CALCUTTA HIGH COURT

Asrabulla

Vs

Kiamatulla Haji Chaudhury

(B.K. Mukherjea ,J.)

05.01.1937

JUDGMENT

B.K. Mukherjea, J.

1. This appeal is on behalf of some of the defendants in a suit commenced by the plaintiffs on their own behalf, as well as on behalf of the inhabitants of Kedupur village, for establishment of a right of pasturage over the lands in suit. The defendants are residents of an adjacent village named Daudpur where the lands in dispute are situated, and they too have been sued in a representative capacity, as representing all the villagers with requisite permission under Order 1, Rule 8, Civil P.C. The case of the plaintiffs in substance is that from time immemorial the inhabitants of village Kedupur having been grazing their cattle in the disputed land openly and uninterruptedly and thereby acquired a right of pasturage therein. The right is claimed on the basis of a custom, as well as on immemorial user giving rise to a presumption of lost grant. It is claimed also as an easement of necessity. The suit was contested by some of the defendants, who traversed the material allegations in the plaint, and contended inter alia that the plaintiffs had not acquired any right either as an easement of necessity or by way of custom or implied grant.

2. The trial Court decreed the suit, holding that the plaintiffs had acquired a right of pasturage, on all the three grounds set out in the plaint, over plots Nos. 1 and 2 of the Commissioner's map, excluding certain portions which were specified in the decree. This decree was affirmed on appeal though the lower appellate Court negatived the claim of the plaintiffs, so far as it rested on the ground of its being an easement of necessity. It is against this decision that a second appeal has been taken to this Court and Mr. Gunada Charan Sen who has appeared in support of the appeal has pressed the following points on behalf of his clients. It has been contended in the first place, that no right of pasturage based on custom or otherwise could be claimed by the plaintiffs in viewof the provisions of Section 6, Assam Land and Revenue Regulation, which prevent the acquisition of any such rights in the province of Assam. It is next argued that even if such rights could be acquired in law there could not be a grant, either actual or presumed, in favour of an indeterminate body of persons as the inhabitants of a village. The third contention is that the custom alleged by the plaintiffs and found by the Courts below is unreasonable; and lastly it is urged that there has been an irregularity in the procedure, which resulted in miscarriage of justice inasmuch as the notice under Order 1, Rule 8, Civil P.C., was actually served in the village, only three days before the hearing of the suit commenced, and the villagers in general who are bound

by the decree had no opportunity of coming up and contesting the suit properly. As regards the first point, it is not disputed that the properties in suit are situated in the district of Sylhet, where the Assam Land and Revenue Regulation is in force. Section 6 of the regulation stands as follows: No right of any description shall be deemed to have been or shall be acquired by any person over any land to which this statute applies, except the following: (a) right of proprietors, landholders, and settlement holders other than landholders, as defined in this regulation and other rights acquired in manner provided by this regulation; (b) rights legally derived from any rights mentioned in Clause (a); (c) rights acquired under Sections 26 and 27 Lim. Act, 1877; (d) rights acquired by any person as tenant under the rent law for the time being in force.

3. If this section be taken to lay down exhaustively as to what kinds of rights over property one could acquire in the province of Assam, and if the acquisition of any other kind of right is distinctly prohibited, undoubtedly it favours the contention of the appellants, for the rights of pasturage claimed by the plaintiffs, do not come within Sections 26 and 27, Lim. Act, and it is not without doing violence to the language that one can speak of customary rights as coming within the provision of Clause (b) of the section. In our opinion, however, this wide interpretation would not be proper having regard to the scope and object of the regulation itself. The regulation does not purport to repeal all laws, so far as the province of Assam is concerned under which various other kinds of rights over property could be acquired, nor does it abrogate all customs or customary rights as invalid. It is to all intents and purposes a revenue Code and it provides for a variety of things including settlement of land revenue, preparation of record of rights, registration of transfers, partition of estates and the procedure to be followed in realising arrears of revenue. Ch. 2 of the regulation defines in the first place the rights of the different classes of owners of land in the provinces which are described under three heads as (1) proprietor, (2) landholder and (3) settlement holder, and Clauses (b), (c) and (d), Section 6 of the chapter enumerate the other rights over land, besides the three mentioned above, which are also recognized for purposes of this regulation.

4. In our opinion for purposes of settlement of land revenue, and for exercising the powers conferred by the regulation, Government would not recognize any other pieces of right over land save and except those which are specified in Section 6. But that does not mean that as between any party, these rights could not be acquired under the provision of laws which are also in force in Assam, or that the rights already acquired would stand confiscated. We may take by way of illustration the case of acquisition of rights over land by adverse possession. Certainly a man could acquire right by adverse possession in Assam, and we are unable to hold that the disseisor gets title derivatively from the true owner which alone could bring him within the purview of Clause (b) of Section 6. Rights of pre-emption on the footing of customs have been enforced even among Hindus in the province of Assam, and have been judicially recognized in many cases: vide the case in Nabin Chandra Sarma v. Rajani Chandra Chakravarti AIR 1921 Cal 162, although they would not come under any of the clauses attached to Section 6. Mr. Sen seems to suggest that all these may be said to be derivative rights as contemplated by Clause (b). It is difficult, as we have said already, to accept this suggestion, as the plain language of Clause (b) would repel such construction. But even if this construction is accepted then in the present case also, the rights claimed by the plaintiffs can be said to be in a sense derived from the proprietors or settlement holders, for a right based on custom or presumed grant, is in its ultimate analysis a right derived from the true owner either expressly or from acquiescence. We overrule therefore the first contention of Mr. Sen.

5. The second contention of Mr. Sen raises an interesting point as to whether the rights of pasturage, claimed by a whole body of villagers, can be acquired by grant either express or presumed. We may say at once that the rights claimed by the plaintiffs are certainly not easements in the proper sense of the word. They are not privileges attached to individuals in respect of their lands. These are rights claimed for a fluctuating class of persons in respect of a locality. They come under the description of the second class of rights intermediate between public and private rights, as enunciated in the well known case in *Chunilal v. Ram Kissen*[1] and they attach to certain classes of persons or portions of the public and have their origin ordinarily in custom. But can there be a presumption of lost grant in cases of such rights when long user is proved? As the Judicial Committee explained in Mahommad Muzafferal Musavi v. Jabeda Khatun the presumption of an origin in some lawful title to support possessory rights long and quietly enjoyed, where no actual proof of title is forth-coming, is not a mere branch of the Law of Evidence. It is resorted to because of the failure of actual evidence. It is not a presumption to be capriciously made and the Court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed without doing violence to the probabilities of the case. "It is a principle, which,"' says *Lord Loreburn, L.C. in Harris v. Earl of Chesterfield*[2]. is based on good sense. The lapse of time gradually effaces records of past transactions and it would be intolerable if any body of men should be dispossessed of property which they and their predecessors have enjoyed during all human memory, merely upon the ground that they cannot show how it was originally acquired. That is the reason why the law infers that the original acquisition was lawful unless the property claimed is such that no such body of men could lawfully acquire it, or the facts show that it could not have been acquired in the only ways which the law allows.

6. Thus in order that there may be a presumption of lawful origin, it is necessary to establish that there was no legal bar in the way of valid grant at its inception, and that not only there was a capable grantor but there was a capable grantee also in whose favour the grant could have been made. If for any reason a valid grant could not have been made no presumption of such a grant can arise. Now it has been held in England, as early as in the year 1590, that the inhabitants of a village could not eo nomine acquire by prescription a right of way, the inhabitants not being capable grantees: vide *Foxall v. Venables*[3] *In Mounsey v. Ismay*[4] the citizens of Carlisle for themselves and their neighbours claimed a right by custom to hold horse races on a certain day every year in the land in suit in respect of which an action for trespass was brought by the plaintiff. Martin B. in giving judgment for the plaintiff held inter alia that: Such a right as was set up by the defendants could only exist by custom, a grant of such right to the freemen of Carlisle, or the citizens of Carlisle would be void. Such indeterminate bodies as the freemen of a city not being themselves a corporation are incapable of being grantees.

7. This view was reiterated in (1911) A C 6234 where the free holders of five parishes adjoining the river Wye claimed a fishery right with reference to a non-tidal portion of the river. The right was exercised admittedly for several centuries openly, uninterruptedly and as of right, and the question was whether a presumption of lost grant could be made. The House of Lords decided by a majority that no presumption of lost grant was available in the case, inasmuch as the free holders of several parishes who were an indefinite and fluctuating body of persons could not be proper grantees in law. Lord Ashbourne, whose was one of the dissenting judgments, made a suggestion that the King might have made a grant to the free holders of the area of fishing in gross, and this may have made them a corporation or the King may have made a grant to an

existing corporation upon trust for the free holders. It was pointed out on the other hand by Lord Gorell, who sided with the majority, that there was no trace of any corporation existing at any time; and the right was asserted by individual free-holders as appurtenant to their respective free holders. There was no foundation for the case, that the presumed grant from the King would incorporate the free holders quoad the grant. In this Court the point came up for decision in *Lutchmeeput Singh v. Sadaulla Nushyo*[5] which arose out of a suit instituted by the plaintiff for restraining the defendants from fishing in certain waters within the ambit of the plaintiff's zemindary. The defendants contended that they had acquired a prescriptive right of fishing in the beels under a custom according to which all the inhabitants of the zemindary had the right of fishing. On the point as to whether there could be a presumed grant from long user the learned Judges observed as follows: Then again from the length of user it cannot be presumed that there was a grant by the Sovereign power. It seems to us that the presumption of a grant is impossible; because it cannot be shown that there was some ascertained grantee or grantees. The Subordinate Judge was of opinion that the tenants of the several parganas in whose favour the right in question is claimed must be considered to constitute a unit, that is to say he considers that they form a corporate body. We fail to see any tangible ground for the assumption. For instance it may be that such a grant may be presumed in favour of a village community if such community be shown to possess all the essentials of a corporate body; but we do not see any reason suggested by any evidence on the record which can support the conclusion that the tenants of the different parganas in whose favour the right in question is claimed form anything like a corporate body.

8. This reasoning applies fully to the facts of the present case, and we are of opinion that no lost grant could be presumed in favour of a fluctuating and unascertained body of persons who constitute the inhabitants of a particular village. Our attention has been drawn to a decision of the Judicial Committee reported in *Bholanath Nundy v. Midnapur Zemindary Co.*[6] where the plaintiffs claimed a right of pasturage over the waste lands of the village which belonged to the defendants on ground of immemorial user. Their Lordships observed in the course of their judgment in this case that: On proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed.

9. It must be remembered however that there were seven suits commenced by different sets of plaintiffs out of which this appeal arose, and they were subsequently consolidated for purposes of hearing. The right of pasturage was claimed as an easement by each individual villager as appurtenant to his tenancy, and the allegation was that the plaintiffs and their predecessors had been enjoying the right of pasturage over the waste lands of the village from time immemorial. The trial Court held that the right was established under Section 26, Lim. Act, and their Lordships of the Judicial Committee restored this judgment with a direction that the defendants would be competent to improve these waste lands, provided sufficient lands were left for pasturage. It would be clear from the judgment, that this was not a right claimed in gross by the villagers in general in respect of a particular locality, and as such the observation of their Lordships do not in any way militate against the view we have taken, viz. that there could be no presumption of a lost grant in favour of the inhabitants of a particular village. In our opinion therefore the second ground urged by Mr. Sen is sound and must prevail. But we cannot, on this ground alone, reverse the decision of the Court below, inasmuch as it has found in favour of the plaintiffs on the ground of custom also.

10. Mr. Sen attempts to assail this finding on custom, substantially on the ground, that the custom

is unreasonable and hence invalid. It may be taken as fairly settled that a question as to the reasonableness or otherwise of a custom is a question of law and it is open to us in second appeal to look into the facts found by the lower appellate Court, for the purpose of deciding as to whether the custom alleged is reasonable or not: see the case in *Mokshadayini Dassi v. Karnadhar Mandal* [7]The period for ascertaining as to whether the custom is reasonable or not is certainly the period of its inception: *Mercer v. Danne*[8] *Mercer v. Denne*[9] and Mr. Sen has contended before us that the Thak records which were prepared between 1860-66 would show that village Kedupur had 400 bighas of patit land within its ambit, which could be used as grazing ground, and it was most unreasonable for the villagers, who had only 40 cultivators amongst them at the time to invade the lands of another village for the purpose of extending their rights of pasturage. We may say in the first place that there is no definite finding that the custom originated near about the time of the preparation of the Thak records, and from the evidence discussed in the judgment of the lower appellate Court it is more probable that its origin was much later.

11. In the second place, we have looked into the Thak papers ourselves, and it seems to us that the description of the lands and the acreage as given there are palpably wrong. In the third place we do not know the number of cattle that existed at the time of the Thak Survey, and the 400 bighas of patit land might not have been available for pasturage at all. The Commissioner who went into the locality for local inspection found 730 head of cattle in the plaintiffs' village and the available pasture land was even less than four hauls. As we cannot rely on the Thak records, the materials, that we have actually got, lead to the only inference, that the custom alleged by the plaintiff is under the circumstances of the case perfectly reasonable. This contention of Mr. Sen, therefore, would fail. The last ground urged by Mr. Sen relates to the irregularity in the service of notice under Order 1, Rule 8, Civil P.C. It is not disputed that the notice was actually served in the village on 8th May 1933, and the hearing of the suit commenced on 11th May following. The time certainly was very short. But as the lower appellate Court has pointed out, the hearing continued for two months, and the judgment was actually delivered on 19th July 1933. All the villagers knew of the progress of the suit, and they had ample opportunities of coming up and defending it if they were so minded. As there was no prejudice we are not prepared to send the case back on this ground alone. The result is that although we do not agree with all the findings of the lower appellate Court, we affirm the decree on the ground that the plaintiffs have established a right of pasturage by custom over the lands specified in the decree of the trial Court. The appeal is thus dismissed. No order as to costs in this Court.

M.C. Ghose, J.

12. I agree.
Cases Referred.

1(1888) 15 Cal 460 (F B)
2(1911) A C 623
3(1590) Cro Eliz 180
4(1865) 34 L J Ex 52
5(1883) 9 Cal 698
6(1904) 31 Cal 503
7AIR 1915 Cal 421

8(1904) 2 Ch 534 at p. 557
9(1905) 2 Ch 538