

(1993) 01 MP CK 0004
In the Madhya Pradesh High Court
Case No : S. A. No. 454 of 1978 (L.)

Veni Ram and Others

APPELLANT

Vs

Karam Singh and Others

RESPONDENT

Date of Decision : 19-01-1993

Acts Referred:

Easements Act, 1882 — Section 7

Madhya Pradesh Land Revenue Code, 1959 — Section 171

Citation : (1993) 1 MPJR 192

Hon'ble Judges : V.S. Kokje, J

Bench : Single Bench

Advocate : P.K. Saxena, for the Appellant;

Judgement

V.S. Kokje, J.

This appeal arises out of a filed by the respondents against the appellants for a declaration and a mandatory permanent injunction. According to respondents/ plaintiffs, they have a right to unobstructed flow of natural water from their own field which is at a higher level to that of the appellants field, which is at a lower level situated just across a small way in between the two fields. The plaintiffs/ respondents had complained that the defendants/appellant had obstructed free flow of water from the plaintiffs/respondents field to the defendants field by increasing the level of their field at the boundry by stacking debris removed from a well sunk by the appellant/defendants in their field. The defendants on the other hand took a stand that there was no right vested in plaintiffs to pass the water in his field on to the defendants" field. Both the Courts below have decreed the plaintiffs" suit. This second appeal has now been filed against these concurrent judgments and decess.

The following substantial questions of law have been framed in this appeal on 2-1-1979.

(1) Whether the plaintiffs can exercise their right of drainage of rain water

against the appellants even when their fields are not contiguous and are separated by a common path ?

(2) Whether the right of drainage of rain water can be exercised against the acts of appellants done u/s 171 of the M. P. Land Revenue Code, 1959 ?

Shri P. K. Saxena, learned counsel appeared for the appellant but none appeared on behalf of respondents at the time of final hearing of this case. Shri Saxena submitted that illustration (1) to Sec. 7 of the Easement Act would only apply in case of adjacent or contiguous fields as there is a common path between the two fields of the plaintiff's and that of the defendants, it cannot be said that the two fields are adjacent or contiguous to each other. He further submitted that in view of Sec. 171 of the M. P. Land Revenue Code (for short "the Code") which declares a Bhoomiswami of the land held for the purpose of agriculture to be entitled to make any improvement thereon for the better cultivation of the land or its more convenient use for the purpose the defendants shall, be entitled to make such improvements on their land by seeing to it that their fields are not water-logged Section 7 of the Easement Act, which forms the basis of the right claimed in the suit alongwith its illustration (1) is reproduced hereunder for ready reference;

7. Easements restrictive of certain rights--Easements are restrictions of one or other of the following rights (namely):

(a) Exclusive right to enjoy--The exclusive right of every owner of immovable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

(b) Rights to advantages arising from situation.--The right of every owner of immovable property (subject to any law in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustration (I) The right of every owner of upper land that water naturally arising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

There should be no doubt that owner of a higher adjacent field has a right to uninterrupted flow of water to the lower field. In *Gibbons v. Lenfestey* and another AIR 1915 P. C. 165 it was observed as follows;

Where two contiguous fields, one of which stands upon higher ground than the other, belong to different proprietors, nature itself may be said to constitute a servitude on an inferior tenement, by which it is obliged to receive the water which falls from the superior. If the water which would otherwise fall from the higher grounds insensible without hurting the inferior tenement, should be collected one body by the owner of the superior in the nature use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property.

A Full Bench of Madras High Court in *Sheik Hussain Sahab v. Pachipulusu Subbayya* and another AIR 1926 Mad. 549 following and reproducing the above portion of the Privy Condi" Judgment further observed that the lower heritor cannot object so long as the flow whether above or below ground is due to gravitation or unless it has been unduly and unreasonably increased by operations which are in acmulationem vicini. In *Kaosal Mohan Pawar v. Kodu Dajiba Power and others* AIR 1946 Nag 75 Bose J : has observed as follows :

The rightful possessors of land on a higher level than the defendant's with a natural drainage in that direction have the right to discharge the surplus rain water which falls on their land on to the defendant's land, and the defendant is bound to accept this water. He cannot raise artificial barriers on his land which will cause the water to accumulate on another's property. He cannot do this even if it is necessary to protect his own property,

It is, therefore, clear from the aforesaid rulings that owner of an adjacent higher field has a right to free and uninterrupted passage of water from his field to the lower adjacent field. But the point raised by the learned counsel for the appellant is as to whether this right can be claimed even if the two fields are separated by a common path, In other words the point raised is whether the two fields could be said to be adjacent or contiguous even when a common path separates them from each other. The illustration (i) to Sec. 7 of Easement Act uses the word adjacent and not contiguous. Prem's Judicial Dictionary Reprint 1992 states that adjacent is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining, and it includes places close to, or near. What degree of proximity would justify the application of the word is entirely, a question of circumstances (See : *Wellington v. Lower Hunt* 1904) A. C 773 A rulling of the Allahabad High Court in *Bhan Deb Vs. Emperor*, has also been referred to in the dictionary for the proposition that when there is a wall separating house from the public road, the building cannot be called as adjacent to the road "Adjacent" must mean "joined at same point". In *Aiyar's Judicial Dictionary* XI Edn. the word is stated to mean lying near to, contiguous. The word contiguous and contiguously situated are defined as under:

CONTIGUOUS" The word "contiguous" should be construed as in the sense of "touching in actual contact or next in space" in reference to its loose, inexact, secondary, improper and abnormal sense and it is usually employed in that sense, Sometimes, no doubt, the word is used loosely in the sense of "neighbouring or situated or in close proximity (though not in actual contact)". But this secondary meaning should be accepted unless there is something compelling in that behalf in the subject or context

CONTIGUOUSLY SITUATED" The expression is used in the sense "neighbouring, situated in close proximity though not in contact. The expression does not mean "thuching in the actual contact". Expression conveys that there must be sufficient proximity between the fields to eable" irrigation, flood control or drainage for purpose of cultivation to be done advantageously in the normal

course by joint labour of cultivators.

In Black's Law Dictionary Fifth Edn. the word Adjacent is defined as lying near or close to; sometimes, contiguous; neighbouring; Adjacent implies that the objects are not widely separated, though they may not actually touch In Prem's Judicial Dictionary (supra) the word "Contiguous" means touching, and is as nearly as possible the synonym of adjoining. Therefore, where a lease reserves power to the lessor to do certain acts on any premises adjoining or contiguous that means adjoining or near to so as to give contiguous a cognate, but not identical, meaning with adjoining. (Hynes v. King, (1893) 3 Ch. 439)

I am inclined to follow the broader meaning given to the words "adjacent" and "contiguous" not confining them to the sense of actual contact. The Allahabad ruling (supra) is given in criminal case and runs counter to predominant view taken in other English and Indian cases. In the present case between the two fields there is a common path. In the context of right to free flow of water, the defendants' field has to be taken as adjacent to or contiguous to the field of the plaintiffs. The common path in between naturally is being used by both the parties, the plaintiffs and the defendants. If somebody else's field, howsoever small, had been situated between the two fields of the plaintiffs and the defendants, it could be said that the defendants field was not adjacent to or contiguous to the field of plaintiffs. But that is not the situation here. There is, therefore, no force in the contention that illustration (i) to Sec. 7 of the Easement Act does not apply to the case.

The next question is as regards applicability of Sec. 171 of the Code. A bare reading of this section would show that it is not in derogation of rights of other persons against the Bhoomiswami. A Bhoomiswami has been declared by this section to be entitled to make any improvement on his field for the better cultivation on it or for its more convenient use. This does not mean that rights against such a Bhoomiswami of third parties can be defeated under cover of making the improvements on the land to which a Bhoomiswami is entitled u/s 171 of the Code. The improvements have to be made in a manner not infringing rights of owners of adjoining fields. There is, therefore, no force in the contention that right drainage or rain water cannot be exercised by the plaintiffs as against the defendants in respect of whatever is done by the defendants for improvement of their field u/s. 171 of the Code.

This brings us to the relief which can be granted in this appeal. Shri Saxena, learned counsel for appellant submitted that even if the declaration and permanent injunction in favour of respondent is upheld, there is no case for sustaining the mandatory injunction granted by the lower Courts, in the changed circumstances of the case. Accordingly to Shri Saxena, mandatory injunction granted by the trial Court and confirmed by the first appellate Court does not deserve to be continued. The trial Court had granted a declaration that rain water falling on plaintiffs' survey No. 1043 naturally goes on the defendants' land survey No. 1056 and 1052. It has also granted a permanent injunction against

the defendants restraining them from obstructing the flow of water from plaintiff's land to the defendants' land. A mandatory injunction had also been granted by the trial Court directing the defendants to construct a Nala for draining the water. The portion of the decree of the lower Courts so far as demolition of water channel was stayed by an order passed in this case on 17-11-78. The stay order was confirmed on 5-3-79 and has remained in force till this date. Fourteen years have elapsed and the mandatory injunction has not been carried out because of the stay order from this Court. During all these years percentage of rain fall has depleted, and it is quite likely that the volume of rain water overflowing or collecting on the fields of the parties also has gone down. In any case the respondents could do without the compliance of mandatory injunction. It would be, therefore, be proper to maintain the decree so far as the declaration and permanent injunction is concerned and to modify it by deleting the relief of mandatory injunction granted by the lower Courts.

In the results, the appeal is dismissed. So far as the relief of declaration and permanent injunction is concerned, the appeal is partly allowed by setting aside the mandatory injunction granted by the lower Courts. It is, however, made clear that the relief of permanent injunction enjoins upon the respondents an obligation not to obstruct in any manner flowing of rain water over the fields of the defendants from the field of the plaintiffs and the defendant/appellant are under an obligation to do all that is necessary for ensuring this unobstructed flow of rain water from the field of the plaintiffs to the field of defendants. With these directions the appeal stands disposed of. There shall be no order as to costs.