(1869) 05 CAL CK 0001

Calcutta High Court

Case No: Special Appeal No. 381 of 1869

Kartik Chandra Sirkar		APPELLANT
	Vs	
Kartik Chandra Dey and Another		RESPONDENT

Date of Decision: May 21, 1869

Judgement

Bayley, J.

I am of opinion that this special appeal should be dismissed. The suit was for a declaration of the plaintiff''s right to fill up an excavated jhil, to close up a sench and to recover the price of certain trees mis-appropriated by the defendants. The defendants'' answer was that they had a right of user by prescription.

2. The first Court gave a decree prohibiting the defendants from using the disputed jhil and sench for the purpose of irrigation, and directing the plaintiff to fill up the jhil at his own costs.

3. The lower appellate Court in the first instance gave a judgment to the effect, that if the tank were a lakhiraj one or repaired or if user had ceased even for a short time, the right by user would not exist; but if the tank were mal and kutcha, the right would exist.

4. On special appeal the case was remanded to the lower appellate Court to retry it, taking evidence from both the parties so as to determine the fact whether legal user sufficient to defeat the plaintiff''s claim existed or not.

5. The judgment of the lower appellate Court passed after the remand is now before us. It is not so clear as it might be, but after fully considering the arguments of the pleaders and looking to the judgment itself as a whole, I think that the lower appellate Court has substantially found that the defendants had the right of user they claim, viz., of water from the plaintiff''s tank or pushkorini. To use the Court''s own words in the 5th para. of its judgment "it has been satisfactorily proved by the evidence of the five or six witnesses examined by the defendants that there existed an outlet of water in the disputed tank. More especially it has been established by

the deposition on oath of the plaintiff''s vendor, the former proprietor of the disputed tank, who is also a friend and relation of the plaintiff, that an outlet of water has always existed in the tank in question." Now the tank in question is not the "Anjadoba" but the plaintiff''s tank or pushkorini. I think, then, that, on the whole, there is a sufficient finding of fact that there was an outlet so used by the defendants.

6. Next comes the question as to whether the length of time that the lower appellate Court has found the defendants to have been in use of the tank, constitutes such a period as would create in them a right of user as recognized by law. Now, there is no precise expression in the evidence in the case or in the lower appellate Court''s judgment showing that it was an user for 12 years or 20 years, but there is a clear statement by the lower appellate Court based on statements made by the witnesses that it had been a user for a long time, and also "barabar" . To my mind the term "barabar" embraces a period sufficient to carry the user to a period beyond 12 years. Its nearest English equivalent may be said to be "all along" or "always." I therefore think that there is a finding of fact based on the evidence on the record that there has been an user by the defendants for a period sufficient to create a legal right of user in defendants.

7. I would add that in giving a decree in this shape, I would restrict it to the same sench and the same extent of jhil being allowed to the defendants'' use as they had before the plaintiff had excavated the tank.

8. A case has been cited to us Krishnamohan Mookerjee v. Jagornath Roy Jugi 2 B.L.R. A.C. 323, where it has been held that "in this country while the law recognizes that rights may be gained by long and continuous enjoyment, i.e., by prescription," no particular period is necessary for the establishment generally of a prescriptive right: and that in some cases, four or five years will suffice to create legal user. I regret much to differ from this view and do so most respectfully, but I think that at least a 12-years enjoyment is necessary to constitute a legal user. In saying this I have regard in the first place to the period prescribed by the Hindu law in respect of the acquisition of right by prescription, and to the general law of limitation in respect to interests in land which we are bound to administer here. As however on the evidence in this case there has been a finding of fact by the lower appellate Court of the defendants'' enjoyment of the property in question for a period of more than 12 years, and therefore for a period sufficient to constitute a legal right, I think it unnecessary to discuss the decision farther, or to refer the matter to the Full Bench. I would add that the decision of L. Jackson and Markby, JJ., in the case just cited, is the only one out of a current of decisions of this Court supporting the view that four or five years may suffice to constitute a legal user. Formerly the current of decisions was to the effect that proof of an user for 20 years or nearly so, as prescribed by the English law, was requisite. Latterly 12 years have been adopted.

9. I would dismiss this special appeal, but without costs.

Macpherson, J.

10. I also think (though not without some hesitation) that this appeal must be dismissed, upon the general ground that the Subordinate Judge has substantially found that the outlet for water (the jhil and sench, which the plaintiff seeks to close, has existed for many years, for a period which gives the defendants a right to keep it open. In the 7th paragraph of his judgment the Subordinate Judge says, "the outlet of water is proved to be a long existing one;" and in the fifth paragraph he says, "an outlet of water has always (barabar) existed in the tank in question." The interpretation which I put upon these expressions, looking to the evidence on which they were based, is that the Subordinate Judge finds as a fact that the outlet has existed for very many years, certainly for more than twelve years.

11. The decision of the Subordinate Judge ought to have been more distinct and precise than it is. But I have no doubt as to what he meant: and interpreting his judgment as I do, I follow the course taken recently by another Division Court, under very similar circumstances, in Wuzeerooddin v. Sheobund Lal 11 W.R. 285. It was contended by Baboo Ramesh Chandra Mitter, for the respondent, that even if the Subordinate Judge had found that this user had existed only for a few years (for a period much less than twelve years) it would be sufficient for his purpose; and he relied upon a dictum which is to be found in Krishnamohan Mookerjee v. Jagornath Roy Jugi 2 B.L.R. A.C. 323 where Mr. Justice L.S. Jackson is reported to have said that "cases are quite conceivable in which the plaintiff might not be able to give evidence of actual use for more than four or five or six years, and yet the circumstances might be such that a Court would be warranted in inferring the existence of a right." I do not concur in the proposition thus laid down by the learned Judge, but in the view I take of the finding of the lower appellate Court, it is not necessary for me to go further than to say that in my opinion proof of uninterrupted user for twelve years and upwards is sufficient. I agree with the Chief Justice in his remarks upon this subject in the case of Joyprokash Singh v. Amir Ali 9 W.R. 91 and with Mr. Justice Phear in what be says in Mohim Chandra Chuckerbutty v. Chundi Churn Goohoo 10 W.R. 452 "a Court which has to ascertain facts from the evidence ought not to infer from user, and from user alone, that a right of way had been conferred by the owner of the land upon the person who is shown to exercise the user, unless that user has extended over a period at least as long as the period which the law would allow to the owner of the land for bringing an action of ejectment, supposing he had been absolutely excluded from the possession of the land, instead of being only hindered in the complete enjoyment of it by the acts of user of the way."

12. While I think that this appeal should be dismissed, I must add that in my opinion the appellant has very good ground to complain of the judgment of the lower Court about which there is a looseness which makes it difficult to say what is the precise right which the Subordinate Judge considered that the defendants had to prove, or did in fact prove. From one part of the judgment it would almost appear that the

Subordinate Judge considered that the plaintiff was not entitled to succeed in this suit because he had closed up another small tank out of which the defendants used to get water, as if because the plaintiff closed another tank, the defendants were therefore entitled to take water from the tank which is the subject of this suit. Such reasoning would of course be fallacious, and the subsequent portions of the judgment show that the Subordinate Judge did not mean to rely upon it. Again in the third paragraph of the judgment the Subordinate Judge says that he cannot call the existing outlet an old one. In one sense, that is a finding in favour of the plaintiff, as Baboo Anukul Chandra Mookerjee contends. But then the Subordinate Judge goes on to show what he means, namely that the plaintiff himself closed up the old outlet and thereby drove the defendants by way of reopening it, to cut the present channel, which thereby, in a sense, is necessarily a new one. So towards the end of his judgment the Subordinate Judge lays down certain propositions about the public having a right to take water out of tanks in general, for which propositions there is no foundation in law: and he expresses himself in such a manner that it was fairly open to the appellant''s pleader to argue (as he did) that the Subordinate Judge was influenced in his judgment by the incorrect propositions which be laid down.

13. On the whole, I think that the Judge, although he had better have left unsaid a good deal that he said, has in fact merely found that the outlet (jhil and sench) complained of by the plaintiff has been in existence for many years, for more than twelve years, and that therefore the plaintiff is not entitled to have it closed. The present judgment goes no farther than to declare that the plaintiff is not entitled to close the particular outlet in respect of which this suit is brought. If there is any alteration or enlargement by the defendants of the outlet, the plaintiff''s right in respect to such alteration or enlargement will not be in any way affected by the decree in this suit. The appeal is dismissed, but without costs, as there is much in the judgment of the lower appellate Court which might fairly be made the subject of an appeal.