

SUPREME COURT OF INDIA

Raruha Singh

Vs.

Achal Singh

C.A.No.13 of 1960

(P. B. Gajendragadkar and K. C. Das Gupta, JJ.)

24.03.1960

JUDGEMENT

GAJENDRAGADKAR, J. :

1. In the suit from which this appeal by special leave arises the appellant had claimed a mandatory injunction against the defendants (respondents) requiring them to remove the obstruction to the flow of water from Khasra No. 2 to Khasra No. 254 as shown in the map attached to the plaint as well as a perpetual injunction restraining the respondents from repeating such acts in future. The appellant's claim was dismissed by the trial court. On appeal before the Additional District Judge the appellant succeeded and both the injunctions claimed by him were ordered to be issued. The respondents then moved the High Court of Madhya Pradesh by second appeal which was allowed and the appellant's claim dismissed with costs throughout. It is against this decree that the appellant has come to this Court by special leave.

2. In his plaint the appellant alleged that until the abolition of proprietary rights under the Madhya Pradesh Act I of 1951 he was a protected Thekedar of village Kongiya Kala for about 40 years. He held and was in possession of 20 pieces of Malik Makbuza lands and 11 Raiyati lands which were specified in paragraph 2 of the plaint. Of these lands Khasra No. 137 is a Bandhiya known as 'Baderatwa'; Khasra Nos. 254, 253, 255, 450 and 447 also constitute another Bandhiya known as 'Banbharan', while Khasra Nos. 245 and 246 constitute 'Hiriyah-Sahi' Bandhiya. According to the appellant these Bandhiyas were used by him for collecting water for irrigation of his other adjacent fields. The appellant's field, Khasra No. 2 which is known as Budhwa Bharri adjoins Mouza Kansitola khar. The rain water of the said khar in its natural course flows into the appellant's fields. The said rain water also flows into the adjacent lands of Khasra No. 123 belonging to respondent 1, that land being on a lower level, and from the said land it flows through Khasra Nos. 133 and 136 into Baderatwa Khasra No. 137. At this latter Khasra water is collected and let off as required for filling Khasra No. 254 and others.

When the rainfall is normal the water is let off through Khasra No. 156 at or near point M. 1 shown in the map, and when the rainfall is excessive it is let off at point M. 2 in Khasra No. 137 and through Khasra No. 136 at point M. 3 as well as through artificial channels seasonally prepared across the 'dharsa' Khasra No. 114. The water thus reaches Khasra No. 163 wherefrom it goes to Khasra Nos. 159, 233, 251 and 252 and then into Khasra No. 254. In the said Khasra the water is collected and used for irrigating the appellant's paddy fields on the east and south of Panbharan. The plaint specifically alleged that the course through which the water flows from Khasra No. 2 until it

reaches Khasra No. 254 had been shown on the map in the red dotted line. According to the plaintiff the appellant had been enjoying the natural right to have the water of his field Khasra No. 2 flow off into the field of respondent 1, Khasra No. 123, and through it to the appellant's other fields uninterrupted for more than 40 years but the same had been obstructed in June 1954. It is this obstruction which gave the appellant a cause of action for the present suit.

3. This claim was denied by the respondents. In regard to the appellant's allegation that the course through which water flows had been shown in red dotted line on the map the respondents alleged that it was not a natural flow nor was the appellant ever taking the water through that passage. In regard to the user for 40 years on which the appellant relied the respondents made a general denial. As will presently appear we have set out the pleadings at some length because the only question which arises for our decision in this appeal is whether the High Court was justified in dismissing the appellant's claim on the ground that his case as made out in the plaintiff had been misunderstood by the two courts below.

4. The learned trial judge framed four substantive issues. He found that the appellant had not proved his case that the water had been flowing through the course as shown in red dotted line in the map for 40 years openly without interruption and as of right; and so he held that the appellant had not acquired a right of easement for flowing the water over the aforesaid course. According to the trial judge the sluice at point M. 2 as alleged by the plaintiff had not been proved nor was he satisfied about the appellant's case about the obstruction in 1954. On these findings the appellant's claim for a two-fold injunction was dismissed.

5. The appellant then took the matter before the Additional District Judge. The appellate court considered the evidence and found that the appellant had proved his case that the water was flowing through the red dotted line openly as alleged by the appellant. It also held that the obstruction pleaded by the appellant had been established. In dealing with the principal question about the acquisition of the right of easement the appellate court observed that the learned trial judge was patently in error in assuming that Panbharan had been constructed in 1953 A. D. In fact evidence showed that it had been constructed in Sambat 1953 and this mistake had clearly vitiated the whole of the reasoning of the learned trial judge. It appears from the judgment of the appellate court that this position was conceded by the respondents' learned counsel. The appellate court also examined the question as to whether Khasra No. 137 is a Bharri or Bandhiya and on that question he made a finding in favour of the appellant after considering the material evidence led in the case. As a result of its findings the appellate court allowed the appeal and decreed the appellant's claim.

6. The respondents then took the matter to the High Court in appeal. The High Court examined the plaintiff and came to the conclusion that the flow into Khasra No. 137 through the field of the respondents was through a natural course and it also thought that from the said Bandhiya the water was taken to Khasra No. 254 again through natural course. The only artificial channel which the High Court assumed had been pleaded by the appellant was the one seasonally constructed at points M. 2 and M. 3 on the map. The High Court, therefore, came to the conclusion that the case fell under S. 17(c) of the Easements Act, and no right could therefore have been acquired by the appellant as alleged by him. Incidentally the High Court also considered the evidence and it appears it was inclined to take the view that the evidence adduced by the appellant was not satisfactory. On this view the High Court allowed the appeal and dismissed the appellant's suit.

7. Now it is plain that in assuming that the allegations made by the appellant in his plaintiff attracted the provisions of S. 17(c) of the Easements Act the High Court has made out an entirely new case

for the respondents. We have already set out the allegations in the plaint in some detail and we have noticed that the issues framed both in the trial court as well as in the appellate court clearly assumed that the red dotted line on which the appellant relied was alleged by him in substance to be an artificial channel. It is on this footing that the appellant's claim to have acquired a right by 40 years user was considered in both the courts. It was this claim which was disputed by the respondents and on which both the parties led evidence. Therefore, in our opinion, it was not open to the High Court to read the plaint and that too in a very technical manner and to hold that the courts below had completely misjudged the character of the appellant's claim. Since the parties had proceeded to trial on the definite understanding that the channel through which the water flowed right up from the start up to the end was alleged to be an artificial channel it was too late for the respondents to suggest that the plaint should be strictly read and the provisions of s. 17(c) of the Easements Act should be invoked.

8. Incidentally we may point out that the High Court should not have entered into the question of appreciating the evidence as it appears to have done in the last portion of its judgment. This Court has repeatedly pointed out that in second appeal the High Court's jurisdiction is confined to questions of law. In this particular case the District Court had pointed out that the trial court had made an obvious mistake in regard to the date of the construction of the Panbharan. After all the questions at issue had to be tried in the light of oral evidence and surrounding circumstances. In such a case, if the appellate Court recorded definite findings it was not open to the High Court to attempt to reappraise that evidence. However, the decision of the High Court is based principally on the view that the High Court took about the application of S. 17(c) of the Easements Act to the allegations made by the appellant in the plaint; and as we have held in the circumstances of this case it was not open to the High Court to adopt such a course. If the channel represented by the red dotted line on the map was alleged to be an artificial channel there can be no doubt that S. 17(c) would be inapplicable.

9. At the hearing of this appeal a preliminary objection was raised by the learned counsel for the respondents that leave should not have been granted because the appeal is against the decision of a single judge and the appellant did not avail himself of the right to make an appeal under the Letters Patent. Besides, it was urged that this Court usually does not, and should not, interfere with the decision of a single judge in a second appeal. There is considerable force in this contention. However, since leave has been granted we do not think we can or should virtually revoke the leave by accepting the preliminary objection.

10. The result is the appeal is allowed, the decree passed by the High Court is set aside and that of the lower appellate court restored with costs throughout.

Appeal allowed.

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