

(1949) 03 OHC CK 0005
In the Orissa High Court
Case No : A.F.A.D. No. 204 of 1945

Maheswar Naik and Others

APPELLANT

Vs

Tikayet Sailendra Narayan Bhanj Deo

RESPONDENT

Date of Decision : 08-03-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Easements Act, 1882 — Section 18
Evidence Act, 1872 — Section 35, 90

Citation : AIR 1951 Ori 327

Hon'ble Judges : Narasimham, J; Jagannadhadas, J

Bench : Division Bench

Advocate : L.N. Das and S.N. Sengupta, for the Appellant; P. Mohahti, K.N. Das and P. Misra, for the Respondent

Final Decision : Allowed

Judgement

Jagannadhadas, J.—Defendants 1 to 15 are the applta. in this second appeal. The pltf. is the Tikayet of Kanika, The defta. are the Bahar realdents of the Mouza called Chandrasekhacpur. The suit has been brought for an injunction restraining the defts. from entering into a forest belonging to the pltf. which may for convenience be called Patia forest & from cutting & appropriating any of the jungle produce therein. The trial Ct. dismissed the suit, but the lower appellate Ct. reversed it & granted the injunction & damages asked or by the pltf.

2. Killa Patia in which the suit forest is a situated belong to Raja Dibyasingh Deb. On his death his brother Raghunath Deb succeeded to the Estate & on his death Maddan Mohan Dab. There was litigation relating to succession of the property between Mad"n Mohan & A .chyutananda. During the pondency of the litigation Mad an Mohan died & Achyutcanarda succeeded to the property. The estate was sold inexecution of a mtge. decree. during Achyutananda's time & was purchased by the Raja of Kanika in Ct. auction. Independently of this, Mouzts Patia & Ohandrasekhatapur comprised within Patia estate ware brought to sale

by the Govt to realise certain Govt. dues from the estate in 1932 & the Raja of Kanika purchased these two villages in the certificate sale also & obtained possession. Thus the entire Patia estate as well as the two villages of Patia & Chandrasekharpur therein became the property of the Raja of Kanika who duly obtained possession thereof. He thereupon executed a gift, deed in 1935 in respect of the whole of the Patia estate including these villages in favour of his son, the pltf. The estate therefore with the Patia forest therein belongs to the pltf. Though this was questioned at the trial, it is now no longer disputes in the lower appellate Ct. & here.

3. In this estate there is forest of very considerable extent of about 3,000 acres. The forest adjoining the village Patia goes by the name of Patia forest. The original village Patia has in the revn. settlement been divided into two villages called Patia & Ohandrasekharpur. But for all purposes relevant to this litigation the two villages are treated as one & the suit Patia forest as the one connected with these two villages, it would appear from the evidence that the Sahars of this place reside almost entirely in Ohandra sekharpur, there being only three or four families of Sabars in Patia (vide evidence of P. w. 10). It may be mentioned that Sahars belong to the primitive aboriginal class.

4. The case as brought, was against 16 defts of which only defts. 1 to 15 are Sahara. Defendants 1 to 15 claimed rights in the forest on the footing that they belong to the Sahar class & deft. 16 on the footing that he was a villager of Mouza Chandrasekharpur. The trial Ct. which found in favour of defts. 1 to 15, as Sahars of the village, found against the rights claimed by deft. 16 as a villager. There has been no appeal by deft. 16 either in the lower appellate Ct. or here & therefore the appeal is now concerned only with the alleged rights of defts 1 to 15 of the Sahar-residents of Mouza Chandrasekharpui. The pltf. is the proprietor of the suit forest & claims that nobody has got any right to remove forest produce without his permission & without payment of the fees prescribed therefor. The case of the Sahar-defts. as set out in para. 11 of the written statement is as follows :

"These defts. are the aboriginals of Patia & Chandrasekharpur. From time immemorial these defts." forefathers, their successors & these dafts. themselves have been cutting wood from the said jangle & carrying them on head & they have been using the same. From time immemorial also they have been selling the products of that jungle in small quantities in Killa Patia & have been earning their livelihood thereby. These Sahars have the right of selling & using in this manner from time immemorial."

In the said para, II as also in para 10, they make it clear that this right is claimed in resp[ect of "ordinary thorns, bamboos & wood that grow in the jungle year after year," that is only the minor jungle produce of annual growth & not for any of the valuable classes of timber or bamboo the like.

5. The actual incident which is stated to be the cause of action in the plaint is the

alleged removal of twenty bundles of prickly thorns costing Rs. 6 from the disputed forest. It may also be noticed that according to the evidence of usage, one portion of the suit forest "is being treated as reserve forest & the rest as unreserved. The plaintiff's case is that this alleged removal of prickly thorns was from the reserved forest. The learned trial court, under issue 1, found that there is no reliable evidence that the removal was from the reserved forest. The lower appellate court did not give any finding on this matter, but merely contended itself with the statement that there is no denial of the fact that the prickly thorns were removed from the reserved portion. Though the defendants, in the written statement do not, in terms recognise the distinction between reserved portion of the forest & un-reserved & do not limit their alleged rights to the unreserved portion, it is specifically stated before us that the defendant's claim is confined only to the unreserved portion of the forest & it is on that footing that the courts below have dealt with the case. The finding of the trial court that the incident which is alleged to have furnished the cause of action is one that has occurred with reference to the unreserved portion of the forest appears to be correct, in view of the fact that the alleged removal was only of some prickly thorns of annual growth which are more likely to have been found in the unreserved portion of the forest than the reserved. It must be taken therefore that the suit raises the question only of the alleged rights of the defendants in the unreserved portion of the forest & that the absolute right of the plaintiff as proprietor in the reserved portion of the forest is undisputed. It is also further necessary to state that though the claim of the defendants as set out in the written statement is asserted for the purpose of sale in Killa Patia, it is now stated that the claim is confined to sell in mouza Patia (including Chandrasekharpur) that is to sell in small quantities within the limits of villages Patia & Chandrasekharpur & to the normal residents of Patia & Chandrasekharpur. This limitation of claim is justified by the evidence of defendant 1 as D. w. 2 wherein he says "The villagers of Patia purchase fuel from us. We sell fuel, prickly thorns & bamboos in Patia " It must be further noticed that claim of the defendants is to take the forest produce for their own consumption as also for sale as above stated in order to earn their livelihood but the claim is confined to the taking of small quantities by carrying them on head by themselves. As already stated the claim is also only in respect of minor forest produce of annual growth.

6. The dispute relating to forest rights in this forest has been going on from about the year 1932 when the Raja of Kanika purchased this Estate, The dispute, however, appears to have been mainly with reference to the alleged rights of the entire villagers of mouza Patia, who claimed that they had the right to take the minor forest produce without any permit & without any payment That has been negatived on a number of occasions" in the course of the history of this dispute & has now been negatived also by the trial court in this suit. But the dispute now before us is limited to the Sahara residents of mouza Patia & that is the only question with which we are concerned in the present appeal. Both the courts below have found as a fact that the Sahara have been accustomed to remove the forest

produce from the forest for the purposes above-mentioned, but have come to different conclusions on the question whether the said removal is as of right free of payment or with the permission of the proprietor & on payment of fees. As the question involved, is one regarding the proof of custom which is a mixed question of law & fact; we have gone into the entire evidence while keeping in mind that the question of credibility of the evidence is one for the Cts. below.

7. There can be no reasonable doubt in this case about the fact that the Sahar residents of inouza Patia including Chandrasekharpur have been habitually removing the minor forest produce as stated above for long time past. The learned Subordinate Judge on appeal has stated that it is common ground that the Sahara & other low class people of Pata take the forest produce from Patia jungle for their own domestic consumption & for small sale within the Killa Patia & that the material point for consideration is whether the removal of the forest produce is without the permission of the proprietor & free of any charge. The only question therefore is whether the removal is as of right & free of payment.

8. The case for the pltf. is that the removal is on permits which are issued on payment of fees. Since permits & fees go together, the question has therefore further reduced itself virtually to determination as to whether or not the removal is on payment of fees. On this both the Cts.-below have held that on the oral evidence the collection of forest fees from the Sahar-residents of mouza Patia (Chandrasekharpur) has not been made out on the evidence on the pltf. "a side. The learned Subordinate Judge says as follows :

"So far as collection of fees from the Sahar deftg. of Chandrasekharpur, the oral evidence led on the pltf."s aide cannot but lead to the conclusion arrived at by the learned Muneif (that the Sahara had not been proved to have paid any tax to the proprietor)."

This view of the oral evidence is amply justified. Witness after witness on the side of the pltf, comes forward & admits in cross-examination that the Sahara take the forest produce, but they have not seen them paying any royalty to the proprietor, while some of them admit having seen non-Sahar residents paying fees. P. W. 1 says : "I have seen the Sahara & other tenants of Patia & Chandrasekharpur taking fuel, rough wood, roots etc. since my boyhood" & he admits that he has not seen any of the defts. ever paying royalty to the proprietor. P. W. 2 says :

"The Sahara of Chandrasekharpur go to Fatia jungle to get roots & plums. Sometimes they also sell plums. Sahara of Chandrasekharpur also get fuel, rough wood, from jungle for their own use & also for sale."

He does not say that he saw the Sahara paying any fees at any time. P. W. 3, who is related to the original Zamindar of Patia estate says ;

"Chandrasekharpur Sahars get fuel, toots etc. from Patia Jungle & that is their means of livelihood. They sell the fuel in the village."

He admits that he has not seen Chandraseekharpur Sahars ever paying royalty during the Tikayet's time or Aehyamananda's time; though he has seen some others like Baghu Patro, Euso Moharana etc. paying royalty for removal of forest produce from the forest. P. W. 4 is an important witness aged about 60 years. He served under Raghunath Deb as a Mohurir & under (sic) Mohan Deb as his Tahasildar & has also worked under the pltf. He has produced a number of documents to support the pltf.'s case & in particular, counterfoils of permits, Shibas or account books relating to the period subsequent to the acquisition of the estate by the Raja of Kanika in 1933. While he asserts that the Sahars have no right to take the forest produce without permission & without payment of fees & that royalty was being collected during Kanika's regime also from the Sahars, no counterfoil of any permits issued to any Sahar of this village has been produced & he admits that the Shibas (account books) relating to the collection of fees, which show collection of fees from other residents do not show the names of any Sahars of Ohandrasekharpur Mouza. He also admits that the collections from forest tax did not find place in the estate account during the time of Raghunath Deb & says that this was so then as the estate was being managed by the receiver.

9. On his evidence apart from Ex. I, which will be noticed later, there can be no reasonable doubt that the collection of fees from the Sahars of Patia & Ohandrasekharpur at any time is not still made out. It is significant that even after 1932, the accounts which show collection of fees from others do not show any collections from the Sahars. P. W. 6 in his cross examination says that he had been Sahars removing thorns from unreserved portion of the forest, but has not seen any permits with them & had not reported the same to the forest officials though he had reported when the Sahars removed forest produce from the reserved portion of the forest which according to him is demarcated by a line. P. W. 10 is the only Sahar of Mouza Patia who gives evidence on the side of the pltf. & supports him by saying that the Sahara obtained fuel from Patia jungle on payment of forest tax. He says that even in Kanika's time, he has been getting fuel from the forest by taking permits which are returned to the office on his return from the forest. But none of these permits have been produced & filed for the pltf. He admits in his evidence that he is a tenant under the pltf. & that he returned his settlement Patta to the estate which shows clearly that he is under the control of the pltf. P. W. 11 was a forest guard, 16 years old during Dibyasingh Deb's time & states that the Sahars have no right to bring fuel, Bamboo etc. from the Patia forest without permission & without payment of fees, but admits in cross-examination that he cannot say whether the Chandra Bekharpur Sahars pay any tax or not. The inability of this witness who was a forest guard & who must have personally known about the payment of fees by Sahars, if true, to assert positively that the Sahars were paying fees is a significant & weighty circumstance P. W. 13 is a forester under the pltf. & was serving under Achyutananda. He is unable to assert that he collected fees from Sahars at any time for removal of forest produce.

10. On the defence side five witnesses have been examined of whom D. ws. 2 to 4 are witnesses for the applt. They, of course, support the defts." case. On the oral evidence adduced on behalf of the pltf. himself, it is clear that there is no proof that the Sahars had ever paid any fees for removal of forest produce. Mere non-collection of fees may not by itself be any proof of the right of Sahars but this fact assumes significance & importance in view of" the positive proof adduced on the side of the pltf. that fees were being collected from others. As already stated, both the cts. below have agreed in their estimate of oral evidence to the above effect. In their estimate of documentary evidence, however, relating to this matter they have differed & that must now be considered.

11. The earliest document put in evidence on behalf of the pltf. is a Hukumnama, ex. 13 dated 1254 B. S. purporting to have been issued by the Patia Raj to one Muli Patra stating that as the Sahars of Patia & another village had paid the tax, they may be permitted to remove wood from the forest without obstruction. This does not purport to have been signed by anybody nor does it purport to have been written by anybody. It only purports to bear a seal. Though the document appears to be an old one & from the date it bears, must have been more than 30 years old, the presumption available u/s 90, Evidence Act, does not apply to this document. The trial Ct. has not accepted this document on the ground that it was not produced from appropriate custody as it was filed into the Ct., by p. w. 5, the grandson of the said Muli Patra who could not satisfactorily explain why the document was not available at any earlier stage. The appellate ct. however was not willing to accept this criticism & was inclined to accept it as genuine. But it failed to notice that the presumption under Schedule 0 cannot apply to this document, because in terms of that section, the presumption will apply only if the document purports to have been "signed" by somebody or if it purports to be in the handwriting of somebody. The presumption does not apply to the genuineness of a seal. It cannot therefore avail a document, like Ex. 13, which purports to bear only a seal without any signature. This is clear from the meaning of the word "sign" as defined in Section 3, Sub-section (52), General Clauses Act, which includes only a mark with reference to a person who is unable to write his name. Even if the seal is to be treated as a mark,, there is no presumption that the seal is of a person who is unable to write his name. Therefore this document which purports to bear only a seal cannot be taken to have been proved. This view of S 90, Evidence Act has also been taken in *Special Manager, Court of Wards, Balrampur v. Tribeni Prasad* AIR 1985 Oudh 289 : 11 Luck. 35 AIR 1937 194 (Oudh) . From the Ex list we find that this document is noted as having been marked without objection but since the very Munsif who has marked it has felt himself free to reject it, it must be taken that he has marked it subject to its being held to be proved u/s 90, Evidence Act. Ex. 13 therefore must be ruled out of consideration.

12. The next document is Ex 1, an assessment list dated 13.5-1916. P.W. 4 Swapaeswar Misra produces it & gives evidence in support of it. He says that it is a list showing the assessment of forest tax agaisst individuals noted therein

prepared in 1916 during the time of Madan Mohan Deb. He speaks to its being in his handwriting & bearing the signature of the Dewan at the, time, one Dayanidhi Tripathi. This list was apparently also produced before Mr. Datta, Deputy Mag. who held an inquiry relating to forest rights in respect of which he submitted a report, Ex. B which will be noticed later. There can, therefore, be no doubt about the genuineness of this Ex. I. The list bears certain cross marks against some names & in his report Ex. B, Mr. Datta seems to have thought that these marks are against the names of Sahara & that they indicate exemption from payment of assessment. P. W. i however in his evidence states, that it is not so & that numbers 192 to 210 against which there are no cross marks represent the Sahars & that the cross marks indicate the names of persons from whom he actually made collections at the time. According to him, he has not personally collected the taxes as indicated in the assessment list from persons other than those against whose names cross marks are made. Therefore even if his evidence, that numbers 192 to 210 in Ex. 1 refer only to Sahars, is accepted, it is clear that he has not collected any assessment from the Sahars. His statement that the Guard collected from the rest cannot be accepted because he himself admits that there is no record to show it & the Guard has not been called to substantiate it. In any case in the absence of any evidence to show the actual collections from the Sahars a mere assessment list like Ex. 1 to which the Sahars are not parties is not admissible against them to show their liability to pay the assessment. It must also be noticed that p. w. 4 says that assessment lists of this kind were being prepared from year to year during the time of Raghunath Deb. No other list of the kind is produced. There is a very significant admission in P. w. 4's evidence that the collections from forest tax did not find place in estate accounts during the time of Raghunath Deb, & that during Madan Mohan's time the total collections from jungle taxes found place in estate accounts. This would rat an that those accounts would not prove any collection from the Sahars as such.

13. The next important document Ex. 26 dated 15-12-23 which is an award by certain arbitrators. It would appear from this award that in connection with the dispute between the then Zamindar Mouza Patia, there were certain proceedings which came up before the Mag. Mr. E. R. Cousins. The dispute related among other things to the right of the tenants to take forest produce. It was referred to arbitrators & the arbitrators passed an award dated 16-13-23 wherein the arbitrators recognise the right of the proprietor to realise royalty on fuel & prickly thorns taken from Patia jungle by the tenants according to fates prevalent in Khurda Khasmahal. The pltf. strongly relies upon this & it is contended on the other side that this was never acted upon. But whether this is so or not, it has no bearing on the present dispute, because the right claimed by the defts. in this case is not in their capacity as tenants of the village, but because they are the aboriginal inhabitants of the place. That may conceivably stand on a different footing.

14. The next & most important document in the case is Ex. 6. It is a report by

one Mr. N. N. Datta, Deputy Mag. relating to jungle rights of Killa Patia dated 5-12-32. It definitely recognises the right of the Sahar residents of Mouza Pa da including Chandrasekharpur to take the minor forest produce from the unreserve portion of Patia forest for purposes of domestic consumption & for sale in small quantities of headloads. Strong objection has been taken on behalf of the pltf. to the admissibility of this report. This report appears to have arisen on account of a complaint made by the Patia tenant against the Raja of Kanika regarding their forest rights. This complaint was registered as Misc. case No. 67 of 1932 & was in the nature of revenue proceedings before the Revenue Comr. as appears from the Order Sheets, in the said Misc. Case, Exs. P, P-I & P 2. By order dated 10.11-32, in Ex. F-I, it would appear that Mr. N. N Datta was directed to hold an inquiry & report & Ex. B dated 5-12-32 is the report thereupon. Mr. Datta himself has not been called & there is nothing to show whether or not he is available. The document has been marked on admission on the side of the depts. & therefore its admissibility or the value to be attached to it cannot be impugned on that account if otherwise it is admissible. There can be no doubt, that reports of public officials made in discharge of (their official duties are admissible u/s 85, Evidence Act with reference to statements therein of relevant facts or facts in issue. This is well-) established by a number of P. C. cases, Vide Muttu Ramalinga v. Peria Nayagam 1 I. A. 309: 3 Sar. ,841 P. C. Martand Rao v. Malharao 55 Cal. 403 : A. I. R. 1928 P. C. 10. It has however been argued on the strength of Malhkarjuna v. Secy, of State 35 Mad 21 : 14 I. C. 401 and Subhaq Singh v. Raghunath Singh 86 ALL. 282 : A. I. R. 1914 all. 474 that the report of a public official which has been merely submitted to higher authorities for the latter's information or guidance & which itself does not bear the stamp of finality on it, is not admissible in evidence. The cases cited do not lay down any such broad, proposition. In Malhkar juna v. Seay. of State 35 Mad. 21: 14 I. C. 401 a report was called for from the Tahasildar who asked the village Munsif to report. The Tahasildar's report was sought to be put in evidence to show that the village Munsif had reported that certain charities were not Commemoed on a particular date. It was held that the Tahasildar's report was not admissible in evidence of the fact that the charities had not been commemoed by that date: Subhag Singh v. Raghunath Singh 36 ALL. 282: A. I. R. 1914 ALL. 474 the Dist. J. asked the Collector to report which of the three persons suggested was the fittest to be appointed as the guardian & the Collector called for a report from the Kanungo. The report of the Kanungo was not admitted in evidence, This is intelligible on the ground that the Dist. J. had to decide the matter judicially & according to law by taking evidence himself & not on the report of the Kanungo. These oases do not help the pltf. in his contention that Ex. B is not admissible. I have been referred to no authority for the position that the report of a public official is inadmissible in evidence, merely because it was made in compliance with the orders of the higher authorities & was submitted to them.

15. The case in Ghanaya v. Mehtab A. I. R. 1984 Lah 890: 16 Lah. 377 is cited to show to show that Section 35, Evidence Act, is not intended to apply to the

opinions of public official based on or inferences drawn from the allegations made before them in course of inquiries conducted by them. In particular case the inquiry was one under Schedule 02, Cr. P. C. & different considerations may apply to judicial inquiry as distinct from revenue inquiry. While a judicial inquiry is to be based merely on evidence adduced before the officer, a revenue inquiry is not so limited & is to a substantial extent based on personal observation & information. The case in Ghulam Mahomed v. Samundar Khan AIR 1936 Lah. 87 : 165 I. C. 626 is referred to for the position that the statements in mere official correspondences which have no finality are not admissible in evidence. The report Ex. B, however, in this case is not of that category. On the other hand in 35 ALL. 161 (sic), the ownership of a particular temple was in question & the report of a Kotwal who made an inquiry into the ownership at the instance of the Political Agent was held admissible. It appears to me therefore that the report ex. B is admissible in evidence. The P. C. Case reported in Martand Rao v. Malharao 65 Cal. 403 : A. I. R. 1928 P. C. 10 shows that such official reports are valuable & in many cases that is the only best available evidence of facts stated therein, but that the opinions expressed therein should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such report may be. While therefore a report like Ex. B, is admissible, a distinction has to be made between the statements contained therein relating to relevant facts & the opinions expressed therein as to such relevant facts. So far as mere opinions are concerned while they are admissible, the value to be attached is comparatively less. Now with reference to these principles the statements in Ex. B may be made use of in the present case. It may be noticed that the Order Sheets, Ex. H, H 1 & H 2 show that the report was accepted by the Revenue Comr. & that on that basis he attempted to bring about an amicable arrangement between the parties. But he does not appear to have succeeded in doing so. It may be mentioned at the outset that the report was concerned only with the question of the forest rights of the Patia tenants as such, as appears from the fact that the report arose out of a complaint by the Patia tenants. The report was not directly concerned with the rights of Sahar residents of Mouza Patia as such, but the report contains the following valuable statements relating to forest rights of Sahar-residents of Patia:

"The next point of Importance is that the Sahara, Bouria & other low class people who render some service by way of preserving the jungles, supplying fuels to the proprietor & his deity & helping the proprietor in shooting etc., not only take the fuel free of charges for their own use, but also for sale in small scale." Later on the report states "While going to other villages for recording evidence I came across some low class some low class men & on inquiry from them, I was satisfied that they had never to pay any fees for taking fuel for their own use & also for sale in small scale."

Later in the report he records his view that the inhabitants of the Killa Patia had a right to take fuel & prickly thorns from the Patia jungle & that the proprietor had the right of realising royalty from them, but states that the right to realise

royalty was subject to certain exemptions & he proceeds to state "That there were exemptions is now admitted in so far as the Sahars are concerned." These statements extracted from the report, are not mere statements about his opinion, but are statements about the disputed right based on the actual information before him & are clearly admissible in evidence.

16. It has been argued that the statements relate to certain admissions said to have been made before him & therefore the same cannot be acted upon unless the persons said to have made the statements are called as witnesses & the entire admissions are put on record & the witnesses are examined with reference to it. *Oases in Bam Parkash v. Anand Das A. I. R. 1916 P. C. 256 : 43 Cal. 707* *Badha Kishan v. Hari Singh A. I. R. 1927 Lah. 337 : 100 I. C. 800* have been cited in support of it. In *Bam Parkash v. Anand Das A. I. R. 1916 P. C. 266: 43 Cal. 707* the admission referred to is the statement of a witness before a Msg. in a criminal case & what was rejected as inadmissible was the note relating to that statement as proof thereof. In *Molar v. Bam Par shad A. I. R. 1927 Lah. 377 : 102 I. C. 198* also the position was similar. The position here is different. What is sought to be used here is not the supposed admission itself, but the statement of the officer about the right of the Sabars based on the personal information he has received from competent persons, who if at all were not interested in supporting the right & which information is therefore characterised by him as an admission. I have no doubt therefore that the above statements in Ex. B, are admissible in evidence & furnish strong proof, taken with the oral evidence, that as a matter of fact the Sabars were at the time of the report enjoying exemption from payment of any forest fees. This is fully in accord with the estimate of the oral evidence above noticed.

17. It has been argued that this report shows that the taking of forest produce by the Sahars is connected with the services which they were rendering to the proprietor. The report does not show that as a fact that the right was conditioned by the service. The portions of the report relating to the connection of the light with the service are merely his opinion & his proposals for the future. The pltf. has put forward no case that the right of the Sahars if any was one conditioned by service. The question then would have arisen for consideration whether the right was one in lieu of services or burdened with services on the well-known distinction laid down in *Forbes v. Meer Mahomed 13 M. I. A. 438: 5 Beng. L. R. 529* and *AIR 1931 157 (Privy Council)* . No such alternative case having been raised in the pleadings, it is enough to say that taking the report. Ex. B, as a whole & acting on the admissible portions thereof, it does not appear that the right of the Sahara was either permissible or conditioned by service.

18. The next document to be considered is the village note relating to Patia Tillage, Ex. (I) dated 8-4-1984. in current settlement relating to village Patia. The village note states that from time immemorial, the ryots used fuel, prickly plants for fencing & thatching material etc. from the estate" jungles on payment of royalty the rate of which varied in different types. As pointed out in Bhagwan

Singh and Another Vs. Lachuman Prasad Sahu and Another, . this is only a piece of evidence & no presumption of correctness attaches to it. It would also appear from Dalziel's statement report that the portion of the work relating to record of forest rights was not carefully done at that settlement. He remarks as follows at p. 45:

"The customs relating to jungle in this estate were only treated in some selected villages. I think that this work would have been of greater value if regular procedure had been adopted with issue of notice to interested parties."

In any case the village note refers only to the rights of tenants of the village & is based upon the award Ex. 26, already mentioned. which also relates only to the tenants. It has no reference to the rights of the Sahar-residents of the village. Of the other documents filed in the case there are a number of which relate to criminal cases between the proprietor & the villagers relating to forest rights. On the side of the pltf., Exs. 22, 22 a, 23 & 23-A, have been filed. In Exs. 22 & 22 A, certain Sahars were convicted for theft on account of having removed some wood on head loads, but it appears from the facts in that case that the removal was from the reserved portion of the forest. Exhibits 23 & 23-A, show that certain villagers were convicted for removal of wood from the forest, but it does not appear that the persons concerned were the Sahars. On the other hand in Ex. J, certain Sahars who were complained against by the Estate for unauthorised removal of forest produce were acquitted. Exhibits D & D.I show similarly that some other Sahars against whom complaints were lodged for clandestine removal of fuel from Chandrasekharpur forest were finally acquitted, Exhibit K, shows that the Dist. Mag who was moved to file an appeal against the acquittal refused to do so on an elaborate consideration of the rights of the parties. These criminal proceedings above noticed, all relate to the period subsequent to the purchase of the estate by the Raja of Kanika & it is noticeable that these show that the Sahar-residents of Patia were acquitted on the few occasions when they were sought to be proceeded against & there is no clear instance in which they were convicted. Most of the other documents filed in this case relating to this question are counter, foils & account books produced by the estate relating to the periods subsequent to 1932. There is practically no documentary evidence relating to the prior period, but this is only to be expected, because the present proprietor was not likely to have had access to the records of the prior proprietor, whose estate he purchased in Ct. auction hostilely to him. None of the documents that have been filed on behalf of the pltf. of the dates subsequent to 1932, from which date, the new proprietor started vigorous steps for asserting his right to collect fees for the whole of forest produce, show any such collection with the Saha residences of Patia.

19. The position therefore on the evidence is that while it is well established that the Saharresidents of Patia have been accustomed to take the forest produce, there is no proof that any fee has ever been collected from them. No doubt the burden of establishing the customary right to take the forest produce in

derogation of the proprietor's right to the forest is upon the clefts, but where, as in this case, the practice of removal of forest produce is established & an attempt has been made to prove by evidence that fees have been collected for such removal & that attempt fails & it further appears that such fees were never collected from the Sahara while the evidence shows that the fees were in fact collected from others, it is reasonable to attribute the non collection as due to not mere lack of proof but to the existence of the right. The evidence therefore in my opinion to the extent that it goes clearly establishes that the Sahara residents of village Patia including Ghandrasekharapue were in fact exercising the right of collecting minor forest produce, as above stated, as of right & free of payment of any charges.

20. It has been argued that even if this be found, this is not enough in law to establish the customary right on account of the following considerations-(1) There is no proof that the exercise of the right is from the time immemorial; (2) Such customary right which amounts to a right of profit a prendre in gross cannot be acquired in law by prescriptive user ; (3) The custom alleged being also for removing forest produce for purposes of sale is unreasonable; (4) The custom is claimed in respect of a particular class of residents, of a village & not of the entire village & is not recognised in law; (5) The custom as now alleged is with reference to what is now said to be the unreserved portion of the forest & is inconsistent with the proprietor's right to reserve such other portions of the forest as he thinks fit. It is contended on all the above grounds that the custom is not established & cannot be held to be validly made out.

21. As regards the first objection, the evidence adduced is sufficient to make out the exercise of this customary right for the period of living memory of the witnesses. In the case in AIR 1941 21 (Privy Council) their Lordships referring to local customs doubted the applicability of English Rule that a custom in order to be binding should be proved to have been used beyond living memory & stated as follows :

"It is undoubted that a custom observed in a particular district derives its force from the fact that it has from long usage obtained the strict force of law, which must be ancient, But it is not the essence of the rule that its antiquity in every case be carried back to a period beyond memory of the man, still less that it is ancient in the English technical sense.. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such long period & with such invariability as to show that It has by common consent been submitted to as the established governing rule of a particular district."

Judged in this light, the evidence in this case relating to the length of time of the exercise of the custom sufficient to make it out. With reference to proof of customs by immemorial user, it has been pointed out in *Mahamaya Debi v. Haridas Holdar* 20 C. L. J. P. 183 : A. I. R. 1915 Cal. 161 that the proof of

existence of the custom can not be carried back beyond living memory by direct evidence & it is held that if evidence showing the exercise of a right in accordance with the alleged custom as far back as living memory can go is given, it raises the presumption though only a rebuttable one as to the immemorial existence of the custom. This view is also supported by *Rajendra Narain v. Qangananda Singh* A. I. R. 1925 P. C. 213 : 52 I. C. 279 Therefore even according to this standard there is no difficulty in this case in holding that the custom Alleged by the depts is made out on the evidence.

22. The next point urged is that the customary right alleged is in the nature of a profit a prendre in gross. That is a right to take certain profit or produce arising from the property of another. If the exercise of such a right is acquired for the beneficial enjoyment of another tenement, that amounts to an easement as defined in the Indian Law. But where the exercise of such a right is not required for the beneficial enjoyment of another tenement, but is merely for the benefit of certain individuals or well-defined class of individuals, it is a profit a prendre in gross. It is well settled that; the evidence required for establishing, the acquisition of a profit-a-prendre which is an easement, & of a profit-a-prendre in gross is the same. (See *Chundee Churn v. Shib Chunder* 5 Cal. 945 & *Arjun Kaibarta and Others Vs. Manoranjan De Bhoomick and Others*, . But it is urged that a customary right in the nature of profit-a-prendre in gross cannot be established by evidence of long user giving rise to the presumption of a lost grant & the case in *Rivers (Lord) v. Adams* (1878) 3 Ex. D. 361 : 48 L. J. Ex. 47 & A.I. R. 1930 ALL. 238 and *Brajendra Kishore v. Iswar Kaibatra* A. I. R. 1983 Cal. 539 : 146 I. C. 427 and *Arjun Kaibarta and Others Vs. Manoranjan De Bhoomick and Others*, are cited in support of this proposition These cases are distinguishable on facts & it is unnecessary to notice them at length. It will be found on investigation of the facts in each of the Indian cases that the point considered was whether the exercise of the right claimed is reasonable or unreasonable & with that aspect I shall deal presently. But in so far as the principle laid down in the leading English cases *Lord Rivers v. Adams* (1878) 3 Ex. D. 361: 48 L. J. Ex. 47 it is enough to say that the decision turns partly on technical considerations peculiar to English Property Law & that in the latter case in (1911) App 633 there was considerable difference of opinion in the House of Lords about the applicability of the principles of that case. In *Harries v. Earl of Chesterfield* (1911) A. C. 623: 80 L. J. Ch 626 the House of Lords decided against the acquisition of such a right by a majority of 4 against 3, Lord Chancellor Loreburn being in the dissenting minority. With reference to the principles relating to customary rights of this kind the P. C. in *Abdul Hussain v. Mt. Bibi Sonadero*. AIR 1917 P. C. 181: 12 S.L.R. 104 & AIR 1941 21 (Privy Council) have clearly pointed out that the principles of English law cannot be strictly applied. (See also *Bholanath v. Midnapore Zamindary Co.* 31 Cal. 503 : 31 I. A. 75 P. C with reference to similar rights, the Madras H. G. in two cases in *Subramanian Chetty Vs. Vija Raghunatha Pillai and Others*, in recognising similar customary rights. The provisions of the Forest Act providing for an inquiry into

compensation for rights to forest produce when constituting a Gov. reserve forest clearly recognise that in India such customary rights can exist & can be acquired. It may be mentioned that the Forest Manual of Bihar & Orissa shows that such customary rights in respect of protected forests of Ehurda Khamsabal which are contiguous to the suit forest are recognised by Govt. Therefore there is no valid ground for this objection.

23. The next question that has been raised is that since the alleged custom is also for removing forest produce for purposes of sale, it is an unreasonable custom & reliance is placed on the well-known principle English Law that a right in an undefined number of people to take a profit-a. prendre without stint & for sale must lead to the entire destruction of the property & is unreasonable (See (1918) 2 Ex. D. p. 397 . The cases in *Brajendra Kishore Roy and Others Vs. Iswar Kaibarta and Others*, appear to some extent to support this contention. But it appears to me that this cannot be laid down as an absolute proposition of law that wherever a customary right to take forest produce from another man's land with a view to profit by sale of it is claimed, it must necessarily be held to be unreasonable. The decision of the question whether or not it is unreasonable must depend upon the circumstances & facts of each case. That is the view taken in *Subramanian v. Baghunath Pillai* A. I. R. 1918 Mad. 169: 44 I. C. 419. In this case the right claimed though it is a right for purposes of sale, is not a right to take without stint & in unlimited quantities. It is a right to sell not in the open market, but only to the villagers of Patia & Chandrasekharapur. It is also a right to take in small quantities by head-loads by the very persons who are entitled to the right. Thus the right is limited by three considerations, namely, (i) the method of removal is personal & by head-loads, (2) the persons to whom it could be sold are only the villagers of the place, & (3) the sale is within the precincts of the village. It cannot be said that it is a right exercisable by a large & growing class of persons liable to heavy increase in course of time so as to seriously destroy the right of the proprietor itself in the property. The right is claimed only in favour of the aboriginal residents of the particular village who are themselves not large in number & whose rapid multiplication in numbers is not to be assumed to be a matter of course. With reference to a similar contention in *Subramanian v. Raghunath Pillai* A. I. R. 1918 Mad. 169 . Their Lordships say as follows:

"Such an exercise of the right has not hitherto led to the destruction of the fish in the tank nor apparently even to its diminution in numbers. There is no reason to assume a different result in the future. If there is excessive fishing the zamindar may have a right to restrain it, but that is not the question here."

24. It must also be remembered that the question of reasonableness has to be judged with reference to conditions at the time of the possible inception of the custom (*Sea Mahamaya Debi v. Haridas Haldar* 20 C. L. J. 183 : A. I. R. 1915 Cal 161. In this case the practice of an aboriginal inhabitant near the forest, eking out his livelihood by sale of minor forest produce was not only reasonable but

probably inevitable in the olden times. The custom therefore cannot be held to be unreasonable. It is, however desirable to observe that the right of the depts. in this behalf must be exercised consistently with the right of the proprietor to make reasonable arrangements to prevent any gross abuse of the right having regard to the limitations above set out.

25. It has been suggested that it may not be possible for a Zamindar in this case to check & control whether the sale is made to the bona fide residents of the village only & is made within the limits of the village. This is a question of making some practicable arrangements, but cannot be held to make out that the custom alleged is unreasonable. The next objection that has been raised is that the custom is claimed not in respect of the entire residents of the village, but in respect of a particular section thereof namely, the Sahars. It is contended that there can be a local customary right in favour of all the residents of a village or all the tenants of a village, but not in respect; of inhabitants of a particular denomination in the village. On the other side the cases in *Euar Sen v. Mammal* 17 ALL 87: 1695 A. W. N. 10 and *Mohidin v. Shivlingappa* 28 Bom. 666: (1 Bom L. B. 170) have been cited to show that the customary rights in favour of a particular class of person in a village, namely, Muhammadans, have been recognised valid in those cases having regard to the Indian conditions. It would appear that some doubt has been thrown on the correctness of these decisions in the decision of *Mukherjee J. in Gopal Krishna Sil Vs. Abdul Samad Chaudhuri and Others*, . But the doubt expressed is only with reference to the question whether a right of burial can be acquired as a customary right & not whether a section of the inhabitants of a village can acquire a customary right. In* *A. I. R. 1927 Mad. 48* (sic) the validity of a customary right in favour of a particular class of villagers has been recognised. Whatever may be the correct view regarding the general question thus raised, it is noteworthy that the Bihar & Orissa Forest Manual 1917 Edn. I 6 relating to the neighbouring Khurda. Eshmahal protected forest clearly recognises the right of indigenous tribes of Sahars & Bouris to fell, cut, collect & remove certain specified kinds of forest produce, without any payment for sale, provided the sale is not to unprivileged persons under the rules. Therefore it does appear that so far as this customary right claimed in favour of the aboriginal Sahars is concerned, having regard to local conditions it cannot be held to be unrecognisable in law on the ground that the right is not claimed in respect; of the entire inhabitants of the village, which has been negatived.

26. The next objection that has been taken is that since the right claimed is only in respect of the unreserved portion of the forest & that since the right of the proprietor for constituting a reserve in the forest is not challenged, the alleged customary right itself can be defeated by the proprietor's power for reservation & that accordingly" such an illusory right cannot be claimed as a valid customary right. This appears to me to be no valid objection at all. If the customary right of the depts as claimed is established & upheld, it follows that the right of the proprietor for constituting reserves in the forest must be subject to it & the

question resolves itself to one of properly balancing the two rights in an appropriate manner so as to prevent disputes as pointed out in P. C. case in I. L. B. 31 Cal. 503 .

27. There is thus no valid objection to the recognition in law of the customary right as now alleged on any of the grounds that have been arisen to it the deffs. must therefore be held entitled to the right & the pltf. must be refused the injunction that he has asked for.

28. In order to avoid any future misapprehension it is desirable to state that the right recognised by this judgment is one exercisable by the Saharresidenta of Patia & Chandrasekharpur to remove the minor forest produce of annual growth, from the unreserved portion of the Patia jungle, without any payment of fees, for their own domestic consumption & for sale, in small quantities, within the limits of Patia & Chandrasekharpur, to the residents thereof, by removal on head-loads. We do not decide in this case what is the exact nature of the minor forest produce of annual growth to which the right extends & what are the present limits of the reserved forest. But when such a question arises, the report of Mr. Datta, Ex. B & the map & the report of the estate, Amin Exa. 15 & 15 A will have a material bearing. The rights of the Sahars are without prejudice to the proprietary rights of the pltf. to the forest so long as there is sufficient unreserved forest left for the legitimate exercise of the rights of the Sahars, (See Bhol Nath v. Midnapore Zamindar Co. 31 Cal. 803 510: 1 I. A. 75 for an analogous provision) & is also without prejudice to the right of the pltf. to make such reasonable arrangements as may be required to prevent any gross abuse of the rights having regard to the limitations of the same as above stated.

29. In the result the appeal must be allowed & the suit dismissed with costs throughout.

Narasimham, J.

30. I agree.