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Court : Kolkata

Decided On : Nov-19-1934

Reported in : AIR1935Cal413,157Ind.Cas.224

Appellant : Surendra Nath Saha and ors.

Respondent : Harendra Kumar Saha and ors.

Judgement :

Mitter, J.

1. This appeal is directed against the judgment and decree of the Subordinate Judge, First Court of Faridpur which affirmed the decree of the Munsif, First Court of Goalundo. Four persons instituted the suit for declaration that the portion of the Khal, which is the subject-matter of the suit is a part of a public water passage and for injunction to restrain the defendants from obstructing the same. The suit was instituted by the said persons on behalf of the public. They applied for and were given the permission to sue on behalf of the public under the provisions of Order 1, Rule 8, Civil P.C.

2. It is admitted that the Khal flows in a westerly direction from the Pachuria River, a tributary of the River Padma, passes over Dag No. 321, which belongs to the Secretary of State, then over Dag No. 303, which belongs to the contesting defendant, then over Dag No. 299 which belongs to one Sorojendra Shaha, and goes to a long distance towards the west. The plaintiffs' case is that it extends

many miles towards the west and terminates in a Beel called the Singer Beel. The water course over Dag Nos. 321 and 303 is the subject matter of the suit as the obstruction has been placed in Dag No. 303. The Commissioner who was appointed for local investigation has not shown on his map the course of the whole khal. He has shown that it takes its rise from the Pachuria River, admittedly a public channel, near Dag No. 321, passes over the defendants' lands (Dag Nos. 321 and 303) and that it extends further westward. He has shown its course to about four miles further west of the defendants' lands but has not shown on his map either the Singer Beel or the course of the khal thereto, possibly because none of the parties desired him to go further down. In the Record of Rights prepared under Ch. 10, of the Bengal Act and finally published about 20 years before the suit Dags Nos. 303 and 321 have been recorded in the ownership of the contesting defendant and the Secretary of State respectively, but in respect of both of them the record is that the members of the public have a right of boat-passage. This record has remained unchallenged and the Secretary of State who has been made a defendant also does not contest the plaintiffs' claim. The existence of the khal for over 40 years is admitted by the contesting defendant-appellant, but his case is that the disputed portion of the khal is a private water-passage belonging to him, primarily intended for access to his Hat known as the Pachuria Hat which is on a part of Dag No. 303 and adjoining plots, and that boats that passed over Dag No. 303 had to pay to him and his lwardars tolls for passage. Both the Courts below however on a detailed examination of the evidence have come to the conclusion that members of the public have been using the whole of the khal as of right for a very long period, and that the contesting defendant's case about the collection of tolls is false. The learned Subordinate Judge has placed reliance mainly on the following facts:

(i) Entry in the Record of Rights, recording Dag No. 303 as a part of a public highway, (ii) user by the public for a long time, (iii) falsity of the defendant's case as to the levy of tolls, (iv) findings in a judgment of competent jurisdiction in a suit instituted on behalf of the public against the contesting defendant for establishment of a public highway over Dag No. 302 belonging to the defendant, (v) the terminus of the khal in the east in a public highway, e.g., the Pachuria River and (vi) the length of the khal, it is a long one which passes over the defendant's

land, and goes beyond to the west to a length of 3 or 4 miles at least.

3. He has come to the conclusion that there was an intention to dedicate Nag No. 303 as a public passage and that it was so dedicated. Other contentions raised by the contesting defendant, one of them being that the suit was not maintainable as no special damage has been alleged or proved by the plaintiffs, have been negatived by the learned Subordinate Judge, and nothing has been said before me with regard to them. The only point that the defendant-appellant urges before me is that the learned Subordinate Judge has erred in law in inferring an intention to dedicate, inasmuch as it has not been proved that the khal terminates at a public place on the west. Put shortly his contention is that as

a public right of way means a right to the public of passing from one public place to another public place,

there is no scope in law for inferring an intention on the part of the owner of the land to dedicate it as a public highway, when it is not proved that both the termini are public places. In support of this contention reliance has been placed on certain observations of Kay, J., in *Bourke v. Davis* (1890) 44 Ch D 110 at p. 121 and of Lord Dunedin in *Folkstone Corporation v. Brockman* (1914) AC 338 at p. 375. Reliance has also been placed on three passages to be found at pp. 235, 238 and 241 in *Peacock on Easements*.

4. Before dealing with this question it is necessary to decide a preliminary objection raised by the respondents as to the competency of the appeal. It appears that after presentation of the appeal to this Court one of the four persons who got permission to sue on behalf of the public, namely Uma Charan Shaha died. No attempt was made to substitute his legal representatives within 90 days of his death, but some time later an application was put in on behalf of the defendant appellant to set aside the abatement against his legal representatives and to bring them on the record. On this application a rule was issued but that rule was ultimately discharged. On these facts it is contended on behalf of the respondents that as a joint decree has been passed in favour of four plaintiffs, the appeal cannot proceed at all in the absence of the legal representatives of the said deceased plaintiff. At the hearing an application has been put in on behalf of the

appellant stating that as the suit has been instituted by the plaintiffs in a representative capacity no substitution of his legal representatives is necessary and praying that the memorandum of appeal may be amended by simply noting the death of Uma Charan Saha.

5. In the course of the argument on the preliminary point I indicated that if substitution of his legal representatives is not required under the law a misconceived application for substitution or a misconceived application to set aside an imaginary abatement would not affect the defendant appellant's appeal. Dr. Mukherjee, the respondents' advocate very properly and with his usual and characteristic fairness accepted this position, The broad question, namely whether substitution of the legal representatives of such a plaintiff is necessary, was accordingly argued before me. On this precise point there is, so far as I have been able to ascertain, no, decision of this Court and the decisions of the High Courts are conflicting. The earlier decisions of the Lahore High Court lay down that no substitution is necessary and that the appeal would not be incompetent (see for instance *Rahim Buksh v. Channam Din*, 1921 Lah 390. The later decisions of the same Court however do not lay down the rule in such an unqualified form. In them a distinction is drawn between (a) the persons who get the permission from Court to sue on behalf of a class under para. 1, Order 1, Rule 8 or who are made parties on their application under the provisions, of para. 2, Order 1, Rule 8, and (b) the rest of the class. It is said that on the death of any one falling within class (a) substitution must be made and in default the appeal, would be incompetent, but if a person of class (b) is put on the record, that is if, his name finds a place on the record as respondent, although he did not apply to be made a party to the suit according to para 2, Order 1, Rule 8 and thereafter dies the defendant appellant need not take notice of his death and his appeal would proceed. The reason for this distinction is sought to be based on the fact that persons falling within class (a) but not those falling in class (b) are parties to the suit and all the consequences for non-substitution of their legal representatives would ensue. *Wall Mahamad v. Barkhurdar*, 1925 Lah 124, *Rup Chand v. Bunyad Ali* (1922) 5 Lah 432 notes explaining *Ram Dayal v. Mahammad Raju Shah*, 1919 Lah 273, and *Udmi v. Hira*, 1920 Lah 338: See also: *Mt. Afzal-un-nisa v. Fayazuddin*, 1931 Lah 610.

6. The Madras High Court is however inclined to the view that in no case substitution is necessary: 1931 Mad. 452 (9) and Mahomed Kanni v. Naina, 1931 Mad 590. In the last mentioned case the point does not seem to have been argued and the learned Judge merely agreed with the concession made by the advocate. I am however not inclined to agree with the later decisions of the Lahore High Court and in my judgment no substitution is necessary in a representative suit instituted with the permission of the Court under Order 1, Rule 8. It is essential in these matters to have regard to the nature of the suit and the nature of right sought to be enforced. To take an instance: a claim may be based on a customary right vested in the inhabitants of a village but the plaintiff may either claim relief in his personal character for an infringement, violation or disturbance thereof or claim relief on behalf of himself and all the other villagers. In the latter case all the villagers need not appear on the record but one or more of them may be authorised by the Court to represent the absent persons. Order 1, Rule 8 is a rule of convenience founded on the old chancery practice established to prevent delay, expense and multiplication of suits to establish the same right. The scope of a suit so instituted is in essence of a different nature than that of a suit to enforce a claim based on a general right but in an individual or personal character. The person or persons derive their authority to represent the others of the class from the Court, and the Court can grant such authority to any person of the class. The decree passed in such a suit binds all the members of the class. Before decree the persons so authorised may with leave withdraw from the suit but in such a contingency any member of the class who is not already on the record can intervene, apply to the Court for necessary authority and continue the suit. If a suit founded on such a general right is instituted by some on behalf of the class, with no alternative prayer for relief in a personal character, a material defect in the permission granted under Order 1, Rule 8, para. 1, or the absence of such permission would be a fatal defect to the suit.

7. When such an authority to represent the class is conferred on more persons than one they in a body represent the class: Abdul Hakim v. Abdui Gani, 1925 Cal 547. When one of such persons die I do not see how his legal representatives can come in their right of succession. If they fall within the class they can come only by obtaining the permission of the Court to represent the class or under the

provisions of para. (2) of Order 1, Rule 8. In the case of death of one of such persons, where authority to represent the class has been conferred on more than one persons, two possible views and two only can in my judgment be taken, namely, the surviving persons can go on with the suit or a fresh permission from the Court is necessary. The last mentioned position has been taken in the case of Venkatakrishna v. Srinivasachariar, 1931 Mad 452 and would seem to follow from the reasonings of Mukherjee, J., given in Abdul Hakim v. Abdui Gani, 1925 Cal 547. The legal representative of the deceased plaintiff does not come in unless the Court expressly conferred the power of representation on him and his heir. I am however inclined to the view that on the death of such a person the others who had been granted by the Court the authority to represent the class can go on and all that is required is that the Court should be apprised of his death. But it is not necessary for me to decide the question, for had I been able to persuade myself that the appeal is a sound one on the merits I would have given the necessary permission to the defendant-appellant to have the surviving plaintiffs on the record as representing the public. I may however shortly state my reasons. No doubt a person authorized eo nomine under Order 1, Rule 8, para. 1 is not strictly a bare trustee of the action. He himself has a beneficial interest in the action, for as a member of the class, and only as such he gets the advantage of a favourable decree and is affected by an adverse one: see Kekewich, J., in Woolfe v. Van Boolen (1906) 94 LT 502 But his position is certainly analogous to the position of a person who with others brings a suit with the sanction of the Advocate-General under the provisions of Section 92, Civil P.C. In such a case Lord Dunedin has held in Anand Rao v. Ramdas, 1921 PC 123 that there is no defect in the suit and the survivors can proceed with the same. In my judgment therefore the discharge of the rule for setting aside the fancied abatement of the suit as against the legal representatives of Uma Charan Shah cannot affect the competency of the appeal.

8. I now come to the merits of the appeal. As I have already indicated the only point urged before me by the appellant is that the learned Subordinate Judge has erred in law in presuming an intention to dedicate the land in suit for public use, when it is not proved that both the termini of the Khal abut on public places. I may in the first place remark that when a public right of way is claimed over lands belonging to a private owner it is wrong to deal with the evidence in compartments.

It is not legitimate to presume from long user an intention to dedicate and then examine the evidence adduced on behalf of the private owner and to see if the said presumption has been rebutted by him. The evidence must be examined as a whole and the inference either in favour of or against the dedication must be drawn.: Lord Kinnear, in *Folkstone Corporation v. Brockman* (1914) AC 338 at p, 354.

9. The argument of the learned advocate for the appellants proceeds mainly upon the proposition that a public highway implies a thoroughfare, that is, it must begin from and end in a public place. This is usual in most cases but is not a *sine qua non*. There is no rule that a cul de sac cannot be a public highway. I do not see, if there is access from a public place at one end only, why a piece of ground could not be a public highway, if the evidence supports the case of its dedication to public use. Some of the earlier cases in England no doubt proceed upon the view that both the termini must be at public places, but since the decision in *Bateman v. Black* (1852) 18 QB 870 the said view has not been subscribed to in England (see the old cases collected in footnote (q), p. 11, Vol. 16 of Halsbury's Laws of England). As I read the cases they lay down that in case of cul de sac, it would be wrong for the Court to draw the inference of dedication from the mere fact of long user, but the Court should require some additional evidence to support the claim of the public and that the fact that cul de sac has been maintained and repaired at public expense would be a very cogent piece of evidence. The fact that a passage leading from a public place does not stop at the land of the private owner but proceeds further to a great distance, as in the case before me, would be an important factor in support of the claim of the public, especially when it is not shown that the pathway has terminated in private grounds. To hold that a long khal, which begins from a public channel and extends for miles can be regarded as a matter of law to be a private boat way or a boatway restricted only to the use of a class of persons and over which the public would have in no circumstances a right of passage, simply because it is not proved that the other terminus is at a public place would in Bengal lead to serious consequences. To me it seems that the fact that one of the termini is on private land is a circumstance, and it may be an important circumstance, to be taken into consideration by the Court, of fact and when it has taken that into consideration and on the evidence has come to the

conclusion that there has been in the past a dedication, the inference drawn by it is an inference of fact. In *Attorney-General v. Antrobus* (1905) 2 Ch 188, Farwell. J., says:

Now the cases establish that a public road is *prima facie* a road that leads from one public to another public place: see per Lord Cranworth in *Campbell v. Lang* (1853) 1 Macq 451 and *Young v. Cuthbertson* 1 Macq 455 or as Holmes, L.J., suggests in *Giants' Causeway* case *Freeman's Journal*, 15-1-1898, there cannot *prima facie* be a right for the public to go to a place where the public have no right to be. But want of *terminus ad quern* is not essential to the legal existence of a public road; it is a question of evidence in each case. But in no case has mere user by the public without more been held sufficient.

10. In the case before me the evidence of user is not the only evidence on which the learned Subordinate Judge has relied. I have already summarized that evidence and the conclusion arrived at by the learned Subordinate Judge regarded as an inference on a question of fact is also correct. The cases cited by the learned advocate for the appellant namely, *Bourke v. Davis* (1890) 44 Ch D 110 and *Folkstone Corporation v. Brockman* (1914) AC 338, have no application to the facts of the case before me. In *Bourke v. Davis* (1890) 44 Ch D 110, a public right of boating was claimed on behalf of the defendant on a portion of the river Mole, a small tributary of the river Thames, between Cobban Bridge and the dam of a paper mill. Kay, J., pointed out at p. 119 of the report, that although the river Mole was a natural stream, its depth, if the dam were removed, would not be sufficient even for a canoe to pass between the two bridges. Its depth was entirely artificial and upon it depended its capacity for boating purposes. It was in fact a long pond and although at some points along its course a public road ran near it, the road at these places was fenced from the water course by posts and rails. It was never used as a water way except for the purpose of pleasure and recreation.

11. The defendant who was not a riparian owner had put in boats at the places for about eight years and had let them out for hire. In these circumstances he refused to draw an inference of dedication. In *Folkstone Corporation v. Brockman* (1914) AC 338, the question of liability to repair a road was the question at issue. There

the road was made in 1827 by Jacob, Earl of Radnor, over lands of which he was a life-tenant. In 1835 the High-way Act was passed. Thereafter roads could not be dedicated so as to be deemed public highways, repairable by the inhabitants at large, except in accordance with statutory requirements, which had not been complied with in the case. The user which was material therefore was that between 1827 and 1835 of 1836. The Earl of Radnor on completion of the road erected many houses abutting on it which he let out to tenants. The road was necessary for his lessees, their servants and trades people. The road was all along in the course of 80 years repaired by the owner of the soil and never at public expense. Jacob, Earl of Radnor, was a life tenant and had no power to dedicate a right of way to the public. In 1825 his disability in this respect was removed by a private Act of Parliament so as to enable him 'to allot and set out a component part of the ground for public squares, roads, streets, avenues etc,' but during the short period from 1827 to 1836 he made no actual allotment for such purposes. In these circumstances it was held that the user did not lead to the inference of dedication to public use. Lord Kinnear moreover pointed out that the presumption of dedication from certain facts is not a presumption *juris et de jure*. In my judgment therefore the decree made by the learned Subordinate Judge is right and ought to be maintained. The appeal is accordingly dismissed with costs. Leave to appeal under the Letters Patent asked for is refused.