

MANU/BH/0038/1970

Equivalent Citation: AIR1970Pat246, 1969(17)BLJR1020, 1969(2)PLJR505

**IN THE HIGH COURT OF PATNA  
FULL BENCH**

A.F.A.D. No. 665 of 1965

Decided On: 31.07.1969

Appellants:**Sheo Narayan Singh and Ors.**  
**Vs.**  
Respondent:**Ambica Singh and Ors.**

**Hon'ble Judges/Coram:**

*S.C. Mishra, C.J. U.P. Singh and S.N.P. Singh, JJ.*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: Lal Narayan Sinha, Sheenath Singh and Shivanand Prasad Sinha, Advs.*

*For Respondents/Defendant: Kailash Roy and S.B.N. Singh, Advs.*

**JUDGMENT**

**S.N.P. Singh, J.**

**1.** This second appeal by the plaintiffs arises out of a representative suit filed under Order 1, Rule 8 of the Code of Civil Procedure for declarations that plot No. 110 of village Nanhubigha in the district of Gaya is a public path and the defendants have no right to extend the Pind of an Ahar in plot No. 168 of village Amarwa into plot No. 110 and raise its level to the height of the Pind in plot No. 168 by putting earth and that the defendants have no right to construct a Chahka on plot No. 110 or to change its local features and for permanent injunction restraining the defendants from constructing a Chahka or from changing the local features of plot No. 110 or from interfering with the rights of the plaintiffs in plot No. 110 in any way. The plaintiffs also prayed for a decree directing the defendants to restore plot No. 110 to its original position by removing earth and other encroachments from it. A further relief, namely, a decree for permanent injunction restraining the defendants from storing any water in plot Nos. 111, 112 and 114 of village Nanhubigha and plot Nos. 171 and 172 of village Amarwa and from draining out the excess water of Sarikha Ahar to plot Nos. 110, 24, 35, 38, 39 and 41 of village Nanhubigha was sought in the plaint. A claim for mesne profits was also made.

**2.** According to the plaintiffs' case, in village Amarwa there is an Ahar known as Sarikha Ahar in plot No. 170 having its Pind in plot No. 168 belonging to the defendants and it irrigates only ten acres of their land. The outlet of this Ahar is towards north-west. The defendants in order to get the Ahar repaired and to get a Chahka constructed in plot No. 168 obtained sanction for a certain amount from the State of Bihar under Hard Manual Scheme (Scheme No. 5 of 1958) dated the 18th of June, 1958. The plaintiffs put forward the case that plot No. 110, which has been recorded in the record-of-rights as Chhaur Gairmazrua Am, is a village pathway since time immemorial and it is being used as a passage by the public of the locality including the plaintiffs. Plot Nos. 111, 112 and 114 of village Nanhubigha are the

Kasht lands of plaintiff No. 1, plot Nos. 171 and 172 of village Amarwa belong to plaintiff No, 2 and plot Nos. 35 and 34 of village Nanhubigha belong respectively to plaintiffs Nos. 5 and 4.

It was alleged in the plaint that defendant No. 1 under the pretext of executing the aforesaid scheme, in collusion with other defendants, started taking earth from plot No. 111 which was protested by plaintiff No. 1. As there was apprehension of breach of peace, plaintiff No. 1 filed a petition before the Sub-divisional Magistrate Gaya, for starting a proceeding under Section 144 of the Code of Criminal Procedure against defendant No. 1 and others including the then Anchal Adhikari, Barachatty, who was in collusion with defendant No. 1. The Anchal Adhikari, on the other hand, sent a recommendation for starting a proceeding under Section 107 of the Code of Criminal Procedure against plaintiff No. 1 and his family members. The Subdivisional Magistrate of Gaya referred the petition under Section 144 of the Code of Criminal Procedure for enquiry to the Land Reforms Deputy Collector, who, with a view to help the Anchal Adhikari, Barachatty, procured a compromise petition as a result of which the proceeding under Section 144 of the Code of Criminal Procedure was dropped and a proceeding under Section 107 of the Code of Criminal Procedure was started against plaintiff No. 1 and his family members. They were ultimately bound down by a first class Magistrate, Gaya, but in appeal the 3rd Additional Sessions Judge, Gaya, set aside the order of the Magistrate.

In the appellate Court defendant No. 1 filed a petition giving an undertaking that he would not take earth from the land of plaintiff No. 1, that is, plot No. 111 and also from plot No. 110 of Nanhubigha for the repair of the Pind of the Ahar in plot No. 168 of village Amarwa. The defendants, however, in collusion with each other illegally encroached upon plot No. 110 of village Nanhubigha and made an unauthorised extension of the Pind in plot No. 110 to the extent of 80 links at the time when defendant No. 1 was doing earth work in the months of June and July 1958 and thereby encroached upon the public path and put the public in general and the plaintiffs in particular in difficulty in making use of the public passage.

According to the plaintiffs, the defendants not only encroached upon the land but also raised the level of plot No. 110 to the height of the Pind in plot No. 168 with the result that the pathway had become narrow causing inconvenience to the villagers. It was also alleged that as a result of the encroachment and raising of the level of the encroached portion the water will accumulate in plot Nos. 111, 112 and 114 of Nanhubigha and plot Nos. 171 and 172 of village Amarwa and thereby the entire paddy and wheat crops will remain submerged in water and as such the plaintiffs cannot raise any crop in those plots and they would suffer an annual loss of about Rs. 1000. According to the plaintiffs, the sanction of the State of Bihar had been made for the construction of a Chahka in plot No. 168 but the defendants illegally and without any right wanted to construct the Chahka in plot No. 110 as shown by letter "A" in the sketch map appended to the plaint,

**3.** As stated in paragraph 13 of the plaint, the construction of the Chahka in plot No. 110 of Nanhubigha would cause the following injuries:

(a) The village path in plot No. 110 would become impassable as the same would become a water flowing Nala.

(b) Plot Nos. 34 and 36 and the other adjoining plots of village Nahubigha would become incapable of producing any crop as they would become a

water flowing Nala and as a consequence irreparable damage would be caused to the owners thereof. In paragraph 15 of the plaint it has been stated that when the defendants wanted to construct the Chahka the members of the public including the plaintiffs objected and that led to an apprehension of breach of peace. A proceeding under Section 144 of the Code of Criminal Procedure was started restraining defendant No. 1 from constructing any Chahka or doing any work in plot No. 110. That proceeding was converted into a proceeding under Section 145 of the Code of Criminal Procedure. The Magistrate ultimately converted that proceeding into a proceeding under Section 147 of the Code of Criminal Procedure and the same was pending for disposal. According to the plaintiffs, the cause of action for the suit arose in July 1958 when the defendants extended the Pind in plot No. 168 by encroaching over plot No. 110 and by raising the level of the height of plot No. 110 by putting earth and also when the construction of Chahka was done by the defendants on the 4th of May, 1969.

**4.** The suit was mainly contested by defendant Nos. 1 to 3, who filed a joint written statement. The defendants put forward the case that shortly after the last survey operation the Pind of the Ahar in plot No. 168 was extended on a portion of plot No. 110 to the extent of 80 links and that extended Pind was raised to a considerable height and it was further extended towards east in plot No. 111. Although the Pind has been repaired from time to time, the above construction was made 30 years back. Regarding the accumulation of water of Sarikha Ahar in plot Nos. 171, 111 and portion of plot No. 112, the defendants also alleged that the water of the Ahar is being accumulated in the aforesaid plots since more than 30 years and there used to be a "Kanwah" in the southwestern corner of the extended portion of the Pind after it turned east in plot No. 111, the old 'Bhow' being still in existence in the Pind. According to the defendants, the south-eastern portion of plot No. 170 contiguous to Pind No. 168 and southwestern portion of plot No. 111 contiguous east of Pind No. 110 is the Khanta of Sarikha Ahar and as such it was necessary to put a Pind running towards east in plot No. 111 to prevent the water of the Khanta from being completely drained out and a Kanwah used to be given for discharging the excess water. The aforesaid mode of accumulation and drainage of water from Sarikha Ahar, according to the defendants, has been coming in practice for more than 30 years and it was never objected to by the landlords or the tenants of villages Amarwa and Nanhubigha.

**5.** Regarding the drainage of excess water, the defendants further alleged that since more than 30 years the excess water has been flowing out of the Kanwah through plot Nos. 110, 38, 39, 41, 35 etc. and ultimately going to river Falgu, According to the defendants, plot Nos. 111 and 171 have been recorded as Bhith Duba land and for the first time the plaintiffs in Asarh 1367 Fasli before the inspection of Mr. K. D. Sharma began to raise Bawav Dhan in plot No. 111 to create evidence. They further asserted that plot Nos. 38 and 39 are also Bhith lands and no one raised any objection whenever water used to be drained out through those plots or through plot Nos. 34 and 35 or whenever water used to accumulate in plot No. 112,

**6.** According to the defendants, although at the time of survey only ten acres of paddy land of village Amarwa used to be irrigated by the water of Sarikha Ahar but thereafter, for more than last 30 years, about 50 bighas of land is being irrigated by the water of the said Ahar. The defendants admitted in their written statement that plot No. 110 of village Nanhubigha is recorded as Chhaur and its width has been shortened by the extension of the Pind of the Ahar but they asserted that no

inconvenience has been caused to the public in making use of plot No. 110 as a passage. The defendants alleged that the Chhaur does not extend beyond village Nanhubigha and as such it is not being used by all the members of the public. Regarding the construction of the Chahka, the defendants admitted the fact that the foundation for the construction of a Chahka has already been done in the Pind in a portion of plot No. 110 and in a portion of the Pind running towards east in plot No. 111, But they asserted that the construction of the Chahka at the above site is quite legal and in accordance with the scheme sanctioned by the Government.

**7.** The State of Bihar (defendant No. 7) filed a separate written statement and raised a number of technical pleas including the pleas that the notice under Section 80 of the Code of Civil Procedure was illegal and invalid and that the suit was barred by the provisions of Bihar Private Irrigation and Works Act and under the law of limitation. The State of Bihar denied the allegation that the Circle Inspector, the Anchal Adhikari and the Land Reforms Deputy Collector were in collusion with the defendants and they supported the case of the defendants that under the scheme a Chahka was to be constructed in plot No. 110.

**8.** The learned Munsif, who tried the suit, framed the following issues:

- (i) Have the plaintiffs any cause of action or right to bring this suit?
- (ii) Is the suit maintainable in its present form and for the reliefs sought?
- (iii) Is the suit barred by limitation and adverse possession?
- (iv) Is the suit barred by the provisions of Bihar Private Irrigation and Works Act?
- (v) Is the notice under Section 80, Civil P. C. on defendant No. 7 valid and legal and sufficient under the law?
- (vi) Is the suit bad for defect of parties?
- (vii) Is it a fact that the extended portion of the Pind in plot No. 168 into plot No. 110 has been made by the defendants in 1958 and the foundation for the Chahka was made in 1959?
- (viii) Is it a fact that the water of the Sarikha Ahar is accumulated in plot Nos. 171, 172, 111, 112 and 114 as alleged by the defendants for more than thirty years and the extended portion of the Pind in plot Nos. 110 and 111 are coming on from that time?
- (ix) Was there any escape for discharging the excess water of this Ahar on the south-western corner of the Pind in plot Nos. 110 and 111 for the last thirty years and were the defendants discharging the water through this passage for the last thirty years or more?
- (x) To what relief, if any, the plaintiffs are entitled?

**9.** It appears that issue Nos. 2 and 6 were not seriously pressed. Regarding issue No. 5, the learned Munsif recorded the finding that there was no defect in the notice under Section 80 of the Code of Civil Procedure. Issue No. 4 was answered by the learned Munsif in the negative. The three main issues, namely, issue Nos. 7, 8 and 9, were considered together by the learned Munsif. Upon a consideration of the evidence

adduced by the parties, both oral and documentary, the learned Munsif held that the evidence adduced on behalf of the plaintiffs was consistent and in conformity with the record-of-rights including the Fard-ab-Pasi prepared by the survey authorities. He, therefore, preferred the plaintiffs' evidence and did not place any reliance on the evidence adduced by the defendants. Accordingly he answered issue No. 7 in the affirmative and issue Nos. 8 and 9 in the negative.

The learned Munsif answered issue No. 3 also in the negative. Regarding issue Nos. 1 and 10, the learned Munsif recorded the finding in these words:

"It will appear that the defendants have encroached upon a public Chhaur by extending the Pind of the Ahra and they have also opened opening by digging the foundation for a Chahka which has created difficulty in passage over the Chahka and caused damages to the public pathway and it has also been held that in case the Chahka be constructed the lands of the plaintiffs are going to be submerged under water which would put them to loss; as such, the plaintiffs have a valid cause of action for the suit and are entitled to a decree therein."

In the result, he decreed the suit of the plaintiffs with costs in the following terms:

"It is hereby declared that plot No. 110 of village Nanhubigha is a public path and the defendants have no right in extending the Pind into this plot and the defendants are directed to restore this plot at the place of encroachment to its original position by removing the earth over 80 links in length starting from the point where plot No. 168 meets plot No. 67 at the south-western corner, and they are also directed to fill up the foundation dug for the purpose of Chahka both at their own costs, within three months of this order, failing which, the plaintiffs would be entitled to remove them and restore the above encroachments to their original position at the costs of the defendants and through the processes of the Court. The defendants are further restrained permanently from constructing any Chahka at the place where the foundation has been damaged to submerge the lands of the plaintiffs. The reliefs which have not been specifically granted by the order would be deemed to have been refused."

**10.** The appeal filed by the defendants was heard by the 2nd Additional Subordinate Judge of Gaya. The learned Additional Subordinate Judge formulated the following points for determination in the appeal;

(1) It is a fact that the extended portion of pind in plot No. 168 over 110 was made by the defendants in 1958 and the foundation for the chahka was made in 1959?

(2) Whether it is a fact that this extension took place more than 30 years back as alleged by the defendants and that the water of Sarikha Ahar is accumulated in plot Nos. 171, 172, 111, 112?

(3) Whether there was any escape for discharging the excess water of this Ahar on the south-west corner of the pind in plot 110 and 111 for the last 30 years as alleged by the defendants?

(4) To what relief, if any, are the appellants entitled?

He took up points (1) to (3) together and upon an appraisal of the evidence on the record recorded his findings in these words:

"I hold that the defendants have very satisfactorily proved that the extended portion of the pind over plot 110 was done more than 30 years back and the Kanwa was in existence at the south-western end of this extended portion where the Chahka is proposed to be constructed for the same period and the excess water of the Ahar used to pass along the Kanwah. I also hold that the plot 111 also formed the pet of the Ahar since the extension. In the beginning of the judgment I had made reference that on a close examination of the survey map it will appear that the original plot 168 extended over a portion to the west of plot 111 which gives an indication that water used to accumulate on the north-western corner of plot 111 as otherwise there was no meaning of giving a pind to the west of plot 111. It is clear that subsequently this pind was extended by villagers of Amarwa to which no objection was taken by the plaintiffs or any other villagers of Amarwa or Nanhubigha and the excess water or spill water of the ahar used to pass over this Kanwa."

**11.** In the appellate Court an argument was advanced on behalf of the plaintiffs-respondents that the defendants could not acquire any right of constructing the Chahka at the place where its foundation had been dug because that would damage the Nala and that no prescriptive right or a right of easement would be acquired in the Chhaur land even if the entire case put forward by the defendants be correct. The learned Additional Subordinate Judge after considering the decision in the case of *Kuseshwar Jha v. Uma Kant Jha*, MANU/BH/0169/1941 : AIR 1942 Pat 188 took the view that in the instant case by extending the Pind over a portion of the Chhaur the width of the Chhaur was permanently lessened and to that extent there was complete dispossession and as such Article 23 of the Limitation Act has no application. Regarding the Nala, he held that the excess water of the Ahar used to pass through the Kanwah along the Nala through this Chhaur for more than thirty years and that also amounted to permanent dispossession and could not be taken to be a continuing wrong. Accordingly he held that Article 142 of the Limitation Act applied in the case and the plaintiffs had no remedy. The appeal was accordingly allowed with costs, the judgment and decree of the trial Court were set aside and the suit of the plaintiffs was dismissed.

**12.** The plaintiffs thereupon filed the present second appeal to this Court. This appeal was originally placed for hearing before a learned single Judge who by his order dated the 28th of September, 1967, referred it to a Division Bench. On the 14th of October, 1968, the appeal was placed before a Division Bench and that Bench referred it for hearing to a Full Bench.

**13.** Learned counsel appearing for the appellants, while arguing the case before the Full Bench, challenged the findings of fact as recorded by the first appellate Court, although there is nothing to indicate that the correctness of those findings was challenged before the learned single Judge, who referred the case to a Division Bench, or before the Division Bench, which referred the case to a Full Bench. It was submitted that the findings of the Additional Subordinate Judge that extension of the Pind over plot No. 110 was done more than 30 years back and Kanwah was in existence at the south-western end of the extended portion for the same period are based on inadmissible evidence, namely. Exhibits A/1, A-1/1, A-1/2 and E/2. It was further contended that the judgment of the lower appellate Court does not show that

the witnesses examined on behalf of the defendants have given evidence to the effect that the extension of the Pind over plot No. 110 was made more than 30 years back and the Kanwah is also in existence at the south-western end of the extended portion since that period. Thus, according to learned counsel, the findings of the learned Additional Subordinate Judge are vitiated and they are not binding on this Court in second appeal. There does not appear to be any substance in the grounds urged by learned counsel for upsetting the findings of fact recorded by the first appellate Court.

(Then after discussing evidence (Paras 14 to 16) his Lordship proceeded).

**17.** Now I proceed to consider the points of law which have been raised on behalf of the parties.

**18.** Before the learned single Judge and the Division Bench a point had been raised that in the case of public land, such as Gairmazrua Am land, the question of adverse possession does not arise. Mr. Lal Narayan Sinha appearing for the appellants did not press this point before the Full Bench. He, however, submitted that the right of way over plot No. 110 has not been affected by the extension of the Pind of the Ahar in this plot and by raising its level and as admitted by the defendants it is still being used by the members of the public. Thus, there being no complete ouster, the instant case is a case of continuing wrong and Section 23 of the Limitation Act, 1908, applies. In support of this contention he relied on the decisions in the cases of Maharani Rajroop Koer v. Syed Abdul Hossein (1880) 7 Ind App 240 (PC), Hukum Chand v. Maharaj Bahadur Singh, MANU/PR/0031/1933 : AIR 1933 PC 193, Bibhut Narayan Singh v. Mahadev Asram, MANU/BH/0041/1939 : AIR 1940 Pat 449 and Balakrishna v. Shree D.M. Sansthan, MANU/SC/0174/1959 : AIR 1959 SC 798. The cases cited by learned counsel no doubt (support?) the proposition that Section 23 of the Limitation Act applies to a case of obstruction to a right of way unless there is complete ouster. If there is no complete ouster it is a case of continuing nuisance as to which cause of action will be renewed de die in diem so long as the obstruction continues. The principles of law on the question of applicability of Section 23 of the Limitation Act have been summarised by their Lordships of the Supreme Court in Balakrishna's case, MANU/SC/0174/1959 : AIR 1959 SC 798 referred to above, in these words: ".....Section 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damages resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and that may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that Section 23 can be invoked."

The material question, therefore, which arises for consideration is whether on the findings of the lower appellate Court it can be held that the instant case is not a case of complete ouster but a case of continuing nuisance. As I have already pointed out, the learned Additional Subordinate Judge has taken the view that by execution of the Pind over a portion of the Chhaur the width of the Chhaur has been permanently lessened and to that extent there is complete dispossession. The learned Munsif in paragraph 49 of his Judgment has observed as follows:

"From the evidence disclosed in this case It will appear that the pind in 110 plot has been extended up to 80 links as a result of which the road has been narrowed. This cannot be said to be a complete ouster of the public who are still using that passage, may be, with difficulty."

Learned counsel appearing for the appellants contended that the above observation of the trial Court is supported by the statements made in paragraph 23 of the written statement filed on behalf of defendant Nos. 1 to 3 wherein it has been asserted that no inconvenience has been caused to the public in making use of the public passage although the width of plot No. 110 has been lessened due to the extension of the Pind. It is not possible to accept the contention of learned counsel. According to the plaintiffs' own case the defendants raised the level of plot No. 110 to the height of the Pind in plot No. 168 with the result that the pathway has become narrow. The defendants in their written statement have simply asserted that by the extension of the Pind in Plot No. 110 the pathway has only been lessened but not completely stopped. There is, however, no admission by the defendants that the extended portion of the Pind is still being used as a pathway. The view of the lower appellate Court, therefore, that by the extension of the Pind over a portion of the Chhaur the width of the Chhaur has been permanently lessened and to that extent there was complete dispossession cannot be said to be wrong. Thus, by the raising of the Pind in Plot No. 110 the defendants completely obstructed the plaintiffs from using that portion of the Chhaur in Plot No. 110 over which the Pind was extended. As it is a case of complete ouster, Section 23 of the Limitation Act does not apply with regard to the extended portion of the Pind in Plot No. 110.

**19.** The next point which falls for consideration is whether the defendants have any right to construct a Chahka on the extended portion of the Pind. According to the finding of the lower appellate Court, the Chahka is proposed to be constructed at the south-western end of the extended portion of Plot No. 110 where the Kanwah was in existence for more than 30 years and the excess water of the Ahar used to pass along this Kanwah. In the map prepared by Sri Akhouri Sidhinath, Pleader Commissioner, 'Bhows' at three places in plot No. 168 have been shown by the letters B(1), B(2) and B(3). The place where the foundation for the proposed Chahka was laid has been shown by the letter "X" a little beyond the extended portion towards south-west of plot No. 110. In the map prepared by the Pleader Commissioner there is nothing to show that a Kanwah exists at the place where the foundation for the construction of the Chahka has been laid. The Pleader Commissioner had been specifically asked to report about the Bhows and outlets and the passage for the flow of water from the Ahar, In his report under point No. 7 he has stated as follows:

"I found three Bhows and outlets in Plot No. 168 (Amarua) fitted with hume pipes for flow of water to irrigate the fields lying to the north of it."

In his evidence also the Pleader Commissioner (D.W. 3) has not said a word about the existence of the Kanwah at the proposed site of the Chhaka. It is therefore, difficult to locate the exact place where the Kanwah had been constructed more than thirty years back as found by the lower appellate Court. Even if it be assumed that there is a Kanwah at the place where the foundation for the Chahka has been laid, the defendants have no right to construct a Chahka at that place. A Kanwah is a small opening for the flow of excess water whereas by the construction of a Chahka a wide opening will be made in the entire width of plot No. 110 as a result of which great volume of water would pass through the Chahka. According to the report of the Pleader Commissioner, the length of the foundation dug for the proposed Chahka was

22 links north to south, its breadth was 20 links east to west and its depth was 7 links. The plaintiffs have alleged in their plaint that by the construction of the Chahka the village path in plot No. 110 would become impassable and it would become a river flowing Nala. They have also asserted that plot Nos. 34 and 35 and the other adjoining plots belonging to the plaintiffs in village Nanhubigha would become incapable of producing any crop and irreparable damage would be caused.

According to the report of the Pleader Commissioner, plots Nos. 34, 35 and 41 are Dhanhar plots and plot No. 39 is a Bhith plot. Merely because a Kanwah has been in existence in the extended portion of the Pind of the Ahar in plot No. 110 for more than 30 years at its south-western end over which excess water of the Ahar passes, as found by the lower appellate Court, the defendants have no legal right to construct a Chahka at that site. By doing so the defendants would naturally cause considerable damage to the pathway in plot No. 110, which had already been lessened by the extension of the Pind of the Ahar, and to the fields of the plaintiffs, such as, plots Nos. 34, 35, 39 and 41. The plaintiffs are, therefore, entitled to a decree for permanent injunction restraining the defendants from constructing a Chahka at any place in plot No. 110 and for a direction to fill up the foundation put up for the purposes of the Chahka with their own costs.

**20.** Now remains to consider the question whether the defendants have acquired any legal right to store water in the lands of the plaintiffs or to drain out excess water of the Ahar through the lands of the plaintiffs. As stated earlier, in the plaint the plaintiffs have also prayed for a decree for permanent injunction restraining the defendants from keeping or storing water in any portion of plot Nos. 111, 112 and 114 of village Nanhubigha and plots Nos. 171 and 172 of village Amarwa and from draining out any excess water of the Ahar through plot No. 110 or through plot Nos. 34, 35, 38, 39, 41 etc., of village Nanhubigha. The lower appellate Court has not given any finding on the question whether the defendants have acquired any right to store water over plots Nos. 112 and 114 of village Nanhubigha or plots Nos. 171 and 172 of village Amarwa. It has also not recorded any finding whether the defendants have any right to drain out water from the Sarikha Ahar through plot Nos. 34, 35, 38, 39, 41 etc., of village Nanhubigha. According to the finding of the lower appellate Court the defendants have been storing water in plot No. 111 since the construction of the Pind of the Ahar more than 30 years. As already stated, the lower appellate Court held that the excess water of the Ahar passes through the Kanwah in plot No. 110 for the same period. It was submitted on behalf of the appellants that there is no question of adverse possession so far as the questions of storing of water of the Ahar in plot No. 111 and other plots and draining of the excess water through plot Nos. 34, 35, 38, 39, 41 etc., are concerned. The relief claimed by the plaintiffs in that regard can only be refused if the defendants succeed in proving that they have acquired a right of easement to store water on the lands of the plaintiffs and to drain out the excess water of the Ahar in the various plots of land belonging to the plaintiffs.

Mr. Kailash Roy, learned counsel appearing for the respondents, did not dispute this proposition but he contended that the defendants have pleaded and succeeded in proving such a right. In this connection learned counsel referred to paragraph 11 of the written statement wherein it has been stated that since more than 30 years water of Sarikha Ahar used to accumulate in plot Nos. 170, 171, 111 and portion of plot No. 112 and paragraph 13 of the written statement wherein it has been stated that excess water has been flowing through plot Nos. 38, 39, 41, 35 etc., after crossing plot No. 110 for more than 30 years. In paragraphs 11 and 13 of the written

statement it has not been asserted that no objection was raised by the owners of the plots in question to the storing of water in their lands and to the draining of the excess water through their lands. Thus, there is no averment in the written statement that the defendants have been enjoying peacefully and openly without interruption the right to store water in the lands belonging to the plaintiffs and the right to drain out water through the lands of the plaintiffs.

In course of his argument, Mr. Kailash Roy referred to the decisions in the following cases of Radha Kishun v. Sundar Mal, MANU/BH/0021/1933 : AIR 1934 Pat 11, Rambhai v. Vallabhai MANU/MH/0274/1920, Amritanath Biswas v. Jogendra Chandra, MANU/WB/0036/1922 : AIR 1924 Cal 369, Ramkrishna v. Ramanath, AIR 1929 Mad 819 and Madhub Dass v. Jogesh Chundar ILR(1903) Cal 281 and contended on the basis of the aforesaid decisions that where there is evidence of long enjoyment of a prescriptive right in a particular way it is the habit and duty of the Court to clothe the fact with right. Thus, according to learned counsel, though it has not been specifically pleaded in the written statement that the defendants as of right have been storing water in the Ahar in the lands of the plaintiffs and draining out excess water through the lands of the plaintiffs, in view of the fact that there is evidence that the defendants are doing so for more than 30 years, the defendants should be clothed with the right to do so. It is difficult to accept this contention of learned counsel. The facts of the cases relied upon by learned counsel were quite different and as such the decisions in those cases do not help the defendants. In the instant case there is no finding of the lower appellate Court with regard to the storage of water over plots Nos. 112 and 114 of village Nanhubigha and plots Nos. 171 and 172 of Amarwa. There is also no finding regarding the drainage of water through plot Nos. 34, 35, 38, 39, 41 etc. The plaintiffs, therefore, are entitled to a decree for permanent injunction restraining the defendants from storing water of the Ahar in plot Nos. 112 and 114 of village Nanhubigha and plot Nos. 171 and 172 of village Amarwa and from draining out excess water through plot Nos. 34, 35, 38, 39, 41 etc.

Although there is the finding of the lower appellate Court that the excess water of the Ahar has been passing through the Kanwah, which is in existence at the south-western end of the extended portion of plot No. 110 since more than 30 years, the plaintiffs are entitled to a decree for permanent injunction restraining the defendants from draining out water through the entire plot No. 110 because the defendants have neither claimed nor proved that they have been draining out water through Kanwah as of right. So far as plot No. 111 is concerned, no doubt there is a finding that plot No. 111 formed the part of the Ahar since the extension but there is no finding that the defendants are using the plot as a part of the Ahar throughout the year as of right with the result that no crop is raised therein. The plaintiffs, therefore, are entitled to a decree for permanent injunction restraining the defendants from storing water of the Ahar as of right even in plot No. 111.

**21.** For the reasons stated above, I allow the appeal in part, set aside the judgment and decree of the lower appellate Court and decree the suit of the plaintiffs in part. The plaintiffs will be entitled to a decree for permanent injunction restraining the defendants from constructing a Chahka at any place in plot No. 110 and for a direction to fill up the foundation put up for the purposes of the Chahka with their own costs. The plaintiffs will get a decree for permanent injunction restraining the defendants from storing water of the Ahar as of right in plot Nos. 111, 112 and 114 of village Nanhubigha and plot Nos. 171 and 172 of village Amarwa and from draining out water as of right through plot No. 110 even through Kanwah and

through plot Nos. 34, 35, 38, 39, 41 etc. of village Nanhubigha. The plaintiffs' suit is dismissed with regard to the other reliefs. On the facts and circumstances of the case, I direct that the parties would bear their own costs throughout.

**S.C. Mishra, C.J.**

**22.** I agree.

**Sinha, J.**

**23.** I agree that the plaintiffs are entitled to a decree permanently injuncting the defendants from constructing the Chahka in controversy. In my opinion, the plaintiffs have not made out a case for obtaining any other relief in this suit. The parties should bear their own costs throughout.

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