

(1959) 06 GAU CK 0007
In the Gauhati High Court
Case No : First Appeal No. 50 of 1958

Hidangmayum Achou Sarma

APPELLANT

Vs

Union Territory of Manipur

RESPONDENT

Date of Decision : 23-06-1959

Acts Referred:

Civil Procedure Code, 1908 — Order 41 Rule 1
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1
Limitation Act, 1908 — Section 2(5), 2(5), 26, 26

Citation : AIR 1960 Manipur 18

Hon'ble Judges : T.N.R.Tirumalpad, J

Bench : Single Bench

Advocate : T.N.Bhattacharjee, N.Ibotombi Singh, Advocates appearing for Parties

Judgement

1. This is an appeal against the judgment of the First Subordinate Judge, Manipur, dismissing the suit C. S. No. 7 of 1953 filed by the appellants for a declaration that the land called Uchekon Maning Pat was a common pasturage, used and enjoyed as of right by the villagers of the three villages Uchekon, Khongman and Nandeibam Leikai and that the settlement for cultivation of the suit land in favour of some of the defendants by the Deputy Commissioner of Manipur was illegal and inoperative and for an injunction restraining the defendants from interfering with the appellants' said right of pasturage.

(2) The case of the appellants was as follows: Uchekon Maning Pat was originally a fishery.

It dried up over 68 years before suit and ever since then the villagers of the 3 villages have been enjoying the said land without interruption as a common pasturage for over 60 years and the villagers have thereby acquired the easement of pasturage by prescription for the statutory period against the Government. They further say that this right was recognised by the Maharajah of Manipur in 1945 before the integration of this territory.

(3) The suit was originally filed against certain persons in whose favour the Deputy Commissioner of Manipur granted settlement in the said land. In the trial which followed before the District Judge of Manipur, the plaintiffs obtained a decree declaring the land to be a pasturage and the settlement in the names of the defendants as illegal. There was an appeal to this Court and the decree of the District Judge was set aside and the case was remanded for trial after impleading the Government of Manipur as a party. Accordingly, the Government of Manipur was impleaded as a defendant. In the subsequent trial before the First Subordinate Judge it was held that the appellants had not established that Uchekon Maning Pat was enjoyed by them as common pasturage for over the statutory period of 60 years and so the suit was dismissed. It is against that decision that the present appeal has been filed.

(4) The points which arise for decision are (1) whether the villagers of the 3 villages, namely, Uchekon, Khongman and Nandeibam Leikai, have acquired the right of common pasturage for Uchekon Maning Pat by prescription for the statutory period of over 60 years against the Government, (2) whether the suit is barred by limitation against the Government, and (3) whether the appellants are entitled to any relief.

(5) Point No. 1: Now before we proceed to decide this question at issue, we have to be clear about the right which the appellants claim. The appellants admit that Uchekon Maning Pat was originally a fishery till about 68 years before they filed the suit. According to them, the fishery got dried up 68 years before the suit and since then the ancestors of the villagers of the 3 villages have been using the said Maning Pat as a common pasturage and enjoying it as of right peacefully as an easement without any interruption for over 60 years.

Thus it is their definite case that the right which they claim over the Maning Pat is a right of easement acquired by them and their ancestors as an easement of prescription against the Government. In other words they base their claim under S. 26(1) and (2) of the Indian Limitation Act. It has therefore to be clearly understood that the appellants are not claiming the said easement as a customary easement on the basis of immemorial user, but as an easement acquired by them by prescriptive user for the statutory period of over 60 years against the Government. It is on that claim that this appeal has to be decided.

(6) Before we go into that question, it may also be mentioned that the appellants have asserted their rights under S. 26 of the Limitation Act with deliberation because they knew that they cannot claim the right as a customary easement. There was no law of easement in Manipur prior to 1949. It was in 1949 that Manipur was integrated into the Indian Union. There was no law of easement prior to that date. All waste lands belonged to the Maharajah of Manipur before 1949.

It was admitted by the appellants' learned counsel that no easementary right could be claimed against the Maharajah by any subject before the said

integration. Even after the integration the Easements Act has not yet been made applicable to Manipur. But the Indian Limitation Act was made applicable on 16450 to Manipur. Hence the appellants knew that their claim for easement can be brought by them only under the Indian Limitation Act. So, we are confined strictly to the provisions of the Indian Limitation Act for deciding this case.

(7) Under the Indian Limitation Act, S. 2(5) defines an easement, as follows:

" "Easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his Own profit any part of the soil belonging to another or anything growing in, or attached to, or subsisting upon, the land of another".

Under this definition it is "a person" which will no doubt include "persons" as also a "definite body of persons", who would be entitled to claim the easement. But the question here is whether it will include an indeterminate and fluctuating body of persons like the villagers of the 3 villages on whose behalf the present suit has been brought. Can such an indeterminate and fluctuating body of persons prescribe for an easement under S. 26 of the Limitation Act? Section 26 paragraph 2 again mentions that the easement must have been enjoyed by a person.

(8) In my opinion it cannot be said that the villagers of the villages are capable of prescribing for such an easement. I say so particularly in this case in the face of the evidence adduced by the appellants' witnesses. P. W. 5 in his evidence admitted that during the past 30 years the number of houses in the 3 villages has been fluctuating and that he was unable to say who were the villagers who have been rearing cattle in the said village. P. W. 1 also stated that every house in the villages except about 10 houses have got cattle. Thus there is no definiteness as to the persons or body of persons who were said to have acquired the right. Nor is there any definiteness as to the particular persons in the 3 villages who possessed any cattle and who have been grazing the said cattle in the Maning Pat.

If for example, a new family settles down in one of the 3 villages and starts rearing cattle then that family would also get the right of easement if the said right is said to vest in the 3 villages. Again, if some of the families in the 3 villages who have not been till now rearing cattle start to do so now, then such families will also get the right of easement if the appellants' claim is upheld. Certainly, S. 26 of the Limitation Act is not intended to grant the right of prescriptive easement in the case of such persons. It has been held in *Maharaj Bahadur Singh v. Gandrai Singh*, AIR 1917 Eat 640 (2) that under Ss. 25 and 26 of the Limitation Act an easement of prescription can be conferred only on a determinate person and not an indeterminate and fluctuating body. Again, it has been held in *Kunja Paria v. Nityananda Layek*, 53 Cal W.N. 346 that an indeterminate body of persons like the villagers of a village can acquire a right only on the basis of a custom and that prescriptive right by a fluctuating body of

persons is not allowable in law. I entirely agree with the above decisions. On this one ground alone the suit brought by the appellants ought to have been dismissed without even going into the question whether or the evidence adduced, the case of prescriptive¹ easement has been established.

(9) In the course of the arguments before me the learned advocate for the appellants did not try to support the appeal on the basis of a prescriptive right, but only on the basis of a customary right. In the face of the pleadings made in the plaint basing their claim only on the prescriptive right, the appellants cannot be allowed to change their case, in appeal when they found that their case based on prescription must fail. Even, if the appellants now attempt to base their case on a customary easement, the appellants cannot succeed as a custom has got to be clearly set up in their plaint and evidence adduced in respect of such custom. But the P.Ws. sought to speak only about their prescriptive right. The plaint allegation is itself against any such right of pasturage.

A custom has got to be immemorial if it is to be made the basis of a claim. But the appellants have categorically stated in the plaint that Uchekon Maning Pat was a fishery 68 years before suit. If it was a fishery, then, it could not have been a grazing ground and there can be no right of pasturage over the fishery. It was alleged in the plaint that the appellants' ancestors drained the fishery and converted it into a grazing ground and started grazing their cattle 68 years before the suit. Thus according to the appellants' own plaint it was not a case of immemorial custom. The allegations in the plaint have been made with a view to set up a case of acquisition of a prescriptive right of easement. This again shows that the appellants cannot succeed by trying to set up a customary right for the first time in appeal.

(10) If we go into the evidence regarding the right of prescription, we would find that even the prescriptive right has not been established in any manner. None of the appellants' witnesses were even able to say what the area was over which the alleged prescriptive right was said to have been acquired by them. Nor were they able to establish even the fact that for the past 68 years before suit Uchekon Maning Pat has been continuously a grazing ground. It is the respondents' case that from 1931³² the right of fishing in Uchekon Maning Pat was being sold in auction year by year until 1950 when by the Notification Ext. D B. dated 24⁵⁰ the said fishery was cancelled and the area converted into cultivable land.

The appellants themselves produced Ext. PC to show that Uchekon Maning Pat was being sold as a fishery from 1931³². P. W. 4 also admitted in his evidence that the area was being sold as a fishery and the Patsel of Rs. 15/ was being paid yearly for the said fishery right. P. W. 5 even admitted that in 1942 it was sold as a fishery and the surrounding villagers caught fish and even P. W. 5 caught fish. P. W. 5 would say that it was a grazing ground for 80 years prior to 1942. But it is not the case of the appellants.

Even if we accept the evidence of P. W. 5, it follows that it had ceased to be a grazing ground for about 12 years before suit. Under S. 26 of the Limitation Act, a suit has to be brought within 2 years of the interruption of the easementary right. As the suit has been brought according to P. W. 5 only 12 years after the said interruption the suit has definitely got to fail on the said evidence of P. W. 5 alone, whether the claim of easement is made on a prescriptive right or on a customary right. Thus whichever way we look at the matter the appellants have no case at all.

(11) The learned Advocate for the appellants has filed an application for receiving additional evidence in appeal stating that the same was tendered in evidence in the lower Court, but unfortunately omitted to be marked. The documents sought to be admitted are (1) a plan about which P. W. 7 gave evidence and (2) an order of His Highness the Maharajah of Manipur dated 7245, refusing to grant settlement of Uchekon Maning Pat in view of the objections raised by the local villagers and the Settlement Department. It appears to be quite unnecessary to admit these documents in evidence in the view which I have taken about the case that the appellants cannot prescribe for the easement under S. 26 of the Limitation Act.

The plan does not in any way advance the case of the appellants. Nor does the fact that the Maharajah did not grant settlement of the land in 1945 in any way prove the case of easement. The Maharajah had every authority to grant or not to grant the settlement of the lands vested in him. Because he refused to do so on the objections raised by the local villagers and the Settlement Department, it did not mean that the villagers had prescribed for any easement, but only that the Maharajah chose not to allow any settlement of the land. As already stated, there can be no question of easement as against the Maharajah and it cannot be said that the Maharajah refused to give the settlement because the villagers had proved their case of easement.

(12) The land was cancelled as a fishery by the Administration of Manipur in 1950 and thrown open for settlement. Some of the appellants filed applications before the Deputy Commissioner requesting for settlement of portions of the land. P. W. 1 was himself one of such applicants, but the Deputy Commissioner did not give any portions of the lands to the appellants. That the appellants themselves applied for settlement is indicative of the fact that to the knowledge of the appellants there was no question of any easementary right. P.W. 1 stated in his evidence that he filed the suit being dissatisfied with the settlement in favour of the defendants and the rejection of his prayer for settlement.

He said that Gurumayum Amusana Sarma of Sagolband got settlement of a portion and that if he could get it, the witness saw no reason why persons living near the disputed field should not get settlement of the land. It is clear that this suit has been brought not because of any easementary right vested in the appellants, but because of their discomfiture that others should get the land in preference to the appellants. There is no doubt in my opinion that the decision of

the learned Subordinate Judge that prescriptive right has not been established is correct This point is found against the appellants.

(13) Point No. 2 It was pointed out by the learned Government Advocate that the alleged date of interruption of the easement is mentioned in the plaint as 7453 that the suit was originally brought on 2751953 only against the persons in whose favour settlement was granted by the Government, but that the Government was made a party only on 281155, which was more than 2 years after the alleged data of interruption and that the suit was therefore barred under S. 26 of the Limitation Act. It was also pointed out that as the Limitation Act was extended to Manipur only on 16450 it cannot have any retrospective effect and that a person can start prescription against the Government only after 16450. These are, no doubt, interesting questions, but it is not necessary to decide them in the present appeal as in view of my finding of point No. 1, the appeal has got to fail in any case. Hence I am not giving any finding on point No. 2.

(14) In view of my finding on point No. 1 it follows that the appellants are not entitled to any relief. The appeal therefore fails and is dismissed with costs.