Tula and ors. Vs. Sadh and ors.

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Court : Himachal Pradesh

Decided On : Oct-23-1961

Reported in : AIR1962HP28

Judge : C.B. Capoor, J.C.

Acts : Evidence Act, 1872 - Sections 3, 13, 18 and 42; ;Constitution of India - Articles 13(1), 19, 19(1) and 19(5)

Appeal No. : Second Appeal No. 24 of 1958

Appellant : Tula and ors.

Respondent : Sadh and ors.

Advocate for Def. : D.R. Choudhary, Adv.

Advocate for Pet/Ap. : D.N. Vaidya and; T.P. Vaidya, Advs.

Disposition : Appeal dismissed

Judgement :

C.B. Capoor, J.C.

1. This is a plaintiffs' second appeal and arises out of the appellate judgment and decree of the learned District Judge Mandi whereby the judgment and decree of the learned Senior Subordinate Judge dismissing the suit was affirmed,

2. Briefly stated, the plaint allegations were as below:

The plaintiffs were the owners of different parcels of land comprised in several Khasra numbers in Hadbast No. 269 Ghogardhar, Tehsil Jogindernagar. For the last three years the defendants have without any right been letting loose their cattle for grazing in the disputed land in the Kharif season thereby preventing the plaintiffs from sowing any crop in their land in that season. On 21-6-1917 an order was made by Shri H. W. Emerson, the then Superintendent Mandi State, recognizing that Hindu Gujars of villages Drangsira, Guma and Ner Kalan had a right to graze their cattle in the land situated in Ghogardhar subject to the payment of 50 per cent of the land revenue to the owners of the land and the supply of milk at the paraos (stages) Urla, Drang and Jhatingri. That order is not binding on the plaintiffs as Shri Emerson had not power to make it and it has in particular ceased to be binding on the coming into force of the Constitution of India inasmuch as the right of the Hindu Gujars recognized in the aforesaid order was an infringement of fundamental right of the plaintiffs to hold and enjoy their property and by virtue of Article 13 of the Constitution had become void and inoperative. The defendants are further stated to have ceased to pay the land revenue and to supply milk at the paraos. On the above allegations the plaintiffs mainly prayed for the grant of a perpetual injunction restraining the defendants from grazing their cattle in the disputed land.

3. The defence in the main was that the defendants had been grazing their cattle in the disputed land after the harvesting of the Rabi crop for a long time whereof human memory runneth not to the contrary that the order of the Superintendent Mandi was binding on the plaintiffs, that they were not liable to supply milk at the paraos free of cost and that they had not ceased to pay 50 per cent of the land revenue, rather the plaintiffs had refused to accept the same when it was offered. It was denied that the right to graze cattle ill the Kharif season was an infringement of the fundamental right of the plaintiffs or had become void under Article 13 of the Constitution of India.

4. By an order dated 29-11-1960 the following issues were remitted to the learned District Judge :-

1. Whether the Gujars of villages Drangsira, Guma and Ner Kalan have acquired either a customary easement or a customary right to graze their cattle in the disputed land of the plaintiffs during Kharif season?

2. (a) Whether the order dated 21-6-1917 made by the Superintendent Mandi was of a competent Court?

(b) Is the said order relevant under the Indian Evidence Act?.

5. The findings recorded by the learned District Judge are that the Gujars of villages Drangsira, Guma and Ner Kalan have acquired a customary right to graze their cattle in the disputed land during the Kharif season, that the order dated 21-6-1917 made by the Superintendent Mandi was of a competent Court and was relevant under Sections 13 and 42 of the Indian Evidence Act.

6. These findings have been challenged on behalf of the appellants.

7. The first question that arises for decision is as to whether the defendants have acquired a customary right to graze their cattle in the disputed land during Kharif season. There is overwhelming evidence not only the one tendered on behalf of the defendants but also the one led on behalf of the plaintiffs bearing out that for more than 30 years the Gujars of villages Drangsira, Guma and Ner Kalan have been grazing their cattle in the disputed land. Shri Kishan Chand (P. W. 1), Thanthu (P. W. 2), Sidhu (P. W. 3), Tulsi Ram (P. W. 4), Swaru (P. W. 5), Hirda Ram, (P. W. 6), Achhru Ram (P. W. 7), Bhantu (P. W. 8) and Setu (P. W. 9) stated that the Gujars have been grazing their cattle in the disputed land for a long time.

8. On the record there is an order of the Superintendent, Mandi, Ex. P. 1 dated 21-6-1917 wherein it has been stated that the Gujars of villages Drangsira, Guma and Ner Kalan had been grazing their cattle in the disputed land during the kharif season for a long time. On behalf of the appellants it has been contended that the aforesaid order was not of a competent Court and was not relevant under the Indian Evidence Act. Shri Radha Lal (R. W. 5) who was Reader to the Superintendent Mandi State has stated that Shri Emerson exercised civil, criminal and revenue powers and was the head of administration. Appendix VI of the

Annual Administration Report of Mandi State for 1915-16 bears out that the Superintendent of Mandi State exercised civil, criminal and revenue powers and Appendix II thereto indicates that Shri Emerson was also Settlement Officer. The order Ex. P. 1 was made during the course of the settlement operations and the learned District Judge has rightly presumed that the said order wasmade in the exercise of powers as a Collector. According to Section 3 of the Indian Evidence Act all Judges and Magistrates legally authorized to take evidence were Court. A Collector is legally authorized to take evidence and as such is a Court in accordance with Section 3, referred to above. The said order was, therefore, of a competent Court.

9. According to Section 42 of the Indian Evidence Act an order other than the one mentioned in Section 41 is relevant if it relates to matters of a public nature relevant to the inquiry. The words 'matters of a public nature' as used in the aforesaid section are wide enough to include matters in which a large section of the public is interested. In order that a matter may be of public nature it is not necessary that the whole of the public of a locality may be interested in it. In the order Ex. P. 1 the rights of Gujars of three villages to graze their cattle in the disputed land was recognized and there cannot be any doubt that the aforesaid right was a matter of public nature and the order Ex. P. 1 was relevant under Section 42, Indian Evidence Act, referred to above. Under Section 13 of that Act any transaction by which a right or custom is created, claimed, modified, recognized, asserted or denied is relevant where the question is as to the existence of any right or custom. The order Ex. P. 1 was a transaction by which the right claimed by the defendants was recognized and it was relevant under Section 13 also.

10. It has been vehemently contended on behalf of the appellants that the defendants cannot be said to have acquired a right to graze their cattle in the former's land as permission had to be obtained by them from the authorities of the Forest Department for grazing and that the right claimed was not reasonable inasmuch as it amounted to a deprivation of the proprietary rights of the appellant. While it does appear that permission used to be obtained by the Gujars from the Forest Department for grazing their cattle it has not been established that it was

obligatory on the Gujars to obtain such permission. It appears from the statement of Shri Narpat Ram (A. W. 2) who is a retired Divisional Forest Officer that permission was necessary if the grazing was to be done in the Government land. He has stated that permit used to be issued in respect of Government forest and that if some one wanted to graze his cattle in the land owned by the zamindars it was not necessary for him to obtain any permit from the Forest Department. Moreover it has not been alleged on behalf of the appellants much less it has been proved that the Gujars had to obtain or used to obtain permission from the owners of the land to graze their cattle. From the mere fact that permission used to be obtained by the Gujars from the officers of the Forest Department it would not follow that they did not acquire a right to graze their cattle. On behalf of the appellants reliance has been placed upon a ruling of the Madras High Court reported in Lakshmi Kumara v. Narayanappa Naidu, AIR 1928 Mad 799, but that case is distinguishable inasmuch as therein the tenants had to apply to the landlords for obtaining permission for grazing their cattle in the latter's land. Incidentally it may be observed that in the aforesaidMadras case it was held that a customary right of pasture on landlord's land can be established by proper evidence.

11. It has next to be seen if the right claimed by the appellants was unreasonable. The unreasonableness according to the appellants was in the main due to the fact that they are deprived of the use of their land during the Kharif season. It has been held in Asrabulla v. Kiamatulla, AIR 1987 Cal 243, and Nani Gopal v. Kshitish Chandra, AIR 1952 Cal 108, that the reasonableness has to be judged with reference to the date of the inception of the custom. It appears from the order of Mr. Emerson that previously the owners of the disputed land used to cultivate their land during the Rabi season only and it used to lie fallow during the Kharif season. It could not, therefore, be said that the right was unreasonable at the inception. Every easementary right to a certain extent is a limitation on the rights of the dominant owner and if the contention advanced on behalf of the appellants is accepted the result will be that the whole of the law of easements will have to be declared to be void. Subject to the customary right claimed by the defendants the plaintiffs can use and enjoy their land and it is not correct to say that the plaintiffs have been deprived of their right to hold and enjoy their land. In AIR 1952 Cal 108,

referred to above, it was held that the villagers of a particular village can claim a right of pasturage over the banks of tanks as a customary right and that the exercise of the right of pasturage by the villagers over the banks of a tank does not entirely deprive the owner of the right to use the servient heritage and that such a custom is reasonable.

11A. In the case of Bari v. Tukaram Lahanu, AIR 1959 Bom 54, the plaintiffs brought a suit for a declaration that they as Kumbhars of certain village had a customary right to remove earth from the western side of a particular field belonging to the defendant for preparing earthen pots and it was held that the period of 30 years for which the right was exercised was sufficiently long to recognize the custom and that from the mere circumstance that the plaintiffs used to give earthen pots to the malguzar it was not safe to infer that the Kumbhars removed the earth from the field with the approval and consent of the malguzar.

12. I, therefore, hold that the right claimed by the plaintiffs (sic-defendants(?)) was not unreasonable at its inception and that prior to the coming into force of the Constitution the defendants had acquired a customary right to graze their cattle in the plaintiffs' land.

13. The. Constitution of India has not enlarged the proprietary right of the citizens. It was held in Laxman Ichharam v. Divisional Forest Officer, Raigarh, AIR 1953 Nagpur 51 that the effect of the Constitution is not to enlarge a proprietary right or any other right in property or in a holding of a citizen before the commencement of the Constitution and that where the right itself is of a limited character it Would remain so despite the coming into force of the Constitution.

14. It has also been urged on behalf of the appellants that when the Gujars enter their land they demolish the dangas and as a result of the grazing by the cattle pits are caused in their land and on those grounds also the custom was unreasonable. If some damage is caused to the plaintiffs' land as a result of the exercise of the right claimed by the defendants and such damage is not incidental to the exercise of the right a suit may be filed to recover the damage but the right claimed cannot be characterized to be unreasonable on the score that it causes damage.

15. It has next been contended on behalf of the appellants that even if the right claimed by the respondents is held to be a valid custom it has become void on the coming into force of the Constitution of India.

16. Article 13 and the relevant portion of Article 19 of the Constitution read as below:-

'13(1). All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires:-

(a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.'

'19. (1) All citizens shall have the right:

.... (f) to acquire, hold and dispose of property;

.... (5) Nothing in Sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.'

17. In view of Clause (3) of Article 13 there can be no doubt that a custom which has the force of law is included in the expression 'or laws in force' as used in

Clause (1). In this connection the ruling reported in Panch Gujar v. Amarsingh, AIR 1954 Raj 100 (FB) may usefully be referred to.

18. The precise question that arises for decision is as to whether the customary right claimedby the respondents was a reasonable restriction onthe right, to hold property in the interest of thegeneral public.

19. So far as I am, aware there is no reported case in which the question if a customary right is in contravention of the fundamental right of a citizen to acquire, hold and dispose of property may have been considered. There are, however, some castes in which the constitutionality of the law of pre-emption based on custom or on statute has been considered. Those cases are not quite apposite to the matter in hand but I propose to notice them as they might throw some light.

20. In the case of Abdul Hakim v. Jan Mohammad, AIR 1951 All 247 it was held that the law of preemption in Uttar Pradesh is for the welfare of the people because it avoids litigation, consolidates property and tends to increase the production of wealth and that the Agra Pre-emption Act, 1922, had not become void by virtue of Articles 13(1) and 19(1)(f) of the Constitution of India as it did not impose any unreasonable restrictions on the right of property.

21. In the Full Bench ruling reported in AIR 1954 Raj 100 supra the custom of pre-emption which allowed an owner of adjoining property to claim possession of the property sold only on the ground of being the owner of the adjoining property was held to be invalid as being contrary to the provisions of Article 19(1)(f) of the Constitution.

22. In Moti Bai v. Kand Kari Channaya,' AIR 1954 Hyd 161 the customary law of pre-emption as enforced by the Courts in Hyderabad State prior to the Constitution was held to be a violation of the fundamental right under Article 19(1)(f) of the Constitution and as such to have become void and unenforceable under Article 13(1) after the coming into force of the Constitution of India.

23. In the case of Punjab State v. Inder Singh, AIR 1953 Punj 20, Section 15 of the Punjab Preemption Act was not held to be ultra vires the Constitution on the

ground that the object underlying the aforesaid section was to preserve the homogeneity of the village community and to prevent fragmentation of holdings.

24. The Allahabad and Punjab cases were distinguished in the Full Bench case of the Hyderabad High Court on the ground that those cases dealt with the law of pre-emption based on statute and not on custom. Article 13 of the Constitution is as much applicable to custom or usage having the force of law as to law and in principle there is no difference between law and custom or usage having the force of law and Article 13 would come into play if either of them be in conflict with the fundamental right enshrined in Clause (f) of Article 19(1). With great respect to the learned Judges of the Rajasthan and Hyderabad High Courts the reasons assigned by the High Courts of Punjab and Allahabad for holding the law of pre-emption to be a reasonable restriction on the right to hold and dispose of property appear to be quite forceful.

25. The customary right claimed by the respondents in the instant case is to graze their cattle in the disputed land during the Kharif season. Cattle have a very important place in the economy of the hilly regions. All the owners of cattle do not own pasture land. The right to graze cattle in the land of another is thus a very valuable right. According to the respondents it is the Gujars of three villages who have a right to graze their cattle in the disputed land and it has next to be considered if the interests of the aforesaid Gujars can be held to be the interest of the general public. The words 'general public' as used in Clause (5) are wide enough to include a section of the public also. The expression 'interests of the general public' does not mean the interest of the public of whole of the Republic of India. It means nothing more than in the public interest' and legislation affecting a limited class of persons or limited, area might well be legislation in public interest, vide Iswari Prosad v. N.R. Sen, AIR 1952 Cal 273 and Bramadathan Nambooripad v. Cochin Devaswom Board, AIR 1956 Trav-Co. 19. The customary right claimed may thus well be regarded to be in the interest of general public and ex hypothesi a reasonable restriction on the right of the appellants to hold their property.

26. I, therefore, hold that the customary right claimed by the defendants-respondents fulfils the requirements of a valid custom and that the aforesaid right

has not become void on the coming into force of the Constitution.

27. In conclusion, the appeal fails and is dismissed with costs.