
(1954) 08 AP CK 0001

In the Andhra Pradesh High Court

Case No : Second Appeals No's. 1716 and 1717 of 1951 in Appeal Suit No's. 97 and 98 of 1950

Kommu Venkadu and Others

APPELLANT

Vs

Candrakota Subbaramaiah and Others

RESPONDENT

Date of Decision : 11-08-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (1954) 08 AP CK 0001

Hon'ble Judges : Umamaheswaram, J

Bench : Single Bench

Advocate : U. Bhimasankaran, S.V. Kondagu, A. Viswanatha Iyer and D.C. Krishnamurti, for the Appellant; K. Kotayya, for the Respondent

Final Decision : Dismissed

Judgement

Umamaheswaram, J.—These two Second Appeals arise out of two suits instituted against the residents of Mallepalli and Madigapalli for restraining them from passing through the fields of the Plaintiffs by means of a permanent" injunction. The Defendants pleaded that for over 100 years they were passing through the fields of the Plaintiffs and through the fields of some other ryots for going to Mecherla. The District Munsif of Guserala held that the Defendants had established a customary easement and dismissed the suits. On appeal, the Subordinate Judge of Narasaraopet allowed the appeals on two grounds, namely that the Defendants did not plead customary right in their written statements, and that they did not make out the customary right. The Second Appeals are filed on behalf of the villagers of Male-palli and Madigapalli.

2. The main contentions urged by the learned advocate for the appellants are that though the expression "customary right" is not specially mentioned in the written statements, the facts set out therein are sufficient to establish a customary right in the villagers of Malepalli and Madagapalli. It was also contended that the custom was not unreasonable as found by the lower

Appellate Court and that the mere fact that other villagers were also using that pathway did not negative their customary right. I agree with the contentions of the learned advocate for the appellants that having regard to the Privy Council's decision reported in - AIR 1950 56 (Privy Council) , the omission to use the words "customary right" in the pleadings or state the exact nature .of the legal right does not prevent the Court from upholding the customary rights if the facts warrant that conclusion.

At page 57, Lord Radcliffe in delivering the judgment of the Judicial Committee observed as follows:

The appellants, as they were entitled to, confined their plaint to the allegation of fact that "The said plot has been reserved from time immemorial and the people of the locality are using it for the said purpose from generation to generation" without pleading any special legal conclusion from these facts.

Their Lordships held that the facts pleaded were sufficient to make out a customary right. As in the Privy Council case, the Defendants have pleaded in their written statements that for a period of over 100 years they have been passing through the fields of the Plaintiffs and through the fields of some other ryots for going to Mecherla. I therefore disagree with the view of the Subordinate Judge and hold that it is open to the Defendants to make out a customary right. 3. The ., essential ingredients of customary right are set out in the Privy Council decision referred to supra. The custom should be immemorial in origin, certain and reasonable in nature and continuous in use. So, the short question that falls to be determined is whether the Defendants have established that the custom is ancient, certain and not unreasonable. I have perused the entire oral evidence of the Defendants' witnesses and I agree with the Subordinate Judge that the Defendants have not established that the custom is either ancient or reasonable in character. The right set up by the Defendants is to pass through cultivable lands belonging to the Plaintiffs. D.W. 2 admitted in, cross-examination that the owners of the respective fields over which the pathway passed plough the entire land without leaving the pathway. There was no re-examination of this witness on this point.

D.W. 6 admitted "The lands are cultivated without having a pathway, but yet people pass along it". The lands are admittedly of black-cotton soil on which dry crops are grown. I agree with the conclusion of the learned Subordinate Judge that a custom to pass over cultivable lands of this description is certainly unreasonable and cannot be recognised by the Courts. Though, as pointed out by Lord Radcliffe in - AIR 1950 56 (Privy Council) at p. 58 (A)", the conclusion arrived at by the lower Appellate Court is not a pure question of fact" and may be interfered with u/s 100," C.P.C., still a case where the question, whether it is reasonable or not has been gone into by the lower appellate Court, the High Court will not lightly interfere with that finding of fact as observed by Ramesam J. in - Goli Paddayya and Others Vs. Chaliki Krishnamurthy, at p. 654 (B).

The observations of Ramesam J. are apt and are in the following terms:

Generally, questions whether a custom of this kind which is set up by one party and denied by the other in agricultural tracts in this country, is reasonable or certain, are eminently questions of fact more of common sense than any abstract questions of law and unless there is clearly a misdirection as to the principles of law that ought to be applied, eminently questions for the lower Appellate Court.

I do not, therefore, wish to interfere with the finding of the lower Appellate Court. Moreover, I am also satisfied on the evidence that the custom pleaded is unreasonable.

4. The learned advocate for the appellants contended that the period for ascertaining as to whether the custom is reasonable or not is the period of its inception and relied upon the decision reported in - *Asrabulla and Others Vs. Kiamatulla Haji Chaudhury and Others*, . I agree with that contention. There is no evidence in the present case that the lands were not cultivable lands when the custom originated. The evidence is to the effect that the lands are always being cultivated with dry crops. So, the question of the custom having been reasonable at the inception, but having become unreasonable later on does not arise for consideration on the facts of the case. The learned advocate for the respondents relied on the decision reported in - *Baldeo Bind and Others Vs. Sk. Abdul Aziz and Others*, in support of the proposition that a customary right claimed by the Plaintiffs to go in procession through land bearing valuable crops should fail on the ground that the custom was unreasonable. I adopt the reasons of that case and hold that the custom pleaded in the present case is also not reasonable.

5. The next question is whether the custom pleaded is certain. The evidence of the Defendants' witnesses on this question is not uniform. D.W. 1 stated that the pathways were useful for the villagers of Malepalli and Madagapalli, Dwarakapuram and the mountain and that it was a public pathway. D.W. 2 stated that all who wish to use the pathway might use it. D.W. 3 said that all persons were entitled to the pathway. In the chief examination, D.W. 4 said that the way was a public way. As the Defendants have not pleaded that the pathway is a public pathway and the evidence is not sufficient to make out a dedication by the Plaintiffs, the Defendants rightly did not contend that the pathway is a public pathway.

The learned advocate for the appellants, however, contended that the mere fact that other villagers used the pathway, did not, in any way, affect their claim of customary right. The answer to this contention is to be found in the observations of Lord Justice Cotton in - *"(Earl) Dela-warr v. Miles"*, (1881) 17 Ch D 535 598 (E):

In that case what was attempted to be asserted was a claim of all the inhabitants of a village to use a green for the purpose of recreation. The evidence given was that all people, whether of the village or not, had used it, and it was held that

this evidence would not support a claim of right in respect of the inhabitants of that village. Some of the persons who used it happen to be inhabitants of the village, but there was no distinction at all as between their user and that of all the rest of Her Majesty's subjects, and therefore the user by all Her Majesty's subjects as such, the villagers not using it as villagers, but as Her Majesty's subjects, did not afford any evidence in support of the claim sought to be established.

Biswas J. followed these observations in the case reported in - *Harisadhan De and Others Vs. Radhika Prosad Pandit and Others*, . In Halsbury's Laws of England, Volume 10, para 14 - "*Hammerton v. Honey* (1876) 24 WR 603 (G) is cited in support of the proposition that the user whereby it is sought to prove custom must not be of a nature too wide to support the custom as alleged. The observations of Jessel, Master of Rolls cited in foot-note (c) are instructive:

It must not only be consistent with the custom alleged but, if I may use the expression, not be too wide. For instance, if you allege a custom for certain person, to dance on a green and you prove in support of that allegation not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom. It is not confined to what you say it is, and if your evidence is good for anything you prove a great deal more than you have alleged. You cannot select a bit of the practices proved which might possibly have a legal origin and say that the evidence must be rejected which would show that bit to be only a small part, say one-twentieth of the whole usage of which the remaining nineteen-twentieth may be utterly incapable of legal origin, and therefore that the one-twentieth must be assumed to have had a legal origin. I know there have been some observations made in cases which come to this-that the general legal usage is not destroyed because an occasional illegal usage is shown; but that does not apply where you have evidence of a totally different state of things which does not support a local custom at all.

The learned advocate for the appellants relied on the last sentence in the observations of Jessel (M.R.). I do not think that the evidence in this case falls within the exception mentioned by the learned Master of Rolls. What is spoken to by the Defendants' witnesses is that all the members of the public are entitled to use the pathway and not merely residents of Malepalli and Madagapalli.

6. The last question that falls to be decided is whether the custom is sufficiently ancient. The two plans filed to the case, Exs. A-1 and A-2 show that there was no pathway in 1902. The question is whether the customary right was acquired later. The decision reported in - "*Kuar Sen v. Mamman*" 17 All 87 (H) followed in - "*Palaniandi Tevan v. Pathirangonda Nandan*" 20 Mad 389 (I) no doubt lays down that the principle of English Common law that a custom is not proved if it is shown not to have been immemorial is not. to be applied to this country. Sir John Edge in - "17 All 87 (H)" cited above observed as follows:

To apply such a principle as we have been urged by the counsel for the appellant to do would be to destroy many customary rights of modern growth in villages and other places.

If really the Defendants pleaded that the customary right came into existence after 1902, the decision in - "17 All 87 (H)" and - "20 Mad 389 (I)" might support him. The case as set put in the written statements was that the customary right was being enjoyed for over 100 years. The Plaintiffs confronted the Defendants with the two survey plans for which the Defendants were not able to furnish any answer. Is it now open to the Defendants to plead a customary right as having come into existence after 1902? Is the user for over 40 years sufficient to warrant the conclusions that the custom is ancient? I do not think in the circumstances it is possible for me to hold that the Defendants have established that the custom is an ancient one.

7. In the result the Second Appeals fail and are dismissed with costs. No leave.