Case Note: Case concerning right to water of a tank by virtue of an easement created under a declaratory decree of the court.

35Ind. Cas.40

IN THE HIGH COURT OF CALCUTTA

Decided On: 19.06.1916

Aut Behary Gui and Ors.
v.
Rameswar Mitra and Ors.

Hon'ble Judges:
Fletcher and Teunon, JJ.

JUDGMENT

1. This is an appeal from the judgment of the learned Subordinate Judge of Burdwan, dated the 21st April 1915, reversing the decision of the Munsif of Katwa. The suit was brought, by the plaintiffs to obtain a perpetual injunction restraining the defendants from filling up a certain tank in which the plaintiffs, had an easement by virtue of a declaratory decree that was made in a former suit in their favour. The case apparently, therefore, was a very simple one because the evidence established without doubt that the defendants were doing and about to do acts which must necessarily interfere with the rights of the plaintiffs that were declared in their favour in the former suit. The case, however, which was made and commended itself to the learned Judge of the lower Appellate Court was that the tank had become a nuisance to the defendants and that, therefore, the defendants were entitled to fill it up. The method in which the tank, according to the judgment, of the learned Judge, became a nuisance to the defendants was that the tank was overgrown with weeds and was full of insects. As regards the second point I have grave doubt whether the learned Judge did, in fact, mean that the tank was full of insects, because in one place of his judgment he remarked that the ladies of the plaintiffs' household were using the water of the tank for washing clothes, utensils, etc., and that apparently the water was also used for drinking purposes, which I am astonished to hear if the learned Judge could have meant to say that the water was full of insects. The view, of course, that the tank is full of weeds may be true, because if weeds once begin to grow in a tank it is liable to be overgrown with them. The plaintiffs, however, offered to bear the expenses of having the tank cleared of these weeds. So, therefore, the defendants had no substantial grievance with regard to that point. The insects apparently, according to the argument of the learned Vakil of the defendants who are the respondents before us, are not in the tank but only over the top of the tank, the water of which we are told is overgrown with weeds. We are not told what these insects are. They may be butterfly or mosquito or any other kind of insect, it is wholly a novel idea that because insects fly over the tank, the

ladies of the plaintiffs' household cannot use the water of it which the Court in the former suit found that they had a right to. This Court in making the decision in the former suit expressed no opinion as to the defendants right to fill up the tank. There can be no doubt that that was the source both of the weeds and the insects and the origin of the present suit. The plaintiffs have a clear right in this case under the declaration made by the Court in the former suit and the right declared in that suit has been deliberately infringed by the defendants, and the Court ought in this case to award to the plaintiffs a perpetual injunction restraining the defendants from interfering with that right. The present appeal must, therefore, be allowed and the decree of the learned Judge of the Court of Appeal below must be set aside and that of the Court of, first instance restored. The defendants must pay the costs of the plaintiffs in this Court as well as in the Court of Appeal below.