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Court : Orissa

Decided On : Nov-24-1959

Reported in : AIR1960Ori95

Judge : G.C. Das and ;S. Barman, JJ.

Acts : Limitation Act, 1908 - Sections 26(1); [Easements Act, 1882](#) - Sections 1 and 15

Appeal No. : Appeal under Orissa High Court Order No. 2 of 1957

Appellant : Ramesh Chandra Panda and ors.

Respondent : Lambodar Panda and ors.

Advocate for Pet/Ap. : G.K. Misra, Adv.

Disposition : Appeal allowed

Judgement :

Das, J.

1. This is an appeal against the judgment of a learned Single Judge of this Court in Second Appeal No. 241 of 1955. The sole question involved is whether the plaintiffs were using the disputed pathway as of right.

2. The facts are short and simple. The plaintiffs commenced a suit for declaration of their right of way over the disputed land belonging to the defendants and for a direction that the defendants should remove the obstruction raised by them over the said land and for a permanent injunction restraining them from closing the pathway. The plaintiffs' whole case was that there is a public road (plot No. 52) running east-west between the homesteads of the parties and the suit pathway is situated on the following plots of the defendants and has its point of entrance from the aforesaid public road near the front of the plaintiffs' homestead and its point of departure on a village pasture land which is on the northeast of the said path-way and is being used as a way by the plaintiffs for generations and for more than thirty years peaceably and openly and as of right to the knowledge of the defendants without any interruption. The said path-way was being used by the plaintiffs, their women-folk and their cattle. It is due to certain quarrel between the parties that the defendants closed the southern end of the disputed path-way by raising a fence. Accordingly, the plaintiffs filed the suit for the afore-mentioned declarations.

3. The defence was a complete denial of the existence of the pathway or the right claimed by the plaintiffs. According to them whole plot was fenced on all sides. They, however, admitted that the present suit was the result of a quarrel regarding certain seabait disputes between the parties who are close relations.

4. The trial judge although found the plaintiffs' open and peaceful user for more than thirty years to the knowledge of the defendants and their neighbours, he dismissed the suit on the ground that the user was not as of right. On plaintiffs' appeal, the Court of appeal below while agreeing with the findings of the trial Judge decreed the plaintiffs' suit reversing his finding that the user was not 'as of right'. Thus, the appellate court in short found the plaintiffs' user was 'as of right'. Against this judgment a Second appeal was filed before this court which was numbered as Second Appeal No. 241 of 1955. Eventually the appeal was heard by Rao, T. who by his judgment dated 12-11-57 set aside the judgment and decree of the lower appellate Court and restored that of the trial court. He, however, allowed leave to appeal and accordingly this appeal came up before us for disposal,

5. Before going into the merits of the case, I would like to state that the defendants never pleaded that the plaintiffs' user was by permission or sufferage. A Civil Court Commissioner was appointed and he by his report (Ext. 1/a) dated 30-6-52 found that the disputed strip of land which is used as a pathway had been fenced on both sides along its length. He also found that its southern end merges with the public road in plot No. 52 and its northern end merges with the public sand-dune. He further found that this strip of land was used as a common passage or a foottrack by the defendants for going to their private tanks and orchards and that the track was here in existence for the last 25 or 26 years. Thus, in view of the concurrent findings of both the courts below the only question in Second appeal was whether the plaintiffs were using the suit pathway 'as of right'. Rao, J. relying upon the decisions reported in *Khoda Buksh v. Tajuddin*, 8 Cal WN 359; *Kunjammal v. Rathnam Pillai*, AIR 1922 Mad 5; *Ramchandra Trimbak v. Hari Martand*, AJR 1929 Born 144 and *Nasiruddin v. Deokali*, AIR 1929 Pat 124, held that the plaintiffs failed to prove that the right claimed by them was exercised 'as of right'. Accordingly, he dismissed the plaintiffs' suit. It appears that the matter was not fully argued before my learned brother and all the relevant decisions were not brought to his notice at the time he delivered the judgment in the second appeal.

6. Whether the user was with an animus as of right is a question of fact but a long, user, however, raises a presumption in favour of the plaintiffs that the enjoyment has been 'as of right'. There might be some difference between the conditions and the circumstances as also the habits of the people in England and in India, but the basic principle on which both the English and Indian laws are based appears to be the same. It is now well settled in England that a party enjoying an easement acted under claim of right until the contrary is shown (See *Gale on Easements*, 12th Edition, pp. 212, 213).

The position in India appears to me to be not only that the plaintiff has to establish user for the statutory period of twenty years, but he has to establish that the user is as of right; the law then presumes that it is as of right, that is to say, it has a lawful origin, if the plaintiff proves open and notorious user to the knowledge of the defendant. The defendant may show that the facts are such that the user was not as of right but was under license not amounting to a grant or he can show fraud or

force or secrecy by which the plaintiff had been using the right. In that case it would destroy the effect of the user 'as of right'. The defendant in that event must plead in his written statement that the long user is attributable to permission or sufferage. If no such averment is made he should not be allowed to argue that user was by his leave and licence.

7. We are concerned in this case with Clause (1) of Section 26 of the Indian Limitation Act. It says where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years, and where any way or water-course, or the use of any water or any other easement has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for twenty years, the right to such access and use of light or air, way, water-course, use of water or other easement shall be absolute and indefensible. Section 15 of the Indian Easements Act lays down the same principle, but that Act does not apply to the whole of Orissa except those parts which have been taken from the Central Provinces (Madhya Pradesh) and Madras.

8. The question as to what precise meaning is to be given to the expression 'as of right' had been agitating the minds of the Judges both in England and India. The legal position in England has been laid down by Parke, B. in the case of *Bright v. Walker*, (1834) 1 Cr. M. and R. 211 at p. 219, in the following terms:

'In order to establish a right of way, and to bring the case within the second section (of the English Prescription Act) it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right' for that is the form in which by Section 5, such a claim must be pleaded, and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done -- if he shall have occasionally asked the permission of the occupier of the land -- no title would be acquired, because it was not enjoyed 'as of right'. For the same

reason it would not, if there had been unity of possession during all or part of the time, for then the claimant would not have enjoyed as of right the easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated, that is, by the same means by which a similar claim, arising by custom, prescription or grant, would now be defeasible, and therefore, it may be answered by proof of a grant, or of a license, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence of ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised.'

Willes, J. in the case of *Mills v. Colchester Corporation*, (1867) 2 C. P. 476 at p. 486 observed:

'in the case of prescription, long enjoyment in order to establish a right must have been as of right, and therefore neither by violence, nor by stealth nor by leave asked from time to time.'

So also Lord Davey in the case of *Gardner v. Hodgson's Kingston Brewery Co. Ltd.*, (1903) AC 229 at P. 238, while repeating the words used by Erle, J. in *Eaton v. Swansea Water Works Co.*, (1851) 17 Q.B., 267 at p. 275. stated that 'enjoyment as of right' means 'nec vi, nec clam, nec precario'. Lord Davey's concise explanation, however, was explained by Lord Dehman in *Tickle v. Brown*, (1836) 43 R.R., 358, in the following terms:

'It seems therefore that the 'enjoyment as of right' must mean an enjoyment had, not secretly or by stealth., or by tacit sufferance, or by permission asked from time to time, on each occasion or even on many occasions of using it; but an enjoyment as openly, notoriously, without particular leave at the time by a person claiming to use it without danger of being treated as trespasser as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right or, though not strictly legal, yet lawful to the extent of excusing the trespass as by consent or agreement in writing not under seal in ease of plea for forty years or by such writing or parol consent or agreement, contract or license in case of a plea for twenty years.'

Fry J., in the case of *Moody v. Staggles*, (1879) 12 Ch. D. 261, similarly observed:

'Where there has been a long enjoyment of property in a particular manner it is the habit, and in my view, the duty of the Court, so far as it lawfully can, to clothe the fact with right.'

An identical view was also taken by the Judicial Committee of the Privy Council in the case of *Bholanath Nundy v. Mindnapore Zamindari Co.*, 31 Ind App 75 (PC).

9. The earliest case in India appears to have been decided by a Division Bench of the Calcutta High Court in the case of *Mahomed Alli v. Jugal Ramchandra*, 14 Suth WR, 124. Phear J. in that case held that where a claim to a right of way is supported by evidence of user only, the court must satisfy itself whether or not the user was founded on actual right, the guiding principle being that open user of another's land for the purposes of a road or pathway, if continued without interruption for a long time and not attributable to permission or sufferance, induces the presumption that the user was a right.

The next decision is of Bancrjee, J. in the case of 8 Cal WN 359 in which the learned Judge held that in a suit to establish a right of way, the property of the English rule that the presumption from user should be that it is as of right, must depend upon the circumstances not only of each particular case, but also of each particular country regard being had to the habits of the people of that country. It would not be right to draw here the same inference from user that would be proper and legitimate in a case arising in England. Under Section 26 of the Limitation Act the onus is upon the plaintiff to prove that the user was 'as of right.'

The learned Judge further observed that in the first place Section 26 of the Limitation Act upon which the right claimed is based, expressly requires that the user must be as of right, and if that is so, it is for the plaintiff to show that this requirement of the law has been satisfied. Relying on U.N. Mitra's book on law of Limitation and Prescription (3rd Edition, p. 424 Foot-note) the learned Judge quoted from an unreported decision that the nature and character of the servient land, the friendship or relationship between the servient and dominant owners, and the circumstances under which the user had taken place, may induce the Court to hold

that the enjoyment was not 'as of right' although there is no direct proof that the enjoyment was had with the permission of the servient owners. Apparently this passage refers to a legal origin or otherwise.

This case appears to have been noticed in the subsequent judgments of the Patna, Madras, Bombay and Nagpur High Courts. The learned Judge, however, did not refer to the earlier Division Bench decision of his Court referred to above in 14 Suth WR 124. There are four other decisions of the Calcutta High Court which may usefully be referred to: Subsequent to the decision in 8 Cal WN 359, there is another Division Bench decision of the same High Court in the case of Rameswar Mitra v. Natabar Guin, 19 Ind Cas 66 (Cal), wherein their Lordships held that in a suit under Section 25 of the Limitation Act, the onus is on the plaintiff to prove that the user was of right, but the presumption to be drawn from user must always be a question of fact depending upon the circumstances of each case. The learned Judges approved the decision of Banerjee, J. in the case of 8 Cal WN 359 in respect of the onus to prove. In that case the defendants in their written statement averred that the plaintiffs had never used the disputed Ghat. The plaintiff had successfully proved that he had used the Ghat in question for twenty years. Finding themselves in this position, the defendants wanted to take up an inconsistent plea that this user has been a permissible one. The defendant was rightly denied to take up that plea and the user was held to be 'as of right'.

10. In the case of Bihari Lal Mookerjee v. Asutosh Banerjee, AIR 1925 Cal 788, a Division Bench of the Calcutta High Court was of opinion that in order to establish a right of easement it is enough for the plaintiff to prove that he has been exercising the right without interruption, without express or implied permission of the owner of the dominant tenement and without secrecy or stealth. Accordingly, they held that the findings arrived at by the Court of fact amounted to exercise by the plaintiff of the right of easement 'as of right' for a period of twenty years, uninterrupted and without obstruction. Sitakanta Pal v. Radha Govinda Sen, AIR 1929 Cal 542 is doubtless a decision against the contention of the appellants, The learned Judge in that case held that a title to easement is not complete merely upon the effluxion of the period mentioned in the statutes, viz., twenty years and however long the period of actual enjoyment may be, no absolute or indefeasible

right can be acquired until it is so brought in question in some suit, and until it is so brought in question, the right is inchoate only and in order to establish it when brought in question the enjoyment relied on must be an enjoyment for twenty years upto within two years of the institution of the suit.

But the decision was apparently based on the finding of fact arrived at by the Court below. The only other decision that I need refer to is the decision of Rankin, C. J. in the case of Ismail Biswas v. Emperor, AIR 1930 Cal 289. This was a case under the Indian Penal Code and the question was whether an offence under Section 430 has been committed or not. The evidence in that case was that he has been taking water to irrigate his land through a channel from a tank and as such had acquired a right to do so. This case is relied upon for the legal concept as has been laid down by Rankin, C. J. The learned Chief Justice observed:

'It appears to me that if the evidence is that a person has the occupation of lands and has been taking water to irrigate his lands through a channel from this tank, that is pretty good evidence that he has some right so to do. This is not one of those things that can be concealed or that can be done behind the back of people so that nobody in the neighbourhood can possibly get to know of it. It is done openly and on the face of it, it appears to me that the fact of enjoyment of such a right as that is some evidence of the right itself.'

11. Now coming to the Madras decisions, the first case cited, was the case of AIR 1922 Mad 5. This is one of the cases which was relied upon by Rao, J. In that case a Division Bench of the Madras High Court held that where it was found that the plaintiff's privy was cleaned for over thirty or forty years by scavengers passing through the defendant's house there was a presumption that the user was as of right. The learned Judges, while coming to that decision observed that in the case of an alternative enjoyment a legal origin is presumed in England until the contrary is proved and referred to *Phillips v. Halliday*, 1891 A.C. 228 and *Good Man v. Saltash Corporation*, (1882) 7 A.C. 633 and certain other English decisions. They further held that in India there are conditions and circumstances such as nature and character of the servient land, the friendship or relationship of parties to be taken note of before a Court can come to the conclusion that the exercise of a

right of way can be held to have been is of right and relied upon the Calcutta High Court decision in 8 Cal WN 359. Thus, the learned Judges came to the conclusion that the¹ presumption in law is that the user was as of right, when the plaintiff successfully proves that he exercised the right for the statutory period.

12. In the case of Paddayya v. Krishnamurty, AIR 1927 Mad 653, Ramesam J. sitting with Odgers J. was of opinion that where a customary right of way is set up and user for thirty years is proved, the presumption would be prima facie that it was as of right and it is for the party who wants to show that it was only permissive to prove it. In another decision of the same High Court in the case of Maharaja of Venkatagiri v. Ardhamala Yagadu, AIR 1937 Mad. 953, Beasley C. J. took the view that the tenants started with a presumption in their favour that they were using the water as of right and the presumption not having been rebutted by the landlord, the tenants had acquired a title by prescription to use the water and the landlord was not entitled to recover compensation. And the fact that in some years there may not have been enough water to irrigate as large an area as in other years is not a bar to the acquisition of such right by prescription. Thus, the clear Madras view is that a legal presumption of the user as of right could be drawn when the plaintiff proves uninterrupted, notorious possession for the-statutory period.

13. The decisions of the Bombay High Court are to the same effect. In the case of AIR 1929 Bom 144, it was held that a question regarding a right of way the Court should consider the character of the ground the space for which the right is claimed the relations between the parties and the circumstances under which the user took place to decide whether the user was 'as of right'. The learned Judge while following the decision in 8 Cal WN 359 made a slight distinction with regard to the Madras case referred to in AIR 1922. Mad 5. Beaumont, C. J. sitting with Sen J. in the case of Rau Rama v. Tukaram Nana, AIR 1939 Bom 149 was of the view that where a party shows that for the statutory period he has openly exercised certain rights which in themselves are sufficient to establish an easement, prima facie he-is entitled to the easement, and it is not necessary for him to show that during the whole or part of the period of prescription the plaintiff was not consciously claiming an easement.

14. It appears that a consistent view was being taken by the Lahore High Court in this behalf. According to them, an open user continued without interruption for a long time and not shown to be attributable to any permission on the owner's part is prima facie evidence of enjoyment as of right. The presumption is that the user is of right (Vide *Diwan v. Jagta*, AIR 1925 Lah 354 and *Piare Lal v. Ishaq Lal*, AIR 1926 Lah 522(1)). The decision in AIR 1926 Lah 522(1) was a decision in a Letters Patent Appeal from the decision in AIR 1925 Lah 354 cited above.

15. Before coming to the Patna decisions, I would like to refer to three decisions of the Nagpur Court. In *Narain v. Ikram*, AIR 1925 Nag 270, Kotval, A.J.C. took the view that an open user continued without interruption for a period of over twenty years and not shown to be attributable to permission or sufferance on the owner's part is prima facie evidence of enjoyment as of right within the meaning of Section 26 of the Limitation Act. Failure on the part of the Court to draw such a presumption will be an error of law making a second appeal competent. In the case of *Nathuram v. Kalu*, AIR 1939 Nag 69, Stone C.J. after an elaborate discussion of the position of law in England and in India held that the plaintiff has to establish user for the statutory period.

He has to establish that the user is as of right, but the law presumes that it is as of right, that is to say that it has a lawful origin, if the plaintiff proves open and notorious user. That presumption however is rebuttable and the defendant may show if he can, that the facts are such that the user was under license not amounting to grant, or he can show fraud in the sense it is used in relation to this subject or he can show force, or he can show secrecy. These latter would go to destroy the effectiveness of the user, the former would go to show that it was not as of right. Niyogi J. in *T. Rajlu Naidu v. M.E.R. Malak*, AIR 1939 Nag 197, relying on the decisions in AIR 1922 Mad 5, AIR 1926 Lah 522(1) and *Nazir Hussain v. Aulad Haider*, AIR 1926 Pat 460 and also on 8 Cal WN 359, held that there is evidence though meagre to sustain the findings of the Courts below that the defendant was exercising the right of way for himself, for his servants and for his carts since 1908, and the land on which he exercised his right was and is admittedly set apart as passage.

The relationship between the parties was not such as to indicate that the defendants' user was attributable to leave or absence of leave, on the contrary the circumstances leave no doubt for the influence that it was recorded as a natural and lawful mode of enjoyment of the tenement. In the case of Phoolchand Narayan v. Murari Lal Nathulal, AIR 1951 M. B. 89, a Single Judge of that Court also was of opinion that before a right of way can be acquired by an easement, it is necessary to prove that there has been an actual enjoyment of the right and that the enjoyment has been open and without interruption and that it has been enjoyed for over twenty years. Unless all these ingredients are proved no right of easement can accrue to the owner of a dominant heritage.

16. Great reliance was placed on a decision of the Patna High Court in the case of AIR 1926 Pat 460. The facts in the instant case appear to be in all fours with that case. The facts in the Patna case were that the defendant did not set up a case of permissive user, on the other hand, he denied the user upon which the plaintiff relied as in the present case. Das, J. referred to that decision in 8 Cal WN 359 and while relying on the earlier portions of that decision, he clarified the latter portion with regard to the legal origin. Though he was of the opinion that the circumstances under which an easement can be acquired are the same in India as in England he asked himself the question ; 'On what ground are we then to say that the English rule does not apply to this Country?' and eventually came to the conclusion that in India there is often express or tacit permission to use a private land but such a case must be pleaded by the defendant.

If it is so pleaded in the written statement the Court may consider the whole matter with a strong leaning in favour of the defendant. But where no such case is made out by the defendant, the court, in his opinion, ought not to allow him to argue such a case. In the instant case it was complete denial by the defendant regarding the existence of a pathway and their whole case was that the entire field including the strip of land had been fenced all round. That defence, however, was found to be false when the Commissioner went to report with regard to the existence or otherwise of the disputed pathway. In fact the Civil Court Commissioner reported in his report, Ext. 1/a that such a pathway does not exist with green fence on both sides and the pathway had been fenced on, both sides from the public road to the

sand dune. Rao, J. referred to the decision in AIR 1929 Pat 124. The principle enunciated in that case fully supports the contention of Mr. Misra though the ultimate finding was against him.

The Patna High Court reiterated the same view in the case of Brajasunder Deb v. Rajendra Narayan, AIR 1941 Pat 260. Relying on the case in Rajrup Kuer v. Abdul Hossein, 7 Ind App 240 (PC), Fazl Ali, J. (as he then was) held that the right of easement which has been enjoyed for very long time must be referred to a legal origin and therefore the owner of the servient tenement must be presumed to have granted the right. Thus, it appears that in order to rebut the legal presumption that the plaintiff has been using the disputed pathway as of right the defendant must allege that it was a permissive one. If the defendant does not set up a case of permissive user in his written statement he cannot be allowed to take up that plea when confronted by the evidence adduced by the plaintiff that the user was as of right.

17. Lastly, I would like to refer to two decisions of this Court; the first one is an unreported decision in the case of Sk. Maibu v. Dalu Sha, S. A. No. 384 of 1949. Ray C.J. in that case referred to the decisions in AIR 1922 Mad 5, AIR 1929 Pat 124 and the decision of Das, J. it appears, has been met with the approval of Ray, C.J. To the similar effect is the observation of Narasimham, J. (as he then was) in the case of Rama Chandra v. Kanduri Charan, ILR 1955 Cut 145, wherein he held that to establish customary right of pasturage it is not necessary for the plaintiffs to show that when the villagers first allowed their cattle to graze on the disputed plot they did so in assertion of their right to graze. Direct evidence of such assertion of right can never be obtained and growth of custom is not based on the assertion of such right at its inception. It generally originates in a practice of usage found convenient or beneficial at a particular time and repeated freely and spontaneously till the oft-repeated practice in course of time acquires the binding force of law. If peaceable and open enjoyment for a sufficiently long period of time is proved, there would be a legal inference that the enjoyment was as of right

18. Thus, in view of the findings of fact that the plaintiff was using the disputed pathway openly and peaceably to the knowledge of the defendant without any

interruption for over twenty years, the presumption would be that they had been using the same as of light, particularly when the defendant had never pleaded that such user was a permissive one or by sufferance. In view of the clear position in law as discussed above, we are afraid, the decision of the learned Single Judge cannot be upheld.

In the result, the judgment and decree in the second appeal No. 241 of 1955 is hereby set aside and the plaintiffs suit is decreed with costs of all the courts below. Since there has been no appearance on behalf of the respondent in this court there would be no order for costs.

Barman, J.

19. I agree.

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