

(1955) 03 CAL CK 0016
In the Calcutta High Court
Case No : A.F.A.D. No's. 691 to 712 of 1949

Jugal Kishore Birla and Others

APPELLANT

Vs

Bishnu Hari Jana and Others

RESPONDENT

Date of Decision : 07-03-1955

Acts Referred:

Bengal Tenancy Act, 1885 — Section 153
Evidence Act, 1872 — Section 13

Citation : AIR 1955 Cal 419

Hon'ble Judges : Renupada Mukherjee, J

Bench : Single Bench

**Advocate : Pramatha Nath Mitra and Kshetra Mohan Chatterji, for the Appellant;
Jajneswar Majumdar and Sailendra N. Banerjee, for the Respondent**

Final Decision : Dismissed

Judgement

Renupada Mukherjee, J.—The appellants of these 22 appeals brought a group of 29 rent suits in the 3rd Court of the Munsif of Midnapore for recovery of arrears of rent from the tenants respondents. The rent lands are situate in different mouzahs of Pergunna Kutubpore within the district of Midnapore and the period of claim varies between 2 and 4 years within the limits of the years 1350 B. S. to 1353 B. S.

2. The defendants contested the suit raising various pleas, but the plea which was common to all the suits and which is material for the purpose of these appeals was that by virtue of an immemorial Custom prevailing in Pergunnah Kutubpore the tenants were entitled to proportionate remission of rent on account of "haja" and "suka", that is, inundation & drought. The tenants pleaded that there was a total failure of crops in 1352 B. S. on account of "suka" or drought and also a complete failure of crops in 1353 B. S. on account of "haja" or inundation and so the tenants were entitled to get wholesale remission of rent for these years.

The custom as also its validity was denied on behalf of the plaintiffs and the

learned Munsif who heard the suits analogously decreed the suits in part by one judgment allowing this plea in 24 suits and holding that the existence of a valid custom had been established in respect of "jal" lands in Pergunnah Kutubpore. He further held that there was a total failure of crops in all the mouzahs in 1352 B. S. on account of "suka" and also a total failure in 1353 B. S. in some of the mouzahs on account of "haja" and partial failure in others. Accordingly the learned Munsif allowed remission of rent in respect of jal lands for these two years, the remission being complete or partial according to the extent of the damage found by the Munsif. In 5 suits the plea was negatived because the Munsif found that the plea was not available to the defendants of those suits on account of the bar of "res judicata".

3. The plaintiffs landlord preferred appeals from the decrees passed in all these suits. The learned Subordinate Judge affirmed the judgment and decrees passed in the above 24 suits with the exception of 2 suits in which the lower appellate Court made a finding that the plea of "haja" and "suka" was not open to the defendants of those suits on account of the bar of "res judicata". The laud-lords have filed these 22 appeals from the judgment and decrees of the lower appellate Court leaving out the 7 suits in which the plea was negatived by the trial Court and the lower appellate Court.

4. Mr. Mitter appearing on behalf of the plaintiffs appellants submitted that he did not contest the findings of the Courts below as to the actual damage of the crops in the years 1352 B. S. & 1353 B. S. but he contended that the factual existence of the custom had not been established & even if it be held that it was established, the custom was not a valid and legally enforceable custom as it lacked some of the essential attributes of a valid custom, namely, reasonableness, certainty and continuity. Before I take up these two contentions of Mr. Mitter, I shall dispose of a preliminary objection raised by Mr. Majumdar on behalf of the respondents regarding the maintainability of some of the appeals.

5. Mr. Majumdar argued that most of these appeals are valued at less than Rs. 50/- and as the learned Munsif who heard the suits was specially empowered u/s 153(b), Bengal Tenancy Act to dispose of the suits finally and as no question of the amounts of annual jamas payable was raised in those suits, no First Appeal lay to the Court of the District Judge and no Second Appeal lies to the High Court. In support of this contention Mr. Majumdar relied on a case reported in -- Rajabala Dasi Vs. Jai Chand Lal Babu and Others, . The headnote of this case indicates that the existence of a custom of "haja" was at issue but the headnote appears to be misleading because from the body of the judgment which is a very short one, one would get the impression that the only point at issue in that case was whether the tenants were exempted from paying rent for a particular year in pursuance of a custom to obtain remission of rent by reason of destruction of crops through inundation.

This shows that the custom was not disputed and so the plea whether the tenants were entitled to get remission of rent was in the nature of a plea of

payment. This is how this case has been explained in a subsequent decision reported in --" Atar Mian Patwari Vs. Indra Kumar De and Others, , and following the latter decision I hold that no question of rate of rent was involved to the case reported in Rajabala Dasi Vs. Jai Chand Lal Babu and Others, ", because the custom was not disputed there. Where, however, the custom is disputed, as in the present case, the question of the amount of rent becomes at issue because the decision on the question of custom would affect the amount of rent for all time to come. So, I hold that the question of the amount of rent has been decided by the Courts below by deciding the question regarding the existence and validity of the custom pleaded by the defendants and in that view of the matter I hold that the appeals are maintainable.

6. I now revert to the contentions put forth by Mr. Mitter on behalf of the appellants. The contentions urged by Mr. Mitter resolve themselves into two parts, -- (1) whether the tenants have succeeded in establishing the factual existence of the custom pleaded by them and (2) assuming that, such factual existence has been established, whether the custom lacks some of the essential attributes of a valid custom, namely, reasonableness, certainty and continuity. I shall take up these contentions one after another.

7. As to the factual existence of the custom, the evidence on record, -- specially the documentary evidence -- is so abundant and one-sided that Mr. Mitter was not in a position to controvert the concurrent findings of the Courts below on the issue of the existence of the custom. In a very exhaustive and ably expressed judgment the learned Munsif has traced the recognition of this custom for over a century in documents of various kinds and descriptions. I may mention some of these documents here. Exht. K (1) is an "amalnama" potta of 1240 B. S. (1833 A. D.) wherein the landlord agreed to give remission of rent for "jal" lands on account of the Providential causes of "haja" and "suka" in pursuance of a Pergunnah custom.

Of course, this potta was granted not by the predecessor of the plaintiffs who are co-sharer landlords of the rent lands in respect of 10 annas share, but by a predecessor of one of the cosharers of the plaintiffs. But this document in which a predecessor of some of the cosharers of the plaintiffs makes a statement in derogation of his own interest is certainly admissible for the purpose of showing the existence of the Pergunnah Custom. This Pergunnah custom also finds a mention in two other "amalnamas", one of 1240 B. S., Exht. K, and another of 1271 B. S., Exht. K. 2.

8. The existence of the custom appears to have been brought into issue and the custom appears to have found judicial recognition in a long series of judicial decisions, some of which may be noted here. The earliest in point of time is a judgment of a Deputy Collector in 1863 (Exht. G-9). Mr. Mitter contended that this judgment does not show that the question of the existence of any custom was raised in that case. The judgment, however, shows that the tenant claimed "mina" or remission on account of destruction of crops by flood and that not only

the defendant of that case but all the raiyats were claiming remission on account of destruction of crops by flood. Evidently, the tenants were relying on a custom although that word is not specifically used in the judgment and the finding of the Deputy Collector was that allowance must be made to the defendant for distraction of crops because it was clearly proved that "haja" had taken place. In my judgment, this finding amounts to a judicial recognition of the custom.

9. The next judgment in order of sequence is a judgment of the High Court of 1894, Exht. G. Raja Sourindra Mohan Tagore, predecessor of the plaintiffs, was the plaintiff appellant in that case and it was recognised that there was a customary right in the tenants to get remission of rent on account of inundation or drought. The existence of the custom was again recognised by the High Court in a judgment of 1908, Exht. G-3, and in two judgments of 1925, Exht. 2 Exht. G-8, both of which were delivered by Walmsley J. The plaintiffs predecessor was a party to one of these judgments of 1925, namely, Exht. G2, in which the existence of the custom in the whole Pergunnah of Kutubpore was recognised. It does not appear that the matter again came in to High Court between 1926 and 1946. It however appears that the matter next came up to High Court in 1947 in a group of appeals in which judgment was delivered by Roxburgh J., on the 20th June upholding the validity of the custom (vide judgment passed in "S. A. Nos. 230 to 245 of 1947 (Cal), (C)").

10. Mr. Mitter on behalf of the appellants contended that the course of judicial decisions on this point is by no means uniform and that there were several decisions of civil courts in favour of the appellants in which the existence of the custom has either been negatived or a pronouncement has been made against its validity on the ground that the custom is unreasonable and uncertain. In support of this contention, Mr. Mitter drew my attention to some judgments (Exht. 4 series). The dates of these judgments range between the years 1937 and 1944. In some of these judgments the question of the existence of the custom was not specifically put in issue but in some others there was no doubt a finding that no such valid custom existed in Pergunnah Kutubpore. Exht. 4-D, a judgment delivered by the Additional District Judge of Midnapore, on 18-11-1944, is typical of one of the judgments in which this same Judge ruled out the existence of such a valid custom.

But all the above judgments marked Exht. 4 series are judgments of subordinate Courts in which the earlier decisions of the High Court have either not been noticed or considered and so they cannot have any weight against the decisions of the High Court which are uniform on the question of the existence of this custom. I am of opinion that the existence of the custom has been established beyond any doubt by these judgments of the High Court and it is not necessary for me to refer to other documents which support the custom and which have been mentioned in the judgment of the trial Court, namely, settlement khatians, Exht. J-series, the dakhilas granted by the landlords, Exht. A-series, and some orders passed upon the subordinate officers to grant remission to tenants

according to a "pratha" or custom, Exht. D-series.

11. I now pass on to consider the other contention of Mr. Mitter which was that assuming that the factual existence of the custom has been established, it is open to the appellants to challenge its validity in these appeals and to show that the custom is not enforceable in law on the score of unreasonableness, uncertainty and lack of continuity.

12. Mr. Majumdar, on the other hand, argued that when a custom has been repeatedly brought to the notice of the Courts and judicially recognised it becomes a part of law of the locality where it prevails and it is not necessary to prove its attributes in each individual case. In support of this contention Mr. Majumdar relied on a Privy Council case reported in -- "Raja Rama Rao v. Raja of Pittapur", AIR 1918 PC 81 (D). The following passage quoted from page 83 of the report amply supports the contention of Mr. Majumdar:

"..... When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading"

In this connection reference may also be made to a case reported in -- "Banarasi Das v. Sumat Prasad", AIR 1936 All 641 (E). The following sentence quoted from p. 648 of the report is significant:

"A custom that has been repeatedly brought to the notice of the Courts and has been recognised by them regularly in a series of cases attains the force of law and it is no longer necessary to assert and prove it."

13. Mr. Mitter on behalf of the appellants contended, on the other hand, that he is entitled to challenge the validity of the custom and in support of this contention he relied on a case reported in -- Shri Audh Behari Singh Vs. Gajadhar Jaipuria and Others, . Mr. Mitter quoted the following passage from p. 423 of the report in support of his contention:

"The ambit or extent of a custom is a matter of proof and the defendants were certainly competent to adduce evidence to show that the custom of pre-emption prevailing in the city of Banarasi was available not against all persons who held lands within it but only against a particular class of persons"

In my judgment, neither the case cited by Mr. Mitter nor the passage quoted by him lends him any support because in the case relied on by him the defendants were allowed to raise only the question of the ambit of a custom and not any question affecting its validity. Indeed, the judicial recognition of a custom means nothing more nor less than the recognition of a valid custom and such recognition would be meaningless if a party were to be allowed to impeach its validity each time a custom is put in issue in a Court of law. In my judgment, it is not open to the appellants to raise any question affecting the validity of the

custom and I hold that the Courts below are justified in granting remission of rent in pursuance of a valid custom.

14. In the result, the appeals must fail because both the contentions put forth by Mr. Mitter have failed.

15. The appeals are accordingly dismissed with costs to the contesting respondents.