

(1955) 02 OHC CK 0011

In the Orissa High Court

Case No : Second Appeal No. 304 of 1949

Ram Chandra Rout and Others

APPELLANT

Vs

Kanduri Charan Jena and Others

RESPONDENT

Date of Decision : 02-02-1955

Acts Referred:

Citation : (1955) 21 CLT 154

Hon'ble Judges : Narasimham, J

Bench : Single Bench

Advocate : P.C. Chatterjee and B. Mohapatra, for the Appellant; L.K. Dasgupta and B.C. Dasgupta, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, J.—This is Plaintiffs' appeal against the concurrent decisions of the two lower Courts dismissing their suit for a declaration of the customary rights of pasturage of the villagers of Gurda in Balasore district, over Current Settlement plots Nos. 507 and 512. The said plots were recorded in the Anabadi Khata of the landlords of the village with a note to the effect that they were "Rakhit Jogya" (fit to be reserved). The suit was brought by the Plaintiffs in a representative capacity and it was alleged that the residents of village Gurda were accustomed from time immemorial to graze their cattle on the said two plots and that they have acquired a customary right to such pasturage. The landlords (Defendants 4 to 8) settled the disputed lands with Defendant 1 to 3 on 16-5-45 and thereby interfered with the customary right of the villagers and thus compelled the Plaintiffs to institute the suit for necessary reliefs.

2. The main defence was a denial of the, alleged customary right of the villagers over the plots in question. Defendants 1 to 3 claimed to have obtained occupancy rights by virtue of the valid settlements made with them by the landlords. The landlords of the village, (Defendants 4 to 8) while denying the use of the disputed plots as grazing ground from time immemorial as alleged by the Plaintiffs, put forward an alternative case to the effect that even if the villagers

were in the habit of grazing their cattle on the disputed plots, such grazing was done with the permission-of the landlords and that consequently no customary right would accrue.

3. The Trial Court dealt with the suit on the assumption that the right claimed by the Plaintiffs was in the nature of an easement. He accepted the oral evidence adduced by the Plaintiffs to show that they were grazing their cattle on the disputed plots for several years but he thought that the Plaintiffs failed to establish that the grazing was done as of right. The lower appellate Court while correctly pointing out that the right claimed by the Plaintiffs was not in the nature of an easement but was a right based on custom, I yet agreed with the trial Court that the Plaintiffs failed to establish that the long user of the disputed plots as grazing ground was "as of right". Hence, he held that the essential element to establish custom was wanting in the case.

4. I give below a chart showing the relevant entries in the three Settlement Reports of Balasore district in respect of the disputed plots.

Plot No.

Area.

Nature of the entry

Current Settlement

51212.01

RakhitJogya in the AnabadiKhata of he landlord.

Revision

do

529 12.19

Gochar in the AnabadiKhata of the landlord.

Provincial

do

529 12.50

do

507 2.67

RakhitJogya in the AnabadiKhata of the landlord.

Revision

do

483 2.83

Laikpadia (cultivable waste land) in the AnabadiKhata of the landlord.

Provincial,

do

483 3.12

Laikpadia in, the AnabadiKhata of the landlord.

5. For appreciating the significance of the settlement entries it will be necessary to refer to paras 263 and 474 of Maddox's Provincial Settlement Report, paras 77 and 78 of the Revision Settlement Report of James and paras 457 to 460 of Dalziel's Current Settlement Report. These paragraphs need not be quoted in extenso but they show that the resident-tenants of a village have, in general, a prescriptive right to graze their cattle upon some or all the waste lands of the village. This right was referred to by Mr. Stirlirig in his minutes of 1821 and in paragraph 262 of Maddox's Settlement Report it was pointed out

There is, however abundant evidence that the right existed and if in some villages it was not exercised this was because the zamindars were strong enough to withhold from the tenants their customary privileges.

During the preparation of the Provincial Settlement Khatians the Assistant Settlement Officers were directed to select in each village a few large fields suitable for grazing and to enter them in a separate Khatian to which they were required to get the signatures of some of the leading raiyats and zamindars, The same procedure was followed during the Revision Settlement and some of the inaccuracies in the Provincial Settlement entries were corrected, Admittedly, the two disputed plots were not entered in separate Khatians either in the Provincial or in the Revision Settlement, They were entered in the Anabadi Khata of the zamindars and there was no note in the remarks column of the Khatian to the effect that the villagers had any customary right to graze their cattle. But plot No. 529 was recorded as Gochar, thus making it clear that it was used as pasture land. But presumably either because of the lack of agreement between the landlords and the tenants of the village or because the Settlement authorities were not satisfied that customary rights of pasturage had accrued over this plot, the rights the villagers were not expressly recorded in those two Settlements. Provincial Settlement plot No. 483, however, was not recorded as "Gochar" but only as "Laik Padia".

6. At the time of the Current Settlement, those plots which were reserved for grazing were entered in a separate Khatian as "Rakit". Admittedly, "neither" of the two plots was entered in the Rakhit Khatian. But the entry "Rakhit Jogya" (fit to be reserved) in the Current Settlement shows that the Settlement authorities thought that the plots were grazing grounds and as such suitable for being reserved. It was observed in para 460 of Dalziel's Settlement Report that all the plots which were reserved plots in the previous Settlements were also recorded as "Rakhit" except when unsuitable and that efforts were made to persuade the

landlords to consent to reserve more plots where grazing grounds were inadequate. He has also observed that a standard of at least five percent of the total area of each village was aimed at, but that the landlords were often unwilling to give their consent to such reservation. The total area of village Gurda is 320.02 acres and it is admitted that the extent of the land reserved as grazing ground in the Rakhit Khata is only 9.03 acres. The Settlement authorities standard of five percent would require at least 16 acres to be reserved in the village. Apparently, due to the refusal of the landlords to give their consent, this target could not be reached in the village and the disputed plots could not be entered in the Rakhit Khata. But as they were suitable for grazing ground, the entry "Rakhit Jogya" was made in the Current Settlement.

7. The evidence led by the Plaintiffs which has been accepted by both the Courts, notwithstanding some unsatisfactory features here and there, is to the effect that the disputed plots were used as grazing ground by the villagers for a very long time. The witnesses could doubtless speak only about what was personally known to them. But they also spoke about the practice that was prevalent since the time of their forefathers. Some of the witnesses were aged sixty or seventy years (P.Ws. 3 and 4) and both the Courts have accepted their evidence and come to a finding that the cattle were grazing on the disputed plots for at least thirty or forty years, if not more.

8. Two important questions now arise for consideration

(i) is there sufficient rebuttal of the presumption of correctness attaching to the Settlement entries?

(ii) on the findings of fact of both the Courts have the Plaintiffs established, their customary right over both or one of the two disputed plots?

9. Current Settlement plot No. 512 may be dealt with first. It was recorded as "Gochar" both "in the Revision and Provincial Settlement and ad "Rakhit Jogya" in the Current Settlement. It is true that the customary right of the villagers over this plot was not recorded in any of the Settlements. But the oral evidence which has been accepted, shows clearly that this plot was used by the villagers for grazing during living memory and also from the time of their forefathers as spoken to on tradition. On behalf of the Defendants, however, the only material witness on this point is D.W. 2 who is one of the co-sharer landlords. He totally denied the use of the land as pasturage and further stated that he never allowed or permitted anyone to graze cattle there. The alternative defence put forward in the landlord's written statement to the effect that the villagers used to graze their cattle on the disputed plots with the permission of the landlords was not only not supported by any evidence but the only witness on behalf of the landlords (D.W. 2) emphatically denied the grant of any such permission on any occasion to the villagers. His evidence about the non-user of the disputed plots as grazing ground has, however, been disbelieved by both the Courts of fact.

10. The Settlement entries in respect of C.S. plot No. 512 are not in any way

conflicting with the oral testimony of the Plaintiffs' witnesses and it cannot be contended that the Settlement entries are in favour of the landlords. On the other hand, they definitely disprove the statement of D.W. 2 to the effect that this plot was never used as grazing ground. They fully support the evidence of the Plaintiffs' witnesses about the actual user of the land as grazing ground. It is true that the villagers right to graze was not recognised by the Settlement authorities but this is a question of law to be decided by the Court on the proved facts of the case bearing in mind the legal principles governing the establishment of any right by custom.

11. The necessary requisites of a valid custom are that it should be-

(i) reasonable

(ii) ancient

(iii) invadable and certain

(iv) continuous and lastly found to have always been

(v) peaceably and openly enjoyed.

12. Mr. Dasgupta on behalf of the Respondents contended that it was unreasonable to claim the whole of plot No. 512 amounting to 12 acres and odd as grazing ground in view of the reservation of 9 acres already made in the village and also in view of the observation in para 460 of Dalziel's Settlement Report to the effect that about five to five and a half percent of the total area of the village should ordinarily be reserved as grazing ground. He urged, relying on *Nritta Kumari Dasi v. Puddomnoi Bewah* (sic) *Bholallath Nundi v. Midnapore Zamindary Co.* ILR Cal. 503 that it will be reasonable to reserve only sixteen acres of land in the village for grazing ground and that as nine acres have already been reserved by the Settlement authorities, it would be unreasonable to recognise customary rights over the whole of plot No. 512 amounting to 12 acres and odd as grazing ground. This argument, however, does not appeal to me. Even if the Plaintiffs succeed in respect of the whole of plot No. 512, the total area of land that would be reserved for pasturage in the village would be $12 + 9 = 21$ acres. The total area of the village is 320 acres. The target of five percent mentioned in para 460 of Dalziel's Settlement Report is the minimum and if in a village it is found as a fact that about $6\frac{1}{2}\%$ of the total area of the village is used as grazing ground, the test of reasonableness laid down for recognition of such a custom is not contravened.

13. On the question of immemorial user, it is now well settled by a series of decisions that the rule of English law would not apply literally in India. As early as 1895, in *Kaur Sen v. Mamman* ILR All. 87 it was observed-

We cannot in these Provinces apply the principle of the English Common Law that a custom is not proved if it is shown not to have been immemorial. To apply such a principle, as we have been urged by the Counsel for the Appellant to do would

be to destroy many customary rights of modern growth in villages and other places. The Statute Law of India does not Prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed.

This principle has been followed in *Palaniandi Tevan v. Puthirangonda Nadan* ILR Mad. 389 *Mohidin v. Shivlingappa* ILR 23 Bom. 666 *Mahamaya Debi v. Haridas Haldar* AIR 1915 Cal. 161 *Ali Mohammad v. Sk. Katu* AIR 1923 Cal. 200 and AIR 1928 39 (Nagpur) . In a recent decision of the Privy Council reported in AIR 1941 21 (Privy Council) the same principle was reiterated in the following words

Their Lordships are not convinced that Young C.J.'s reference to the English rule stated in Blackstone's Commentaries, that a custom, in order that it may be legal and binding, must have been used so long, that the memory of man runneth not to the contrary was either opposite or useful, when applied to Indian conditions. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law, 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 of 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 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.

If there is evidence showing the exercise of a right in accordance with an alleged custom as far as testimony can go there would be a rebuttable presumption as to the immemorial existence of the custom. In AIR 1925 213 (Privy Council) the same point was reiterated in the following words

After the existence of the custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence, and it is for this reason that such evidence is allowable as an exception to the general rule.

The Plaintiffs' witnesses while speaking about their personal knowledge of the use of the plot as grazing ground during living memory have also spoken about what they learnt from their ancestors on the subject (P.Ws. 1 and 3). There is no rebutting evidence on the side of the Defendants. On the facts of the case, therefore, it should be held that the immemorial user has been established as required by law.

14. But the lower Courts dismissed the Plaintiffs' suit mainly on the ground that the user "as of right" has not been established and that the evidence on the Plaintiffs' side was consistent with an alternative case of permissive user with the consent of the landlords. Here, both the Courts have committed an error of law. To establish customary right of pasturage it is not necessary for the Plaintiffs

to show that when the villagers first allowed their cattle to graze on the disputed plot they did so in assertion of their right to graze. Direct evidence of such assertion of right can never be obtained and growth of custom is not based on the assertion of such right at its inception, It generally originates in a practice or usage found convenient or beneficial at a particular time and repeated freely and spontaneously till the oft-repeated practice in course of time acquires the binding force of law. If peaceable and open enjoyment for a sufficiently long period of time is proved there would be a legal inference that the enjoyment was as of right. This was emphasised in *Md. Yusuf v. Suraj Bali Singh* ILR All. 87 : AIR 1930 All. 339. Thus in *Goli Paddayya and Others Vs. Chaliki Krishnamurthy*, , thirty years open user o right of way was held to justify a presumption that it was as of right and that it was for the party who wanted to show that it was only permissive, to prove it. Again, in *Maharajah of Venkatagiri Vs. Ardhamala Yagadu and Others*, open and continuous user for more than twenty years was held to justify the presumption that the user was as of right.

15. In the present case, open and peaceable enjoyment of the right of grazing over the disputed plot during living memory has been proved by the evidence of the Plaintiffs' witnesses which has been accepted. The presumption would, therefore, be that the user was as of right unless it is rebutted by evidence from the Defendants' side. The landlords' sole witness (D.W. 2) denied the grant of any permission and consequently the question of implied permissive user does not arise on the pleadings of the parties. In the Provincial Settlement Report of Maddox, there are some observations to the effect that some landlords used to charge fees for permitting grazing on their waste lands. If the landlord of Gurda had formerly charged fees for grazing, some evidence on this point would surely have been available. Not only no such, evidence was led but an attempt was made to deny the user of the land as a granzing ground altogether thereby rendering it academic to discuss as to whether there was implied permission by the landlords to allow grazing on the disputed plot. Hence, bearing in mind the legal principles mentioned above it should be held that on the findings of the lower Courts there is a presumption that the grazing over the disputed plot was done by the villagers as of right and that the said presumption has not been rebutted.

16. The other two tests of custom such as certainty and continuity have been satisfied by the Plaintiffs' witnesses.

17. As regards C.S. plot No. 507, however, the case stands on a slightly different footing. It was not recorded as "Gochar" either in the Provincial Settlement or in the Revision Settlement but it was recorded as "laik Padia" (culturable waste). Doubtless, the Plaintiffs' witnesses have stated in a general way that this plot was also used as a grazing ground by the villagers. But this type of evidence will not suffice to rebut the presumption of correctness attaching to settlement entries. Cattle may be permitted to graze on any waste land in a village. But unless there is some other evidence to show that this plot was also used as a

regular grazing ground, customary right cannot accrue. The very fact that during the previous settlements this plot was not entered as "Gochar" whereas C.S. plot No. 512 was entered as "Gochar" would support the view that this plot was not used as grazing ground by the villagers though as it was waste land cattle strayed into it and grazed occasionally. I would, therefore, hold that the presumption of correctness attaching to the old settlement entries at the time they were made has not been rebutted and the necessary ingredients to establish the right of pasturage over this plot are not found.

18. In the result, the judgment of the two lower Courts are set aside so far as C.S. plot No. 512 is concerned and the Plaintiffs' suit is decreed. But the judgments of the two lower Courts are maintained in respect of C.S. plot No. 507 and the Plaintiffs' suit is dismissed in respect of that plot. As the Plaintiffs have succeeded in respect of a substantial portion of the claim they should get costs throughout.