

BadruddIn and ors. Vs. Tej Ram and ors.

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Court : Allahabad

Decided On : Jan-22-1929

Reported in : AIR1929All233

Appellant : BadruddIn and ors.

Respondent : Tej Ram and ors.

Judgement :

1. This appeal and appeal No. 1584 of 1925 as also the appeals Nos. 1878 and 1879 of 1924 were connected for the purposes of arguments, although the two sets of appeals are, in one sense, independent. We had heard the last-mentioned two appeals, viz., Nos. 1878 and 1879 of 1924 and delivered a short judgment, which, however, had neither been signed nor sealed. On hearing appeals Nos. 1583 and 1584, we considered it desirable that the respondents' counsel in the appeals Nos. 1878 and 1879 of 1924 should be reheard and we reheard him accordingly. We are now in a position to decide all the four appeals on the same broad principle.

2. It appears that the river Bhakra flows between several villages, the village of Jatpura being on one side of the river. The defendants in each of the several suits out of which these appeals have arisen are the zamindars of the village of Jatpura. By suit No. 103 of 1923 the zamindars of village Hurhari, by suit No. 118 of 1923 the zamindars of mauza Mirnagar, by suit No. 112 of 1923 the zamindars of mauza Gularia and by suit No. 308 of 1923 the zamindars of mauza Sangarh,

each laid claim, separately, to certain tracts of land on the ground that these lands had been cut off from the village of Jatpura by the river Bhakra, and had been attached to their respective villages. It was alleged on behalf of the plaintiffs that there was a custom by the name of 'dhardhura' by which the deep stream of the river has always been the boundary between the village of Jatpura on the one side and the respective villages of the plaintiffs on the other. The defence was, in some cases, that there was no such custom of 'dhardhura' as has been alleged and, in others, while it was admitted that there was such a custom of dhardhura, it was contended that custom did not cover the present case. A distinction was sought to be drawn on the ground that, on this particular occasion, the river had not merely shifted its course on a wide bed, but had entirely made for itself a new channel, with the result that a large tract of land without even being submerged, became divided by the stream. It was contended that the custom alleged did not cover a case like this.

3. Our attention has been drawn to a recent case decided by a Bench of five Judges of this Court, viz., Kunjbehari Lal v. Jaimal Singh : AIR1928 All399 . This case draws attention pointedly to one thing and it is this The term dhardhura' is not a term of art and a mere statement that there is a custom of dhardhura does not necessarily mean that the custom is wide enough to apply to a case where an entirely new channel is cut by a river. In the Full Bench case, the plaintiff laid claim to what was undoubtedly his property before the river Deoha carved out for itself a new channel. The plaintiff said that the land on the other bank of the new channel continued to be his property in spite of the coming into existence of a new channel. The defence was that a custom of 'dhardhura' prevailed and by it the deep stream of the river formed boundary between the villages of the parties. The plaintiff admitted that there did exist a custom of dhardhura but he said that such a custom did not apply to the circumstances of the particular case, viz., where a new course is dug out by a river for itself. The defendants failed to prove that the custom alleged by them and admitted by the plaintiff was wide enough to cover the case before the Court. The result was that the Full Bench agreed with the Court of first instance in decreeing the plaintiff's suit.

4. It is clear from the Full Bench case that there is no charm in the term 'dhardhura' and that the mere allegation of the existence of the custom of dhardhura cannot be taken to mean that the custom applies so as to confiscate what was, the day before, the property of another man. It will be noted that the case of Gulab Rai v. Girwar Singh : AIR1927 All221 was referred to and considered by the Full Bench. It will be also noticed that one of the learned Judges who was party to the earlier case was a party to the Full Bench case. There are a few sentences in the earlier case which are capable of being construed as laying down that it is enough to pronounce the words 'dhardhura' in order to make it applicable to a case of the cutting out of a new channel by a river. With all respect, the case of Gulab Rai v. Girwar Singh : AIR1927 All221 was decided rightly, on its own merits, and on the evidence before their Lordships. At the end of para. 1 of the judgment there occurs the following sentence:

In the present case, an immemorial usage is established of old settlements and it is not denied that on several occasions in the past land cut off by the river has been incorporated in the opposite village.

5. The Bengal Regulation No. 11 of 1825 by Section 2 lays down that where an immemorial custom determining the rights of proprietors of two or more contiguous estates divided by a river exists, such custom shall govern their rights. An instance is quoted, there, of such a custom, but such instance is not exhaustive. There may be other kinds of customs. Evidently the regulation means that where any custom (provided it is not unjust or against the law) exists, that custom alone will prevail and it is only in the absence of a custom that the rule laid down by the regulation shall apply. The custom that may prevail at any particular locality, may be a custom absolutely identical with the rule laid down by the regulation itself, or the incidents of the custom may be different from the rule laid down by the regulation. In the illustration given in Section 2 of the regulation, there is nothing which implies that the custom quoted is a custom by which estates, cut off by the sudden change of the course of a river, cease to be the property of the original owner. This will be clear from the language of the entire section. It runs as follows:

Whenever any clear and definite usage of shekust pywust, respecting the disjunction and junction of land by encroachment or recess of river... (such as that the main channel of the river divide the estates shall be the constant boundary between them, whatever changes may take place in the course of the river, by encroachment on the one side and accession on the other)....

6. It will be noticed that the framers of the regulation were not considering at all a case of what is known under the Roman law as avulsion, i.e., tearing out of an estate by the sudden change in the course of a river. The words underlined (italicized) in the above quotation will amply justify this view. But as we have already stated, all customs that may have, from time immemorial, been governing the rights of the parties shall continue to do so, in spite of the Regn. 11 of 1825. Such an immemorial custom may be one applicable even to a case of a sudden change in the course of the river, as this Court had before it in the case of *Gulab Rai v. Girwar Singh* : AIR1927 All221 . Only such a custom which has a very far-reaching consequence must be established by clear and cogent evidence. A mere statement, therefore, that a custom of 'dhardhura' exists will not be enough, where a custom is pleaded. All the incidents of the custom must be pleaded and will have to be proved.

7. Having cleared the ground as to what was essential to be pleaded and established by the plaintiffs in these cases, we have examined the several judgments. While we find some indications that in his judgment in suit No. 112 of 1923 (S.A. No. 1878 of 1924) the learned Subordinate Judge was prepared to find for a custom such as would cover the sudden change of a river, there are also indications that the learned Judge was led away by the literal meaning of the word 'dhardhura.' He says:

The term dhardhura is very expressive, it literally means that the channel of the river is the boundary.

8. In sentences which follow the learned Subordinate Judge rightly puts forward the respective cases of the parties, but we are not quite sure that he realized the full significance of the defence. The learned Judge in appeal, Mr. Saksena, was certainly led astray, to a greater extent, by the term 'dhardhura'. At one place in his

judgment he says:

In the present case it has been proved that the custom of dhardhura, i.e. the stream is the boundary, prevails in the village and there is no difficulty in the application of the custom as to the land gained by gradual accretion or by sudden change.

9. It appears that the learned Judge was not prepared to draw any distinction between the land gained by gradual accretion and land gained (if the word 'gained' can be properly used) by sudden change. The appeals in the two suits No 112 and 308 of 1923 were decided by the same learned Judge. The two other suits, viz. 103 of 1923 and 118 of 1923 were decided, by the same Subordinate Judge who had heard the two other cases, mainly by reference to his own previous judgment. The appellate Court in these two cases was presided over by a different Judge. That learned Judge, it appears to us, took it for granted that the rule of dhardhura applied, without any further proof, to a case of sudden change in the course of a river. He was cognizant of the defendant's case. But he laid the burden of proof on the defendants, although it is clear to us that it was for the plaintiff, who claimed what was, so to say, a day before, the defendant's land, to prove the custom by which he claimed. The learned Judge says,

One significant fact emerges from this, and that is, that the appellants (defendants) have been unable to give any instance in which a block of land on one side of the stream has been in the possession of the zamindars of the village on the opposite side. Had the rule of dhardhura been interpreted in the past as they would now have it, there must have been cases in which recognizable plots of land of greater or less size were cut off by the river and separated from the village to which they had originally belonged and such plots would have continued in the possession of their old owners.

10. This, as we have said, is putting the burden of proof, on wrong shoulders. In the earlier judgment of Mr. Saksena, we find that he was pressed with the argument that the plaintiffs had not proved any instances by which the custom alleged applied to the present case. Mr. Saksena recognized that there was some force in the argument and thereby recognized the rule of law that the burden of

proof lay on the plaintiff. In this, no doubt, he was right.

11. With respect to the claim relating to the village of Hurhara, a distinction is to be drawn. The claim was based, in the alternative, on custom and contract. If there was no custom, no contract in derogation of the rule of law as laid down by the Regn. 11 of 1825 would, probably, be binding on the parties, especially where they were not dealing with the present circumstances but with future contingencies. This will be a matter which will have to be considered by the Courts below. The result is that we set aside the decrees of the Court of first instance and the lower appellate Court and remand the suits to the Court of first instance with the direction that they will be retried after giving the parties a further opportunity to adduce evidence. In deciding the cases, the Court will have the observation of this Court as to the necessity of the plaintiffs' proving the incidents of the alleged custom, viz., whether they cover a case of avulsion or sudden change in the Course of the river. Costs. here and hitherto will abide the result.

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