
(1970) 09 OHC CK 0002
In the Orissa High Court
Case No : Second Appeal No. 621 of 1966

Jagabandhu Sahu and Others

APPELLANT

Vs

Bipin Jena and Others

RESPONDENT

Date of Decision : 01-09-1970

Acts Referred:

Easements Act, 1882 — Section 18

Citation : (1970) 09 OHC CK 0002

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : D. Mohanty and B. Patnaik, for the Appellant; B.K. Pal, B. Pal and A. Mohanty, for the Respondent

Final Decision : Partly Allowed

Judgement

R.N. Misra, J.—The plaintiffs who came to court under Order 1, Rule 8, CPC as representing the villagers of Sarmanga within the district of Keonjhar are the appellants against a reversing decision of the learned Subordinate Judge of Keonjhar.

2. They sued for declaration that the villagers have a customary right of pasturage over the disputed property which constitutes two plots bearing Nos. 1257 and 1258 being 2.10 acres and 1.43 acres respectively totalling to 3.53 acres. The plaintiffs asked for a permanent injunction restraining defendants 1 to 10 from using the said lands for agricultural purposes and thus changing the nature of the land. There was a prayer for eviction of the defendants in the alternative. According to the plaintiffs these two plots had been utilised as Gochar of the villagers from time immemorial. There was no recorded Gochar for the village and the entire cattle of the village used to have pasturage from the disputed property. Defendants 1 to 10 had encroached upon the disputed land for the first time in 1954 and wanted to commence agricultural operations. There was an encroachment case under Orissa Act 15 of 1954 by the S. D. O., Anandapur, whereupon the defendants gave up possession. But again there was

encroachment in the year 1958 and the defendants have remained in possession in spite of the encroachment proceedings. Defendants 1 to 10 filed T. Section 124 of 1961 for a declaration that they had non-evictable tenancy interest in the disputed property. That suit was dismissed. Yet the defendants have remained in unlawful possession.

3. The defendants in a joint written statement contended that they were members of the scheduled caste who have no lands of their own and they were in cultivating possession of the disputed property for more than 20 years and have not only reclaimed the disputed land but they have also very substantially improved it. They alleged that the suit was the outcome of jealousy and greed of the villagers. It was seriously disputed that these two plots were never Gochar lands of the villagers and the villagers have other recorded Gochar lands. The defendants also pleaded that they had acquired adverse possession over the disputed property.

Defendant No. 11 -- the State of Orissa -- filed a separate written statement alleging that the disputed property was recorded as Patita and belonged to the Government. Neither of the parties has any right to such property. Defendants 1 to 10 had been evicted, but they again came upon the properties in July 1961 which led to the initiation of a proceeding under the prevention of Land Encroachment Act.

4. The trial Court held that the disputed property was communal and the plaintiffs had a right of pasturage over the same; the defendants were in possession of the disputed property as trespassers and had no right, title or interest therein, nor had they acquired title by adverse possession. It, therefore, decreed the suit.

5. The learned Appellate Judge came to hold that the plaintiffs had failed to establish the acquisition of customary right of pasturage over the disputed property. Though he found from the evidence of the parties that the cattle of the village had really been grazing on the disputed property, he held that it must be taken to be a case of permissive user and acquisition of a customary right must be found against. Upon a reference to the judgment in T. S. No. 124 of 1961 he also found that the defendants had no interest in the property. On these findings of his, he allowed the appeal and dismissed the suit. The plaintiffs are in Second Appeal against this reversing decision.

6. The learned Appellate Judge has stated,

"It appears to me that the cattle of village Sarmanga used to graze over the suit lands like other waste lands in the village till the defendants 1 to 10 encroached upon it in about 1954. But this alone does not give the plaintiffs a right of pasturage over the suit lands. There is no evidence to show that the plaintiffs intended at any time to exercise a legal right of pasturage over the suit lands specifically. The suit lands along with other waste lands belong to the State and the villagers use to let loose their cattle on these waste lands. It was only a

practice arising out of indulgence on part of the State. The assertion of a legal right and the prolonged submission to or acceptance of the exercise of that right by those interested in disputing it never took place. Grazing of cattle on vacant lands in the village did not involve any invasion of the rights of the owner or the creation of any right to the benefit of the villagers."

The learned Appellate Judge relied upon a decision in AIR 1957 Andh Pra 997, Krishnamurthi v. Bapanayya, wherein it was indicated,

"A practice that has risen in comparatively recent years due to indulgence or tacit permission of the owner of land must be distinguished from a custom originating in the assertion of a legal right and a prolonged submission to or acceptance of the exercise of that right by those interested in disputing it. Vacant lands in a village are commonly used for purposes such as threshing or boiling and drying turmeric or for juvenile sporting without involving any invasion of the rights of the owner or the creation of rights in others who are tacitly allowed to use the land."

They also held,

"No fixed period of enjoyment can be prescribed as necessary to prove a customary right and the character and length of enjoyment necessary for such purpose must depend upon the nature of the customary right claimed."

In this Court, in Lambodar Panda and Others Vs. Ramesh Chandra Panda and Others, , Rao, J., held,

"According to the conditions in India, the relationship of the parties and the circumstances of each particular case, there is a presumption that the user is permissive and the person claiming the right must prove the acquisition of such right u/s 26 of the Limitation Act or Section 15 of the Indian Easements Act."

This dispute was with reference to a right of way over a plot of land which was admittedly lying vacant and had been found to have been used for the purposes of coming and going. In an appeal from the aforesaid judgment in this Court a Division Bench of this Court in Ramesh Chandra Panda and Others Vs. Lambodar Panda and Others, , placed reliance on a judgment of Fry, J., in (1879) 12 Ch D 261, Moody v. Steggles, where it was observed,

"Where there has been a long enjoyment of property in a particular manner it is the habit, and in my view, the duty of the Court, so far as it lawfully can, to clothe the fact with right."

Their Lordships of the Judicial Committee in (1904) 31 IA 75 , Bholanath Nundy v. Midnapore Zamindari Co. are said to have taken a similar view.

7. In the present case the State as defendant No. 11 in a part of its written statement has said,

"The defendants 1 to 10 encroached upon those lands in the year 1954-55 for

which encroachment case No. 208 of 1954-55 was started against them. Most of the villagers also filed objection on the ground of using this as pasture land and after due enquiry by the authorities, they were evicted from the land in the year 1961 on payment of back rent and penalty."

This paragraph of the written statement gives an impression that the State accepted the objection raised by the villagers in the encroachment proceeding and on a finding that the villagers had a right of pasturage directed the defendants to be evicted. In the lower appellate court there has been a clear finding that the defendants have not perfected their right to any part of the disputed property and are not entitled to lay any claim. In this Court this aspect has not been agitated. But Mr. Pal for the respondents contended that there are applications pending with the Revenue Authorities for settlement of the lands with the defendants and in case the plaintiffs do not succeed in the litigation the defendants are likely to be settled with the lands in view of the latest policy of the Government in regard to settlement of such lands with members of the scheduled caste. That is a matter with which this Court has nothing to do.

8. On the finding recorded in the lower Appellate Court that the villagers of Sarmanga had been utilising the lands for pasturage it must be held that this has been in vogue for many years past and can easily be said to be from a period which can be described in law as time immemorial. The Lower Appellate Court has not come to find that there was any resistance given to the right of the plaintiffs. The State of Orissa has not pleaded permissive user. In such circumstances, it was not for the lower Appellate Court to hold that such user must be permissive. I think it fair to conclude on the findings already arrived at that the plaintiffs had been able to establish that they had a right of pasturage. The question for examination, however, is as to whether such a right was over the entire land. In the Courts below that aspect had not been properly examined and, therefore, I was of the view that the matter must be remitted to the Court of appeal below for a determination on that question. This became necessary in view of the judgment of the learned Appellate Judge wherein it is stated that there were other lands in the village which the villagers were also using. At this stage Mr. Mohanty, the learned counsel for the appellants, stated that it would be sufficient for their purpose if the right of pasturage is declared over plot No. 1257 and the villagers would not press their claim in respect of Plot No. 1258. In such circumstances, I think it sufficient for the purposes of the appeal to hold that the plaintiffs as representatives of the village Sarmanga are entitled to a decree declaring their right of pasturage over Plot No. 1257 of Khata No. 124 of mouza Sarmanga which is said to be 2.10 acres in extent. Defendants 1 to 10 appear to have been in forcible possession over this plot and are utilising the same for agricultural purposes. Thus they are liable to be evicted from it. But they are also entitled to the user of the disputed plot as Gochar as they belong to the village. Defendants 1 to 10 are restrained from interfering with such right of pasturage and the State of Orissa is restrained from putting any obstruction on exercise of such right over the said plot. The plaintiff's claim in regard to Plot No. 1258 is

negated. The appeal is allowed in part. Both parties do bear their own costs throughout.