State Of Bihar & Ors vs Subodh Gopal Bose & Anr on 22 August, 1967

Equivalent citations: 1968 AIR 281, 1968 SCR (1) 313, AIR 1968 SUPREME COURT 281, 1968 BLJR 177, 1968 (1) SCR 313, ILR 47 PAT 205

Author: J.C. Shah

Bench: J.C. Shah, S.M. Sikri

PETITIONER:
STATE OF BIHAR & ORS.

Vs.

RESPONDENT:
SUBODH GOPAL BOSE & ANR.

DATE OF JUDGMENT:
22/08/1967

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
SIKRI, S.M.

CITATION:
1968 AIR 281 1968 SCR (1) 313

ACT:
Bihar Tenancy Act, 1885, s.102--Custom-sheets prepared under--Right of tenants of Lower Murli Hill (Shahabad District) to quarry limestone for trade purposes whether supported by said custom sheets--Right whether could be claimed as a profit a prendre or customary easement--Right must be reasonable to be accepted.

HEADNOTE:
Respondent No. 1 acquired tenancy rights in five plots in the villages of Biknaur and Samahuta situated in the area known as Lower Murli Hill in District Shahabad, Bihar. In 1949 he filed a plaint in the Court of the Subordinate Judge Sasaram, against the State of Bihar and others, claiming inter alia that as a tenant he had a customary right to quarry limestone for trade purposes from the Lower Murli

Hill. The claim was based mainly on certain entries in the Custom-sheets prepared at the time of the Cadastral Survey in 1913 under s. 102 of the Bihar Tenancy Act, 1885. The trial court rejected the claim but the High Court held the custom to be established by the evidence of the Customs-sheets. The defendants appealed.

Held The High Court was in error in holding that the plaintiff had established the custom pleaded by him or that it was reasonable.

(i) There was nothing to show that the practices and privileges recorded in the Custom-Sheets were exercised as a matter of right. The record has presumptive value. But the revenue authorities were concerned to ascertain the existing state of affairs and not to determine whether the practices and privileges were ancient, certain, reasonable and continuous. As evidence of local custom, the custom sheets had therefore not much value. On the other hand there were indications that the exercise of the privileges recorded therein was permissive. Even on the most liberal interpretation they did not provide evidence of the exercise of the privilege of commercial exploitation of limestone from the area in question. [317D; 319G]

(ii) Even granting that the Custom-sheets recorded a local custom that the tenants in the villages of Baknaur and Samahuta excavated stones from the hills near the villages for purposes of trade, a claim of right founded on that custom must be held unreasonable and incapable of enforcement by the sanction of a court's verdict, [320B]

A claim in the nature of a profit a prendre operating in favour of an indeterminate class of persons and arising out of a local custom may be held enforceable only if it satisfies the tests of a valid custom. A custom is a usage by virtue of which a class of persons belonging to a defined section in a locality are entitled to exercise specific rights against certain other persons or property in the same locality. To the extent to which it is inconsistent with the general law undoubtedly the custom prevails. But to be valid a custom must be ancient, certain and reasonable, and being in derogation of the general rules of law must be construed strictly. A right in the nature of a profit a prendre in the exercise of which the residents of a locality are entitled to excavate stone for trade purposes would ex-facie 313

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be unreasonable, because the exercise of such a right ordinarily tends to the complete destruction of the subject matter of the profit. The custom, if exercised in its amplitude as claimed, may also lead to breaches of the peace, for it would be open to all tenants to work any quarry simultaneously for trade purposes. [321B-D; 324D]

Lord Rivers v. Adams, L.R.3 Ex. Div. 361, Harris & Anr. v. Earl of Chesterfield and Anr., [1911] A.C. 623, Alfred F. Beckett Ltd. v. Lyons [1967] 1 All E.R. 833, referred to

Lutchhmeeput Singh v. Sadaulla Nushyo & Ors., I.L.R. 9 Cal. 698 and Arjun Kaibarta v. Manoranjan De Bhoumick, I.L.R. 61 Cal. 45, approved.
Henry Goodman v. The Mayor and Free Burgesses of the Borough of Saltash. 7 A.C. 633 and Mercer v. Denne, [1904] 2 Ch. D, 534, 557 distinguished.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 147 & 148 of 1966.

Appeals from the judgment and decree dated November 15, 1960 of the Patna High Court in Appeal from Original Decree No. 212 of 1961.

D. P. Singh, K. M. K. Nair and S. P. Singh, for the appel- lants (in C.A. No. 147 of 1966) and respondent No. 2 (in C.A. No. 148 of 1966).

A. K. Sen, K. K. Sinha and R. P. Katriar, for the appellant (in C.A. No. 148 of 1966).

S. T. Desai, R. Chaudhuri, P. K. Chatterjee and Arun Chandra Mitra, for respondent No. 1 (in both the appeals). The Judgment of the Court was delivered by Shah, J. Subodh Gopal Bose-hereinafter called 'the plaintiff' commenced an action in the Court of the Subordinate Judge, Sasaram, against four defendants-the State of Bihar, the Collector of Shahabad, the Additional Sub-Divisional Officer Sasaram, and Dalmia Jain & Company Ltd.,-for a decree declaring that he was entitled to quarry limestone for trade purposes from the Murli Hills described in the Schedule annexed to the plaint, and for an injunction restraining the defendants from dispossessing the plaintiff or granting, a lease of the land to any other person. In the Schedule, the two properties in respect of which relief was claimed were: (i) the Upper Murli Hill admeasuring 137 acres together with subsoil and mineral rights situate in pargana Rohtas bearing Touzi No. 4769 Tahsil Circle Sasaram, and (ii) the Lower Murli Hill comprising an area of 250 bighas within the Banskati Mahal together with the surface, subsoil and mineral rights situate in pargana Rohtas, Touzi No. 4771 Tahsil Circle Sasaram. The trial Court dismissed the suit. In appeal the High Court of Patna modified the decree passed by the trial Court and declared that the plaintiff was entitled to quarry limestone for trade purposes from the Lower Murli Hill, "subject to the right which the owner of the Banskati Mahal had therein as set out in the judgment", and restrained the defendants by a permanent injunction from dispossessing the plaintiff from the Lower Murli Hill described in the Schedule annexed to the plaint. With certificate granted by the High Court, the State of Bihar and the Dalmia Jain and Company Ltd. have separately appealed.

By his plaint the plaintiff claimed that he was a tenant in possession of 250 bighas of land of the "Lower Murli Hill"

> within the Banskati Mahal and that he was in possession of the Upper Murli Hill as the local agent of the Kuchwar Company which held lease$ for twenty years from

April 1, 1928 to March 31, 1948, for quarrying limestone and that under the covenant for renewal in the said leases, the Kuchwar Company had remained in possession of the upper Murli Hill and the State of Bihar had accepted rent from the Company and had otherwise assented to the Company remaining in possession. The plaintiff also claimed that by immemorial custom and usage recognized by the survey authorities the plaintiff as a tenant of land within the Banskati Mahal had a right to quarry and remove limestone for trade purposes. The Court of First Instance held that at the date of the suit, the plaintiff was in occupation of 250 bighas of land in the Lower Murli Hill, but he was proved to have derived tenancy rights from the Zamindar only in respect of plot No. 168 of Baknaur and plots Nos. 42, 128, 130 and 44 of Samahuta. The Court further held that 32.50 acres out of plot No. 44 of Samahuta were acquired for the Dehri-Rohtas Light Railway Company and the plaintiff's right derived from the Zamindar was pro tanto extinguished. The Court also held that the lease in favour of the Kuchwar Company was not renewed, that the customary right to excavate minerals for trade purposes claimed by the plaintiff in the Lower Murli Hill was not proved, that the minerals in the Lower and Upper Murli Hill were vested in the State of Bihar and the plaintiff was merely a licensee from the State in respect of the Upper Murli Hill and was not a tenant holding over. In appeal to the High Court of Patna the claim to excavate minerals from the Upper Murli Hill was not pressed by the plaintiff. It was also conceded by the plaintiff that he was, as found by the trial Court, a tenant from the Zamindar only of five plots one in Baknaur and the other four in Samahuta. The finding that at the date of the suit, the plaintiff was in occupation of 250 bighas of land was not challenged on behalf of the defendants. In the view of the High Court the right to the minerals in the Lower Murli Hill vested in the Zamindar and not in the State, and the Banskati right was merely an incorporeal right to levy tax on the removal of "various spontaneous products and minerals, and did not extend to a right of ownership in the products and. the minerals." The High Court also held that the custom pleaded by the plaintiff of the right to take for trade purposes limestone from the quarries within the Banskati Mahal was prov-

ed. The High Court confirmed the decree passed by the trial Court insofar as it related to the claim to excavate, limestone from the Upper Murli Hill and decreed the claim for a declaration that the plaintiff had the right to quarry limestone and manufacture lime from the Lower Murli Hill and to carry on trade in limestone, "subject to the right which the owner of the Banskati Mahal had of levying duty on the products removed", and for an injunction restraining the defendants from interfering with the plaintiffs possession of the Lower Murli Hill.

[His Lordship after discussing the evidence, held that "It is sufficient to record that there is no evidence on the record of specific instances of the tenants of the villages having ever exercised the right to excavate limestone from the slopes of the Lower Murli Hill for domestic, agricultural or trade purposes" and proceeded]:

> The High Court placed very strong reliance upon the entries in the Custom-Sheet prepared under the Bihar Tenancy Act, 1885. Section 102 of the Act, provides, inter alia.
>
> "Where an order is made under section 101, the particulars to be recorded shall be specified in the order, and may include, either without or in addition to other particulars, some or all of the following, namely: -
>
> .....
>
> (h) the special conditions and incidents, if any, of the tenancy."

At the Cadastral Survey which was completed in 1913, a record of customs and practices was prepared. Exhibits 11, 11 (a) and 11 (b) are the "Custom-Sheets" in respect of the three villages-Baknaur, Samahuta and Murli Hill (Upper Murli Hill). In respect of the villages Baknaur and Upper Murli Hill the Custom-Sheets are in the form of questions and answers. Questions 12 & 13 and the answers thereto in the Custom-Sheet of Baknaur may be set out: -

"12. Whether or not the rai- On obtaining free pass they yats have any right to can bring (stone) for construc- take away stone, if there tion of house and well. is one, what is that?

13.Whether the raiyats have They can prepare lime for any right to take away cultivation work from the forests lime, lac, or any other in the Mahal. Nothing is forest product. If they realised for it. If they pre- have one, what is that? pare lime for sale purposes, fee is realised according to Schedule vide Memo. No. 270 dated 14-12-1904; and lac jungle is made settlement."

By the Schedule of fees, "stone chips" were chargeable at rates varying between-/4/ 4 and /1/1 per ton and big stones for construction of houses were chargeable at the rate of Rs. 1/2/- per hundred. In Ext. II (b) relating to the Upper Murli Hill in answer to question No. 12 it was recorded that the Hill "has been given in B settlement i.e. in thika: " only the tenants can get stone chips from the Hill. In answer to Question No. 13 it was recorded that "the basti is unpopulated: the Hill has been let out in settlement: the people of the village cannot prepare lime from the Hill of this Mauza, but they can prepare lime from the Hill of other Mauzas of this Mahal for cultivation purposes." In Ext. 11(a) which relates to the village Samahuta, the relevant entries which are in narrative form are as follows: -

> "The residents take away stones for constructing houses and wells and prepare lime for their personal use without paying any fee and for sale they pay fees according to the rates entered in the Schedule.
>
> Thika settlement is made in respect of lac."

Relying upon these entries the High Court held that the right to trade in limestone was vested by custom in the tenants in the Banskati Mahal. We are unable to accept this interpretation of the

Custom-Sheets. 'The record is merely a catalogue of practices and privileges of the tenants in the villages within the Banskati Mahal,there is nothing to show that it was recorded that the practices and privileges were exercised as a matter of right by the villagers. Un- doubtedly the record has presumptive value. But the revenue authorities were concerned to ascertain the existing state of affairs and not to determine whether the practices and privileges were ancient, certain, reasonable and continuous. As evidence of local custom, the custom-sheets have therefore not much value. There are again inherent indications in the custom-sheets that the exercise of the privileges recorded therein was permissive. Harbans Rai--descenent of Raja Shah Mal--had imposed duties on the removal of forest produce and the minerals. There is no record of the nature of the duties imposed in the days of Harbans Rai and of exemptions, if any. The entries in the custom-sheets indicate that the forest produce and minerals taken by the tenants in the village were subject to certain duties. Imposition of duties upon forest produce and minerals was evidently in exercise of signorial rights. In the custom-sheets of the villages Baknaur and Samahuta it is recorded that the tenants "take minerals and forest produce"

> for domestic and agricultural purposes, but if they prepare lime for sale they have to pay duties. Recognition of the practice of taking stone and forest produce for domestic purposes without payment of duty is easily explained. In a predominantly agricultural commuinity it would have been regarded as churlish, for the Zamindar who was for all practical purposes the local representative of the Ruler to deny to the tenants of lands the facility of taking articles of small value for domestic or agricultural purposes. Acceptance of liability to pay duties on forest produce and minerals taken for purposes other than domestic or agricul- tural, is destructive of the claim of a right to take the articles: it indicates that the removal was permissive being only on payment of duty. The custom-sheet of the Upper Murli Hill recites that because the Hill had been let out the tenants cannot prepare lime from the Hill of the Mauza lends strong support to that view. Again the recitals in Exts. 11 and 11 (a) that a thika settlement was made in respect of "lac" also leads to that inference: it clearly implies that the tenants could not take "lac" from the forest because of the grant of a thika contract. The evidence therefore shows that even the practices recorded in the custom-sheets were followed so long as the Government had not disposed of the corpus in favour of the contractors. The duties set out in the Schedules to the Custom-Sheets are also not shown to be permanently fixed. The Schedule of fees mentioned in the Custom-Sheets was apparently published on December 14, 1904, and there is no evidence that it was merely a record of fees levied since the days of Harbans Rai. From the answer to question No. 4 in the Custom-Sheets it appears that the Government had treated the forest as a protected forest under a notification dated June 30, 1909, and that implies that restrictions were imposed upon the taking and disposal of forest produce. The report dated December 17, 1909 by Jagdum Sahai-a Revenue Officer-that "as the custom throughout the Rohtas Pargana has been that the Zamindars and the cultivators and raiyats in all the villages in which the Government had its Banskati rights could take free of Government duty any quantity of timber, lime and stone etc. for their domestic and agricultural purposes within the limits of their own village, it was difficult to prevent or check the people of Samahuta

Gurmain, and Baknaur from entering into the pure Khas Mahal portion of this Hill to which they had no right for want of distinct marks of its boundary", does not even by implication support a right to take forest produce and limestone for trade purposes. The record of customs and practices is in respect of Banskati Mahal and the area which originally extended over 500 sq. miles, was later reduced to 200 sq. miles, and consisted of 108 villages. The Custom-Sheets recorded that the villagers were accustomed to take dry wood, timber and bamboo for agricultural purposes Ind for construction of houses and that was permitted free of charge. Assuming that a customary right in that behalf is established, removal of forest produce for other purposes with permits and on payment of duty fixed by the authorities cannot be said to be in exercise of a right. The conditions of obtaining permit and payment of fee for removal of the forest produce and limestone for purposes other than domestic and agricultural indicate that the removal was not as of right, but depended upon the sanction of the authorities in whom the right to the Banskati was vested. In Ext. 11 (a) the privilege recorded is of "residents" to take away stones for constructing houses and wells and prepare lime for their personal use without paying any fee, and for sale they had to pay fees according to the rates entered in the Schedule. Granting that the expression "residents" means tenants, if the privilege to take forest produce and stone is being subject to conditions of obtaining permits and payment of fee it cannot be regarded as a right enforceable against the State.

In the plained it was it was claimed that by immemorial customs and usage, the tenants in the Banskati Mahal had a right to quarry and remove limestone and manufacture lime from the quarries and hills within the Mahal. The plea apparently was that all tenants within the Banskati Mahal had the right to quarry and remove limestone and manufacture lime from all the limestone quarries and Hills within the Mahal and to carry on trade therein. Counsel for the plaintiff in this Court did not press for acceptance of this somewhat audacious claim and conceded that the right which the plaintiff merely claimed, notwithstanding the unguarded phraseology used in the plaint, was that:

a tenant of a village within Banskati Mahal is "entitled under customary law to carry on quarrying operations for trade purposes on any forest (waste land) of the village irrespective of whether" he is "a tenant in respect of such forest land or not."

Counsel said that the right claimed by the plaintiff is exercisable only by tenants in the quarries and hills in their village and belonging to the Zamindar and not in other villages of the Banskati Mahal. This case was not pleaded in the plaint. Even if it be assumed that the plaintiff intended to set up a right not as extensive as it was pleaded, and intended to restrict it only to the quarries and hills of the Zamindar in the village in which the tenant claiming the right resided, in our judgment, a customary right to quarry stone out of the Lower Murli Hill and to manufacture lime from limestone for trade proposes is not supported by the customsheets.

We are not concerned in this case with the privilege of the tenants of taking for agricultural or domestic purposes pieces of stones either lying on the surface or even underneath the surface. Whether that would amount to a customary right enforceable against the owner of the surface and the minerals is a matter on which we do not feel called upon to express any opinion. The privilege of taking limestone for domestic and agricultural purposes is one privilege : the privilege of taking limestone for manufac- turing lime by an agriculturist, even if it be for sale, with his primitive methods is another privilege, and the privilege of commercial exploitation of more than a hundred thousand tons 'of limestone a year to be extracted out of the Lower Murli Hill with the aid of machinery is quite a different privilege and even the most liberal interpretation of the custom-sheets will not be evidence of the exercise or grant of the last privilege. Therefore, the customary right pleaded in the plaint that every tenant of any land covered by the Banskati Mahal was entitled to take limestone out of any quarry in any hill in Banskati Mahal and to trade in stone or lime manufactured out of the limestone is not supported by instances of exercise of such right and is not supported by the entries in the Custom-Sheets. The entries in the Custom- Sheets contain on the other hand strong indications to the contrary.

Even granting that the Custom-Sheets recorded a local custom that the tenants in the villages of Baknaur and Samahuta excavated stones from the hills near their villages for purposes of trade, a claim of right founded on that custom must be held unreasonable and incapable of enforcement by the sanction of a Court's verdict. The right exercisable by the tenants in the villages to excavate limestone for trade purposes was not claimed by the plaintiff as an easement: it could not be so claimed, for it is not a right which the owner or occupier of certain land possesses as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in, or upon, or in respect of, certain other land not his own: Section 4 of the Indian Easements Act, 5 of 1882. The Indian Easements Act no doubt makes no distinction for the purpose of acquisition by prescription between the right of easement strictly so-called and the right which under the English common law is called a profit- a-prendre. By the Explanation to s. 4 the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon. A profit-a- prendre is therefore included in the definition of "easement" in S. 4 of the Indian Easements Act. But an easement being a right which is super-added to the ordinary common law incidents of the ownership of a dominant tenement, and which connotes a corresponding burden on a servient tenement, can only be created by grant, or by statute. An apparent exception to this rule is a customary easement. But a customary easement is not an easement in the true sense of that expression. It is not annexed to the ownership of a dominant tenement, and it is not exercisable for the more beneficial enjoyment of the dominant tenement:

> it is recognised and enforced as a part of the common law of the locality where it obtains. A customary easement arises in favour of an indeterminate class of persons such as residents of a locality or members of a certain community, and though not necessarily annexed to the ownership of land, it is enforceable as a right to do and continue to do something upon land or as a right to prevent and continue to prevent something being done upon land. Sanction for its enforceability being in custom, the

right must satisfy all the tests which a local custom for recognition by courts must satisfy.

A profit-a-prendre in gross-that is a right exercisable by an indeterminate body of persons to take something from the land of others, but not for the more beneficial enjoyment of a dominant tenement-is not an easement within the meaning of the Easements Act. To the claim of such a right, the Easements Act has no application. Section 2 of the Easements Act expressly provides that nothing in the Act contained, shall be deemed to affect, inter alia, to derogate from any customary or other right (not being a license) in or over immovable property which the Government, the public or any person may possess irrespective of other immovable property. A claim in the nature of a profit-a-prendre operating in favour of an indeterminate class of persons and arising out of a local custom may be held enforceable only if it satisfies the tests of a valid custom. A custom is a usage by virtue of which a class of persons belonging to a defined section in a locality are entitled to exercise specific rights against certain other persons or property in the same locality. To the extent to which it is inconsistent with the general law, undoubtedly the custom prevails. But to be valid, a custom must be ancient, certain and reasonable, and being in derogation of the general rules of law must be construed strictly. A right in the nature of a profit-a-prendre in the exercise of which the residents of locality are entitled to excavate stones for trade purposes would ex facie be unreasonable because the exercise of such a right ordinarily tends to the complete destruction of the subject-matter of the profit. It is said in Halsbury's Laws of England, 3rd Edn. Vol. 11, Art. 324 at p. 173:

"If a right in alieno solo amounts to a profit a prendre it cannot be claimed under an alleged custom; for no profit a prendre and therefore no right of common can be claimed by custom except in certain mining localities; nor can there be a right to a profit a prendre in an undefined and fluctuating body of persons."

That view is supported by a considerable body of authority. In Lord Rivers v. Adams (1) it was held that the right claimed by inhabitants of a parish to cut and carry away for use as fuel in their own houses fagots or haskets of the under-wood growing upon a common belonging to the lord of the manor is a right to a profit-a-prendre in the soil of another: such a right cannot exist by custom, prescription, or grant, unless it be a Crown grant which incorporates the inhabitants. The House of Lords in Harris and Another v. Earl of Chesterfield and Another(2) held that a prescription in a que estate for a profit a prendre in alieno solo without stint and for commercial purposes is unknown to the law. In the case of Harris and Another(2) the freeholders in parishes adjoining the river Wye were in the habit of fishing a non-tidal portion of the river for centuries, openly, continuously, as of right and without interruption, not merely for sport or pleasure, but commercially in order to sell the fish and make a living by it. The riparian proprietors claiming to be owners of the bed of the river brought an action of trespass against the freeholders for (1) L.R. 3 Ex. Div. 361. (2) [1911] A.C. 623.

fishing. It was held by a majority of the House of Lords that the legal origin for the right claimed by the freeholders could not be presumed and that the action by the plaintiffs was maintainable.

In Lutchhmeeput Singh v. Sadaulla Nushyo and Others(1) a Division Bench of the Calcutta High Court accepted the prin- ciple in the case of Lord Rivers v. Adams(2). In that case the plaintiff sought to restrain the defendants from fishing in certain bhils belonging to his Zamindar. The defendants pleaded inter alia that they had a prescriptive right to fish in the bhils, under a custom, according to which all the inhabitants of the Zamindari had the right of fishing. It was held that no prescriptive right of fishery had been acquired under s. 26 of the Limitation Act and that the custom alleged could not, on the ground that it was un- reasonable, be treated as valid.

Counsel for the plaintiff contended that the present case falls within the principle enunciated by the House of Lords in Henry Goodman v. The Mayor and Free Burgesses of the Borough of Saltash(3). The facts in Henry Goodman's case(3) were peculiar. A prescriptive right to a several oyster fishery in a navigable tidal river was proved to have been exercised from time immemorial by a borough corporation and its lessees without any qualification except that the free inhabitants of ancient tenements in the borough had from times immemorial without interruption, and claiming as of right, exercised the privilege of dredging for oysters in the locus in quo from the 2nd of February to Easter Eve in each year, and of catching and carrying away the same without stint for sale and otherwise. This usage of the inhabitants tended to the destruction of the fishery, and if continued would destroy it. It was held by the House of Lords (Lord Blackburn dissenting) that the claim of the inhabitants was not to a profit a prendre in alieno solo that a lawful origin for the usage ought to be presumed if reasonably possible; and that the presumption which ought to be drawn. as reasonable in law and probable in fact, was that the original grant to the corporation was subject to a trust- or condition in favour of the free inhabitants of ancient tenements in the borough in accordance with the usage. The case came before the Court of Common Pleas, as a special case on facts stated, that the mayor and corporation of Saltash as a corporation was the owner by prescriptive right of the bed and soil and several oyster fishery in the estuary of the River Tamar, and that the free inhabitants of the ancient tenements in the borough of Saltash had from time immemorial, without interruption and claiming as of right, exercised the privilege of dredging for oysters in the river. The House was called upon to reconcile two conflicting rights of the corporation to the several fishery and of the free inhabitants to take oysters. The House reconciled the rights by (1) I.L.R. Cal. 698. (2) L.R. 3 Ex. Div. 361.

(3) 7 A.C, 633 holding that the grant to the corporation of the soil and the oyster fishery, which must be taken to have been a grant before legal memory, was made by the Crown or the Duchy of Cornwall subject to a trust or condition binding on the grantee, the corporation, to allow the owners of ancient tenements within the borough the limited right to dredge for oysters notwithstanding that the right might lead to the destruction of the fishery. In Harris v. Earl of Chesterfield(1), Lord Ashbourne observed at p. 633, after referring to the judgment in Henry Goodman's case(2) that:

> "It was a splendid effort of equitable imagination in furtherance of justice. The conception was reasonably possible and that sufficed."

In a recent case before the Court of Appeal in England:

> Alfred F. Beckett Ltd. v. Lyons(3) it was observed by Harman and Winn L.JJ., that the claim made on behalf of the inhabitants of the County Palatine of Durham that they were entitled by custom of the locality to collect sea-borne coal from the foreshore being a profit-a-prendre, a fluctuating body such as the inhabitants of a county could not acquire by custom a right of that nature.
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> Counsel for the plaintiff also relied upon the observations made by Farwell, J., in Mercer v. Denne(4) at p. 557, that the period for determining whether a custom is reasonable or not is its inception. In Mercer's case(4) fishermen who were inhabitants of the parish Walves were accustomed to spread their nets to dry on the land of a private owner at all times seasonable for fishing. In an action on behalf of the firshermen of the parish for a declaration of right in terms 'of the custom and an injunction restraining the owner of the land from building on or dealing with the land so as to disturb the right of the fishermen, it was urged by the defendant that the, custom was unreasonable, because the sea may recede for a mile or more, and it was impossible to sup- pose that any such extent of ground could ever have been intended to be appropriated to such a custom. Farwell, J., observed that as the event had not happened for upwards of 700 years, he could not see the unreasonableness of it. He also observed that the period for ascertaining whether a custom is reasonable or not is its inception. Counsel for the plaintiff relying upon those observations submitted that if the custom in its inception was unreasonable, a more extensive burden imposed by the exercise of the custom by the passage of time does not make it unreasonable. It is difficult in the very nature of things to ascertain, especially under the English law where proof by immemorial user must date back to the reign of Richard 1, i.e. 1,189 A.D., the conditions existing at the inception of a custom, assuming that one can trace its inception. It is (1) [1911] A.C. 623. (2) 7 A.C. 633.

(3) [1967] 1 All E.R. 833. (4) [1904] 2 Ch. D. 534, 557.

however, unnecessary to dilate upon that matter in this appeal; if by the exercise of a customary right in favour of an indefinite body of persons the property which is the subject-matter of the profit-a-prendre is in danger of being destroyed the customary right will not be recognised: Arjun Kaibarta v. Manoranjan De Bhoumick(1).

Counsel for the plaintiff contended that the Court may ignore the exaggerated claim appearing from the averments in the plaint and declare, relying upon the custom-sheets, a right to excavate limestone and to utilise it for trade purposes limited to the tenants in the two villages. We are unable to accede to that request. In the present case the right to take "spontaneous produce of forest and minerals"

> for domestic or agricultural purposes by the tenants is not in issue. What is in issue is the right claimable by all the tenants of the two villages-even on the restricted

interpretation of the claim set up by counsel for the plaintiff-to excavate stone from all lands in the, village for trade purposes by installing machinery. Such a custom would, if exercised in its amplitude as claimed, may lead to breaches of the peace, for it would be open to all tenants to claim to work any quarry simultaneously for trade purposes, and may also tend to the destruction of the subjectmatter. Such a custom would be unreasonable. The High Court was, in our judgment, in error in holding that the plaintiff had established the custom pleaded by him or that it was reasonable.

The plaintiff had claimed in the plaint that he was at the date of the suit in possession of 250 bighas of land in the Lower Murli Hill. The trial Court held that the plaintiff established tenancy rights in respect of only five plots of land from the Zamindar-plot No. 168 in village Baknaur, and four Plots Nos. 42. 44, 128 and 130 in village Samahuta. It does not appear that this finding was challenged before the High Court. It is true that the plaintiff claimed that he was in possession at the date of the suit of 250 bighas in the two villages of Baknaur and Samahuta and it was so found by the trial Court and the finding was not challenged before the High Court either by the State or by the Dalmia Jain & Co. Ltd. But that claim of possession was apparently founded on the plea that the plaintiff was the representative of the tenant holding over under the leases granted by the State of Bihar to the Kuchwar Company. It was held that the plaintiff's occupation of the lands was not as a tenant holding over, but was merely permissive so long as no final decision was made by the Government of Bihar on the application by the Kuchwar Company for renewal of the leases which had expired. After the Government decided not to grant renewal of the leases, the plaintiff had no right as an agent of the Kuchwar Company to (1) I.L.R. 61 Cal. 45, remain in occupation of the lands other than those in which he had leasehold interest derived from the Zamindar.

Counsel for the plaintiff has therefore restricted his claim to an injunction in respect of the land in which he establishes his interest as a tenant from the Zamindar. The claim of the plaintiff to a declaration in respect of the area of 32.50 acres of land out of plot No. 44 of Samahuta which was acquired for the Dehri-Rohtas Light Railway Company between the years 1912 and 1917 remains to be considered. The right of the Zamindar in the land together with all encumbrances in the land acquired was extinguished when possession was taken by the State in exercise of the authority of the Land Acquisition Act. Thereafter no one could claim in that land title derived from the Zamindar. 30.933 acres out of the land after it was transferred by the acquiring authority to the Railway was leased out to the Kuchwar Company and under a grant from the Kuchwar Company the plaintiff obtained the leasehold rights. The lease granted by the Dehri-Rohtas Light Railway Company to Kuchwar Company was in the first instance for one year, and determinable by notice expiring with the end of the year. It was the case of the State and of Dalmia Jain & Company Ltd. that by a notice served by the Dehri-Rohtas Light Railway Company upon the Kuchwar Company the lease was determined. The plaintiff contended at the trial that the notice was not received by the Kuchwar Company and therefore there was no determination of the lease. Manifestly the plaintiff cannot seek to enforce his right to the land acquired from the Dehri-Rohtas Light Railway Company as a tenant

from the Zamindar, and at the date of the suit the plaintiff had no right in the land, for the conveyance by the Kuchwar Company in favour of the plaintiff was executed several months after the date of the suit. Neither the Kuchwar Company nor the Dehri-Rohtas Light Railway Company is on the record, and it would be impossible in the circumstances to record any finding on the question whether the lease was terminated. But since the right of the Company was not transferred to the plaintiff before the date of the suit, his claim for a declaration of his right and for injunction restraining the defendants from interfering with his possession cannot be sustained. 'The plaintiff as a tenant of the surface rights of the five plots of land in villages Baknaur and Samahuta but excluding the area acquired for the Dehri-Rohtas Light Railway Company is however entitled to protect his possession against unauthorised disturbance.

We accordingly modify the decree passed by the High Court and declare that the plaintiff has no right by custom to excavate limestone for trade purposes out of the slopes of the Lower Murli Hill or from any other land of the villages in Baknaur and Samahuta for trade purposes. The decree passed in favour of the plaintiff restraining the State of Bihar, its agents and servants, and the Dalmia Jain & Company Ltd. from interfering with the plaintiff's possession is maintained in respect of plot No. 168 of Baknaur village and plots Nos. 42, 128, 130 and 44 (excluding the land acquired for the Dehri-Rohtas Light Railway Company) of the village Samahuta so long as the tenancy rights vested in the plaintiff are not lawfully determined.

The appeals will accordingly be partially allowed. In these appeals the plaintiff claimed primarily to enforce his customary right to take valuable minerals from the Lower Murli Hill, and he has failed to establish that right. The plaintiff will therefore pay the costs to the State of Bihar and the Dalmia Jain & Company Ltd. throughout. One hearing fee, in the two appeals in this Court.

G.C. Appeals allowed in part.