(1969) 07 CAL CK 0005

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1866 of 1960

Dhanapati Bag and Others		APPELLANT
	Vs	
Naran Das and Others		RESPONDENT

Date of Decision: July 7, 1969

Acts Referred:

- Easements Act, 1882 - Section 7

Citation: 75 CWN 590

Hon'ble Judges: Salil Kumar Datta, J

Bench: Single Bench

Advocate: S.N. Modak and A.K. Janab, for the Appellant; Sudhansu Kumar Bose, Lakshmi Narayan Mukherjee and Janwardal Pugalia, for the Respondent

Judgement

Salil Kumar Datta, J.

This is an appeal by the plaintiffs against the judgment and decree of affirmance, dismissing the suit for a permanent injunction and compensation. The case of the plaintiffs is that they are the owners of Plots Nos. 586 and 58611305 of Mouja Purba Gopi-nathpur Police Station Haripal in the district of Hooghly described in ''ka'' schedule of the plaint. The defendants are the owners of Plots Nos. 592, 591, 588, 589 and 583 described in ''kha'' schedule of the plaint, situate on the contiguous north of the plaintiffs'' lands. The rain water from the defendants'' lands, being on higher level, is discharged on the plaintiffs'' lands and thereafter passes out towards the east through the channel 1 cubit wide (described in schedule ''ga'' to the plaint) made by the plaintiffs lying throughout the northern boundary of Plot No. 1305, within their lands, running from west to east and on the remaining land the plaintiffs cultivated potatoes. On Pous 26, 1363 B.S. corresponding to January 10, 1957, there was heavy rain in the hours of night and the defendants, taking opportunity to feed their old grudge, illegally and wrongfully cut the southern wall or bund of the channel at various places, and as a result the rain water rushed and spread over the lands of the ''ka'' schedule through the said cuttings thereby

destroying the crop thus submerged by the water. The plaintiffs suffered loss of Rs. 400/- as a result of such illegal acts. The plaintiffs in the circumstances filed on February 4, 1957, the Title Suit No. 31 of 1957 in the Court of First Munsiff of Chander-nagore praying for an injunction restraining the defendants from cutting the southern bund of the channel on a declaration that the defendants had no such right. The plaintiffs also prayed for a decree for Rs. 400/- as compensation for loss of the crops.

2. The defendants contested the suit by filing a joint written statement. Their case is that the level of the land in the locality gradually slopes down from the north to the south and whenever water of northern Plots Nos. 576, 578, 579, 587, 591, 592 and of other lands including Plot No. 577 belonging to the plaintiff, accumulates, the owners of such plots cut their respective ails on the southern side of their plots at places and the water thereby passes off to the lands on the south till it reaches the plaintiffs'' lands and then the water proceeds towards the east along the downward slope and ultimately to river Kana. The water has been flowing in this course since time immemorial and the defendants have the easement of necessity and custom for such flow of water. The defendants denied that there was any channel or bund as alleged by the plaintiffs and accordingly there was no occasion for their cutting the bund of the channel. It was further stated that the plaintiffs had constructed a temporary channel for taking water for irrigation to their lands and no water from the defendants'' land ever passed through the channel. During the heavy rains mentioned by the plaintiffs, the defendants cut the common ails on the southern side between their lands and the plaintiffs'' lands and the water after entering the plaintiffs'' lands rapidly passed off to the eastern side. The defendants also denied that there was any potato cultivation on the ''ka'' schedule lands.

3. The suit was tried on evidence and both parties adduced evidence in support of their respective cases. The trial court dismissed the suit on the following findings: (1) the water channel was made by the plaintiffs for taking irrigation water and the water of the defendants'' lands never flowed through the channel in Plots Nos 1305 and 586, (ii) the water channel because of its narrowness was insufficient for flow of the water of the defendants'' lands, (iii) there is no system in the village for passing of water through water channel (iv) there was no bund to the south of the water channel and accordingly there was no cutting of bunds by the defendants (v) the plaintiffs were raising the level of ''ka'' schedule lands and their motive being to confine the flow of the water from the defendants'' lands through the channel. Accordingly the trial court by its judgment and decree dated May 23, 1959, dismissed the suit.

4. An appeal was preferred by the plaintiffs against the said judgment and decree. Before the appellate court, the plaintiffs did not, as they could not, dispute the right of the defendants to discharge the rain water of their ''kha'' schedule lands to the plaintiffs'' ''ka'' schedule lands, admittedly ''kha'' schedule lands being on higher

level than ''ka'' schedule lands. The appellate court was, however, of the opinion that though the lower land owner can make separate arrangement for discharge of water to protect his land being damaged, he cannot make any arrangement so as to affect or obstruct the discharge of the water from upper land through a channel which may not be sufficient for the purpose, unless the upper land owner submits to the alternative mode of discharge of water or the right to discharge water through the channel is acquired by the lower land owner by grant or prescription. There is no proof of existence of the channel or of the water being discharged for such a long time as to raise a presumption of lost grant or to the acquisition of a prescriptive right by the plaintiffs in respect of the discharge of the rain water by the channel. It was further found that the plaintiffs constructed the channel for the purpose of irrigation and it was neither suitable nor sufficient for carrying off the rain water coming from ''kha'' schedule lands-. The appellate court also found that, there is no reliable evidence as to the existence of the bund, and, even if the southern side of the disputed channel may be taken as the bund, it was an obstruction to the flow of the water, and, to protect their crops on their lands, the defendants were within their rights and could not be held liable for any damage that might have been caused to the plaintiffs as a result of the cutting. It was further held that the plaintiffs were not entitled to any damage. The appeal filed by the plaintiffs in the premises, was dismissed. The plaintiffs have now come up to this court in the second appeal, which is now before us, confining their claim in respect of the injunction only.

5. Before we proceed to examine the judgment and decree under appeal, we shall consider the position in law. In section 7 illustration (1) of the Indian Easements Act, 1882, (V of 1882) it is provided as follows : "The right of every owner of upper land that water naturally rising 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." Though the Act does not apply to West Bengal, the principles underlying the Act have often been applied in deciding questions regarding the right of easements as was held in (1) Baroda Prosad Pal and Another Vs. Asutosh Pal and Others, .

6. In (2) Sheik Hussain v. Pachi-pulusu Subbayya, 1926 ILR 49 Mad. 441 1994 IC 677 (F.B.) , it was held that the owner of a plot of land on a lower level is not entitled to deal with his land so as to obstruct the escape of water from the higher land. In (3) Gibbons v. Lenfestey, (1915) 113 LT (N.S.) 55 (P.C.) Lord Dunedin observed as follows: "The right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude to which this rule can apply. It is a natural right inherent in property." Again in (4) John Young & Co-v. Bankier Distillery Co., (1898) AC 691, it was observed as follows : "The right of the upper heritor to send down and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the

strata below them. The lower heritor cannot object so long as the flow, whether above or below ground is due to gravitation unless it has been duly and unreasonably increased by operations which are in oemulationem vicini." Mr. S. N. Modak, the learned Counsel appearing for the appellants, has not disputed the natural right the owner of the land of a higher level has against the owner of the lower level land, to discharge on it the surface water from his tenement. The existence of such a right is well established on ancient authorities as pointed out by Biswas J. in (5) Natabar Sasmal v. Krishna Chandra, 74 CLJ 95.

7. Mr. Modak contended that even though the plaintiffs as owners of the lower level lands are obliged to receive rain water from the defendants'' higher level lands, once the water has entered the plaintiffs'' lands, they have the right always to arrange for its discharge in such manner they may deem fit, provided however, in arranging for the discharge, they do not impede the natural flow of water out of the defendants'' lands thereby causing damage to the said lands. In support he also relied on the decision (2) Sheikh Hussain v. Pachipulusu, (supra) where it was observed as follows: ".the adjoining owner (of lower level lands) can improve his lands to any extent he pleases, even to the extent of raising the level of his lands provided that he makes suitable arrangements for carrying off the water from his neighbour''s land. We are confirmed in our view by the fact ''that decision in Ramaswamy v. Rasi (1915) ILR 38 Mad. 149 was referred to by the Privy Council in Maung Bya v. Maung Kyi Nye (1925) 49 MLJ 282 (PC) with approval as being consistent with authorities." Mr. Modak accordingly contended that the plaintiffs were entitled in law to take steps to ensure that the rain water discharged from the defendants'' lands to their. lands, did not spread over the entire tract of Plots Nos. 1305 and 586 but are taken out through a channel within their lands along the northern boundary of the said two plots "and the defendants had no right to trespass into the ''ka'' schedule lands and cut the southern bund of the channel at different places as they did following the heavy rains on the night of Pous 26, 1363 B.S.

8. Mr. Sudhansu Kumar Bose, the learned Counsel for the defendants respondents contended that in the locality, the land sloped down from the north to the south and during the rain, the water from higher lands on the north, including even lands of the plaintiffs, passes off to his clients'' lands which again, in turn, passes off to the plaintiffs'' land. The defendants have the natural right of discharge of the water from their lands to the plaintiffs'' lands, and of such water being discharged from the plaintiffs'' entire lands in the natural course towards east. The plaintiffs have no right to interfere with the natural discharge of water and to compel the defendants to discharge water through any channel which may not be sufficient for the purpose. In support Mr. Bose strongly relied on the decision in (6) Patneedi Rudrayya Vs. Velugubantla Venkayya and Others, . It was observed in that case as follows: "Where a right is based upon the illustration (i) to Section 7 of the Indian Easements Act, 1882, (V of 1882) the owner of higher land can pass even flood water

received by him on to, the lower land, at any rate where the flood is a usual or a periodic occurrence in the locality. Where the owner of the lower ground by creating an embankment impedes the natural flow of water he would be obstructing the natural outlet for that water. It makes little difference that the water happens to be not merely rain water but flood water provided the flood is of the kind to which the higher land is subjected periodically."

9. In my opinion, the Supreme Court in its said decision, did not lay down any contrary proposition of law about the right of the owner of the lower level land to arrange for discharge of water entering his land from higher lands, in a particular mode, as enunciated (2) Sheik Hussain''s case (supra), the construction of embankment obstructing the natural outlet for the water from the higher level land was only prohibited. In this case, there is no question of obstructing the natural flow of water from the defendants'' higher lands; we are concerned here with the discharge of rain water from the plaintiffs'' land in the normal and usual rain after it has entered into the plaintiffs'' land by natural outlet from the defendants'' land. Of course, whatever steps are taken by the plaintiffs, they must not interfere with the natural flow of water from the defendants'' land nor should they dam back the water to the defendants'' lands or cause the water to remain in the defendants'' lands. In the decision of (7) Ramdhin Singh and anr. v. Jadunandan Singh, 19 CWN 54, it was observed as follows: "The duty of the defendants is to allow the water from the plaintiffs'' land to pass on through their land. It is then open to them to dispose of it in the way they think best. The lower courts have ordered the defendants to remove the bund which they have created. It is not necessary in order to satisfy the plaintiffs'' claim that this should be done; but it will be sufficient if the defendants make some arrangement by which the water coming on their land from the plaintiffs'' land may pass over his land in such a way as not to remain on the plaintiffs'' land. So far the appeal is allowed."

10. The appellate court is of the opinion that the plaintiffs cannot obstruct the natural course of water by making a channel for discharge of water if such channel is not suitable or sufficient for the purpose. Further it held that the upper land owner may be compelled to discharge the water by a particular channel only if he submits to the alternative mode or the plaintiffs acquire such right by prescription. The plaintiffs have not claimed any right by prescription or by grant or consent of the defendants nor they have in any way disturbed the natural flow of water from the defendants'' lands. The channel they have made is for discharge of water after it has entered in their lands. On the authority of the decisions cited above, it is obvious that the plaintiffs can take steps for discharge of water from their lands in any manner they may elect provided such channel is not insufficient nor unsuitable for the purpose so as to interfere with the natural flow of water from the defendants'' lands.

11. The defendants in their written statement stated that the plaintiff No. 3 on taking possession of land in Aswin 1963, cultivated potato on land of Plot No. 1305 for the first time and for the purpose of irrigation made a channel along the northern boundary of the said land. It was further stated that during the heavy rains of Pous 28, 1363 B.S., there was accumulation of water in their lands and the defendants, in the usual manner, cut the ''ails'' between their lands and the plaintiffs'' lands and water was discharged from their lands. The defendants denied having ever cut the southern wall of the channel as alleged in the plaint. In his evidence, the defendant No. 3 (PW 4) admitted the existence of the channel extending from one end of Plot No. 586 to the other end of Plot No. 1305 and the southern side of the water channel being slightly higher than the rest of the lands. It is not the defendants'' case in the written statement nor is their evidence that the water channel is insufficient for the discharge of the rain water from their lands or the channel is obstructing the natural flow of water from their lands. The accumulation of water stated by the defendant No. 3 is consequent on the heavy rains on Pous 26, 1363 B.S. and it is also not their case that there has been any accumulation of water in the normal course or that the heavy rains are matters of periodic occurrence or even that the accumulation of water on the fateful day is due to the obstruction of the natural flow caused by the walls of the channel.

12. In absence of any case or evidence by the defendants that the channel is unsuitable or insufficient for the discharge of the water so as to interfere with the natural flow of water from the defendants'' land, the appellate court committed an error in law in throwing the onus on the plaintiffs to prove that the channel is sufficient for discharge of water. In fact, in the plaint, it is stated that water from the defendants'' lands is discharged and cleared by the channel in dispute and the plaintiff No. 3 (PW 1) has supported this averment in his evidence. The appellate court committed an error in coming to the finding that the channel is unsuitable or insufficient for the purpose of discharge of water in absence of such case by the defendants or any evidence in support of such finding. Further, there is even no case or evidence that the channel obstructed or is obstructing the natural flow of water from the defendants'' lands. Mere statement of the Commissioner that the width of the channel is 6" carries us nowhere nor the statement of the Commissioner that the channel ends on the north-eastern corner of Plot No. 586, far beyond the defendants'' land, is relevant, as we are concerned here only with the defendants'' lands. The appellate courts further finding that the water on the night of heavy rains rushed into the plaintiff''s land due to obstruction by the channel walls is again without evidence. In the circumstances, the findings of the appellate court about the plaintiffs'' channel being unsuitable or insufficient to discharge the water from the defendants'' land is thus without any evidence, and further in wrongly throwing onus on the plaintiffs while making out a new case on fact for the defendants not borne out by the pleadings or evidence about the suitability of the channel, the lower appellate court has committed substantial errors in procedure

leading to a wrong and erroneous decision. This necessitates interference by this court in a second appeal on the principles reiterated in (8) R. Ramachandran Ayyar Vs. Ramalingam Chettiar, . Accordingly, I set aside the findings of the lower appellate court holding that the planitiffs'' channel is not sufficient or suitable for discharge of the rain water coming from the defendants'' land. On the contrary, I hold that the plaintiffs are entitled to take suitable steps within their lands for the discharge of rain water coming from the defendants'' lands, and entering their lands, and that the channel made by the plaintiffs described in schedule ''Ga'' to the plaint is suitable and sufficient for the purpose of discharge of rain water coming to the plaintiffs'' lands from the defendants'' lands. I further hold that the defendants have no right to cut the walls of the channel made by the plaintiffs and to discharge rain water of their lands through such cuttings.

13. Under the provisions of Section 54 of the Specific Relief Act, 1877 (I of 1877), where the defendant invades or threatens to invade the plaintiff''s right to or enjoyment of property, the court may grant a perpetual injunction when the injunction is necessary, apart from other cases, to prevent a multiplicity of judicial proceedings. In the instant case, the lower appellate court has proceeded on the basis that the channel constructed by the plaintiffs is an obstruction to the natural flow of water from ''kha'' schedule lands and if the defendants cut the bund of the channel situate on the plaintiffs'' lands to protect their lands or crops, they were within their rights to do so and could not be held liable for any damages. Though there is no clear finding by the lower appellate court, it is obvious that the said court has proceeded on the basis that there has been invasion of the plaintiffs'' right to discharge the rain water coming from the defendants'' land through the channel made by the plaintiffs. It is also obvious that for such invasions on the plaintiffs'' right, there can not be any adequate pecuniary compensation nor such damage can be satisfactorily ascertained. As was observed in the case of (9) Apaji Patil v. Apa (1902) ILR 26 Bom. 735 relied on behalf of the appellants by Mr. Modak, as follows : "It appears to us that where a legal right, violated by another under colour of title, is established, the recurrence of violation cannot in ordinary cases be adequately met by the damages, nor can those damages be satisfactorily ascertained. How, for example, can damages be an adequate relief to one who has established his right to the possession of land, if his possession be subjected to repeated obstruction by another, or how can those damages be ascertained ?"

14. Again in (9) Apaji Patil v. Apa (supra) it was observed: "It appears to us that if the plaintiff establishes his right, this is eminently a case for an injunction. If this relief be not granted, there is danger of a multiplicity of proceedings or worse still that the parties will take law into their own hands and in our opinion the court should be ready as far as possible to grant such relief as will tend to prevent the risk of these evils." These observations apply to this case with great force. In future, there is a likelihood of such inroads on the plaintiffs'' right by the defendants, particularly armed with the untenable observations of the lower appellate court referred to

above. It is therefore eminently a fit and proper case where a perpetual injunction should be granted restraining the defendants from making any cutting on the southern bund of the channel in the plaintiffs'' lands described in schedule ''Ga'' to the plaint. There should be further injunction restraining the defendants from discharging the rain water coming from their land through such cuttings. I order accordingly. In the result, the judgment and decrees of the courts below are set aside and this appeal is allowed on contest. The plaintiffs'' suit for perpetual injunction is decreed and the defendants are hereby perpetually restrained from making any cutting in the southern bund of the channel in the plaintiffs'' lands described in schedule ''Ga'' to the plaint and from discharging the rain water coming from lands of schedule ''Kha'' to the plaint through such cutting. In the circumstances, there will be no order for costs in this appeal.