

Moola Singh Vs. Surendra Singh and ors.

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Court : Allahabad

Decided On : Apr-04-1960

Reported in : AIR1960All656; 1960CriLJ1388

Judge : B.R. James and ;J.N. Takru, JJ.

Acts : [Northern India Canal and Drainage Act, 1873](#) - Sections 20, 21, 32 and 70;
Evidence Act - Sections 114

Appeal No. : Criminal Appeal No. 508 of 1959

Appellant : Moola Singh

Respondent : Surendra Singh and ors.

Advocate for Def. : N.S. Singhal and ;Satishchandra Asthana, Adv.

Advocate for Pet/Ap. : P.C. Chaturvedi, Adv.

Disposition : Appeal dismissed

Judgement :

J.N. Takru, J.

1. This is a complainant's appeal, by special leave, against an appellate order of acquittal passed by the First Assistant Sessions Judge of Saharanpur. The circumstances under which it arises are as follows : Mula Singh, the appellant,

filed a complaint against Surendra Singh, Bhopal Singh, Bhagwan Singh and Harbhan Singh, the respondents, alleging that on the evening of the 22nd August 1958 the latter demolished the Gul (water-course) of Kulaba No. 7 Canal Minor Nalhera which passed through their plot No. 265 in village Chapperh and irrigated the appellant's field and they thus committed an offence punishable under Section 70(1) of the Northern India Canal and Drainage Act (Act No. VIII of 1873), hereinafter referred to as the Act.

2. All the respondents denied the appellant's case and attributed their false implication to enmity on account of some election disputes. They examined three witnesses in their defence.

3. The trial court on an appraisal of the evidence led by the parties found the appellant's case proved and consequently convicted and sentenced each of the respondents to a fine of Rs. 45 in default to one week's rigorous imprisonment. On appeal the lower appellate court reversed that judgment and acquitted the respondents. Hence the present appeal by, special leave.

4. Both the courts below have recorded concurrent findings of fact (1) that plot No. 265 belonged to the respondents, (2) that there was a Gul in the said plot, and (3) that the said Gul was demolished by the respondents as alleged by the appellant. The lower appellate court, however, took the view that as plot No. 265 belonged to the respondents, the mere existence of a Gul in the said plot could not confer any right upon the appellant or any one else to use it against the consent and wishes of the respondents unless he, i.e., the appellant, or anybody else had acquired that right under some law or agreement with the respondents.

On behalf of the appellant it was argued before us that this view was contrary to the provisions of the Act and so was liable to be set aside. In order, therefore, to appreciate this contention a reference to the relevant sections of the Act which bear upon this matter is necessary. We shall take up those provisions in the order in which they are relevant for the proper understanding of this case. The first three provisions to which reference has to be made are Sections 70(1), 3(1)(c) and 3(2), material portions, whereof read as follows :

70. Whoever, without proper authority and voluntarily, does any of the acts following, that is to say: '

(1) 'damages'.....any canal.....:

shall be liable, on conviction.....to a fine not exceeding fifty rupees, or to imprisonment not exceeding one month, or to both.

3. In this Act, unless there be something repugnant in the subject or context:

(1) 'canal' includes-

(a).....;

(b).....;

(c) All water-courses as defined in the second clause of this section;

(d).....;

(2) 'water-courses' means any channel which is supplied with water from a canal, but which is not maintained at the cost of the State Government and all the subsidiary works belonging to any such channel:

5. A plain reading of Sections 3(1)(c) and 3(2) shows that the water-course in question is a canal within the definition of that word as contained in Section 3(1) and therefore falls within the purview of Section 70 of the Act. Now, in order to make out an offence under Section 70(1) the prosecution has to establish the following three ingredients :

(1) that the respondents damaged the watercourse in question;

(2) that they did so voluntarily; and

(3) that they did so without proper authority.

6. On the concurrent findings recorded by the courts below which were not, and indeed could not be, challenged before us the respondents have been found to

have voluntarily damaged the water-course in question. But this finding is not sufficient to dispose of the matter, since to hold them guilty, it has further to be found that the respondents did so without proper authority.

On behalf of the appellant it was argued that once the prosecution had proved the first two ingredients, the burden of proving that the person committing the damage had proper authority to do so lay upon that person, and as in the present case the respondents did not lead any evidence on that point, they must be held to have committed that damage without any proper authority. In order to determine this contention, it is necessary to consider what the expression 'without proper authority' means.

There is no dispute that it would include an authority which is derived from the appropriate canal Officers. Mr. Singhal, learned counsel for the respondents, however, argued that apart from the aforesaid authority, the owner of land over which a water-course runs has by the mere fact of the said ownership 'proper authority' to deal with it -- including the right to damage it -- unless the person complaining against that act is able to show that he had acquired a right to the user of the said water-course either under the Act, or under any other provision of law, and as there was nothing to show that any such right had been acquired by the appellant his appeal was liable to be dismissed.

Mr. P. C. Chaturvedi, learned counsel for the appellant, strongly refuted both these arguments and contended that in any case the evidence on record, read in the back ground of the relevant provisions of law--reference to which shall be made later--was sufficient to prove the acquisition of the said right of user by the appellant. We shall therefore proceed at once to the examination of these rival contentions.

7. So far as the first contention is concerned, it can be disposed of summarily. It is a well-established rule of law that the owner of a property has the right to deal with it in any manner he likes provided there is no law, Or private agreement whittling down that right. As the present case arises out of criminal proceedings, there can be no manner of doubt that the burden of proving that there is such a law, or private agreement is on the prosecution, that is the appellant, and if the latter has

failed to discharge it, the respondents cannot be held to have committed the impugned act without 'proper authority'. In our opinion both these propositions are so self-evident that they require no authority to support them. Nevertheless, our attention was drawn to the following four cases :

(a) the unreported decision of our brother Desai in Babu Lal v. The State, Cri. Revn. No. 2076 of 1958. (b) Hukman v. Emperor, AIR 1921 Lah 327;

(c) Ramji Lal v. Emperor AIR 1942 All 102; and

(d) Kanhaiya Singh v. Rex, ILR (1950) All 780.

In case (a) it was held that:

'The applicants have thus damaged or obstructed a canal, but the question is whether they did it without proper authority. They were the owners of the canal and it was on their own land; prima facie their ownership of the canal and of the land on which it existed was sufficient authority for their dealing with it in any manner that was not unlawful. No law forbade their demolishing their channel.

There is nothing to show that their authority as owners was restricted in any manner and thereby ceased to be proper authority for their damaging, altering or obstructing it. In the absence of action contemplated by Section 20 or 21, their authority as owners to deal with it in any manner, that was not unlawful, remained intact and it cannot be said that they damaged, altered or obstructed it without proper authority. No offence is thus committed by them.'

In case (b) a learned Judge of the Lahore High Court held that:

'a right to obtain the passage of water over another man's property can be secured legally by the Canal Department acting on its own authority or it can be obtained on the application of a private person to the Divisional Canal Officer under Section 21 of the Act. Such a right can also be obtained by a private agreement. But where one person merely permits another to take water on a watercourse existing on the former's land and then discontinues the permission and stops the watercourse, he is not guilty under Section 70.'

In case (c) a learned single Judge of this Court held that:

'a person may acquire a right to occupy a part of the land of another person, which may be needed for a water-course either by a private arrangement or through the Canal Officer. In either case it would be unlawful for the owner of the land to interfere with such water-course under Section 70 of the Act. In the present case the wafer-course did not belong to the complainant.

It belonged to the accused themselves, and it was with the accused's permission that the complainant was allowed to take water through it for irrigating his fields. The complainant had not acquired any right to occupy any part of the land which was needed for the water-course. In fact, no water-course of the complainant existed on the land in dispute which belonged to the applicants. The applicants cannot therefore be held guilty of any offence under Section 70 of the Act.'

In case (d) Chief Justice Malik held that:

'in the absence of any order under Section 20 or Section 21 of the Northern India Canal and Drainage Act, whether a particular channel is or is not a water-course is a question of fact and the decision of that question would depend upon the decision of the question whether the water-channel is recognised as such by the people of the locality.

I do not mean that it should have existed for twenty years to enable others to acquire rights of easement, but it should have existed for sufficiently long period or it should have been so generally used by the people of the locality as of right that it could be said that the channel was a well-recognised 'water-course' for the purposes of irrigation.'

8. The weight of judicial pronouncements--to which we would like to add our own--is thus uniformly in favour of the respondent's contention that unless the appellant can prove that he had acquired a right to the user of the water-course in question, he can have no legitimate grievance if the respondents who are the owners of the land over which it flows deal with it in any manner they like. Realising this difficulty Mr. P. C. Chaturvedi contended that the evidence on record, read in the light of the

relevant provisions of law, was sufficient to prove the acquisition of the said right by the appellant.

According to him, the unchallenged evidence of Jaipal Singh (P. W. 4) shows that at the time of occurrence the said water-course had been in existence for about three years, and the appellant had been taking water from it for the purposes of irrigating his fields. This, he argued, could only have been possible if the appellant is held to have received the permission of the canal authorities to do so, as under Section 32(e) of the Act no person

'entitled to use the water of any canal.....shall sell or sub-let or otherwise transfer his right to such use'

without the permission of the Superintending Canal Officer. In other words, his contention was that, in the absence of any definite evidence from either side, the appellant must be presumed to have acquired that right on the ground that if it were not so the canal authorities would not have permitted that water-course to be used by him for well-nigh three years.

For this proposition, he relied upon the presumption of the regular performance of official acts under illustration (e) of Section 114 of the Evidence Act. We are, however, unable to accept this contention. We have already held that the said right can only be acquired in one of two ways, namely, under some provision of the Act or by private agreement. There is not a shred of evidence to prove the acquisition of the said right by either of these means. Under the Act itself there are only two ways in which that right can be acquired.

Section 20 lays down how that right can be acquired through an existing water-course, while Section 21 lays down how a new water-course may be constructed over land belonging to another, to the construction of which the latter is not agreeable. Implicit in both these sections is the acquisition of that right by the private agreement of the parties subject, however, to the permission of the canal authorities under Section 32(e) of the Act.

In the face of these express provisions of law, there is no scope for the acquisition of the said right on the basis of any presumption arising under illustration (e) of Section 114 of the Evidence Act. If the respondents allowed the appellant to take water which flowed through the water-course existing on their land without the previous permission of the Superintending Canal Officer under Section 32(e) of the Act, he may be liable to prosecution for that unauthorised act.

But his act would not ipso facto create any right to the user of that water-course in favour of the appellant. For all these reasons, we are satisfied that the appellant has failed to prove the acquisition of any right to the user of the watercourse in question, which would have the effect of curtailing the appellant's right to deal with it in any manner he liked. We are therefore of the opinion that the view taken by the lower appellate court is correct and its order of acquittal must be sustained.

9. The result therefore is that we find no merits in this appeal. It accordingly fails and is hereby dismissed.

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