

(1975) 01 AHC CK 0051
In the Allahabad High Court
Case No : S.A. No. 4298 of 1964

Ram Sewak and Others

APPELLANT

Vs

Nathoo Singh and Others

RESPONDENT

Date of Decision : 07-01-1975

Acts Referred:

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 122B, 212, 6, 7AA

Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 — Rule 115D

Citation : (1975) AWC 29

Hon'ble Judges : H.N. Kapoor, J

Bench : Single Bench

Advocate : S.N. Verma and V.K. Tiwari, for the Appellant; Lalji Sahai Srivastava, for the Respondent

Final Decision : Allowed

Judgement

H.N. Kapoor, J.—This is a Plaintiff's appeal against the order and judgment dated 20-8-1964 of Additional Civil Judge, Orai allowing the appeal filed by the Defendants and dismissing the Plaintiff's suit. The Plaintiff's had, brought a suit against the Defendant Respondents with the allegations that Defendant No. 1 to 3 had taken illegal possession of certain land which forms part of the ponds and were cultivating the some and obstructing the Plaintiff's from using the same for their purpose and the purpose of their cattle. The Gaon Samaj was also impleaded as a Defendant with the allegations that the Chairman of the Gaon Samaj was colluding with the other Defendants and had not taken any action against the Defendants. The Plaintiffs had brought the suit in a representative capacity on behalf of the tenants of the village i.e. bhumidhars, sirdars, adhivasis etc., It was a suit for permanent injunction restrrining the Defendants Nos. 1 to 3 from interfering in the user of the tank by the Plaintiffs in, any way. It was stated in the plaint that the three ponds in suit existed for over 100 years when the village was inhabited for the first time and by means of grant they were made available to the villagers for their use and the use of their cattle. Customary right

was claimed in the ponds as well as it was stated that they were public property and their management was vested in the Gaon Samaj. The trial court decreed the Plaintiff's suit holding that the Plaintiffs had proved that they had customary right to use the ponds for themselves and for their cattle. The lower appellate court, however, set aside the decree of the trial court on the findings that no customary right had been proved nor any grant had been proved.

2. Learned Counsel for Appellants has argued that the lower appellate court has not drawn proper inference of law from the facts proved and that it has wrongly held that customary right had not been proved. There is no dispute that inference about custom from the evidence on record is a question of law. It was so held by the Privy Council in the case of AIR 1943 111 (Privy Council) that inference about custom is a question of law. The lower appellate court was very much impressed of the facts that it has not been proved that the tanks existed for over 100 years and the village people were using them more than 100 years. No such limitation prescribed that inference about custom can be drawn only if the user for 100 years is proved. It is true that there is no evidence about grant as no documentary evidence could be available about it but the Plaintiff's witnesses have clearly stated that all the three tanks were in existence for long time and they were being used by the tenants of the village for themselves as well as for their cattle. Extract, of Khatauni 1901 and 1902 has been filed showing that the plots, had been recorded as Taiabs. They have been shown as such even in the extract of Khatauni of 1366F. to 1868F. Vijai Bahadur DW 1 who appeared as a witness on behalf of the Gaon Samaj also supported the case of the Plaintiffs that these three ponds existed there and were vested in the Gaon Samaj. He has also stated that they were using them for the purpose of the cattle and that they were the public property and no individual was in possession over them. The "contesting Defendants, however led evidence to the effect by examining Sita Ram (DW 2) and Ram Sahai (DW 3) that the plots in dispute were not ponds and were being cultivated. The lower appellate court has not given any finding that these plots were not ponds and were cultivated land. It has dismissed the plaintiff's suit only on the findings that the use for 100 years has not been proved and that no grant has been proved. In my opinion, it was a wrong approach to the entire controversy. On the basis of the evidence on record the only inference that could have been drawn was that all the three ponds were in existence since before 1901 and were in use of the village people for themselves as well as for their cattle. The contesting Defendants had no right whatsoever on any part of the ponds in dispute. There can be no doubt that they have taken illegal possession in all probability by colluding with the Chairman of the Gaon Samaj who himself did not take any action for ejecting them which he was duty bound to do.

3. Learned Counsel for the contesting Respondents has argued that once it was admitted that the ponds had vested in the State or in the Gaon Samaj, only Gaon Samaj could have taken action against the Defendants u/s 212 of the UP ZA & LR Act or an application could have been moved, u/s 122-B read with Rule

115-D. No doubt, Gaon Samaj could have and should have taken such action but on its failure to do so there is no bar in bringing such action by the village community in their representative capacity. There is another aspect of the matter that use of ponds by the village community can be considered to be for more beneficial enjoyment of the law by the bhumidhars, sirdars, adhivasis and asamis within the meaning of Section 7-AA. It was held by Hon"ble Supreme Court in an unreported case Mahabir v. Durga C.A. No. 746 of 1962 D/- 16-4-1964 about which reference has been made at page 146 of the UP ZA & LR Act, 1968 edition by Sri B. C. Shukla; that suit with regard to village pathway can be brought by the village community and pathway could be deemed to be covered by Section 7-AA. A learned Judge of this Court also took the view in the case of Mohd. Sher Khan v. Union of India 1963 ALJ 99 that suit could be brought by the villagers in a representative capacity with regard to graveyard even though its management has vested in the Gaon Samaj. It is significant that although there is no mention of graveyard in Section 6 of the UP ZA & LR Act but there is a mention about it u/s 212 of that Act. In case suit can be brought for village path-way or cremation ground there is no reason why suit cannot be brought with regard to ponds in the representative capacity by the village people. In my opinion, the lower appellate court has taken erroneous view of law. It cannot be sustained in this appeal.

4. The appeal is allowed. The judgment and the decree of the lower appellate court are set aside and that of the trial court are restored. The Plaintiff's suit is decreed with costs throughout against the contesting Defendant Respondents.