
(1956) 03 AP CK 0036

In the Andhra Pradesh High Court

Case No : Letters Patent Appeals No's. 38 and 67 of 1955

Pasupuleti Krishnamurthi

APPELLANT

Vs

Annadasu Bapanayya and Others

RESPONDENT

Date of Decision : 28-03-1956

Acts Referred:

Citation : (1956) 03 AP CK 0036

Hon'ble Judges : Subba Rao, C.J;Viswanatha Sastri, J

Bench : Division Bench

Advocate : A. Sambasiva Rao, in Appeal No. 38 of 1955 and M. Seshachalapathi, Govt. Pleader in Appeal No. 67 of 1955, for the Appellant; M.S. Ramchandra Rao, M. Krishna Rao and Y.G. Krishnamurthy, for the Respondent

Judgement

Viswanataha Sastri, J.—These two L. P. Appeals have been preferred against the judgment of Umamaheswaram, J., in two Second Appeals S. A. No. 2517 of 1952 and S. A. No. 804 of 1953 affirming the decision of the Courts below decreeing the suit. The first Defendant is the Appellant in one of the appeals and the second Defendant, the State of Andhra, represented by the Collector of Guntur, is the Appellant in the other, though the contentions of the parties in both the appeals are the same. The Plaintiffs sued as representing the inhabitants of Erikalapudi, a hamlet of Gudivada village, for a declaration that an assignment of 3 acres 60 cents of poramboke land in D. No. 493 by the second Defendant (now the State of Andhra) in favour of the first Defendant, a "political sufferer", does not affect the rights of the Plaintiffs to use the land as a Mandabayalu for their cattle, for threshing corn, boiling and drying turmeric and as a playground for school boys and for an injunction restraining the Defendants from interfering with the exercise of these rights. In the "plaint the rights claimed by the Plaintiffs were ascribed to a lost grant, prescription or custom. Their case was that D. No. 493 originally formed part of the Gramakantam of the hamlet of Pasupuleti-varipalem, that owing to a cyclone that occurred about 85 years ago the villagers left the hamlet and settled in the adjoining hamlet of Erikalapudi, that after their migration the land comprised in D. No. 493 was used by the villagers as

Mandabayulu and for, other communal purposes, that the Government had recognised such user by recording the land as Mandabayulu or cattle stand poramboke in the revenue register in 1914 and that it was not now open, to the Government to assign the land to the first, Defendant in derogation of the rights over the-land acquired by the villagers of Erikalapudi, " The Defendants pleaded that the land was Government poramboke, that the Plaintiffs had not acquired any rights in or over the land by grant, prescription or custom and that the assignment in favour of ithe first Defendant was made by the Government in "the exercise of its discretion and in accordance with the rules framed by the State Government. The learned Judge upheld the claim of the Plaintiffs.

2. The only two questions that were argued And that fell to be determined in the Second Appeals were thus formulated by the learned Judge:

(1) Whether the villagers of Erikalapudi have made out the customary right and easement pleaded in paragraphs 5 and 6 of their plaint; and (2) Whether the grant in favour of the first Defendant is in accordance with G. O. No, 1523 (Revenue), dated 11th June 1949 and valid". These points will be dealt with in the same order.

In Exhibit A-8, the Survey and Settlement Register of 1873 for Gudivada village, the land now in question was shown as S. No. 493 measuring 4 acres and classified as Government poramboke in column 4. In the remarks column (No. 12) the entry was "Village site of Pasupuletivari-palam.

The land ceased to be used as a village site or required for that purpose at some period subsequent to 1873 though the exact date is not known. It appears that in 1914 the land was entered as mandabayalu or cattle stand poramboke in the revenue registers as ordered by the Special Deputy Collector in his proceedings dated 9th July, 1914. This order is not produced but it is admitted by the Defendants that there was a change in the appellation of the poramboke in 1914. This circumstance supports the case of the Plaintiffs to this extent that in. 1914 and possibly for some years psf;)r thereto, the land should have been used by the"villagers as mandabayalu and therefore it was so described in 1914 in the revenue register. There was a recent attempt by one of the villagers to get an assignment of the land from the Government but "the attempt failed owing to the refusal of the District Collector to sanction the assignment. It also appears that a Harijan and- a Telaga built houses on a small portion of the land measuring 3 cents and 8 cents respectively and that the encroachment by the Telaga was removed at the instance of the revenue authorities. Vide Exhibit B-6 dated 22nd July, 1949. The land was lying vacant and so long as it was not sought to be appropriated by any individual by enclosing it or building upon it or cultivating it, the Government permitted men and cattle to stray over the land. When there was an application for assignment of the land the Government refused it in the exercise of its discretion. When there was an encroachment on the land by the erection of a building the Government removed it and evicted the owner. The use of the land as mandabayalu by the villagers should have begun

some time after 1873 and some time before 1914 but it is not possible to fix the exact -date. At first a few head of cattle might have strayed into the vacant land and gradually cattle in larger numbers might have assembled on the land on their way to and from Erikalapudi village which is at a distance of a mile. The land in question is not pasture land and cattle could only have been wandering about or resting on the land that is all jthajt is .claimed iox .the Plaintiffs. The other acts ot user such as threshing or boiling and drying turmeric or juvenile sporting are sporadic and of more recent origin. Vacant lands in a village are commonly used for such purposes without involving any invasion of the right of, the owner or the creation of rights in others who are tacitly allowed to use the land.

4. The learned Judge came to the conclusion that the Plaintiffs had proved a customary right to use the land "for the several communal purposes net out in the plaint" - though it is clear that tho right could not have been exercised before 1873. In AIR 1950 56 (Privy Council) (A), the Judicial Committee dealing with a customary right of cremajion on a particular land in a village observed:

What the Courts have required of a custom, if the law is to uphold it as a right, is that it should be immemorial in origin, certain and reasonable in nature and - continuous in use. It is by these tests that the Appellants" claim in this case must be tried." In AIR 1941 21 (Privy Council) (B), the essentials of a valid custom were summarised as follows:

It must be ancient; but it is not of the essence of this rule that its antiquity must, in every case, be carried back to a period beyond the memory ot man - still less that it is ancient in the English technical sense. It was dependent 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 a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district.

There is inconsistency between these two pronouncements of the Judicial Committee. It has to be remembered that the English rule that a custom should have been in use so long "that the memory of man runneth not to the contrary" fixed 1189 A.D., the commencement of the reign of Richard I, as the crucial date at which the custom should be proved to have existed. This technical rule of English law prescribing the age of a valid custom was not applied to India by the Judicial Committee either in the earlier or later of the two decisions cited above. The expression "immemorial" used in the later case means the same thing as "ancient" found in the earlier case and there is no need for choosing between, the two decisions or accepting the one and rejecting the other, as the learned Judge did. No fixed period of enjoyment can be prescribed as necessary to prove a customary right and the character and length of enjoyment necessary for such purpose must depend upon the nature of the customary right claimed. See Palaniandi Thevan v. Puthirangonda Nadan ILR 20 Mad 389 (C); K.R. Ramaswami

Aiyar and Others Vs. The Secretary of State for India and Others, (D).

5. Though the lower appellate Court found in favour of the custom pleaded by Plaintiffs, its judgment on this point was defective and as the learned Judge remarked,-

it would have been more satisfactory if the Subordinate Judge had discussed the oral evidence in greater detail and given reasons for accepting the oral evidence of the Plaintiffs witnesses in preference to the evidence of the Defendants' witnesses.

The bulk of the evidence in support of the customary right was oral. The learned Judge, however, did not discuss or refer to the oral evidence but expressed the opinion that the findings were supported by the evidence on record. The pieces of evidence referred to by the learned Judge in support of his conclusion are the entry of the land as Mandaba-yalu in the revenue register in 1914, the straying of cattle on the land from a date anterior to 1914, the removal of an encroachment on a bit of the land by a Telaga in or about 1949, and the refusal of the Collector on a prior occasion to assign the land to applicants on objections raised by the ryots of Erikalapudi. After referring to this evidence the learned Judge posed the question for decision thus:

On these facts, the question that arises for consideration is, whether a customary right has not been established as found by the Courts below.

The learned Judge answered the question in the affirmative and in favour of the Plaintiff but we regret our inability to accept the correctness of his view.

6. The inference as to the existence of a custom from the facts found is a matter of law open for consideration in second appeal. The question whether a given state, of facts or the facts found in a case establish a custom or usage with all its essential attributes is a question of law, Kumarappa Reddi Vs. Manavala Goundan, (E). So is the question whether a practice that has prevailed for some years has the essential attributes of a legally binding custom, Yashpal Singh and Another Vs. Jagannath and Another, (F). In Palaniappa Chetty v. Devasikamony Pandarasannidhi ILR 50 Mad 709 : AIR 1917 PC 33 (G), the Judicial Committee observed:

Questions of the existence of an ancient custom are generally mixed questions of law and fact; the Judge first finding what were the things done in alleged pursuance of the custom and then determining whether these facts so found satisfied the requirements of the law. The latter is the question of law - Not fact.

A practice that has arisen in comparatively recent years due to the indulgence or tacit permission of the owner of land must be distinguished from a custom originating in the assertion of a legal right and a prolonged submission to or acceptance of the exercise of that right by those interested in disputing it. In our opinion, the facts found by the lower appellate Court and accepted by the learned Judge do not establish the customary rights claimed by the Plaintiffs.

7. In *The Collector of Godavari v. Pedda Rangayya* 4 MLT 440 (H), Benson and Bhashyum Iyengar, J J., laid down the law in these terms:

According to the common law of the country the control of "Grama Natham" vests in the Revenue Authorities and they are at liberty to grant portions of it at their discretion to persons who apply for it for building purposes. Until it is appropriated in this way to the use of some definite person it is usual for the villagers to make use of it in any way that suits them best They throw rubbish on it, graze their cattle on it, use it as a latrine and the like and they are rarely interfered with. But it is always understood that this use is permissive on the part of Government and" that Government has the right at any time to appropriate it for any special public purpose or grant it to an individual for building purposes. Such being the ordinary incidents of "grama natham" it is necessary that a Plaintiff who seeks to limit the ordinary rights of Government in regard to any part of it should establish the limitation by clear proof. We do not think that there is any such proof in the present case. Some elderly witnesses, no doubt, state that ever since their boyhood the place has been used as a place" for the village cattle to stand on when going to and from the pastures and also that it is used in connection with the festival of the Goddess whose temple is adjacent.

But there is probably hardly a village site in this Presidency of which so much could not be said" and no one acquainted with the common law of the country would hold that such user is by itself sufficient to deprive the Revenue Authorities of their ordinary rights of control over and disposal of the village site land. There is no evidence that the land in question was ever dedicated or set apart as, a cattle-stand (Mandai) or for any purpose connected with the temple, though there is evidence that} several previous applications for portions of it have been refused by the Revenue Authorities on various, grounds of inconvenience to the villagers.

In that case, as in the present, previous applications: for assignment of portions of the poramboke had been refused by the Revenue Authorities on the ground of inconvenience to the villagers but that was not considered a decisive circumstance.

8. In *Taluk Board, Dindigul v. Venkataramieif* ILR 46 Mad 866 : AIR 1924 Mad 197) (I), a portion of natham (house-site) poramboke, referred to as Gramakantam in these parts, was assigned by Government and the villagers disputed the legality of the assignment on the ground that the land had; been used by them.

From time out of mind as a threshing floor for 500 acres in times of harvest, for storing manure and green leaves, for stocking hay-stacks, for drying paddy, for allowing their cattle and buffaloes, etc., amounting to 1000 and more, to stray and remain there and for other incidental innumerable purposes, connected with agricultural operation.

The lower appellate Court found as a fact that the-villagers had been using the

land for the purposes alleged by them and granted a decree in their favour. On second appeal the High Court (Ayling. and Odgers, JJ.), reversed this decision on the ground that the right claimed by the Plaintiffs, whether based on custom or prescription, was "of too fugitive and patently permissive a kind to afford support to it.

Ayling, J., remarked:

There is probably no village in the Presidency-in which the unoccupied village site is not used for the purpose indicated. Such user does no harm to any one and is unobjectionable until the land " wanted for its legitimate purpose." In that case also, as in the present, a prior apportionment for assignment of the land had been refused" on the objection of the villagers. In *Desikachari v. Secy, of State* 56 MLJ 38 (J), Madhavan Nair, J., had to deal with a case like the present. Land registered as natham poramboke in the Settlement Register was used for the village cattle to graze daily and for the villagers to assemble during festivals in the village temple for a period of over 60 years. The Government granted a portion of the land under the dharmast rules and the villagers sued for a cancellation of the grant as being an invasion of their rights. The learned Judge held that the user proved by the Plaintiffs did not deprive the revenue authorities of their right to deal with the property under the dharmast rules and observed:

In order to establish the Plaintiff's right to the property there must be something more; than these acts of user. There must be evidence that the land in question was dedicated or set apart as a cattle-stand or for any purpose connected with the temple." This decision is also relevant to another point dealt with later in this judgment.

9. The fact that in 1914 the land was referred to as "Mandabayalu" in the remarks column of the revenue register does not imply a grant of an easement right by the Government to the villagers or a dedication of the property as a cattle-stand or an engagement on the part of the Government not to assign or assess the land in future. The entry in the remarks column is merely descriptive of the land as "a particular kind of poramboke. See *Secy, of State v. Sri Kuthalanathaswami Temple* ILR 52 Mad 25 : AIR 1928 Mad 1176(K). In *A. Venkatasami Naidu-Plaintiff Vs. Agaram Chenga Reddi and Others*, (L), Wallace, J., held that the mere registry of land as a particular kind of poramboke created no vested right in the villagers to hold it as such against the Government. Such registry implied no kind of dedication or trust or any recognition of a vested right of user. This principle was applied to grazing ground poramboke by the learned Judge in S. A. No. 692 of 1926 to which reference is made in his judgment. Once a poramboke, always a poramboke was not accepted as the law of the land by any Court. The decision in *K.R. Ramaswami Aiyar and Others Vs. The Secretary of State for India and Others*, (D), does not lay down a different rule, for, Venkatasubbrah, J., observed, that the description in the Settlement (Register of a poramboke as mandai (cattle-stand) was only some and not conclusive evidence that the land had been set apart for the purpose. In that case land which had

been classed as mandai (cattle-stand) poramboke in the Settlement Registers of 1875 and 1911 was transferred to the category of natham (house-site) poramboke in 1918 and portions of it were thereafter assigned by the Government as building sites. The villagers objected to the assignment on the ground that from time immemorial the land had been used as a cattle-stand for herding cattle, as a threshing floor and, as the seat of a village deity. Venkatasubba Row, J., held that even if the villagers had established a customary right to herd their cattle on the land, the extent of the land subject to that right might be abridged in proper cases. The customary right was held not to be an absolute one in the sense that it had to remain Intact and inviolate through all time, irrespective of changed conditions or circumstances. The question here is whether the customary right has been established at all and not about the extent or quantum of that right. In *Rudrappa Nayak and Others Vs. Dasan and Others*, (M), Walsh, J., held that the description of land as cattle-stand in the Settlement Register did not imply any grant to the villagers and created no vested rights in them and that the right of the Government to assign such land was not restricted by the condition that the villagers should not be prejudiced by their cattle-stand ground being diminished by such assignment beyond what was required for them. The matter was one for the judgment of the Revenue authorities and not of the Civil Courts.

10. In view of these decisions it must be held that the Plaintiffs have not, established any of the customary rights in or over the suit land alleged by them in paragraphs 4 and 5 of the plaint. In fact, the learned Judge assumed that it was only the user of the land as mandabayalu that had been proved by the documentary evidence. Neither the transfer of the land to the category of "mandabayalu" poramboke from that of "gramakantam" poramboke in the revenue registers in 1914 nor the fugitive and intersmittent user of the land by stray cattle with the tacit assent or permission of the Government would justify the inference of a customary easement of Mandabayalu in the villagers.

11. The learned Judge was further of the opinion that the instructions laid down by the Government for the grant of lands to political sufferers had not been followed and therefore the grant to the first Defendant was invalid. If, as we hold, the Plaintiffs had acquired no rights in or over the land either under a grant, proved or presumed, or by custom or by prescription, they could not complain of any legal injury resulting from the assignment of the poramboke by the Government to the first Defendant. It is not for the Court to pronounce on the wisdom or propriety of such assignment in the circumstances alleged by the Plaintiffs. The learned Judge erred in assuming that the onus was on the Government to adduce evidence to show that no other lands were available for assignment to political sufferers before the assignment now in question could be held to be valid. It is admitted that the lands belong to the Government. All that the Plaintiffs claim is a customary right to herd cattle on the land. If this right is not established, there is an end of the Plaintiff's case and how the Government disposes of its poramboke land is not their concern. The instructions referred to

by Uma-maheswaram, J., which are alleged to have been departed from do not confer rights enforceable in a Court of law and the propriety of a writ authority acting within the scope of its powers cannot be questioned by the Civil Courts. Even if the decision did not strictly conform to the instructions, a Civil Court cannot set it aside on that ground. See *Muthuveera Vandayan v. Secy, of State*, ILR 30 Mad 270 (FB) (N), 58 Mad LJ 38 (J), *V. Peddarangaswami Shreshti Vs. The State of Madras and Another*,

12. For these reasons, we are of the opinion that the appeal should be allowed and the Plaintiff's suit should be dismissed with costs throughout (one set in both appeals)