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Court : Kolkata

Decided On : May-16-1986

Reported in : AIR1988Cal320

Judge : Sankar Bhattacharyya, J.

Acts : [Easements Act, 1882](#) - Section 15

Appeal No. : A.F.A.D. No. 1002 of 1979

Appellant : Bhaskar Ghosh and anr.

Respondent : Santosh Kumar Ghosh and ors.

Advocate for Def. : S.K. Bhattacharyya, Adv.

Advocate for Pet/Ap. : P.B. Sahu, Adv.

Disposition : Appeal dismissed

Judgement :

Sankar Bhattacharyya, J.

1. This is a second appeal from the decree of the lower appellate court affirming the decree of a learned Munsif in a suit for declaration of right of easement and permanent injunction.

2. The case of the plaintiffs was that they are the owners of the lands described in Schedules Kha and Ga to the plaint. Plot No. 564 of Mouza Beladanda is a tank locally known as 'Boalpukur' and Plot No. 563 is the hank of the tank, described in Schedules Ka and Ka(1) respectively to the plaint.

3. According to the plaintiffs, there is a katan (opening made by cutting the bank) on the southern bank of the tank delineated by the letters Ka, Kha, Ga and Gha in the sketch map appended to the plaint through which, the water of the tank is drained out into a nala (channel) to its south for irrigating the Kha and Ga Schedule lands situated to the south and southeast of the tank. The katan is filled up with earth after the irrigation is over.

4. This right is being exercised from time immemorial openly, peaceably and as an easement to the knowledge of the owners of the tank and was duly recorded both in the C.S. and R.S. Record of Rights. Defendants Nos. 1 and 2, however, after purchasing a share of the tank on 29-10-73, tried to interfere with the said right, compelling the plaintiffs to bring the action for declaration of their right of easement as above and for permanent injunction restraining defendants Nos. 1 and 2 from causing any interference to the said right.

5. The suit was contested by defendants Nos. 1 and 2 denying the alleged easement right of the plaintiffs. According to them, the lands of the plaintiffs are irrigated with the water of another tank named 'Chhoto Hedo' to the north of the suit tank by bailing out its water through the nala shown in the map appended to the plaint. The entries in the R.S. Record of Rights with regard to the plaintiffs' right of easement is wrong and without any foundation. The water of the suit tank was never used for the purpose of irrigation of the plaintiffs' lands. The tank is used for pisciculture and the plaintiffs for the first time forcibly made the katan on Kartick 29, 1380 B.S. The father of the defendants who are minors wanted to start a criminal case against the plaintiffs for forcibly cutting the southern bank but was persuaded by his elder brother not to file the case. The claim of the plaintiff's is absolutely false and the suit was, therefore, liable to be dismissed.

6. The trial court found upon the evidence that the katan was not made on Kartick 29, 1380 B.S. as alleged by the defendants but was in existence from before, that

the suit tank was never used for pisciculture and that the plaintiffs have a right of easement to drain out the water of the suit tank through the katan and the nala to its south for irrigating the Kha and Ga Schedule lands. In view of the above findings, the trial court decreed the suit.

7. On appeal by the defendants the lower appellate court, concurring with the findings of the trial court dismissed the appeal and affirmed the judgment and the decree of the trial court. It is against this decision that this second appeal has been preferred by the defendants.

8. Mr. Sahu, appearing for the appellants, has urged the following points in support of the appeal;

(1) There is no finding by the courts below regarding the mode of acquisition of the right of easement by the plaintiffs;

(ii) both the courts below, relying upon the settlement records, held that the plaintiffs have the right to irrigate their lands with the water of the suit tank, being oblivious of the position that mere long user of the water of the tank as recorded in the settlement records, cannot confer a right of easement unless such user was as of right and as an easement; and

(iii) there is no finding by the courts below that the enjoyment of the alleged right of easement continued up to within two years of the institution of the suit.

9. Plaintiff's claimed right of easement by prescription, by lost grant and also as of necessity. Though the courts below, relying upon the irrigation right of the plaintiffs recorded in the settlement records, declared such right in favour of the plaintiffs there is no finding by either court as to how the right was acquired

10. During trial, no case of easement by prescription or of necessity was attempted to be made out and the entire claim was based on enjoyment of the right from time immemorial. Ad the witnesses examined by the plaintiffs, including the first plaintiff, consistently deposed that the Kha and Ga Schedule lands are being irrigated with the water of 'Boalpukur' in the manner set out in the plaint since the dawn of their knowledge without any objection by the owners of the tank.

Plainly, therefore, the plaintiffs' case, as made out during trial, was one of lost grant

11. Apart from examining some neighbouring landowners and a labourer (P. W. 5) who has been cultivating the Kha and Ga Schedule lands under the plaintiffs for the last 30-32 years, the plaintiffs also produced the C.S. and R.S. Record of Rights (Exts. B and 2 respectively) wherein their right of irrigation with the water of 'Boalepukur' was duly recorded. The findings of the courts below, it appears, were primarily based on the entry in the settlement records referred to above.

12. Ext. B, finally published in or about the year 1920, clearly and unmistakably indicates that the water of the suit tank is used by the neighbouring landowners, including the plaintiffs, as of right for irrigating their lands by cutting the bank of the suit tank for outlet of water. It further appears that the tenants who cut the bank for outlet of water are responsible for filling up the portion so cut.

13. Mr. Sahu invites my attention to a recital in Ext. B which is to the effect that the right was exercised in 1321 B.S. which corresponds to the English year 1914/1915. From this, Mr. Sahu wants me to hold that the right was exercised only once and, that too, as far back as in 1914/1915.

14. It is not possible to accept the contention of Mr. Sahu, because to do so would be to completely nullify the recitals immediately preceding the recital relied upon by him. On an examination of Ext. B it appears that the tenants of the lands which are at a distance from the suit tank have the right to the flow of the water of the tank to their lands over the lands of other tenants which are contiguous to the tank. In the above context, the recital relied upon by Mr. Sahu can only mean that in the year 1321 B.S. the water for irrigation was taken over the plots mentioned therein. At any rate, one recital is irrelevant for our purpose as the lands mentioned therein do not include any of the lands mentioned in Schedule Kha or G a to the plaint in respect of which the right of easement is claimed by the plaintiffs.

15. The R.S. Record of Rights (Ext. 2) also presents the same picture. It shows that Plots Nos. 679 to 690 (which include the Kha and Ga Schedule lands) are irrigated with the water of 'Boalepukur'. The second page contains the mode of

irrigation which is that the tenants of the lands situated at a distance from the suit tank have the right to the flow of the water of the tank to their lands over the lands which are contiguous to the tank or are at a higher level than those lands by cutting temporary nala over those lands as well as the 'ails.'

16. From the settlement records the presumption arises about the existence of the right of easement claimed by the plaintiffs at least since 1920. It does not appear that the owners of the tank ever objected to the impugned entries in the settlement records. On the contrary, Haripada Gnosh (D.W. 1), one of the vendors of the plaintiffs unequivocally admitted in cross-examination that he and his co-sharers were present in the village during the R.S. operation and got their shares recorded therein. Another witness Nandalal (D.W. 4) also conceded that the plaintiffs' lands are irrigated with the water of the 'Boalepukur'. He tried to support the defence case by stating that the bank of the suit tank was cut by the plaintiffs for the first time in Kartick 1380 B.S. but the defence case was disbelieved by both the courts below which, as stated earlier, held that the katan was all along in existence. This position was also virtually admitted by D.W. 4 when he gave out in cross-examination that he did not notice any change in respect of the suit tank.

17. It is thus seen from the oral as well as the documentary evidence that the Kha and G a Schedule lands are irrigated with the water of 'Boalepukur' since a very long time and at least, upward of 65 years. The presumption of correctness of the entries in the settlement records could not be rebutted by the defendants and in such a situation, the onus could not be shifted on to the plaintiff's to prove as to how the right was acquired by them. On the contrary, the enjoyment of the right for over 65 years gives rise to a presumption of immemorial user which again, would give rise to a presumption of lost grant. In such circumstances, the plaintiffs cannot be expected to prove as to how the right originated. I am, therefore, of the opinion that acquisition of the right of easement by lost grant has been abundantly established in the instant case.

18. As regards the third point, the defendants themselves admitted in their written statement that the plaintiffs exercised the right by cutting the southern bank of the tank on Kartick 29, 1380 B.S. that is, in the year 1973 in which the suit was

instituted Although, according to them, the bank was cut forcibly, both the courts below refused to accept the story as true and held that the katan was in existence from before. It follows, therefore, that the right of easement was exercised by the plaintiff's even in the year of institution of the suit.

19. Mr. Sahu last of all contends that since both the plaintiffs and the defendants are tenants under the State, one cannot claim a right of easement against the other by prescription. In support of his contention Mr. Sahu has placed reliance upon a Single Bench decision of this Court in the case of Badhu Bala Debi v. Gobardhan Chattaraj, reported in : AIR1978 Cal425 where the learned Judge held that although one tenant cannot claim a right of easement by prescription against another tenant under the same landlord, he can nevertheless claim a right of easement on the basis of lost grant. The above decision is, therefore, of no assistance to the appellants because, although in the plaint the right of easement was claimed by prescription as well as by lost grant, during trial the claim was confined only to lost grant on account of enjoyment of the right from time immemorial.

20. For the foregoing reasons, I do not see any merit in the points raised by Mr. Sahu and the appeal must, accordingly, fail. In the result, the appeal is dismissed and the judgment and the decree of the lower appellate court are affirmed. In the circumstances of the case, there will be no order as to costs.