

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.447 of 2006**

1. Santoo, son of Kunwar Rathore, aged 30 years
2. Kanhaiya, son of Late Latel Rathore, aged 25 years
3. Phoolbasan, widow of Late Latel Rathore, aged 29 years
4. Jethiya alias Janki, wife of Santoo Rathore, aged 26 years

All residents of village Semariya, Tehsil Lormi, District-Bilaspur

---- Appellants/Defendants

Versus

Gajanand, aged 56 years, son of Khamhan Rathore, R/o. Village Semariya, Tehsil Lormi, Distt. Bilaspur (CG)

---- Respondent/Plaintiff

For Appellants/Defendants	: Mr.Ashwin Panikar, Advocate
For Respondent/Plaintiff	: Mr.H.V.Sharma, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal
Judgment on Board

19/07/2019

1. The substantial question of law involved, formulated and to be answered by this Court in this defendants' second appeal is as under:-

“Whether the findings arrived at by the lower appellate court in reversing the judgment of the trial court only on the basis of accepting Annexures P-3 & 4 to be public documents which therefore was not required to be proved in proper or not ?”

[For the sake of convenience, parties would be referred hereinafter as per their status shown in the suit before the trial Court]

2. The plaintiff filed a suit for damages pleading inter-alia that

he is owner of agricultural land bearing Khasra No.654, 656/1, 656/2 and 656/3. He further pleaded that water from his field drains from eastern side in Khasra No.656/1 and western side from Khasra No.656/1 in the defendant's field by which excess water is flown out, which the defendants closed by filling mud, as such, the plaintiff suffered loss as water could not be drained from 2.75 acres of land. He also pleaded that application was filed before the Naib Tahsildar, Lormi and by order dated 17.8.1999 the Naib Tahsildar directed to remove the muds from drainage which could be done with the help of police, as such, he is entitled for damage of ₹ 30,000/-.

3. The defendants resisted the suit taking the stand that there is no Kada nali and water drains from his cousin's field Sunderlal. The trial Court dismissed the suit, however, the first appellate Court decreed the suit in favour of the plaintiff, against which, this second appeal under Section 100 of the CPC has been preferred by the appellants/defendants, in which substantial question of law has been framed by this Court, which has been set-out in the opening paragraph of this judgment.

4. Mr.Ashwin Panikar, learned counsel appearing for the appellants/defendants, would submit that in order to claim damage the plaintiff ought to have pleaded and established that he has right of uninterrupted flow of water from the field of the defendants either by prescription or custom and that has been infringed and therefore, he is entitled to damages caused by obstruction to such flow, which has

neither been pleaded nor proved and therefore, the first appellate Court is absolutely unjustified in granting decree in favour of the plaintiff.

5. Mr.M.K.Sinha, learned counsel appearing for the respondent/plaintiff, would support the impugned judgment and decree.

6. I have heard learned counsel appearing for the parties, considered their rival submissions made herein-above and also went through the records with utmost circumspection.

7. The plaintiff in his pleading has claimed to have Kada nali in the field owned by the defendants and further claimed that excess water of his field used to flow from that Kada nali held by the defendants, but he has not pleaded the acquisition of such right either by prescription or custom and that has been infringed by the defendants resulting into damage.

8. The High Court of Madhya Pradesh in the matter of **Chandrabhan Singh v. Shitalprasad Chhedilal**¹ has held that in case of artificial channels for flow of water, the owners of land abutting them, have no natural rights to flow their water but may acquire easement either as against other persons owning land above or below their land. In order to claim right to unobstructed flow of water from the field at higher level through the field at lower level, the owner of the field at higher level has to plead and prove the acquisition of such right either by prescription or custom and infringement thereof resulting into

¹ 1983 M.P.L.J. 729

the damages and if it is not pleaded and proved, then question of violation of such right does not arise. It was observed as under:-

“10. In the case before me, the plaintiff's claim as laid in the plaint, is not based on breach of any contractual duty or prescriptive or customary rights but it is based on his natural right and breach of duty by the defendant to receive overflow of the water into his own field and then to drain it out, as the plaintiff is the owner of the upper land being situated above the level of the defendant's land and that the plaintiff had a right to such a overflow of water. But in order to claim it as of right, the plaintiff had not pleaded and proved the acquisition, of such right either by prescription or custom and infringement thereof, resulting in the damage. Unless the plaintiff pleaded and proved the acquisition of any prescriptive or customary right for flow of water through the land of the defendant and that such right was infringed, the question of violation of such a right does not arise so as to enable him to claim damages. But in the instant case, the plaintiff has neither prescriptive nor customary right of any sort against the defendant and as such he has no right to sue merely on the ground that he had sustained damages. In this view of the matter, the plaintiff's suit for damages could not be decreed and is bound to fail.”

9. In the instant case, the plaintiff has only pleaded that he used to flow excess water of his field from Kada nali constructed in the field of the defendants which the defendants closed by filling mud, but the plaintiff has neither pleaded nor proved the acquisition of such right either by prescription or custom and infringement thereof resulting in damage. In absence of such pleading and proof, the first appellate Court could not have granted decree in favour of the plaintiff and thereby committed grave legal error.

10. For the foregoing reasons, the judgment and decree passed

by the first appellate Court is hereby set aside and that of the trial Court is hereby restored. The plaintiff's suit would stand dismissed. Parties shall bear their own cost(s).

11. A decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-