

(1917) 03 PAT CK 0021

In the Patna High Court

Maharaj Bahadur Singh

APPELLANT

Vs

Gandauri Singh and Others

RESPONDENT

Date of Decision : 05-03-1917

Acts Referred:

General Clauses Act, 1897 — Section 2
Limitation Act, 1963 — Section 26
Specific Relief Act, 1963 — Section 12, 3, 42

Citation : 39 Ind. Cas. 868

Hon'ble Judges : Mullick, J;Jwala Prasad, J

Bench : Division Bench

Judgement

Muluck, J.—This litigation arises out of a suit brought by Maharaj Bahadur Singh, on behalf of himself and in the capacity of Honorary General Manager of the Sitambari Jain sect, against 21 persons who are described as Sonthals and Ghatwals. The 22nd defendant is Babu Ram Bahadur Singh, the zemindar and proprietor of Palganj Estate within which the hill in suit is situated, and he was added by an order dated the 15th May 1912. The hill appears to be about 12 miles long and about 24 miles in circumference. In the Cadastral Survey proceedings the hill has been recorded as the zemindari of Babu Ram Bahadur Singh, now under the management of the Manager of the Encumbered Estates. Maharaj Bahadur Singh has been recorded as occupying an area of 86 acres as a rent-free tenant under the Rajah, on the authority of two ekrarnamas executed by the zemindar of Palganj on the 16th May 1872 and on the 21st September 1878 in favour of Harak Chand Golaicha, Manager of the Sitambari Jain sect, but in the column of remarks it is stated that the lessees are liable to pay to the zemindar a consolidated sum of Rs. 1,500 per year. The evidence shows that this sum of Rs. 1,500 represents the annual value of the offerings made by pilgrims at a certain temple situated in a locality called Madhuban upon the hill, in respect of which previous to 1872 there had been constant disputes between the zemindar and the Sitambari Jains.

2. In the course of the Cadastral Survey it was necessary for the Settlement

authorities to record certain easements and other rights u/s 81 of the Chota Nagpur Tenancy Act of 1908, and it appears that in respect of Pareshnath Hill an entry was made to the following effect: "Once every year on the last day of Baisakh the Sonthals and Ghatwals hunt on Pareshnath Hill without anybody's sanction and prohibition."

3. The Sitambari Jains, being extremely averse to the taking of life, petitioned the Settlement, authorities to expunge this entry, but on the 30th of July 1910, the Assistant Settlement Officer passed the following order:

I have made independent enquiries in the locality and also heard witnesses brought in by the objector in this case. There is not the least doubt that the aboriginal tribes observe the usual festivals on the Baisakh Purnima day and go through these customary ways of hunting on such days, though not on such a large scale as put forward by some of the witnesses examined by the attestation officer. The people who live close to the hills say that they now a days seldom kill any animals on the hills, nor do they go in with the sole object of killing animals. The main feature of the festival seems to be the settlement of family matters by panch, specially matters concerning young girls who might have gone wrong during the year; as is common with the aboriginals, the penalty in such cases is a small fine which is spent up in feeding the panch and drink followed by an excursion over the hills and jungles. This is not the only place where such festivities are observed by the aboriginals, but they do so in almost all the hills surrounding the elaka. The hunting does not seem to me to do any harm to the worshippers of the temples and the hills, as the hunters do nothing which could hurt their feelings. As such the entry will stand.

4. The present suit was instituted on the 27th of July 1911, for the following reliefs:

(1) That it be declared that the Sonthals and Ghatwals have no right to hunt on any day in the year on the Pareshnath Hill.

(2) That an order be passed to the effect that the entry in the khatian may be rectified or expunged.

5. Permission was also sought to prosecute the suit on behalf of the whole Sitambari Jain community as against the Sonthal and Ghatwal communities represented by the defendants Nos. 1 to 21.

6. The suit was tried by the learned District Judge, who framed the following issues:

(1) Has the plaintiff any cause of action and has he any locus standi to bring this suit ?

(2) Has the suit been properly framed and is it maintainable in its present form ?

(3) Are the Jain Sitambari sect in exclusive possession of the Pareshnath Hill and are they entitled to the declaration and order prayed for in the plaint?

(4) Is the entry in the Settlement Khatian, Part 2, of the Record of Rights of the Pareshnath Hill, to the effect that the Sonthals and Ghatwals have a customary right to hunt annually on the said hill on the Baisakh Purnima days, incorrect?

(5) If the custom exists, is it valid?

(6) To what relief, if any, is the plaintiff entitled?

7. The learned District Judge answered issues 1 and 2 in favour of the plaintiff, but he held that the Sitambari Jain sect had no exclusive title or possession in Pareshnath Hill and that the entry in the settlement record was not incorrect. He was of opinion that the custom claimed by the Sonthals and Ghatwals had been established. He accordingly dismissed the suit. Hence the present appeal by the plaintiff.

8. Now the first question that arises is, has the plaintiff got any right to sue? If he is suing merely as a member of the Sitambari Jain sect, as such, is he competent to maintain a declaratory suit of the present nature? In other words, can any Sitambari Jain residing whether in London or in New York come forward and claim a declaration of the incorrectness of the settlement record? In my opinion, he cannot. The suit is one brought u/s 42 of the Specific Relief Act, which entitles any person entitled to any legal character or to any right as to any property to institute a suit against any person denying or interested to deny his title or such character or right.

9. It is admitted that the plaintiff has no interest in the land in respect of which the entry has been made. The entry relates only to jungles and admittedly the plaintiff has no interest in any jungle land. His community have title and interest in only the lands which belong to their temples. The evidence shews that the Sonthals and Ghatwals hunt wild animals and birds in those parts of the hill which are covered with jungle. The Ghatwals and Sonthals do not deny the plaintiff's right in respect of the lands in his possession. Having no legal title or interest in the land in which hunting is carried on, it seems to me that the plaintiff has no right to challenge any entry made by the Settlement Officer in respect of that land. But then the plaintiff falls back upon the ekrarnamas of 1872 and 1878, and it is necessary to consider in this connection the previous litigation relating to the Pareshnath Hill.

10. It appears that in 1859 in certain proceedings before the Superintendent Surveys a dispute arose between the zemindar of Palganj and the zemindar of Nawaghat, in the course of which the zemindar of Palganj filed a sanad alleged to have been given to him by Abu Ali Khan Bahadur. That dispute went up in appeal to an officer named Captain Dalton, who on the 6th February 1861 decided that the hill must be held by the various zemindars as an undivided property. On the 22nd May 1867, the same Captain Dalton as Commissioner confirmed the right of the zemindar of Palganj to take the offerings made by the Jains, but directed the Deputy Commissioner of Hazaribagh to warn the zemindar of Palganj against any unjustifiable interference with the pilgrims.

11. In 1868 the zemindar of Palganj brought a suit against Punamchand Golaicha as Manager of the Sitambari Jain Society for declaration of his title to the hill and for possession of the thakurs which had been set up there for worship. He succeeded in that suit both in the Court of first instance and in the High Court. The parties then compromised and on the 16th May 1872 a temporary ekrarnama was executed, which was followed in 1878 by a permanent ekrarnama, by which the zemindar of Palganj in consideration of a sum of Rs. 1,500 paid to him annually agreed to leave the Jains in possession of their temples and lands with a further promise in the following terms: "If any place upon the said hill or down below in Madhuban the Sitambari Jain Society should require to construct or repair temple and guest house and to make bricks for that purpose, then I and my heirs will give without price the land and stone and wood from the hill for the temple, dharamsala and bricks. If we refuse to give, then Jain Sitambari Society will take of their own power and I, or my heirs and representatives or any person on our behalf or of those persons will not be able to offer any hindrance to the pilgrims in ascending or descending from the hill, and in performing puja and staying in the temples and performing religious duties."

12. It appears that the zemindar thereafter gave various leases on the hill to other parties including a lease granted to one Mr. Baddam on the 14th of October 1876 in respect of an area of 2,000 acres for the establishment of a piggery. The Sitambari Jains represented by Rai Dhanpat Singh and others thereupon brought a suit against Mr. Baddam and the zemindar for an injunction restraining Mr. Baddam from carrying on the piggery. That suit went up on appeal to the Calcutta High Court and was finally decided on the 25th June 1900 by a Division Bench constituted of Petheram, C.J., and Ghose J. The Court held that the zemindar could not be restrained from leasing land, but that the piggery being extremely offensive to the Sitambari Jain community, the plaintiffs were entitled by reason of the restrictive covenant contained in the ekrarnamas to restrain Mr. Baddam from carrying on the piggery.

13. The next case of importance is one brought in 1911 by Maharaj Bahadur Singh against the zemindar for possession of a plot which he had leased to certain members of the Digarabari Jain community. There the plaintiff contended in effect that the zemindar had no right to lease any portion of the property, but his contention was not accepted and the suit was dismissed in appeal by the High Court at Patna on the 5th May 1916. It was held that the provisions of the ekrarnamas, if they were intended to create any interest in favour of future generations of Sitambari Jains, were void for remoteness and the rule against perpetuities, and further that if the suit was based on a personal right created by the ekrarnamas specific performance ought not to be decreed.

14. Now what is the position of the plaintiff in the present case? I very much doubt whether the plaintiff Maharaj Bahadur Singh is competent to represent Harakh Chand Golaicha, in whose favour in 1872 and 1878 the zemindar of

Palganj made the ekrarnamas, Harakh Chand Golaicha acted then as the Manager of the Sitambari Jain Society. There is nothing to show that the Society was incorporated and that it can now be represented by the plaintiff. This point, however, does not appear to have been taken in the Court below, and it appears to have been assumed that the Sitambari Jain Society was a corporate body and that the present plaintiff Maharaj Bahadur Singh was competent to represent it.

15. Now the ekrarnama was merely a contract for a lease, if and when any land should be required. It created no interest in any land. Can the plaintiff maintain that, because he has the right at any future time to select a plot in the jungles of the Pareshnath Hill for the purpose of carrying on his worship, therefore, in the meantime the zemindar is not competent to permit any person to hunt in the said jungles, or can he challenge any entry made by the Settlement Officer in respect of the rights of third parties in the jungle? In my opinion the plaintiff cannot. He has a covenant of a restrictive nature enforceable against the zemindar and his lessees, but he has no interest to bring a declaratory suit such as the one before us. The plaintiff may, if otherwise competent, sue the Sonthals for damages for trespass or he may sue for an injunction on the ground that the hunt interferes with his worship, but he cannot sue for a declaration as to any title or right because no title or right that he possesses has been denied. Upon this preliminary point, therefore, the plaintiff's suit, in my opinion, must fail. The Court ought not to give a party possessing such a remote interest in the matter a declaration affecting any entry in the Record of Rights.

16. Let us next proceed to the merits of the case. The zemindar has filed a written statement admitting the right of the Sonthals and Ghatwals, and the learned District Judge finds that the custom to hunt once on the last day in the year has been established by immemorial prescription. He finds that 6,000 to 8,000 Sonthals and Ghatwals coming from 200 villages situated on and adjacent to the Hill join in the hunt. The hunt is a part of an annual worship held by the Sonthals in memory of their ancestors, and the Ghatwals who are the descendants of persons whose duty it was in ancient times to guard the passes apparently join in the hunt by leave and license. It further appears that Europeans and other persons who have no connection with the worship also join. The gathering has an administrative as well as a social and a religious side and the learned District Judge observes that great importance is attached to the religious ceremonies and the propitiatory sacrifices to the Marang Baru and other bhuts, and that the Sonthals believe that if they failed to hold it, the spirits would be wroth with them and would cause damage by sickness and tigers. Indeed Dr. Campbell, a Missionary of great experience, considers that nothing except the use of armed force would restrain the Sonthals from holding the annual hunt on Pareshnath Hill.

17. Sir Ali Imam on behalf of the appellant strongly presses upon us the contention that a right to hunt such as this cannot be based either on custom or on general prescription or on prescription sanctioned by Section 26 of the Indian

Limitation Act. I think it is clear that Section 26 will not give the right. 20 years' enjoyment has certainly been proved, but it cannot be said that the right has been exercised by "a person" within the meaning of Section 2(5) read with the General Clauses Act. The Sonthals certainly belong to a tribe and the Ghatwals also certainly belong to a class which has now acquired the solidarity of a caste, but nevertheless the Sonthals and Ghatwals are an indeterminate and fluctuating body and incapable, in my opinion, of prescribing for the purpose of the Limitation Act.

18. Next let us see whether the right can be acquired by general prescription. The right in English Law would be a profit a prendre in gross as distinguished from a profit a prendre in que estate. It is not an easement attached to any dominant heritage. Further cases such as *Mounsey v. Ismay* (1865) 3 H. & C. 486 ; 34 L.J. Ex. 52 ; 11 Jur. 141 ; 12 L.T. 27 ; 13 W.R. 521 ; 159 E.R. 621 ; 140 R.R. 567, *Ashraf Ali v. Jagannath* 6 A. 497 : (1884) A.W.N186 : 4 Ind. Dec. 147, *Kuar Sen v. Mamman* 17 A. 87 ; (1895) A.W.N10 ; 8 Ind. Dec. 381, *Palaniandi Tevan v. Putthirangonda Nadan* 20 M. 389 ; 7 Ind. Dec. 277, which recognise the right of the inhabitants of a parish or a village to use the lands of others for sports, recreation or for other purposes, do not directly apply. But in *Goodman v. Mayor of Satiash* (1882) 7 A.C. 683 ; 52 L.J.Q.B. 198 ; 48 L.T. 239 ; 31 W.R. 298 ; 47 J.P. 276 a prescriptive right to a several oyster fishery in a navigable tidal river was proved to have been exercised from time immemorial by a Borough Corporation and its lessees without any qualification, except that the free inhabitants of ancient tenements in the Borough had from time immemorial and without interruption and claiming as of right exercised the privilege of dredging for oysters in the locus in quo from the 2nd February to Easter Eve in each year, and of catching and carrying away the same without stint for sale and otherwise. This usage of the inhabitants tended to the destruction of the fishery, and if continued would destroy it. The defendants Goodman and John Blake were two free inhabitants of the Borough and they were sued by the Corporation for trespass. It was held that a lawful origin ought to be presumed, if reasonably possible, for the usage which they pleaded and that the presumption which ought to be drawn as reasonable in law and probable in fact was that the original grant to the Corporation was subject to a trust or condition in favour of the inhabitants of ancient tenements in the Borough in accordance with that usage. Lords Selborne, L.C., Cairns, Watson, Bramwell and Fitzgerald held that a legal origin could be presumed, but Lord Blackburn dissented and relying upon *Gateward's* case 6 Co. 59b ; 77 E.R. 344 and on *Rivers (Lord) v. Adams* (1878) 3 Ex.. 361 ; 48 L.J. E. 47 ; 39 L.T. 39 ; 27 W.R. 381 held that the law of England does not recognise a grant to a fluctuating body, whether as a charitable trust or otherwise.

19. In *Chesterfield (Lord) v. Harris* (1908) 2 Ch. D. 397 ; 17 L.J. Ch. 688 ; 99 L.T. 558 ; 24 T.L.R. 763, the right in question was a fishery, the plaintiffs claiming to be the owners and the defendants setting up a prescriptive right to a free fishery or common fishery vested in the freehold tenants of a certain manor

whose free-holds were situated in one of the parishes adjoining the river. Although the fishery was proved to have existed in the manner claimed for over three centuries, the Court of Appeal held that the Court could not presume a legal origin for the alleged right. That decision was affirmed by the House of Lords in *Harris v. Chesterfield (Earl)* (1911) A.C. 623 ; 80 L.J. C. 626 ; 105 L.T. 453 ; 55 S.J. 686 ; 27 T.L.R. 548. The right claimed was a profit a prendre in que estate and not a right in gross. The Court of Appeal were agreed that such a right must be in some way connected with the enjoyment of the estate and that there must be some relation between the extent of the exercise and the requirements of its enjoyment. But in the House of Lords there was a considerable divergence of opinion. Lord Loreburn, L.C., Lords Ashbourne and Shaw held that a lawful origin for the exercise of the right ought to be presumed, while the majority of the Court consisting of Lords Halsbary, Macnaghten, Gorell and Kinner held the contrary.

20. Again in *Johnston v. O'Neill* (1911) A.C. 552 ; 81 L.J.P.C. 17 ; 105 L.T. 587 ; 55 S.J. 686 ; 27 T.L.R. 543, the plaintiffs claimed an exclusive right to fish in a lake under grants from the Crown, while the public claimed that they had for centuries as of right and without interruption fished for eels in the lake which was non-tidal. The Court decided against the public and Lord Halsbary observed in the course of his judgment that in inland Waters, apart from tidal waters, there can be no such thing as a public right, meaning by the word "public" a right unconnected with any right of fishing, which is capable of being described as a profit a prendre in aliena solo.

21. Can we not in the present case presume either by the ancient Kings or Muhammadan Emperors of India or by their successors, the British Government, a grant of the zemindari of Palganj to the zemindari subject to a trust that the Sonthals and Ghatwals inhabiting the mauzahs on Pareshnath Hill and its vicinity should be entitled to hunt in the jungles on the Hill one day in the year? Or can we not equally well presume a grant by the Crown to the mauzahs themselves subect to such a trust? Village communities in India bear the strongest resemblance to corporations and they may, in my opinion, be regarded as corporate bodies capable of administering a trust in favour of particular classes residing within their jurisdictions. In my opinion the principle followed in *Goodman's case* (1882) 7 A.C. 683 ; 52 L.J.Q.B. 198 ; 48 L.T. 239 ; 31 W.R. 298 ; 47 J.P. 276 may also be equitably applied to the present case. The House of Lords in *Chesterfield (Lord) v. Harrie* (1908) 2 Ch. D. 397 ; 17 L.J. Ch. 688 ; 99 L.T. 558 ; 24 T.L.R. 763 did not dissent from *Goodman's case* (1882) 7 A.C. 683 ; 52 L.J.Q.B. 198 ; 48 L.T. 239 ; 31 W.R. 298 ; 47 J.P. 276, but distinguished it on the ground that the right claimed therein was not a right in gross, but a right appurtenant to an estate and that an unlimited right to take fish irrespective of the requirements of the estate could not be tolerated. The fact that the grantees constitute a fluctuating body does not appear to stand in the way even in English Law, if the facts justify a presumption that, there was a trust in favour of a person capable of taking such a trust. The view of Lord Blackburn

in Goodman's case (1882) 7 A.C. 683 ; 52 L.J.Q.B. 198 ; 48 L.T. 239 ; 31 W.R. 298 ; 47 J.P. 276, that a trust to a corporation for the benefit of a fluctuating body would offend against the law of perpetuities, did not find favour with the other Judges. In *Rivers (Lord) v. Adams* (1878) 3 E. D. 361 ; 48 L.J. Ex. 47 ; 39 L.T. 39 ; 27 W.R. 381, on which also Lord Blackburn based his judgment, the facts were such that they could not in the opinion of the Court raise the presumption of a trust.

22. Is there anything in the law of India which compels us to hold that a fluctuating body such as these Sonthals and Ghatwals in the present case cannot by immemorial user show a legal origin for their grant? The strongest case in favour of the plaintiff is *LutchmEEPut Singh v. Sadaulla Nushyo* 9 C. 698 ; 12 C.L.R. 332 ; 5 Shome L.R. 27 ; 4 Ind. Dec. 1115. In that case a Division Bench of the Calcutta High Court held that the inhabitants of a number of villages could not establish a prescriptive right of fishery in certain beels on the ground that being a fluctuating body the exercise of the right would end in the ultimate destruction of the fishery, and the Court relied upon the case of *Rivers (Lord) v. Adams* (1878) 3 E. D. 361 ; 48 L.J. E. 47 ; 39 L.T. 39 ; 27 W.R. 381. It also held that such a right could not be allowed by custom because the custom would be unreasonable. On the other hand in *Secretary of State v. Mathurabhai* 14 B. 213 ; 7 Ind. Dec. 600, Sir Charles Sargent, C.J., and Candy, J., declined to apply the principle of *Rivers (Lord) v. Adams* (7) and *LutchmEEPut Singh v. Sadaulla Nushyo* 9 C. 698 ; 12 C.L.R. 332 ; 5 S L.R. 27 ; 4 Ind. Dec. 1115 to grazing rights claimed by the inhabitants of a village against Government. So in *Viresa v. Tatayya* 8 M. 467 ; 3 Ind. Dec. 319, it was held that the inhabitants of a village can claim by immemorial prescription the right to fish in a particular way in a particular part of a tidal navigable water. The defendants in that case pleaded the right of the public to fish where they liked and denied that the plaintiffs had any exclusive right to fish in the locus in que.

23. In *Bhola Nath Nundi v. Midnapore Zemindary Co.* 31 C. 503 ; 31 I.A. 75 ; 8 C.W.N. 425 ; 14 M.L.J. 152 ; 8 S P.C.J.611, the right was one of pasture and was claimed by a large number of tenants belonging to certain villages over the waste lands of the zemindar. Their Lordships of the Privy Council held that the claim was not a right in gross and by implication that it was a profit a prendre in que estate, and it would be useful to reproduce here the following short passage out of the judgment of Lord Macnaghten. He observed as follows:

The case, as presented by the plaintiffs, on the face of it and in substance, seems simple enough. It appears to their Lord-ships that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately, however, both in the Munsif's Court and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured, by copious references to English authorities, and by the applications of principles or doctrines more or less refined, founded on legal conceptions not altogether in harmony with Eastern

notions. The result is that, although the decrees appear to be justified by the main facts, which both the lower Courts held to be established, it is impossible to say that the judgments delivered are entirely satisfactory.

24. The suits were decreed by their Lordships subject to the right of the zemindar to improve his property.

25. In my opinion, the law of India does not preclude us from referring the right of a fluctuating body such as the Sonthals and Ghatwals in the present case to a legal origin. There is nothing unreasonable in the grant of such a right when we bear in mind the special circumstances of this case. The zemindars in jungle tracts in this country are more concerned in the extermination than the preservation of wild animals, The hill, as we have seen, is about 12 miles long and 24 miles in circumference. Is it unreasonable that the zemindar or the Crown should, even if desirous of preserving game, consent to a hunt lasting only one day in the year? The learned District Judge finds that six thousand to eight thousand people hunt, but the evidence does not establish this conclusively. In point of fact the number appears to have generally been much smaller than this. The Settlement Officer, who had more accurate means of ascertaining the facts, records that the right is used by a very few people and that the hunting aspect of the ceremony is now less important than its social and administrative side. I am quite satisfied that in those circumstances it is perfectly intelligible and reasonable that a trust should have been created for the benefit of the Sonthals and Ghatwals.

26. Next let us see whether such a right can be created by custom. In English Law apparently the authorities are agreed that no such right can be created by custom, because the custom would be unreasonable as tending to the destruction of the subject-matter. That is also the view taken in *Lutchmeeput Singh v. Sadaulla Nushyo* 9 C. 698 ; 12 C.L.R. 332 ; 5 S L.R. 27 ; 4 Ind. Dec. 1115, but the exercise of customary rights in gross in alieno solo by a fluctuating body to draw water from a well [*Palaniandi Tevan v. Puthirangonda Nadan* 20 M. 389 ; 7 Ind. Dec.) 277] or to bury the dead [*Mohidin v. Shivlingappa* 23 B. 666 ; 1 B L.R. 170 ; 12 Ind. Dec. 415] or to erect tazias [*Ashraf Ali v. Jagannath* 6 A. 497 : (1884) A.W.N.186 : 4 Ind. Dec. 147] or for the exhibition of tazias [*Kuar Sen v. Mamman* 17 A. 87 ; (1895) A.W.N10 ; 8 Ind. Dec. (N.S.) 381] has been recognised by our Courts.

27. It is true that we have been shown no case which recognises a profit a prendre in gross by custom, but the only obstacle in recognising profits a prendre in favour of fluctuating bodies is that the exercise of the custom would operate to destroy the subject-matter of the right, and if in this case it can be established that the exercise of the right by the Sonthals and Ghatwals was not under the circumstances unreasonable, I see no reason why we cannot find in favour of the custom, In this connection the same arguments as to unreasonableness that hold good for prescription also hold good for custom. In the particular circumstances of the locality, I see nothing unreasonable in the custom. We know that as a

matter of fact cultivation is spreading and the area in which the hunt is carried out is tending to diminish. The zemindar may possibly have allowed the practice to continue and to ripen into a local custom with the express intention of benefiting by the destruction of the wild animals.

28. I find, therefore, that the Sonthals and Ghatwals have established either a prescriptive or a customary right.

29. In my opinion, apart from these points of law, there is no merit in the plaintiffs' claim. Their grievance, if any, is hyper sentimental and, as the learned District Judge observes, if any concession were to be made on the ground of sentiment the claims of the Sonthals and Ghatwals far outweigh those of the Jains. It is in evidence that the Hill is used by sportsmen other than the Sonthals and Ghatwals and that at one time there was a sanatorium upon it for British soldiers when animals were freely killed for food. No objection appears to have been taken on the score of destruction of life in those cases. Nor does it appear that the hunt in any way interferes with the worship. Indeed from the fact that hunt must be carried out in the parts covered by jungle, it is clear that the susceptibilities of the worshippers in the temples are not likely to be seriously wounded.

30. There is, however, one matter which must be noticed. The authority of the Settlement Officer to make such an entry has been questioned, and this turns upon the interpretation to be given to the term forest produce". If wild animals can come within the definition of forest produce contained in the Chota Nagpur Tenancy Act, then the Settlement Officer is competent to record the rights connected with them. Now forest produce includes dead animals, horns, lac, etc., and it has been contended before us that this description only applies to inanimate as distinguished from animate objects. The question is one of some difficulty, but I am unable to see where the distinction between animate and inanimate matter begins and ends, and if the carcass is forest produce, why the animal itself in its live state should not also be forest produce.

31. There is also one other matter in connection with the entry which requires notice, and that is its unqualified nature. It is clear from the decision of the Assistant Settlement Officer that the right is enjoyed by only those Sonthals and Ghatwals who inhabit the Hill and its immediate vicinity. This fact should have been made clear in the entry, which, as it stands, may be stretched into meaning that it even applies to the Sonthals and Ghatwals of districts far removed from Hazaribagh. If the plaintiffs had not failed on the preliminary point of maintainability, we should have declared that the entry was to be limited to the Sonthals and Ghatwals on the Hill and its immediate vicinity, a reasonably liberal construction being always given to those qualifying words. I attach no importance, as was also observed in *Chesterfield (Lord) v. Harris* (1908) 2 Ch. D. 397 ; 17 L.J. Ch. 688 ; 99 L.T. 558 ; 24 T.L.R. 763 by the Master of the Rolls, to the fact that a large number of persons other than the grantees also take part. The position appears to be that there is only one dihari or huntsman, who has the

right to regulate the hunt, but that as a matter of practice, a large number of outsiders join in the hunt, whom he cannot keep out.

32. The result is that, in our opinion, the plaintiff's suit has been rightly dismissed. The appeal is dismissed with costs, which are assessed ten gold mohurs.

Jwala Prasad, J.

33. This appeal arises out of a suit for a declaration that the Sonthals and the Ghatwals have no right to hunt on any day in the year on the Pareshnath Hills and for an order that the entry of their customary right in the Survey and Settlement khatian to that effect that "Once every year on the last day of Baisakh the Sonthals and the Ghatwals hunt on the Pareshnath Hills without anybody's sanction and prohibition," be rectified or expunged from the said khatian. The words within inverted commas is an extract from the entry in the khatian, Part 2, of Pareshnath Pahad, District Hazaribagh, relating to the schedules of jungles in the vicinity of mauzas.

34. The entry in question was made in June 1910, u/s 81(n) of the Chota Nagpur Tenancy Act, regarding the right of persons to take forest produce from jungle land or waste land. The said entry was confirmed on 30th July 1910 by the Assistant Settlement Officer in an appeal u/s 87 of the Act by his decision quoted hereunder in extenso:

I have made independent enquiries in the locality and also heard witnesses brought in by the objector in this case. There is not the least doubt that the aboriginal tribes observe the usual festivals on the Baisakh Purnima day and go through these customary ways of hunting on such days, though not on such a large scale as put forward by some of the witnesses examined by the attestation officer. The people who live close to the hills say that they now-a-days seldom kill any animals on the hills, nor do they go in with the sole object of killing animals. The main feature of the festival seems to be the settlement of the matters by punch, specially matters concerning young girls who might have gone wrong during the year, as is common with the aboriginals, the penalty in such cases is a small fine which is spent up in feeding the punch and drink followed by an excursion over the hills and jungles. This is not the only place where such festivities are observed by the aboriginals, but they do so in almost all the hills surrounding the area. The hunting does not seem to do any harm to the worshippers of the temples and the hills, as the hunters do nothing which would hurt their feelings. As such the entry will stand.

35. The suit has been brought by the plaintiff as a member of the Sitambari sect of Jains and also as Honorary General Manager of a Society of the said Sitambari Jaina known as the Sitambari Jain Society and as shebait of Issur Pareshnath Deb Thakur.

36. The principal allegations made in the plaint are as follows:

37. That the plaintiff and the other members of the Sitambari Jain sect and their predecessors have always been in exclusive possession of the Pareshnath Hill situate in Gadi Palganj and have always used and still use the said hill as a place of devotion and pilgrimage and regard the whole hill as very sacred, being the place of salvation of several of their ancient sages; that the said Society has erected a large number of temples on the top of the hill, set up charans or foot prints, and nothing is more outrageous to their religious feelings than the slaughtering or killing of animals on the said sacred hill, which the doctrines of their religion strictly prohibit; that the Baisakh Purnamashi day is particularly a sacred day of the Jains; that the said community holds possession of the hill and exercises rights not only by long immemorial custom but also by contract with the proprietor of Gadi Palganj; that the said Sonthals and the Ghatwals have no right to hunt on the hill by custom or usage; and that in case a general slaughtering of the animals on the hill is allowed it would have the effect of desecrating the holy place and seriously wounding the feelings of the Jain community of all sects; and that such a customary right, if any, is objectionable and ought not to be held valid.

38. On the other hand, the Sonthals and the Ghatwals defendants resist the plaintiffs claim on the ground that they have from time immemorial customary right to hold the annual hunt on the Baisakh Purnamashi day as a religious observance; that their right existed long before the Jains had any concern with the hill, which could not be affected by any interest that Jains may have subsequently acquired in a portion of the hill: and that the Jain community has no right or interest whatever in the Pareshnath Hill or any portion thereof, save and except the bare right of user of certain building sites in the central range of the hill, on which the temples were allowed by the proprietor of Palganj Gadi to be erected; and that the plaintiff has, therefore, no locus standi or any right to challenge the correctness of the Settlement entry and has no valid cause of action for the suit. The defendants further assert that they have been enjoying the right peaceably and to the knowledge of the Jain community and that the killing of animals on the Pareshnath Hill is no hindrance to the exercise of the religious parctices of the Jains.

39. The Palganj Estate within which the hill is situate is under the Chota Nagpur Court of Wards. The Manager of the Estate was made a co-defendant at his own request, and has by his written statement supported the claim of the Sonthals and the Ghatwals to hunt on the hill.

40. The parties went to trial in the Court below on the following issues:

1. Has the plaintiff any cause of action and has he any locus standi to bring the suit?
2. Has the suit been properly framed, and is it maintainable in the present form?
3. Are the Jain Society sect in exclusive possession of the Pareshnath Hill and are they entitled to the declaration and order prayed for in the plaint?

4. Is the entry in the Settlement Khatian, Part 2, of the Record of Rights of the Pareshnath, Hill to the effect that the Sonthals and the Ghatwals have a customary right to hunt annually on the said Hill on the Baisakh Purnamashi day, incorrect?

5. If the custom exists, is it valid?

6. To what relief, if any, is the plaintiff entitled?

41. The first two issues have been decided by the Court below in favour of the plaintiff.

42. The case made in the plaint is that the Jains following the Sitambari faith from a, very ancient time held under the Muhammadan Government and still hold exclusive possession of Pareshnath Hill and they used the said hill as a place of worship, devotion, pilgrimage and have constructed buildings and set up thakurs at their own cost. The plaintiff has brought the suit in two-fold capacity: (I) as an Honorary Manager of the Sitambari Jain Society, and (2) as a member of the Sitambari sect of Jains. The plaintiff has the same interest as the other members of the community have, and he applied under Order I, Rule 8 of the Code of Civil Procedure, corresponding to Section 30 of the old Code, for permission to sue on behalf and for the benefit of the whole community of Jains. He also applied for permission to allow him to prosecute the suit against the entire community of the Sonthals and the Ghatwals in the names of the defendants mentioned in the plaint. Looking at the order sheet it appears that the prayer of the plaintiff was allowed and the necessary notification was published in the Bihar and Orissa Gazette of 17th April 1912, Part IX, page 35. If the facts alleged in the plaint. were, true, the plaintiff would have been entitled to bring the suit, as he along with the other members of the community was affected by the entry in question. The right of some of the Jains to bring the suit on behalf of themselves and the whole community was recognised in the well-known case of Dhunput Singh v. Paresh Nath Singh 21 C. 180 ; 10 Ind. Dec. (N.S.) 752. The learned Deputy Commissioner says that this point was not argued before him. The respondents cannot, therefore, be permitted to re-open a point not pressed by them in the Court below.

43. The sole question involved in the other issues is whether the plaintiff is entitled to have a declaration u/s 42 of the Specific Relief Act. Under this section the person entitled to a declaratory decree must have a "legal character" or a right as to any property. The plaintiff has admittedly no legal character and the suit is not for a declaration in respect of the legal character of the plaintiff. The question is whether he has a right to any property which is prejudicially affected by the entry complained of. The property concerned, in respect of which the right of the Sonthals and the Ghatwals has been recorded in the Survey Khatian, is the Pareshnath Hill. The hill belongs to the proprietor of the Palganj Gadi which has been recorded as the proprietor thereof in the Survey Khewat. The plaintiff as General Manager of the Sitambari Jain Socitey has been recorded as being in

possession of 86 acres of land on the said hill. In column 6 of the khewat, Exhibit 11, the Society has been shown to be entitled to take free of charge timber or stone which they may require in order to build temples or dharamsalas on the Pareshnath Hill, or below it at Madhuban. The plaintiff has been recorded in respect of 86 acres as mokararidar. The bill covers a very large area extending over several miles.

44. The lower Court has held that the plaintiff has no right or title as regards the entire hill nor is he in exclusive possession, of the same. No doubt the plaintiff alleged in the plaint that he and the other members of the Jains Sitambari sect have been in exclusive possession of the Pareshnath Hill and exercise rights not only by long immemorial custom but also by contract with the proprietor of Gadi Palganj, The plaintiff has failed to substantiate his exclusive possession over or right in the entire hill. The plaintiff relied in the Court below upon certain documents in proof of his title, such as the Farmans of Akbar, 1593, and of Ahmed Shah, 1752, etc. These documents have not been proved and have been held by the Court below as false and fabricated. These documents were set up in the well-known piggery case *Dhunput Singh v. Paresh Nath Singh* 21 C. 180 ; 10 Ind. Dec. (N.S.) 752 and were held to be entirely unreliable and spurious. It was held in the piggery case as well as by this Court, *Daya Bhai v. Maharaj Bahadur Singh* 34 Ind. Cas. 432 ; 1 P.L.J. 238, that the proprietary right in the Pareshnath Hill is with the Raja of Palganj. The learned Court below is perfectly right in holding that the plaintiff has failed to prove his title to, or possession over, the hill except his mukarari right in 86 acres. It is conceded in this case by Sir Ali Imam, Counsel for the appellant, that the plaintiff has failed to prove that the Pareshnath Hill belongs to the Jain Society or that the Society has any interest in the hill beyond what is recorded in the Survey Khatian, namely, the mukarari interest in 86 acres and the rights created by the ekrarnamas of 1872 and 1878. The plaintiff now relies solely upon the interest created by the said ekrarnamas. The ekrarnama of 1872, which was subsequently ratified by the ekrarnama of 1878, was executed by Pareshnath Singh, the proprietor of Palganj Gadi, in favour of Gorakh Chand Galaicha, then Honorary Manager of the Society, the predecessor of the present plaintiff. The provision relating to the interest of the Society is described in the following words:

If the Sitambari Jain Society shall require any place on Pareshnath Hill or below at Madhuban for erecting mandir or dharamsala and for doing repairs and making bricks for the said purpose, in that case, land my heirs shall give for making mandir, dharamsala and bricks land, stones and timber from the hill, free of cost, and if I and my heirs refuse to give, in that case the Sitambari Jain Society shall take the same of its own power.

45. It has been recently held by this Court, in the case of *Daya Bhai v. Maharaj Bahadur Singh* 34 Ind. Cas. 432 ; 1 P.L.J. 238, quoted above, that the aforesaid provision was not intended to create an interest in favour of the Sitambaris and that such a provision could not in India be regarded as creating an interest in

Immovable property, and further that if this provision was an attempt to create an interest in favour of future generations of Sitambaris it was void for remoteness. It is thus clear that the plaintiff, or the Jain Society of which he is the General Manager, or the Jains in general of which he is a member, have no interest in the lands on the Pareshnath Hill. The plaintiff has, therefore, failed to prove any interest or title in the lands on Pareshnath Hill. u/s 42 of the Specific Relief Act, I of 1877, the plaintiff is not entitled to any declaration on the ground that he has an interest in the property. The plaintiff has, of course, no legal character apart from his claim to have a right in the property in question. No suit for a declaration that a particular custom does or does not prevail, will lie unless the right of the plaintiff in any property is affected by the custom: *Sheobaran v. Bhairo Prasad* 7 A. 880 ; . (1885) A.W.N275 ; 4 Ind. Dec. (N.S.) 960. Therefore unless the plaintiff has any right in the entire hill the custom embodied in the Survey Khatian does not affect him and hence no declaration as to the validity or otherwise of the custom would lie u/s 42 of the Specific Relief Act.

46. In another clause of the ekrarnama of 1872, it is provided that the executant, Raja of Palganj, or his heirs and representatives or any person on their behalf will not be able to offer any hindrance to the pilgrims in ascending or descending the hill and in performing puja and religious dirties, and he, the Rajah, or his heirs and representatives will never do any improper act in the temple and will not create any improper disputes with the pujaries or other people of the Jain Sitambari Society and will not do any harm to the performance of their lawful act and that there will be no obstacle to the members of the Jain Society going to the hill for religious purposes. It is contended on behalf of the appellant that the entire hill is held sacred by the Jain sect and that killing of animals is repugnant to the religious suceptibilities of the members of the Jains sect, and hence the right to hunt over the hill recognised and entered in the khatian in favour of the Sonthals and the Ghatwals is repugnant to the Religious ideas of the Jains. Reliance is placed upon the aforesaid decision of the Calcutta High Court in *Dhunput Singh v. Paresh Nath Singh* 21 C.180 : 10 Ind.Dec.(N.S.) 752. It is contended that on the basis of the above clause In the ekrarnama the lease in favour of Mr. Baddam and others executed by Raja Paresh Nath Singh was held inoperative and the defendants in that case, namely, Mr. Baddam and others were restrained from using the hill leased to them for the purpose of keeping piggery and slaughtering of pigs and other animals. It was no doubt held in that case that the hill is sacred to the Jains and the act of Mr. Baddam and others in establishing a piggery for the slaughtering of animals was repugnant to the sentiments of the Jains and that the Rajah had no power to give a lease of the property to Mr. Baddam and others for the aforesaid purpose. But in that case the lessees had established already a piggery and were carrying on the manufacture of lard and were slaughtering animals for the purpose of their trade. The leases in favour of Mr. Baddam and others were executed long after the lease given to the Jain Society in 1872 by the Raja. The nuisance was already committed in that case and the Jain Society was entitled to restrain the

subsequent lessees from carrying on the trade offensive to their religion. The lease to Mr. Baddam was in direct derogation of the lease granted to the Jain Society. But in this case it is not alleged in the plaint that any tortious act was done by the Sonthals and Ghatwals on the strength of the entry in the khatian by way of slaughtering animals to the annoyance of and as a nuisance caused to the plaintiff or his sect. In fact the cause of the plaintiff is that no custom of hunting exists. The plaintiff has no right to bring this suit unless nuisance was committed by the defendants in accordance with the entry in the khatian. The plaintiff's suit is, therefore, bad on the sole ground that the suit is not maintainable u/s 12 of the Specific Relief Act.

47. The Raja of Palganj us the proprietor of the hill is the only person interested in disputing the entry made in favour of the Ghatwals and the Sonthals, as his property is affected by the entry. The Rajah does not object to it, and in fact supports the custom of hunting set up by the Sonthals and the Ghatwals. I do not think it is open to the plaintiff to challenge the entry, as he is a stranger to the property and has no interest in the hill.

48. It is, however, said that the Ghatwals and the Sonthals have not proved any right to hunt on the hill, and no custom has been established and the entry is, therefore, wrong on that ground. The learned District Judge has on evidence held that the defendants have proved the custom set up by them. A careful perusal of the evidence leaves no manner of doubt that the District Judge is right in his finding. It cannot but be, therefore, held that the defendants have proved that they have been holding the annual hunt on the hill on the Purnamashi day. The right is, however, attacked as being invalid in law, inasmuch as it creates a right of the nature of a profit a prendre in gross as distinguished from profit a prendre in que estate and that such a right is not recognised by the Indian Statutes. The right of the Ghatwals and the Sonthals is to hunt on the hills and to appropriate the profit of the game, i.e., the animals killed by them. u/s 3, Clause (xi): "Forest produce includes wild animals also." The entry no doubt recognizes a right of the nature of a profit a prendre in gross as the right to hunt and appropriate the animals is independent of any dominant heritage, but customary right of various kinds not amounting to customary easements and not depending upon any dominant heritage has been recognized by the Courts in India. Instances of such rights are rights of the inhabitants of a village to bathe in a tank, Channanam Pillay v. Manu Puttur 1 M.L.J. 47, to burn holi on a particular land, Ashraf Ali v. Jagannath 6 A. 497 ; (1884) A.W.N.186 ; 4 Ind. Dec. (N.S.) 147, to place tazias on a particular spot, Mamman v. Kuer Sen 16 A. 178 ; (1894) A.W.N.12 ; 8 Ind. Dec. (N.S.) 114, Kuar Sen v. Mamman 17 A. 87 ; (1895) A.W.N.10 ; 8 Ind. Dec. (N.S.) 381. It has been laid down in the last ruling that the exercise of a customary right for a length of time makes it a customary law of the place or in respect of the persons concerned. In Sitab Rai v. Dubal Nagesia 6 C.L.J. 218, a customary right of the tenant in the locality to out wood for fuel, plough-handles, door posts, etc., was held to be a right of customary easement attaching to the locality and not to any collection of individuals. In

Mohidin v. Shivlingappa 23 B. 666 ; 1 Bom. L.R. 170 ; 12 Ind. Dec. (N.S.) 415, the right to bury dead bodies was recognized as a customary right and not as an easement, but it was held that such a right is reasonable when it is confined to a limited area or to a limited class of men.

49. In England the right of people to enter upon a plot of land on a particular day and to have races thereon was recognized in *Mounsey v. Ismay* (1865) 3 H. & C. 486 ; 34 L.J. Ex. 52 ; 11 Jur. (N.S.) 141 ; 12 L.T. 27 ; 13 W.R. 521 ; 159 E.R. 621 ; 140 R.R. 567. So also was the right to hold dance on a piece of land independent of the right in property upheld in *Abbot v. Weekly* 1 Lev. 176 ; 83 E.R. 357. In *Hall v. Nottingham* (1876) 1 Ex. D. 1 : 45 L.J. Ex. 50 ; 33 L.T. 697 ; 24 W.R. 58 it was held that a custom may be good, though the effect be to deprive the owner of the land of the whole use and enjoyment of it.

50. The important rights to appropriate the profits of properties belonging to others independent of any dominant heritage recognised by the Indian Courts are the rights to take water from a well situated in another's land, *Palaniandi Tevan v. Puthirangonda Nadan* 20 M. 389 ; 7 Ind. Dec. (N.S.) 277, the right to catch fish in a tidal river by placing stake nets in certain place, *Narasayya v. Sami* 12 M. 43 ; 4 Ind. Dec. (N.S.) 379, *Viresa v. Tatayya* 8 M. 467 ; 3 Ind. Dec. (N.S.) 319, the right of pasturage over the land of Government or zemindari, *Secretary of State v. Mathurabhai* 14 B. 213 ; 7 Ind. Dec. (N.S.) 600, and a universal custom of grazing cattle on the waste land, *Ram Saran Singh v. Birju Singh* 19 A. 172 ; (1897) A.W.N.35 ; 9 Ind. Dec. (N.S.) 114, *Lokenath Bidiyadhur v. Jahania Bibi* 12 Ind. Cas. 305 ; 14 C.L.J. 572. The last ruling further held that the right to extra territorial fishery, though not an Immovable property, is an interest in Immovable property. This was the view also taken in *Ram Gopal Bysack v. Nurumuddin* 20 C. 446 ; 10 Ind. Dec. (N.S.) 302.