or in any other way. The learned Subordinate Judge accepts this view and relies on *White v. White* [1906] AC 72. In my opinion the learned Subordinate Judge has taken an erroneous view of the decision in this case. There the higher proprietor claimed the right to appropriate as much water as he required for his mill on the ground that the Crown had given him a grant of the whole water in the river and the learned Judge held that such a grant was repugnant to the ordinary law of rivers and could not be conceived and that the proprietor had established the user of only 1,200 cubic feet of water per minute and that his claim to a prescriptive right to more than 6,000 cubic feet per minute or to as much water as he liked had failed. Lord Robertson in his judgment expressly points out that the rule of prescription is *tantum prescriptum quantum possessum*. It was nowhere held in that case that if a higher proprietor establishes that he has been in possession from time immemorial of the right to appropriate the whole of the water the law

will not sanction his title to do so. So it has been held in *Wright v. Howard* [1823] 57 ER 76; *Mason v. Hill* [1832] 110 ER 114 *Debi Prasad v. Jaynath* [1897] 24 Cal 865; and *Balbhadra Prasad v. Sheikh Barkat Ali* [1906] 11 CWN 85. On the other hand it is contended on behalf of the defendants that the Indian Easements Act, though not applicable in this province, may be regarded for the purpose of ascertaining the general or common law principle applicable. Section 17 of the Indian Easements Act declares that a right which would tend to a total destruction of the subject of the right, or of the property on which, if the acquisition were made, liability would be imposed, cannot be acquired by prescription, and it is argued that the upper proprietor cannot be allowed to convert the river into a pond and thereby destroy the flowing stream. Here the right to appropriate the water is a negative easement appurtenant to the land of the upper proprietor and the water though diverted, is not destroyed. Section 17 of the Easements Act is intended to apply not to such rights but to rights in the nature of profits a prendre which do not include a right to water. I do not think, therefore, that the principle of that section is applicable to this case.

8. The law applicable here is either Section 26 of the Indian Limitation Act of 1908 or the general law of prescription. Under that the law every right peaceably enjoyed as an easement, and as of right without interruption for the prescriptive period, becomes absolute and indefeasible after the expiry of such period. The plaintiffs are, therefore, entitled to succeed if they can prove enjoyment as alleged for the necessary period.

9. Apart from this question of law which in my opinion has been wrongly decided by the learned Subordinate Judge, there is a further difficulty in the way of the respondents. Before the Munsif the parties went to trial on the issue whether the plaintiffs were entitled to maintain a dam of the dimensions described in the plaint. The defendants made a categorical denial to the effect that no dam of any kind had ever existed at this place. The Munsif disbelieved the evidence that no bundh had existed and he found that the evidence as to dimensions was un rebutted. On appeal the respondents shifted their ground and induced the learned Subordinate Judge to adopt a middle course, namely, that the plaintiffs had proved a right to maintain a "bundh," but that they had not proved that the bundh should be 107 feet long 31 feet wide and 11 feet high. The learned Subordinate Judge states that the defendants allege that in 1321 the length as well as the height was altered by the plaintiffs so as to completely obstruct the water flowing down to their village. We have been unable to find any authority for this statement. There is nothing in the written statement or the depositions to support this finding. Apart from the objection that a party cannot be allowed to plead inconsistent facts, or to give proof at variance with his pleading, it is clear that there is nothing in the evidence produced by the defendants upon which this inconsistent finding can be based. The learned Subordinate Judge was no doubt competent to come to such a finding from the plaintiff's own evidence, but on this point the evidence is one sided and un rebutted as the Munsif puts it. Again the learned Subordinate Judge's statement that there is no evidence on behalf of

the plaintiffs to prove that the bundh, as it exists at present, existed from before 1326, is quite contrary to the evidence recorded. It is true that one witness, P.W.2, states that the bundh was 160 feet long 31 feet wide and 11 feet high. It is explained by the appellants here that "160" was a mistake for "170", the two words in Hindi to express these lengths being very similar. Be that as it may: there was plenty of other evidence to the effect that the disputed bundh is the one which has existed from time immemorial. The learned Subordinate Judge has committed a mistake of record in saying that no such evidence existed.

10. The other evidence upon which the Subordinate Judge has relied consists of certain documents filed by the defendants to show that in a dispute between the villagers of Madanpur and Manik Chauk before an Assistant Settlement Officer it was agreed that a diversion made by the Madanpur villagers from a point north of the Madanpur bundh should not be kept completely closed by means of a dam erected by the Madanpur villagers, and that for a certain number of days the water in this diversion should be allowed to flow so as to go down south to Manik Chauk. The learned Subordinate Judge infers from this that the bundh at Bacharpur could not have been 160 feet long 31 feet wide and 11 feet high. It was found in that case that there was a "bundh" of some kind at Bacharpur and the learned Judge infers from the conduct of the Manik Chauk villagers that the bundh could not have been high or long enough to obstruct the whole of the water. Before coming to this finding we had to find that the diversion brought the water back into the channel above the Bacharpur bundh and that at the time of the Magistrate's order the Manik Chauk people got their water over or through this bundh. There is no such finding by the learned Subordinate Judge and the inference does not follow that because the diversion through Madanpur was allowed to be kept open for a certain number of days for the benefit; of Manik Chauk, therefore, the bundh at Bacharpur could not have been of the dimensions alleged in the plaint. The plaintiffs on the other hand, assert that the water did not come back to the river but found its way to Manik Chauk, if at all, over the fields of Madanpur. The learned Subordinate Judge has, therefore, committed an error of law in drawing the inference.

11. Further the plaintiffs are entitled again to object that the defendants ought not to be allowed to give proof inconsistent with their pleading.

12. It is no doubt true that this Court ought not to interfere in second appeal with a finding of fact so long as there is some evidence to support it, but here it would seem that the learned Subordinate Judge has arrived at his findings without evidence and that the trial is bad. It is also not clear to what extent he has been affected by his erroneous view as to the right of a lower proprietor against a higher proprietor.

13. The result is that in our opinion the appeals must succeed and the decree of the learned Subordinate Judge must be set aside. He will re-hear the appeals according to law, but the parties will not be entitled to adduce any further evidence. As no objection was taken to the competency of the defendants to

adduce evidence to show that a dam of different dimensions has been maintained by the plaintiffs, the Subordinate Judge will be entitled to consider all the evidence adduced, but he will of course also take into consideration the inconsistency between pleading and proof as a factor in determining the weight to be attached to such evidence. There being no materials for giving the plaintiffs relief in respect of any bundh of smaller dimensions their suit must either be decreed in full or dismissed.

14. Costs will abide the result.

Kulwant Sahay, J.

15. I agree.