
(1978) 02 CAL CK 0049
In the Calcutta High Court
Case No : S.A. No. 1227 of 1963

Representatives of Mouza Asti Etc.

APPELLANT

Vs

Chandu Herram and Others

RESPONDENT

Date of Decision : 08-02-1978

Acts Referred:

West Bengal Estates Acquisition Act, 1953 — Section 4, 5, 6

Citation : 82 CWN 490

Hon'ble Judges : Chittatosh Mookerjee, J

Bench : Single Bench

Advocate : S.C. Das Gupta and Kshetra Mohan Kumar, for the Appellant; Bhupendra Kumar Panda and Dwipendra Kumar Panda, for the Respondent

Judgement

Chittatosh Mookerjee, J.—2, 11 acres of land comprised in Plot No. 1, Khatian No. 1, Mouza Asti, P.S. Dantan, is the subject-matter of the present appeal. In the Cadestral Survey Records the said plot was included in the khas khatian of Radha Gobinda Pal, who was the then Zamindar of the Mouza. The said Plot No. 24 was described as with the remarks Radha Gobinda Pal died leaving a Will and the defendant Nos. 2 to 4 of the present suit were his legal representatives and also landlords of the mouza. The defendants 2 to 4 by filling returns u/s 6 of the West Bengal Estates Acquisition Act, 1953 had purported to retain the said Plot No. 24. In the finally published R.S. Records, the defendants 2 to 4 have been recorded as non-agricultural tenants. At the same time, the suit plot has been again recorded as a with the remarks On 6th July, 1958 they executed a kobala in respect of the suit land in favour of the defendant No. 1. The present appellants as plaintiffs had instituted a suit in representative capacity on behalf of the residents of village Asti against the present respondents, inter-alia, for the declaration of their customary right of pasturage in the said Plot No. 24, recovery of possession and for permanent and mandatory injunction for removal of bandhs and for restoring the land as a pasturage. The plaintiffs obtained leave under Order 1 Rule 8 of the Code. The defendant No. 1 and the defendants Nos.

2 to 4 contested the said suit by filing separate written statements. They in-alia denied that the plaintiff villagers have acquired any right of pasturage over the suit land by custom.

2. Both the learned Munsif in the trial court and the learned Additional Subordinate Judge in appeal have found that the villagers of Asti from time immemorial had been using the suit land as a pasturage openly, uninterruptedly and to the knowledge of the landlords, who were the owners of the suit land. Their further finding is that the landlords, who were the owner of the suit land did not exercise any act of possession over the suit land nor did they ever attempt to bring the suit land under cultivation or in fact, exercise any of the rights of ownership. Both the C.S. and R.S. Records showed that the villagers of Asti used the suit land as a common pasturage. The suit land, according to the findings made by the two courts of fact was a low land and in the lower level than other surrounding lands. It became quite unfit for cultivation in the rainy-season because accumulation of water. The defendant No. 1 for the first time brought the suit land under cultivation in 1365 B. S. After the suit land was brought under cultivation, it was no longer possible for the cattle of the villagers Asti mouza to graze therein throughout the year. There was no other grazing ground in the village. The lower appellate court has recorded in its judgment that there was "plenty of evidenre sufficient for a conclusion that the plaintiff, the villagers of Asti village, had acquired a customary right of pasturage over the suit land, and there is nothing for the respondents to challenge such finding of the learned Munsif". But the trial court and the lower appellate court have dismissed the plaintiffs' case on the ground that the customary right of pasturage claimed by the plaintiffs was not reasonable. According to the lower appellate court, the landlords had allowed the villagers to use the suit land as a pasturage so long because they had no immediate need for cultivation and they had been living far away from the suit land, they should not be prevented from exercising their right to the suit land as owners by cultivating the land and thereby being totally deprived of the enjoyment of the same.

3. The plaintiff-appellants brought the instant suit in a, representative capacity on behalf of a fluctuating and unascertained body of persons constituting the village Asti. It is settled law that the doctrine of Lost Grant has no application to such rights as those of the inhabitants of a particular locality to continue an ancient and established user of some piece of land (See observations of the Privy Council in *Lakshmidhar Misra and others v. Rangalal and others* AIR 1950 P.C. 56 at page 59). Their Lordships in *Lakshmidhar Misra and others v. Rangalal and others* (Supra), in this connection had referred to the judgment of B. K. Mukherjea J. (as he then was) in *Asrabulla and Others Vs. Kiamatulla Haji Chaudhury and Others*, . In their Lordships' view "the true legal basis to such rights lies in custom." "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."

4. In the instant case the courts of fact have found immemorial user of the suit land as a grazing field of the village Asti. In fact, two courts of fact have held that all the attributes of valid custom except reasonableness had been fulfilled. The plaintiffs' claim of right of pasturage as a custom has been negated only on the ground that the said right claimed by them was not reasonable. Therefore, the only point in this appeal is whether or not the right of pasturage by way of custom claimed by the plaintiffs was reasonable or not.

5. "Custom" has been defined as local common law which is established by long use. Therefore, one of the ingredients of a valid custom is its reasonableness. If it is against reason it has no force in law. Reasonable for the purpose is not to be understood as meaning every unlearned man's reason, but artificial and legal reason warranted by authority of law. Consequently, a custom may be good although the particular reason for it cannot be assigned. It is sufficient if no good legal reason can be assigned against it. When, however, it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the custom, even though it may have existed from time immemorial, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom (vide Halsbury's Laws of England, 4th Edition Vol. 12, paragraph 409). It has been also held that the period for ascertaining whether a particular custom is reasonable or not is at its inception. The commencement must be based on a reasonable cause and must not be contrary to the public good or injurious or prejudicial to the many. In other words, by the expression "reasonable" is meant that it is for the benefit of the commonwealth. The leading case on the point is the decision of *Mercer v. Denne* (1904) 2 Ch. 534 at page 5517 per Farwell J; affirmed in (1905) 2 Ch. 538 C.A. B. K. Mukherjee J. (as he then was) in *Asrabulla and others v. Kiamatulla Haji Chowdhury* (Supra) at page 507 of 41 C.W.N. had relied upon the said decision. (See also Halsbury's Laws of England, 4th Edition, Vol. 12 paragraph 411). Whether an alleged custom is reasonable or not is a question of law and it is open to the High Court in second appeal to look into the facts of a case to arrive at a finding regarding the reasonableness or otherwise of an alleged custom (vide *Mokshadarani Dassi and others v. Karnadhar Mandal* 19 C.W.N. 1108; *Asrabulla and others v. Kiamatulla Haji Chowdhury* (Supra) at page 58.

6. The lower appellate court has pronounced the right of pasturage claimed by the plaintiffs as an unreasonable one because the same if upheld will prevent the owners from exercising their right to the suit land. The court of appeal below in this connection relied upon the decision of M. C. Ghose J. in *Saladurjaman Chowdhury and Others Vs. Oazaddin and Others*, . M. C. Ghose J. in *Saladurjaman's case* (Supra) found that in the said case immemorial usage had not been sufficiently established. This finding was sufficient for disposal of the case before M. C. Ghose J. Therefore, the further observations of the learned Judge about the reasonableness or otherwise of the claim of pasturage set up in the said case appeal to be obiter. I am unable to accept the extreme submission

of Mr. Panda, learned advocate for the respondent, that M. C. Ghose J. in *Saladurjaman's* base (Supra) laid down as an absolute proposition of law that whenever a customary right completely deprives the owners of their right to the land over which custom is claimed, the same must be held as unreasonable. It may be pointed out that M. C. Ghose J. had concurred with B. K. Mukherjea J. in *Asrabulla's* case (Supra) in upholding a claim of customary right of pasturage of the inhabitants of a village over lands of an adjacent village. A custom is not unreasonable only because it is prejudicial to the interest of the individual. In each case the court has to consider the customary right claimed is for common good or for the benefit of the community at large. The Court has to consider the facts and circumstances of each individual case. "At the same time an alleged custom would be held to be unreasonable if it would entail unnecessary expense or throw an unjust or disproportionate burden on some individual for the benefit of others or on the ground that it would destroy the subject-matter of the right (see *Halsbury's Laws of England*, 4th Edition, Vol. 12, paragraph 13)". Nasim Ali J. in *Chandra Nath Das and Others Vs. Puskar Chandra Das and Others*, , had distinguished the decision in *LutchmEEPut Sing v. Sadanka Nushya* (1883) 9 Cal. 698 which was relied upon by M. C. Ghose J. in *Saladurjaman and others v. Oazaddin and others* (Supra), in the following manner :--

In that case fishery right was claimed in certain beels against the owner of those beels by an unlimited number of tenants of several paraganas. Under these circumstances, it was held that such a custom would be unreasonable, for if the right based on such a custom were declared the tenants would take away the whole fish stocked in the beels and nothing would be left for the owner. The learned Judge in that case relied upon the case of (1878) 3 Ex. D 361 (2). But in (1875) 1 Ex. D 1 (3), the possibility that the custom there set up might have the effect of taking away from the owner the whole use and enjoyment of property was not thought sufficient ground for disallowing it.

7. The Judicial Committee in *Lakshmidar Misra and others v. Rangalal and others* (Supra), had upheld the customary right of residents of a village to use a particular piece of land as a cremation ground and that no part of the said site could be made available for the purposes of private industry. Accordingly, the defendants of the said case were directed to remove their mills, buildings, machineries and other structures and to restore the disputed land to its original condition and render it useful as a cremation or burial ground.

The decision of the Judicial Committee in *Bholanath Nandi v. Midnapore Zamindary Company* 31 I.A. 75 : 8 C.W.N. 425, is not relevant for the purpose of deciding the present case. Bijan Kumar Mukherjea J. in *Asrabulla & others v. Kiamalulla Haji Chowdhury and others* (Supra) pointed out that in *Bholanath Nandi v. Midnapore Zamindary Company* (Supra), the right of pasturage was claimed by different sets of plaintiffs in seven suits as an easement by each individual villagers as appurtenant to his tenancy and in the said case the right of pasturage was not claimed in gross by the villagers in general in respect of a

particular locality. In the present case, however, as already stated the plaintiffs" claimed right of pasturage over the suit land not by the easement but by way of custom.

8. We may now proceed to consider the facts and circumstances of the present case and whether the custom of pasturage was supported by evidence proportionately strong and convincing. The lower appellate court after referring to the oral evidence adduced on both sides made the following findings :--

Practically all the witnesses examined by the parties excepting the defendant No. 2 (D.W. 5) who is very much interested in the result of the suit, supports the case of the plaintiffs that they had been using the suit land for a pretty long time by grazing cattle to the knowledge of the landlords and quite openly and uninterruptedly in seasons and out of seasons and during this long period at least over 50 years the landlords, the owners of the suit land did not do any act of possession on the suit land nor did they ever attempt to bring the suit land under cultivation in the exercise of their right of ownership.

9. Both in the C. S. and R. S. Records the disputed plot of land had been recorded in possession of the villagers of Asti mouza for use as a common pasturage. The suit land was low land and, therefore, it was unfit for cultivation during the rainy season. It had transpired in evidence that the villagers owned about 150-200 heads of cattle and they had no other pasturage in the mouza. The learned Judges in Asrabulla's case (supra) in order to consider the reasonableness of the custom of pasturage claimed in the said suit had referred to the thak papers and to the Commissioner's report. The Commissioner found that there were 730 heads of cattle in the plaintiffs" village and the available pasture land was even less than four hauls. In the circumstances, the custom of pasturage was found to be reasonable. In my view, the custom of pasturage in the instant suit also has been established by very strong and convincing evidence. The finding by the lower appellate court is that throughout the owner of the land in question did not exercise the right of ownership over the suit land and only on 21st Bhadra, 1365 B.S. The defendant No. 1, who had purchased the interest of the defendants 2 to 4 had entered upon the land for cultivation of paddy in the rainy-season. The suit in question was brought within the two years from the said date.

10. The lower appellate court has further found that the villagers had claimed their right of pasturage on the suit land even in the rainy season when they would only cut grass from the suit land which in no case could meet the fodder of the cattle of the entire village and the cultivation of the land in the season would not affect the villagers very much. The lower appellate court had referred to the owners "moderate claim of cultivating the same in rainy-season". In other words, the lower appellate court was inclined to find that the owners were entitled to cultivate the suit land during the rainy season. But the lower appellate court rejected the plaintiffs" claim for customary right of pasturage even during the rest of the year. On the finding made by the lower appellate court it should have

declared the plaintiffs' right of pasturage except during the rainy season.

11. Accordingly, the plaintiffs' suit should be decreed in part and their right of pasturage over the suit land except during the cultivation season should be upheld. They would, however, have no right of pasturage over the suit land during the months of Jaistha and Kartik each year. During the rest of the year, however, the villagers of village Asti shall be entitled to exercise their customary right of pasturage over the suit land. The defendants are admitted owners of the suit land and as early as 1385 B.S. they had improved the land by putting up bandhs. Therefore, it would not be a sound exercise of discretion to grant the prayer of the defendants for mandatory injunction.

12. The suit property has admittedly been retained by the defendants under the provisions of the West Bengal Estates Acquisition Act. Therefore, the said customary right of pasturage even considered as an "encumbrance" did not stand annulled by reason of the notification published u/s 4 read with Section 5 of the West Bengal Estates Acquisition Act. I have explained in my decision in Satish Chandra Naskar and Others v. Upendra Nath Biswas and Others 1977 (2) CLJ 236 , the true legal position. Therefore, the decision of the Supreme Court in State of West Bengal Vs. Sudhir Chandra Ghose and Others, is distinguishable.

13. I, accordingly, allow the appeal in part and set aside the judgments and decrees of the lower appellate court and the trial court. The plaintiffs shall be granted a decree declaring their customary right of pasturage over the suit land except during the months of Jaistha and Kartik. They, however, would not be entitled to exercise right of pasturage over the suit land during the months of Jaistha and Kartick each year. Rest of the prayers in the plaint including the prayer for mandatory injunction would stand disallowed. In the circumstances, of the case, both parties will bear their respective costs throughout.