

(1953) 03 GAU CK 0005
In the Gauhati High Court
Case No : Civil Rule No. 118 of 1952

Sandhiram Mahajan and Others

APPELLANT

Vs

Deputy Commissioner and Others

RESPONDENT

Date of Decision : 06-03-1953

Acts Referred:

Assam Forest Manual Rules — Rule 3
Assam Forest Regulations, 1891 — Section 34(2), 35(2), 72
Assam General Clauses Act, 1915 — Section 15
Constitution of India, 1950 — Article 226
General Clauses Act, 1897 — Section 14

Citation : AIR 1953 Guw 168

Hon'ble Judges : Sarjoo Prasad, C.J; Ram Labhaya, J

Bench : Division Bench

Advocate : B.C. Barua and P.N. Sarma, for the Appellant; D.N. Medhi, Senior Govt. Advocate for No. 1, S.M. Lahiri and T.N. Phookan for Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

Ram Labhaya, J.—This petition arises out of orders passed by the Deputy Commissioner and Additional Deputy Commissioner, Kamrup with a view to evicting petitioners from their "Khutis" in Marasarudiya and Gardhiyarchar which form parts-of a Grazing Reserve.

2. A professional grazing reserve known as Kurihamari Grazing Reserve is situate in Mouza Pub-Barkhetri within the Nalbari Circle in the Kamrup District. This grazing reserve admittedly is an unclassed state forest. The case for the petitioners is that they are professional graziers and they have been grazing their cattle in the Khurihamari grazing reserve with their Khutis in Marasarudiya and Gardhiyarchar areas of the reserve for 10 or 12 years. The Deputy Commissioner on 1-5-1343 earmarked those areas for their "Khutis" They have been paying grazing fees from year to year and obtained permit also for the current year which commenced from 1-7-1952. The permits admittedly are for grazing In

Khurihamari Professional Grazing Reserve. They do not specify areas where "Khutis" are located.

3. On 9-9-1951 the petitioners received a notice from the Deputy Commissioner, Kamrup directing them to remove their "Khutis" with their cows within 7 days of the receipt of the notice to Duradhorachar in Kurihamari Reserve. The notice also stated that on their failure to comply, they will be punished in accordance with law. In this notice the Deputy Commissioner also intimated the grounds which formed the basis of his order, to the petitioners. They were informed that on account of the herding of their cows by them in close vicinity of the buffaloe goalas of Khurihamari Reserve, the buffaloe goalas had to suffer harm and this conduct was leading to other complications. This notice was issued in pursuance of an "ex parte" order dated 8-8-1951, made on the representation of respondents 2 to 3 to the effect that keeping of buffaloes and cows in the same vicinity was causing loss to the buffaloe goalas as cows had been spoiling or swallowing quantities of salt meant for buffaloes and were also damaging clothing kept in the court-yards by buffaloe goalas. The petitioners applied to the Deputy Commissioners for a review of his order pointing out that the new site to which they were asked to shift was a low-lying area which remained submerged in the rainy season and the cows if removed there, would not survive. The petition of review was heard by the Additional Deputy Commissioner who rejected it. The petitioners then preferred an appeal to the Chief Minister and the Revenue Minister. They were informed on 9-4-1952 that they should seek redress from competent authority. They again approached the Deputy Commissioner and asked for stay of execution of the order passed against them. On 16th June the Deputy Commissioner ordered that his previous order stood and should be executed with the help of the police if necessary. He ordered the S. D. O., Nalbari to allow the petitioners reasonable time not exceeding one week to shift to the new site.

This order was also passed by the Additional Deputy Commissioner, who on the representation of the petitioners on 23rd June allowed the petitioners one month's time to shift on account of high flood in the area. He also held out the hope that if the flood did not subside by that time, further time would be allowed. On 19-7-1952 he allowed them further time till 15th October to remove their "Khutis". On 29th August he again directed the petitioners to shift to the new site within the same reserve. By this order he also permitted them to shift with leave to some other place like Balachar, Gaypurdiya and Pahumarijara but insisted on their shifting from the site where their "Khutis" were located as originally ordered on 6-12-1951. On behalf of the petitioners it is urged that the impugned orders are without jurisdiction as the Deputy Commissioner had no power to evict the petitioners or to direct the removal of their "Khutis" under the rules which regulate grazing in the unclassified forest reserves. It is further contended that the orders in question were discriminatory in nature as they gave preferential treatment to the respondents who are influential.

4. The area of the reserve is 18,403 Bighas. The petitioners have been directed to shift from Gardhiyarchar and Marasarudiya to Duradhorachar. Duradhorachar had a large area. By his order of 29th August, the Additional Deputy Commissioner has also permitted the petitioners to approach the sub-divisional Officer, Nalbari in case instead of shifting to Duradhorachar they preferred going to Balachar, Gaypurdiya or Pahumarijara, other areas in the same reserve.

5. Under the Forest Regulation of 1891 the Provincial Government has power to constitute any land at the disposal of the Government a reserved forest in the manner provided in the Act. Section 29 of the Act authorises the Government by notification in the official Gazette to constitute any land at the disposal of the Government a village forest for the benefit of any village community or group of village communities. Section 34 of the Act provides for protection of unsettled forests belonging to the Government. It provides that no person shall make use of any forest produce of any land at the disposal of the Government and not included in a reserved forest or village forest, except in accordance with rules to be made by the Provincial Government in this behalf, or as provided by the last section of this Chapter (Chap. IV). Clause 2 of Section 34. enumerates matters which may be regulated by these rules. Under Sub-clause (e) of Clause 2 such rules may, with respect to such land regulate or prohibit the cutting of grass and pasturing of cattle, and regulate the payments, if any, to be made for such cutting or pasturing. Part II of the Assam Forest Manual embodies general rules under the Regulation. These rules have the force of law. Chapter 2 of Part II contains rules regarding unclassified state forests. Unsettled forests referred to in Section 34 of the Act are described as unclassified state forests, they not being reserved forests or village forests. In Chapter 3 of Part II are grazing rules under Sections 34(2), 35(2) and 72(d) of the Assam Forest Regulation. Rule 3 (ii) of Chapter 3 provides that the Deputy Commissioner or the Sub-divisional Officer may fix the sites of "Khutis" or Bathans and these shall not be moved to a new site without permission of the Deputy Commissioner or the Sub-divisional Officer

6. Mr. Barua on behalf of the petitioners has strenuously contended that the Deputy Commissioner having fixed the "Khutis" once could not change the sites during the currency of the period of the permit. The rule does not make it obligatory on the Deputy Commissioner or Sub-divisional Officer to fix the "Khutis" or the Bathans. They may fix sites. Permission to shift to another site can be given by the competent authority. Shifting of sites is thus contemplated by the rules though with the permission of the Deputy Commissioner. The mandate of the rule is that the grazier shall not have the right to shift the sites of "Khutis" or Bathans without obtaining previous permission. He may apply for such permission and he may be permitted to shift from the site originally allotted to him. The question is whether the Deputy Commissioner may on his own motion or the motion of other persons having "Khutis" or Bathans contiguous to the fixed "Khutis" of a set of graziers may also order them to shift the site of "Khutis". Stated in other words the issue is whether having fixed the sites of "Khutis" once the Deputy Commissioner or the Sub-divisional Officer has the

power to change their sites. The rules do not in express terms confer any such authority on the Deputy Commissioner or Sub-divisional Officer. It is therefore argued that where the Deputy Commissioner or the Sub-divisional Officer has fixed the site of the "Khutis" once, he cannot alter them during the currency of the permit.

7. The argument is attractive but it has its-obvious snags. The permit itself does not specify the site or location of "Khutis" or Bathans. It authorises grazing in an unclassified forest "specified in the permit. It gives no right to the graziers to graze their cattle in a particular area of the unclassified forest. Nor does it give them an unqualified right to have their "Khutis" or Bathans in a particular part of that forest. Need for fixing "Khutis" or Bathans may not be felt at all. If it becomes necessary, the Deputy Commissioner or the Sub-divisional Officer, as the case may be, has got power to fix the sites. The learned Advocate-General contends that the power to fix implies also the power to re-fix sites of "Khutis" or Bathans unless the language of the rule expressly provides to the contrary. He bases his contention on the provisions contained in Section 15 of the Assam General Clauses Act. This section provides that where any power is conferred by any Act or regulation of the Provincial Legislature then (unless a different intent appears,) that power may be exercised from time to time as occasion arises.

Under this provision if need for a re-fixation or alteration of sites is felt, the Deputy Commissioner or Sub-divisional Officer shall have jurisdiction to alter the sites of "Khutis". Circumstances which may make re-fixing of the sites of "Khutis" necessary or desirable can be easily conceived. The effect of Section 15, Assam General Clauses Act would be that the competent authority shall have the right to re-fix them unless a different intention could be read into the rule. We do not think it is possible to read any such intention. The rule was primarily intended to prohibit shifting of sites by the graziers without the permission of the Deputy Commissioner. It is not intended to create any limitations on the power of the Deputy Commissioner or the Sub-divisional Officer. It cannot be said that the rule itself in express terms or by necessary implication or intendment prohibits re-fixation or the alteration of sites of "Khutis" or Bathans during the currency of the permit. By virtue of Section 15, Assam General Clauses Act, the competent authority will have the power to fix sites for "Khutis" from time to time according to the need of the situation. In this view of the matter the impugned orders would not be in excess of the jurisdiction that Rule 3 (ii) confers on the Deputy Commissioner or the Sub-divisional Officer.

8. Mr. Barua has also referred us to provisions relating to reserved forests and village forests. Rules u/s 72(c) provide for ejectment from reserved forests. The Divisional Officer may eject any person from land in a reserved forest in which no person has been allowed to settle other than as a villager admitted in accordance with the rules published in notification No. 4631-R dated 6-12-1930 or any rule issued in substitution thereof to govern the administration of forest villagers. Such persons may be ejected or ordered to vacate forthwith and the Divisional

Officer may sell, confiscate, destroy any crop raised or any building or other construction erected without authority. He has also referred to Rule 4 of Chapter VII which relates to the establishment and control of village forests. This rule also authorises the Divisional Forest Officer to evict summarily from a village forest without payment of compensation any one who does not comply with the rules or who refuses to carry out his orders so far as they are consistent with the rules or whose conduct impairs the harmonious working of the village. Mr. Barua argues that no similar power of the ejectment from unclassified forest is given to any officer by the rules. The inference according to him is that there is no such power of eviction. We need not at this stage determine what powers of eviction the Deputy Commissioner or the Sub-divisional Officer acting under Rule 3 (ii) relating to unclassified forest is possessed of and when, if his orders are not obeyed and forcible eviction becomes necessary.

The petitioners have claimed relief under Article 226 by issue of high prerogative writs. If they are in default and have not obeyed orders which the Deputy Commissioner was authorised to issue under the rules, they would be out of Court on that ground alone. Mandamus may be refused when to grant it would accomplish a wrong. Its purpose is to remedy a wrong, not to promote it and should not be granted in aid of those who do not come to Court with clean hands. "If the orders passed were by competent authorities, the petitioners will have no case for any of the extraordinary writs. For, the effect of the writs would be to aid them in their persistent and contumacious disregard of the orders of a competent authority. Mr. Barua has not pressed that even if the orders are found to be within the jurisdiction of authorities concerned, petitioners would be entitled to the writ they have prayed for. We have found that the impugned orders are not without jurisdiction. Petitioners therefore were under an obligation to comply with those orders. They have failed to do so and this failure completely disentitles them to any protection from this Court by the issue of any high prerogative writs.

9. The last contention raised by Mr. Barua is that the reasons given for shifting of sites were not enough to support the order in law and that the orders involved discrimination in the application or the administration of the laws which regulates grazing in unclassified forests. He points out that the object was to save the buffalo goals from alleged harm and to avoid other complications, the nature of which is not indicated. In support of this contention he has relied on--"London, Brighton, and South Coast Rly. Co. v. Truman" (1885) 11 A C 45 . That case does not help the petitioners. In that case it was held that the Railway company had acquired land for purposes authorised by the Act. It was incidental and necessary to the authorised use of the Railway for cattle traffic and the company was not bound to choose a site more convenient to the adjoining occupiers of land. This decision is of no assistance to the petitioners who have challenged the validity of an order which is administrative in character. The Deputy Commissioner or the Sub-divisional Officer when exercising his power of fixing or re-fixing the sites is not bound by any objective standards. He is not bound to give any reasons.

There is no provision for appeal against these orders. Fixing of sites or their alteration is left to his discretion. Any erroneous exercise of this discretion cannot be controlled by high prerogative writs. The contention really amounts to a challenge to the order on its own merits. In view of the nature of the order it is not open to us to examine and rectify the order on its merits as an appellate authority. No malice of any kind has been attributed to the officials concerned and orders cannot be regarded as having been made "mala fide" in legal contemplation as they have not been shown to have been made an extraneous consideration or for purposes other than those of the rules under which action has been taken.

10. The petition is dismissed and the Rule discharged.

Sarjoo Prosad, C.J.

11. I agree.