

Lambodar Panda and ors. Vs. Ramesh Chandra Panda and ors.

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Court : Orissa

Decided On : Nov-12-1957

Reported in : AIR1958Ori248; 24(1958)CLT117

Judge : P.V.B. Rao, J.

Acts : [Easements Act, 1882](#) - Sections 15; Limitation Act, 1908 - Sections 26;
[Evidence Act, 1872](#) - Sections 101 to 104 and 114

Appeal No. : Second Appeal No. 241 of 1955

Appellant : Lambodar Panda and ors.

Respondent : Ramesh Chandra Panda and ors.

Advocate for Def. : G.K. Misra, Adv.

Advocate for Pet/Ap. : R.N. Misra, Adv.

Disposition : Appeal allowed

Judgement :

P.V.B. Rao, J.

1. The defendants filed this Second appeal against the reversing judgment of Shri B. S. Patnaik, Subordinate Judge of Balasore decreeing the plaintiffs suit for a declaration of their right of way over the disputed land belonging to the defendants

and directing the defendants to remove the obstructions raised by them to the plaintiffs right of way over the said land and permanently restraining them from closing the pathway.

2. The plaintiffs' case is 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 fallow plots of the defendants and has its point of entrance from the said public road near the front of the plaintiffs' homestead and its point of departure on a village pasture land which, is on the north-east of the said pathway 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 without any interruption; that the plaintiffs are using the said way for going to and fro to the pasture land with their cattle and for going to and fro to the neighbouring village and to the market of the said village and the women folk of the plaintiffs' family also use the path for going to and fro to the pasture land for answering calls of nature; and that it was the only pathway available to the ladies for the several purpose.

Alleging that the defendants on account of a quarrel closed the southern end of the said path by raising a fence, the plaintiffs sued for a declaration and other reliefs as stated above. The defendants denied the existence of the path or the right claimed by the plaintiffs and contended that the suit was the result of some shebaiti dispute between the parties who are Brahmins and are closely related.

3. The learned Munsif by his judgment dismissed the suit holding that' though the plaintiffs' user of the suit pathway was for more than thirty years and was accordingly an immemorial user without any interruption and the user might be quite open and notorious to the knowledge of the defendants and the neighbours, the said user was not as of right and consequently the plaintiffs were not entitled to succeed.

4. On appeal, the learned Subordinate Judge held that the plaintiffs' user was as of right also and in that view decreed the suit.

5. Mr. R. N. Misra appearing for the appellant' contended that the judgment of the learned Sub-ordinate Judge is contrary to law and that he did not appreciate

correctly the authorities on the point. The learned counsel contends that by virtue of Section 26 of the Limitation Act and section 15 of the Easements Act and the decisions in the cases reported in *Nasiruddin v. Deokali*, AIR 1929 Pat 124 (A); *Kunjammal v. Rathnam Pillai*, AIR 1922 Mad 5 (B); *Ramachandra v. Hari* AIR 1929 Bom 144 (C) and *Shaikh Khoda Buksh v. Shaikh Tajuddin*, 8 Gal WN 359 (D), the learned Subordinate Judge ought to have held that the plaintiffs failed to prove that the user was as of right as the burden to prove the same is upon them and that he erred in holding that the defendants failed to prove and not even to assert that the user by the plaintiffs was permissible.

6. There is no specific averment in the written statement of the defendants that the user of the pathway by the plaintiffs was a permissive user. Both the Courts below found that the plaintiffs and the defendants were neighbours and were relations; that they were Brahmins and that the ladies of the plaintiffs' family were using the pathway for going to the pasture land for answering calls of nature. The learned Subordinate Judge rightly observed that 'in determining the case of easement acquired by prescription as a matter of right, the law is well established that the conditions of things in England are quite different from those in India. In England, the circumstances under which one will permit another to use the land for the purpose of passage without the former having a right to it, is very rare'.

The people there are very jealous of their rights to the property. They do not allow any person to trespass into their land and if in such cases there is proof that a certain right was exercised openly for a long time there is a presumption that the user was as of right. But in India conditions are quite different. If a man's land is fallow, for a short-cut to a particular place, people in India generally use that land as a way and the owner of that land generally does not object.

Even if he objects, it is not taken in the right spirit. If respectable ladies of a neighbouring household use the pathway to go to ease themselves, generally there will be no objection in such a case also. If such user is continued, it is no doubt true that it is continuous for a long time and is open, But the question to be determined is -- can those things suffice to hold that the user was as of right?

7. The relevant clause with regard to the acquisition of a right of way under Section 26 of the Limitation Act is Clause (1) which is as follows:

'xx xx x and where any way or watercourse, 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, watercourse, use of water, or other easement shall be absolute and indefeasible.'xx x xx'

Section 15 of the Easements Act says

'xx x xx'where a right of way 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, support or other easement shall be absolute,'xx xx x

According to these sections, it is clear that the burden of proving a prescriptive right of way lies on the person who asserts it. In the leading case in 8 Cal WN 359 (D). it was held that:

'In a suit to establish a right of way, the propriety 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 facts in that case appear to be similar to the facts of the case before me. The learned Judge Banerjee J. in the above cited case observed:

'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'.

He also observed, quoting from Babu Upendra Nath Mitter's book on the Law of Limitation :

'The nature and character of the servient land, the friendship or relationship between the servant 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 owner".

It was also contended before the learned Judge that in that case before him there was no averment in the written statement that the user was permissive: that the contention of the defendants was only a denial of the existence of a right; that consequently the plaintiff who sued for a declaration of the existence of such a right was entitled to succeed; and that the defendant could not contend that the user, if any, had been permissive when he strongly denied? any such user altogether. To this contention, the learned Judge observed:

'That no doubt is so. But although the Defendant may not be entitled to have a finding on this point, the Plaintiff is bound to have a finding in his favour upon this point before he can obtain, a decree, as Section 26 expressly requires that the user should be as of right in order that it may lead to the acquisition of a right to an easement'.

This decision, therefore, in my opinion, supports the . appellants' contention. In the case reported in AIR 1929 Pat 124 (A) a Division Bench of the Patna High Court held, following the judgment of Justice Banerjee in the case of Shaikh Khoda Buksh v. Shaikh Tajuddin, (D):

'It cannot be presumed that if the owner of the dominant tenement has for a long period passed over the servient tenement that he did it from the beginning with a claim of right'.

In the course of the judgment, Courtney-Terrell, C. J. observed: '

'In English law the exercise of a right of way and similar positive easements for a prolonged period gives rise to the presumption that such exercise was 'of right',

that is to say, it is presumed that the right of passage was exercised without any permission, express or implied, on the part of the owner of the servient tenement. This is because social conditions and the nature of landed property in England are such that landowners are particularly jealous of their exclusive right and the familiar appearance of the notice boards to be seen in England bearing the inscription 'trespassers will be prosecuted' is an indication of the views held by the owners of property. Accordingly, it is to be presumed that if the owner of the dominant tenement has for a long period passed over the servient tenement that he did it from the beginning with a claim of right, for it is unlikely that if he had not such a right that the owner of the servient tenement would have allowed him to pass. In India, however, and it may be in other countries where such views of the exclusiveness of landed property do not prevail, a mere period of long user will not give rise to the presumption. It is customary for the owner of a piece of waste land not to raise any objection to the passage of strangers over such land".

The learned Judge also observed:

'It follows, therefore, that he who claims such a right by reason of long user must plead and establish as a fact that he has exercised his user under a claim of right. If he so pleads it is for the defendant to rebut the plea by establishing that the user was in fact by express permission. In this case the plaintiffs have contended that the circumstances are such that the mere long user does not give rise to the presumption, and, in the second place, they have contended that the user was in fact permissive. No express permission appears to have been proved on the part of the plaintiffs to the passage of the methrani but the learned Subordinate Judge has found that the general circumstances and the relationship between the defendant's predecessor & the family of the plaintiffs are such that such presumption ought to be inferred. One of the daughters of the defendant's predecessor was married to a member of the plaintiff's family. The privies of both houses were served from the Mangal Bazar road by way of the strip of land and having regard to the conditions of Indian family relationship the learned Subordinate Judge considered it probable that the plaintiffs would not have raised any objection, and indeed would have consented to the clearance of the defendant's privy by means of that passage. In my view the view of the learned

Subordinate Judge was right and since the defendant has neither pleaded nor proved that the clearance of his privy by way of the plaintiffs' land was done throughout the period of 20 years under a claim of right and since the circumstances of Indian life do not give rise to the presumption of a claim of right by mere long user the defendant has failed to establish the acquisition by prescription of the easement claimed by him'.

In the case reported in AIR 1929 Bom 144 (C), a Division Bench of the Bombay High Court held, that the object of Section 15 of the Indian Easements Act in requiring that the user of a right of way should be open is that it must be of a nature from which a presumption would arise that the owner of the land had knowledge that his land was being used and that he had acquiesced in it and that in questions according 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. In the case reported in AIR 1922 Mad 5 (B), a Division Bench of the Madras High Court approved the observations of Justice Banerjee in 8 Gal WN 359 (D) and observed:

'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 as of right'.

8. These authorities therefore clearly establish that the person claiming a right of way should Prove that the user was as of right. This he can do by showing that at some time there was obstruction, but nevertheless he continued to use. These authorities also show that according to the conditions in India, the relationship of the parties and the circumstances of each particular case there is a presumption that the user is permissive and the person claiming the right must prove the acquisition of such right under Section 26 of the Limitation Act or Section 15 of the Indian Easements Act.

9. Mr. G. K. Misra, the learned counsel for the respondents relying upon the decision referred to by the learned Subordinate Judge vehemently contended that

where there is no allegation by the owner of the servient tenement that the user of the way was permissive far less proved, the plaintiff, the owner of the dominant tenement is entitled to succeed on proof of a continuous user for over 20 years openly which is by itself proof of the user as of right. In support of this contention, he relied upon the decision of a Division Bench of the Patna High Court in the case of Nazir Hussain v. Aulad Haider, reported in AIR 1926 Pat 460 (E), where the learned Judge Justice Das who delivered the judgment with which Adami J. agreed, observed:

'In order to establish a right of way it must be proved that the claimant has enjoyed it for the full period of 20 years and that he has done so as of right; but if it should be the case of the opposite party that the enjoyment was made by violence or by stealth or by leave asked from time to time, it is for him to allege and establish that case. But where no such case is made by him the court ought not to allow him to argue such a case'.

The learned Judges dissented from the view expressed by Banerjee J. in 8 Gal WN 359 (D). In the case of Piare Lal v. Isho Lal reported in AIR 1926 Lah 522 (1) (F), it was held by a Division Bench of the Lahore High Court,

'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'.

The judgment of the learned Judges is a short one and no authorities are discussed in the said judgment. Mr. G. K. Misra, the learned counsel also relied upon a decision of a single Judge of the Nagpur Chief Court in the case of Narain v. Ikram reported in AIR 1925 Nag 270 (G). In this case it was held,

'An open user continued without interruption for a period of over 20 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 a court to draw such a presumption will be an error of law making a second appeal competent',

In this case, the judgment of Justice Banerjee does not appear to have been cited before the learned Judge. These decisions no doubt directly support the contention of the respondents-plaintiffs, but I would prefer to follow the decisions relied on by the learned counsel for the appellants and hold that the plaintiffs did not prove that the right claimed by them was exercised by them as of right. In this view of the matter, I would set aside the judgment and decree of the lower appellate Court and restore those of the learned Munsif. The appeal is allowed with costs.

10. Leave to appeal is asked for and is granted.

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