

Nanak and ors. Vs. Basanta and ors.

Nanak and ors. Vs. Basanta and ors.

SooperKanoon Citation : sooperkanoon.com/451053

Court : Allahabad

Decided On : Jul-14-1975

Reported in : AIR1976All157

Judge : Chandra Prakash, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 and 100

Appeal No. : Second Appeal No. 3627 of 1965

Appellant : Nanak and ors.

Respondent : Basanta and ors.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : N.L. Ganguli, Adv.

Disposition : Appeal dismissed

Judgement :

Chandra Prakash, J.

1. This is a second appeal against the order dated August 28, 1965, of Shri T.N. Saxena, III Additional Civil Judge, Meerut, dismissing the appeal of the appellants after confirming the decree of the trial court.

2. The dispute between the parties related to a nali; a rasta and a pulia detailed in the plaint. The case of the plaintiffs-respondents Nos. 1 to 3 was that they used to irrigate their fields from the nali aforesaid but the defendants without any right had demolished that nali and raised certain constructions over it, with the result that plaintiffs Nos. 1 to 3 were deprived of their right of irrigating their fields. It was also alleged that the rasta in dispute was a common rasta which was enjoyed by the plaintiffs also but the defendants without any right had narrowed that rasta by making constructions over it, it was further alleged that the defendants without any right had demolished the pulia in dispute which had resulted in damage to the plaintiffs. On these allegations the plaintiffs claimed possession over the aforesaid nali and rasta and wanted the defendants to restore the status quo ante. They also wanted restoration of the pulia. They further wanted a permanent injunction restraining the defendants from interfering with the plaintiffs' right of the use of the nali, rasta and pulia. Plaintiffs Nos. 1 and 2 claimed Rs. 200/- each as damages from defendants Nos. 1 to 3 or other defendants found liable while plaintiff No. 3 claimed damages to the extent of Rs. 20/- from defendants Nos. 1 to 3 or other defendants found liable.

3. The suit was filed against the present appellants defendants Nos. 1 to 3 and the present respondents Nos. 4 to 32.

4. The suit was contested by defendant No. 2 alone. His defence was that the defendants had not demolished any nali or pulia as alleged in the plaint nor had the defendants narrowed any rasta of the plaintiffs. It was also alleged that the nali in dispute had been demolished by the Consolidation authorities and the State of U.P. was a necessary party. The jurisdiction of the trial court was also challenged and it was further pleaded that none of the plaintiffs was entitled to any amount of damages.

5. The trial court after taking evidence of the parties came to the conclusion that it had jurisdiction to try the suit. It was further held that plaintiffs-respondents Nos. 1 to 3 had failed to prove that the defendants had demolished any rasta or pulia or they had curtailed or narrowed down any rasta. It was further held that the State of U.P. was not a necessary party to the suit and the plaintiffs had failed to make out

any case of damages. On these findings the trial court decreed the suit with respect to the restoration of the nali and dismissed the rest of the claim.

6. Against the above decree defendants Nos. 1 to 3, the present appellants, filed an appeal in the Court below while plaintiffs-respondents Nos. 1 to 3 filed a cross-objection against the portion of the aforesaid decree which had dismissed the plaintiffs claim. After hearing the learned counsel for the parties the Court below confirmed all the findings of fact arrived at by the trial Court and dismissed both the appeals of defendants-appellants Nos. 1 to 3 and the cross-objection of plaintiffs-respondents Nos. 1 to 3.

7. Against that order the appellants-defendants Nos. 1 to 3 have come up in second appeal before me.

8. Nobody has appeared on behalf of the plaintiffs-respondents to contest this appeal.

9. I have gone through the record of the case with the assistance of the learned counsel for the appellants alone. After going through the record and giving the matter my anxious consideration I have come to the conclusion that the decree of the lower appellate Court cannot be interfered with.

10. The first contention raised before me was that it has not been proved in the case that the plaintiffs-respondents Nos. 1 to 3 had suffered any substantial damage and, therefore, no decree should have been passed by the Courts below with respect to the nali in dispute. There is a concurrent finding of fact of both the Courts below that the nali was in existence from which plaintiffs-respondents Nos. 1 to 3 used to irrigate their fields. There is further the concurrent finding of fact that this nali had been demolished by the defendants the present appellants and respondents Nos. 4 to 32. The above findings of fact cannot be challenged in this second appeal. When the nali, which used to irrigate the plaintiffs fields, had been demolished by the present appellants and respondents Nos. 4 to 32, it cannot be said that the plaintiffs respondents Nos. 1 to 3 have not suffered any damage. The plaintiffs have been deprived of their right of irrigating their fields from a nali which had been demolished by the appellants and respondents Nos. 4 to 32 and the

Courts below were perfectly right in restoring the status quo ante.

11. My attention was drawn to the ruling reported in *Raj Singh v. Ch. Gajraj Singh*, (1957 All U 822) = (AIR 1958 AU 335). This ruling is distinguishable on facts. The case in that ruling related to the nuisance caused by the starting of a bhatta and the smoke from the bhatta adversely affected the plaintiff's grove and caused damage to its trees and fruits. The present case is not a case of private or public nuisance. In the present case the defendants had demolished the nali from which the plaintiffs used to irrigate their fields and for which they had no right. The above ruling is, therefore, inapplicable to the facts of the present case.

12. The second contention raised before me was that the State of U.P. has not been impleaded. The plea taken by the appellants in the written statement was that the nali had been demolished or changed by the Consolidation authorities and not by the appellants and, therefore, the State of U.P. was a necessary party. It has been found as a fact by both the Courts below that the nali in dispute had been demolished by the appellants and respondents Nos. 4 to 32 and not by the Consolidation authorities or any other public servant of the U.P. State. The U.P. State was, therefore, not a necessary party in the case and the contention on this point was rejected.

13. The third contention raised before me was that the plaintiffs-respondents Nos. 1 to 3 have not given the extent of the breadth of the nali whose restoration they want and, therefore, the decree was inexecutable, no such plea was taken in the written statement filed by the appellants nor was any such plea taken by the appellants in the Court below. It is, therefore, not open to the appellants to raise an entirely new plea without taking it in the written statement. Further it will be open to the Courts below to see the extent of the nali to be restored in the execution proceedings and the Court below will restore the nali to the minimum extent necessary in the case. This point is, therefore, also decided against the appellants.

14. There is no force in this appeal and it is accordingly dismissed, but as nobody has appeared on behalf of the respondents there will be no order as to costs.