

(1925) 02 CAL CK 0067
In the Calcutta High Court

Upendra Nath Ghosh and Others

APPELLANT

Vs

Bhusan Sahana and Others

RESPONDENT

Date of Decision : 24-02-1925

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 99

Citation : AIR 1926 Cal 462

Hon'ble Judges : Walmsley, J

Bench : Division Bench

Judgement

Walmsley, J.—The plaintiffs prefer this appeal. They sued to obtain a declaration of their right to take water from the defendant's tank for the purposes of irrigation and for orders directing the defendants to abstain from obstructing them.

2. The defendants denied the existence of the right and said that the plaintiffs had never been in the habit of taking water from the tank, and that they could not acquire any right by prescription against the defendants, as they were both the tenants of the same landlord. Another defence was that if the right existed at all it was confined to three plots immediately adjoining the tank and that the plaintiffs by breaking down an ail on the further side of those plots had increased the area to which water would flow and had thereby added to the burden and in consequence forfeited the right altogether. Defect of parties was also pleaded.

3. The learned Munsif found that the suit was not bad for defect of parties and that the plaintiffs had proved long user from which an origin in grant could be inferred but he held that the right was limited to the three western plots only: he did not accept the argument that the plaintiffs had forfeited the right by trying to extend it to the plot on the east. On these findings he gave the plaintiffs a partial decree.

4. The defendants preferred an appeal to the District Court. While it was pending one of the defendants, Mosabhar Shana, died, the remaining defendants did not

apply for the substitution of his heirs within the time followed by law and the appeal abated so far as he was concerned. The plaintiffs urged in consequence that the whole appeal abated.

5. The learned Judge held that the whole appeal did not abate. In regard to the defendant's plea of nonjoinder he held that the omission of three ladies was fatal to the suit. On the facts he agreed with the first Court, although his finding about a grant is stated less definitely, but he held that by adding to the burden the plaintiffs had forfeited their right altogether. In short he dismissed the suit for two reasons: the first that three lady co-owners had not been made parties, the second that the plaintiffs had forfeited the right by trying to enlarge it.

6. I may add that there was an appeal by the plaintiffs in regard to the plot on the east that was dismissed and I am not concerned with it. The present appeal relates only to the three plots on the west.

7. Four questions have been urged before me, namely whether the appeal could proceed, whether the suit was bad for defect of parties, whether such a right could be acquired by the plaintiffs against the defendant, while they were both tenants of the same landlord, and whether the Judge's view that the plaintiffs forfeited their right is correct.

8. On the first question two authorities have been quoted for the plaintiffs in support of the contention that the omission to substitute Mosabbar's heirs had the effect of causing the whole appeal to abate.

9. They are the cases of Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi [1920] Cri.L.J. 217 and Pulin Behari Roy v. Mahendra Chandra Ghosal [1921] Cri.L.J. 405. In the first case the appeal had abated as against one of the plaintiff-respondents who had obtained a decree for possession. It appears to me that different considerations obtain when the abatement is as against a defendant-appellant. In the second case the problem was avoided. On these authorities I am not prepared to hold that the appeal abated as against all the appellants. I think the case is one to which the principle of Order 41, Rule 4 is applicable. The appeal proceeds on grounds common to all the defendants and one of them might have appealed and secured a modification of the decree in favour of all. Surely, therefore, it is unreasonable to hold that the absence of one must disqualify the others from carrying on the appeal. That is the view taken by the learned Judge and I agree with him that the appeal could proceed.

10. The next question, also a technical one, is raised on behalf of the defendants. The learned Judge found that three ladies, the daughters of Sushar, the deceased brother of the first defendant, have an interest in the tank and that they ought to have been made parties. As the first Court took the opposite view it is said that the learned Judge had offended against the provisions of Section 99, Civil P.C. It is necessary, however, to see first whether those ladies were necessary parties. The Munsif found and his finding is not displaced that they were not in actual possession and that they had no hand in resisting the plaintiffs. The Judge added

the fact that no one knew the extent of their fractional interest. It appears further that two defendants were added after the filing of the written statement, and it has not been suggested to me that anyone else was named in the written statement as a necessary party. This last point is a reason for being slow to accept the learned Judge's views. The other points bear on the matter whether the suit could proceed in the absence of the three ladies, and I think that they afford reason for holding that it could, particularly the fact that they had done nothing in the way of giving a cause of action to the plaintiffs. In this view I am supported by Chatterjea, J.'s judgment in the case of Madan Mohan Chakravarty v. Sashi Bhusan Mukherji 19 C.W.N. 1211.

11. The third question is a very difficult one as pointed out by Chatterjee, J., in the judgment just mentioned. I do not think it arises, however, for, as I read the finding of the learned Judge it is that the circumstances warrant the presumption of grant. That was the Munsif's finding expressed clearly, and more than once.

12. The learned Judge is less definite, but in the paragraph dealing with the right of one lessee against another, he rejects the defendants' argument for two reasons, the first is that he thinks that one lessee can prescribe against another, and the second is that the matter is not one of prescription but of grant. He says that user comes down "from a very long time which gives rise to a presumption of grant." He goes on to say that: "I agree with the learned Munsif that the plaintiffs had the right" and the Munsif it must be remembered in the ordering portion of his judgment declared plaintiff's right of easement by ancient grant. I hold, therefore, that the learned Judge has endorsed the first Court's specific finding of grant and, therefore, that the question as to the rights of one lessee against another does not arise.

13. The fourth question raises a problem which is enveloped in obscurity. This is not surprising for easement and natural rights show such infinite variety that a hard and fast rule cannot be expected. In the present case the leading feature for consideration is, I think, that the additional burden can easily be removed. As the dominant and servient tenements can be restored to the status quo ante, I think the view taken by the Munsif is reasonable, namely, that the plaintiffs should have their right declared so far as it extends to the three plots on the west.

14. The result is that I allow the appeal and set aside the judgment and decree of the lower appellate Court, and restore those of the first Court. I think a supplementary order is required for the purpose of ensuring that the status quo ante is restored, and I direct that the declaration be conditional upon the plaintiffs replacing the ail between the western plots and the eastern plots within three months from the date of this decree. The ail to be made must be adequate and it will be open to the defendants to move the Court if they are not satisfied as to the alignment and adequacy of the ail.

15. As to the costs: the Munsif's order will stand; as to costs in this Court the

parties will bear their own costs in this Court and in the lower appellate Court.