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State of U.P. Vs. Ram Dass and ors.

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Court : Allahabad

Decided On : Mar-17-1975

Reported in : AIR1976All44

Judge : J.M. Lal, J.

Acts : Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951 - Sections 4, 6 and 7

Appeal No. : Second Appeal No. 248 of 1964

Appellant : State of U.P.

Respondent : Ram Dass and ors.

Advocate for Def. : S.C. Das, Adv.

Advocate for Pet/Ap. : K.S. Verma, Adv.

Disposition : Appeal allowed

Judgement :

J.M. Lal, J.

1. This second appeal has been filed by the State of U. P. against a decree passed against them by the courts below. That decree is for a declaration that the plaintiffs are entitled to catch fish in Plot No. 968 area 314.24 acres which

corresponds to Plot No. 1788 of First Settlement. It further restrains the defendants from interfering with the plaintiffs' right to catch fish.

2. The plaintiffs' predecessors Debi Bux Singh and others were formerly proprietors of village Kondar Pargana Mahadewa Tahsil Tarabganj, District Gonda where this pond is situate and is popularly called as Jheel Kondar. They however transferred their proprietary rights in this village to Raia Kishun Dutt Ram. But during the First Settlement Debi Bux Singh and others still claimedsome under-proprietary rights with land as well as in the Jheel in Question of which the total area at that time was 467 acres bearing number 1788, and also the groves, the banjar land and Abadi where their own houses and the houses of their servants were situate. The settlement Commissioner under his decree dated November 2, 1874 held that Debi Bux Singh and others (the descendants of the transferors existing at that time) had under-proprietary rights in an area of 218 bighas 9 biswas land which was in their cultivation as Sir on payment of annual quit rent at Rs. 443.73 paise. They were also declared to have under-proprietary rights in 20 bighas and 11 biswas of Banlar land and 17 groves which would be held rent free. They would also have under-proprietary rights in the sites of their own houses and those of their resident servants with right to fish and Khar in the said Jheel as well as the right to realise customary dues on ceremonial occasions like births and marriages from raiyats. This decree of the Settlement Commissioner was upheld in second Appeal by the learned Judicial Commissioner with this modification that a list of all the co-sharers on whom these rights were conferred was attached to the decree and the lands held by them as Sir or grove were specified therein. It is on the basis of that decree that the plaintiffs claim right to catch fish from the said pond even after the abolition of Zamindari without any let or hindrance by the State Government. Alternatively, they base their claim to that right on a customary easement also.

3. The defence of the State Government was that after the abolition of the Zamindari not only proprietary rights but all under-proprietary rights also vested in the State Government under Section 4 read with Section 6 of the U. P. Zamindari Abolition and Land Reforms Act (to be hereinafter called as the Zamindari Abolition Act) except the rights which were specifically saved under Section 7 or

any other provision of the Act. About the ponds like the present one with a right of fishery therein there was a specific provision for its vesting in the State Government contained in Section 6 (a) (i) of the Zamindari Abolition Act. The State Government was managing and breeding fish in this pond for commercial purposes through its Fisheries Department. As regards the plea of custom it was alleged that no such custom existed and in any case such a custom was unreasonable which cannot be recognised by law.

4. Both the courts below held that on the basis of the decree dated November 2. 1874 passed by the Commissioner during the First Settlement proceedings, the predecessors of the plaintiffs had acquired a right of fishery in the saidpond and that right was not taken away from them under the provisions of Section 4 read with Section 6 of the Zamindari Abolition Act. The State Government as successor-in-interest of Raja Kishun Dutt Ram would be bound by that decree. This finding has been challenged, by the learned Chief Standing Counsel on behalf of the appellant.

5. From a perusal of the judg-ments of the Assistant Settlement Officer, the Commissioner and the Judicial Commissioner passed in settlement proceedings, which were on settlement record which had been sent for by this Court as it had been sent for by the lower Appellate Court (since copies of those judg-ments which are on that record are not issued), it is evident that though Debi Bux Singh and others had transferred all their proprietary rights in the village Kondar in favour of Raja Kishun Dutt Ram some under-proprietary rights in favour of these persons including the right to fishery in the pond in question had been conferred on the transferers by the Settlement Authorities. The transferers had claimed the entire Jheel as their under-proprietary property but only the right of fishery was granted to them in this Jheel (pond). The right to receive customary dues on ceremonial occasions of births and deaths from the raiyats was also conceded to the plaintiffs' predecessors.

6. The question that arises in thissecond appeal is whether after the abolition of the zamindari the right of fishery can still be claimed by the plaintiffs on the basis of that decree. In my opinion, the courts below have been misled by thinking that

the State Gavernment is successor-in-interest of Raja Kishun Dutt Ram proprietor against whom that decree was passed in favour of the plaintiffs' predecessors granting them under-proprietary rights in some of the properties. The State Government acquired the estates of the intermediaries in exercise of its right of eminent domain under the provisions of the Act. Section 4 of the Zamindari Abolition Act provides that all such estates shall stand transferred to and vest except as hereinafter provided, in the State free from all encumbrances. The expression 'estate' has been defined in Clause (8) of Section 3 while 'intermediary' has been defined in Clause (12) of Section 3 of the Zamindari Abolition Act. Clause (12) provides that 'intermediary' with reference to any estate means a proprietor, under-proprietor, sub-proprietor. Thekadar, permanent lessee in Avadh and permanent tenure-holder of such estate or part thereof. From this definition it is evident that not only the estate of Raja Kishun Dutt Ram's successors who were the proprietors of this vil-lage but also the estate of the plaintiffs who were the successors of the uncier-proprietors would vest in the State Government under Section 4 free from all encumbrances except as provided elsewhere under that Act. It cannot be disputed that the right of fishery that was given to Debi Bux Singh and others under that decree against Raja Kishun Dutt Ram and others was in the nature of an encumbrance which would be a hindrance in the full and unrestricted use of that pond by the proprietor in any manner he liked. The pond could not obviously be used by Raia Kishun Dutt Ram in a way so as to exclude the predecessors of the plaintiffs from enjoying their right of fishery in it. The right of fishery that was conferred on the predecessors of the plaintiffs under that decree is itself an immovable property within the mean-ins of Transfer of Property Act as held by the Supreme Court in Ananda Behra v. State of Orissa. : [1955]2SCR919 . It may be stated that the entire bundle of rights in a property may constitute an immovable property and also a single or some of the rights in it may also constitute an immovable property. When a mortgage is created on an immovable property, the mortgagee's interest is an immovable property and the rest of the rights left with the mortgagor in that property also constitute immovable property.

7. Section 6 of the Zamindari Abolition Act provides that when the notification under Section 4 has been published in the Gazette then, notwithstanding anything contained in any contract or document or in any other law for the time being in

force and save as otherwise provided in this Act, the consequences as hereinafter set forth shall, from the beginning of the date of vesting, ensue in the area to which the notification relates. One of these consequences mentioned in sub-clause (i) of Clause (a) is that in every estate all rights, title and interest of all the intermediaries in fisheries shall vest in the State Government. The expression 'document' as used in Section 6 includes a decree also like the one passed by the Commissioner on 2-11-1874 in First settlement proceedings. From this is follows that in spite of that decree the rights of the plaintiffs as under-proprietors in the fishery in question shall vest in the State Government.

8. In this connection reliance is placed by the learned counsel for the plaintiff-respondents on the decision of this Court in Rai Krishan Saran v. State of U P.. : AIR1957 All455 in which the petitioners who filed the writ petition in the High Court maintained and operated a ferry in pursuance of a grant made by the East India Company in 1781. They had no interest in any of the lands. Anotification issued by the U. P. Government under the Zamindari Abolition Act declared that all private ferries except those mentioned therein vested in the Stats. On these facts it was held that rights of the petitioners to this ferry being independent of any lands which vested in the State by virtue of the notification under the Zamindari Abolition Act, the petitioners' right could not be termed 'the right of an intermediary' and therefore it would not be hit by the provisions of Section 6 (a) (i) of the Act. The ferry in question could not, therefore, vest in the State by virtue of the notification. In my opinion, this decision has no application to the facts of the present case. In this case the right of fishery was specifically conferred on the predecessors of the plaintiffs by virtue of their being under-proprietors after having sold their proprietary rights to Raja Kishun Dutt Rarn. The same remarks apply to another decision of this Court in Rai Pra-kash Narayan v. The State of U. P., (1959 RD 1771 in which it was held that under Section 6 of the Zamindari Abolition Act the rights, title and interest of intermediaries in the estates have alone vested. Where, therefore, a particular ferry, as the one in dispute in that case is unconnected with any estate acquired under the Act, it will continue despite the acquisition of the zamindari under Section 4 of the Act to belong to its previous owner and that Sub-clause (i) of Clause (a) of Section 6 will not entitle the State to claim that ferry.

9. It is then contended on behalf of the plaintiff-respondents that this right of fishery is saved to them under Clause (aa) of Section 7 which provides that nothing contained in this Chapter shall in any way affect the right of any person being a Bhumidhar, Sirdar, Adhivasi, or Asami of any land, to continue to enjoy any easement or any similar right for the more beneficial enjoyment of the land, as he was enioying on the date immediately preceding the date of vesting. In my opinion, this provision has no application to the facts of the present case. The right of fishery that has been claimed by the plaintiffs is not an easement or similar right for the mere beneficial enjoyment of the land. An unrestricted right to fishery for any purpose whatsoever including commercial purpose is claimed in this case by the plaintiffs. Obviously such a right cannot be said to be for the mere beneficial enjoyment of the land held by the plaintiffs as bhumidhars. This right like the right to realise customary dues on ceremonial occasions such as births and deaths from the raiyats cannot claim protection under Section 7 (aa) of the Zamindari Abolition Act.

10. Lastly it was argued that this right of fishery may be enjoyed by theplaintiffs as a customary right since there is a mention of it in the Wajibul-arz. The wajibul-arz which was prepared in the first Settlement on the basis of the decree passed by the Commissioner on Nov. 2, 1874 does not state that this right of fishery is available to the residents of this village irrespective of their being proprietors, under-proprietors or tenants. On the other hand, the Wajibul-arz only mentions the right of fishery of the predecessors of the plaintiffs on whom this right was conferred by the decree by virtue of their being under-proprietors after the sale of their proprietary rights to Raja Kishun Dutt Ram. Moreover, this alternative case based on customary right was definitely given up on behalf of the plaintiffs in the lower appellate court. A customary right, as claimed in this case, of fishery in the pond in question without any let or hindrance is also an unreasonable custom which is capable of destroying the very subject-matter of that right. Such an unreasonable custom cannot be recognised by law. This view finds support from two decisions of the Calcutta High Court in Brajendra Kishore v. Ishwar Kaiberta, (AIR 1933 Cal 5391 and Arjun v. Monoranjan De : AIR1934 Cal461 . In the former case it was held that a claim to profits a prendre over the soil of another, such as a right to fish without stint and for commercial purposes, which might lead to the

destruction of the subject-matter, is a claim of right unknown to law, and a custom which may be alleged to support it is bad and unreasonable, The same view was expressed in the latter case in which it was held that every custom sanctioned and upheld by the Courts must be reasonable. It is unreasonable when it throws an unusual burden on some for the benefit of others. It is also unreasonable if it would destroy the subject-matter of the right. A profit a prendre cannot therefore be supported on the ground of custom specially in favour of an indefinite and fluctuating body of persons, as it would result in the subject-matter being soon exhausted. It was also a case in which right of fishery was claimed on the basis of a custom.

11. A customary easement under Section 18 of the Easements Act like the right of pasturage in a plot of land in the village available to all the persons or a right to bury the dead bodies on a piece of land or to burn Holi on some land, is a customary easement which is available to all the residents of the village irrespective of their being proprietors, under-proprietors, tenants or simply raiyats. Of course, such a right may be saved from being extinguished under Section 6 of the Zamindari Abolition Act and the persons who had been enjoying that right may continue to enjoy it under Section 7 (aa) of that Act. But this cannot be said inrespect of right of fishery as claimed in this case without any stint. The plaintiffs cannot therefore claim the right of fishery in this case as a customary easement or as a customary right also

12. As a result of the above findings, the appeal is allowed. The decrees passed by the courts below are set aside and the plaintiff's suit is dismissed. But considering the circumstances of the case the parties shall bear their own costs throughout.

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