Case Note: Case concerning an offence of mischief under Section 430 of the I.P.C. resulting in adversely affecting the right to water from a tank of the complainant.

AIR1930Cal289

IN THE HIGH COURT OF CALCUTTA

03.12.1929

Ismail Biswas and Ors.
v.
Emperor

JUDGMENT

Rankin, C.J.

1. In this case the petitioners have been convicted of an offence under Section 430, I.P.C., that is, of committing mischief by doing an act which caused or which they knew to be likely to cause a diminution of the supply of water for agricultural purposes. This offence is perhaps a particularly grave form of the offence of committing mischief which is denned in Section 425.

Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously.

2. Now it appears that the tank in question is in the middle of two others. It appears that the complainant has a channel from which he has been getting the water of the tank in question to irrigate his lands. The finding of the Courts below is that the petitioners have cut a new channel in another part of the tank and they have been taking water to their own lands across a certain road.

3. At the hearing of the case, it was necessary, first of all, to prove the elements that constituted "mischief" under Section 425, I.P.C. and that involved showing that the petitioners knew that they were likely to cause wrongful, loss or damage to the public or to any person. The first question is whether this conviction should be set aside on the ground either that it is not shown that this question of wrongful loss or damage is made out or that it is shown that the question has been wrongfully dealt with by either of the Courts below. 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 no body 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. Now, when the case came before the District Magistrate it is complained that he did not deal sufficiently with this matter. I am bound to say as I read the grounds of appeal before him, that I see no indication that the accused persons on that appeal were suggesting to him that the complainant did not have the right to take water from the tank to irrigate the lands. It appears to me that what was then complained of was the finding of the Magistrate to the effect that the complainant was in possession of it. The Magistrate says that that is so. In the notice of appeal to the District Magistrate it is said that it was never admitted that the three tanks were in the possession of the complainant but the question which was before the Court and about which the witnesses spoke was about the right to take water. That suggests that the mistake of the Magistrate was that he thought that the accused admitted the right to possession of the tank whereas he only admitted the right to take water. In my judgment there was no occasion at all on the part of the District Magistrate, on the case coming before him, to deal expressly or fully with this question whether or not the complainant was a person who had a right to take water, so that even assuming that the accused had no right it was shown sufficiently that the complainant was a proper person to be heard to complain. In the same way, it seems to me that it was entirely nugatory and idle to ask, in the circumstances of this case, for a finding from the District Magistrate in terms following the language of Section 430, I.P.C. No doubt a person who takes water is causing loss and here one has to show whether he has caused a diminution of the supply of water for agricultural purposes. In my opinion, the facts in this case and the case which came before the District Magistrate render it entirely trivial to complain that it is not shown that the amount of water taken diminished the supply of the complainant's water. It has been pointed out to me that there is paragraph in the grounds of appeal which says that it is not shown how much water the accused people took. That is a paragraph which is criticizing the passage in the judgment of the trial Judge where he said that these accused had only got a little bit of land and that it was entirely unnecessary for them to get water from this tank. These two criticizms to my mind come to nothing.

4. It has been complained very much that the Magistrate took a wrong view in saying that the question before him was not a question of title and that the question of possession of the tank was not of primary importance. Of course, if a case was made to the effect that, though he had been out of possession one of the accused had his title to the tank, the Magistrate could not find wrongful loss until he dealt with that claim of title. The claim of title in the part of the accused in such a case has to be dealt with. In this case, what was said is that the tank belonged to another mouza altogether, it belonged to another landlord altogether and that these people who were tenants of that land-lord had acquired a right of easement by continued user. In this particular case, it was not necessary to investigate questions of the documentary title very far because on the facts of the case the Courts were both satisfied that the accused people had cut a new channel and the accused themselves, among other things, made a case which rendered their position very difficult as regards this matter because as is pointed out they called witnesses to show that the second channel had existed for a number of years and that the accused had been in the habit of irrigating their lands by means of it.

5. One version was that the channel ran beside the bund of the tank but did not cross the road, another was that it crossed the road, and another was that there was no channel to cut across the road but that water overflowed. The Courts below have found that this story of there having been a channel there before is entirely untrue and that entirely negatives any question of easement right in the accused persons. A case was referred to in which it was pointed out that certain tenants were prosecuting their landlord for interfering with the tenant's right to water for agricultural purposes. In that case, if the facts are looked into, the tank in question was admitted to belong to the landlord, the water was admittedly the landlord's and the landlord had admittedly the right to settle the fishery right; and the tenants were prosecuting the landlord, therefore, for doing something with the landlord's own water; and, in order to show that there was any right in them to complain, they, had to establish that they had right of easement in what was prima facie the landlord's. In that case it turned out that the claim of the tenants to make good their right to take water raised difficult questions and this Court pointed out the these questions were of a character difficult to determine in a mere police Court. That is not this case. That decision is not to be read as wiping Section 430 out of the Penal Code altogether. This is a case where somebody who made a claim to an easement which is found to be false was taking water from somebody else's tank. In my judgment, the complainant has shown to have a perfectly good right to complain if he has shown that he has been openly in enjoyment of the water of that tank. In my opinion, in this case there is no force in the submission of these accused before the District Magistrate that the complainant had no right to take water from the tank. In these circumstances, I think that the Rule must be discharged.