# Vakiluddin And Ors. vs Mahabir Prasad And Ors. on 8 November, 1951

## Equivalent citations: AIR1952ALL527, AIR 1952 ALLAHABAD 527

JUDGMENT

Mushtaq Ahmad, J.

1. This is an appeal by the defendants in a suit for injunction restraining the defendants from taking possession over plot 584, old, corresponding to plot 234/1, new measuring 13 bighas and 8 biswas, in village Mohammadpur, District Allahabad.

2. This relief was claimed by the plaintiffs on the allegation that, as residents of the village, they bad acquired certain rights by custom and that, therefore, the defendants were not entitled to take possession of the plot. The plaintiffs had, in the first instance, taken proceedings against the defendants under Section 145, Criminal P.G., but, having failed in the criminal Court, filed the suit giving rise to the present appeal.

3. The defence taken by defendant 1, who was the only contesting defendant was that on 19-4-1944, he had obtained a lease of the plot which belonged to Rani Gomti Bibi of Phulpur from the Court of Wards, in charge of her estate, and that the plaintiffs, not being entitled to the rights mentioned in the plaint, had no justification in objecting to the defendants' taking possession of the land.

4. The plaintiffs had enumerated in the plaint a long list of purposes of a most heterogeneous nature for which, according to them, the villagers including themselves were entitled to use the land, as they had done in the past. These purposes are remarkable for their multifariousness and amount almost to overlap the entire proprietary rights of the owner of the land, leaving her practically nothing by way of a residuary interest. They are set out in the judgment of the trial Court and may be summarized here :

1. Using a part of the land as graveyard,

2. using a part as Deoasthan, place of deities,

3. using another part as a tank, in fact two tanks being alleged,

4. grazing cattle on a portion,

5. enjoying trees planted on a portion,

6. using a portion for purpose of khaiyans,

7. using another portion for purposes of ghoors,

8. using another portion again as a pigsty,

9. using a yet other portion for taking earth for houses, and

10. passing over a certain portion as a passage land.

5. The learned Munsif, after inspecting the site and recording a note of inspection, dated 7-10-1944, held that the plaintiffs had not proved the customary right they had alleged in respect of any one of the above purposes, and he, there-fore, dismissed the suit. The lower appellate Court, in a judgment typically brief and uninformative, reversed that decree and allowed the plaintiffs' claim, on the finding that the custom alleged had been proved.

6. Learned counsel for the defendant-appellant has challenged the finding of the lower appellate Court with regard to custom on a number of grounds. Is is well settled that a finding on such a question is a mixed finding of fact and law and can be impugned in second appeal.

7. When one reads the judgments of the Courts below, one cannot avoid the impression that, while the trial Court had analysed the various items of claim alleged by the plaintiffs in detail, and, with reference to the evidence relating to them severally, had come to a finding that the plaintiffs' case had not been established, the lower appellate Court brought out a much too brief and sweeping order in reversal of the judgment under appeal before it and decreed the plaintiffs' suit. It, therefore, became necessary for me to examine the entire case and in that process even to look into the evidence on the record relating to the alleged custom. My endeavour in this respect was made rather easy as I did not have to consider any documentary evidence in the case, for there was none, and my inquiry was confined only to the oral evidence and that too only of three witnesses examined by the plaintiffs including Mata Din, one of themselves.

The question, therefore, is whether the evidence of these three witnesses, the fourth, Karim Bakhsh, P.W. 3, being only a formal witness, had at all made out a custom of such as extensive and drastic nature as claimed by the plaintiffs--extensive in the sense that it was intended by the plaintiffs to have created in their favour a right to use the land for such multifarious purposes as mentioned in the plaint, and drastic in the sense that, if the alleged custom was proved, it almost deprived the proprietor of the land of all her interest in the same.

The value and quantum of the evidence relied upon by the plaintiffs and the vastness of the scope of the custom alleged by, them yielded the two tests which I feel justified in employing to answer the question whether that custom had really been proved and whether the lower appellate Court was right in holding so. There is a practical difficulty in the way of the plaintiffs-respondents in supporting the judgment of the lower appellate Court arising out of its undue brevity no lass than its being based on grounds, every one of which will on scrutiny be found faulty and utterly

unsustainable.

8. Before I enter into such scrutiny I may note that the learned counsel for the defendants-appellants did not argue that a castomary right could not, in law, be acquired, his real contention being that the necessary ingredients of proof of such a right having its origin in an alleged custom ware wanting. This, therefore, resolves the inquiry into the short question whether those ingredients were or ware not; proved by the evidence of the three witnesses examined by the plaintiffs and including one of themselves.

9. There is one anomaly which cannot be missed in our attempt to scan the judgment of the learned Civil Judge, and that is that without examining the plaintiffs' evidence he accepted every bit of their case. The usual process enjoined by law that every item of claim should be tested on the anvil of evidence was completely ignored. The only words in the judgment embodying the final conclusion of the learned Judge, which ordinarily should have followed a critical examination of the evidence with reference to each item of claim, were these :

> "..... but its long use clearly goes to show that the villagers have acquire the customary easement over the land in suit."

10. We know nothing as to what the learned Judge meant by the words "long use". We know nothing as to what the elements were of a legal proof of a right of custom. Much less do we know what the evidence was on either of these. The wards quoted appeared as the climax of the result arrived at by the learned Judge, and the judgment soon concluded with an almost irritating abruptness. I should find it very difficult to endorse such a process of reasoning or the decree based on it.

11. I feel tempted to examine item by item the few specific grounds on which the learned Civil Judge accepted the plaintiffs' case and negatived the defence taken by the contesting defendant. I do this immediately.

12. His first point was that the Court of Wards, in charge of the estate of Rani Gomti Bibi, having been approached by a number of residents of the village after the lease in question with a representation that the villagers had been using the land for diverse purposes and on this these villagers having been advised to file a suit for the determination of their rights, the former must be taken to have 'admitted' the right. One would have to strain one's brain to appreciate this reasoning. I cannot imagine how such an advice given or suggestion made by the Court of Wards involved an admission of the villagers' alleged rights.

If the Court of Wards, on this representation, had rescinded the lease which had already been granted to defendant 1 on 19-4-1944, there would undoubtedly have been an explicit admission of the villagers' right. On the other hand, the advice was to have the matter decided by the Court', which meant that it was equally open to the Court to pronounce that no such rights existed at all. It was, no doubt, said in the written order on the representation made by the residents of the village that the Court of Wards had no knowledge of the rights alleged. Even this, of course, was no admission of the factum of the rights.

13. His second point was that the learned Munsif, in his inspection note, had actually noted the various purposes for which the plaintiffs had filed the suit. I do not see any meaning in this remark. The word "noted" does not certainly mean "found." Besides, the learned Munsif had, in the inspection note, definitely mentioned that there was no grave yard on any portion of the land in dispute, no tank on it and no trace of any pigsty on it. These were admittedly among the "diverse purposes" which the plaintiffs had alleged in their plaint, Critically speaking, therefore, this remark of the learned Judge was wrong.

14. His third point was that the witnesses on either side had admitted that there were khalyans and Deoasthans and also trees and that cattle grazed on the land there being also a pit from which mud was taken by the villagers. We know nothing who those witnesses were and what their evidence was. It cannot surely be too much emphasised that a Court of appeal, particularly when giving a judgment of reversal, mast notice and critically examine the evidence to justify its judgment being contrary to that of the trial Court. It is an utterly hopeless and unsatisfactory method of dealing with cases merely to say that witnesses of the parties have proved this, that and the other. A judgment following such a reasoning, if it is a reasoning at all, is hardly a judgment under the Rules of our Court, and it is a typical instance of judicial evasion which it is the bounden duty of our Courts to eschew.

Having been put on the track by this remark of the learned Judge, I looked into the evidence in this case. I found that, consistently with the other witnesses of the plaintiffs, Suraj Bali Patwari, examined by the contesting defendant as witness No 2, had stated that, a long time before, Khalyans used to be kept but that on the land in dispute they had never been kept nor had he seen any being kept. He had further said that, thirty or forty years before, ghoors used to be kept, but that they were removed. He had also said that people used to pass over a portion of the land, as it was lying party. He, no doubt, admitted that there was, on a portion of the land, a Deoasthan. Without going in detail into the evidence of the other three witnesses examined by the defendant-appellants, can it be said that the remark made by the learned Civil Judge about the "admission" of the parties' witnesses was correct? I cannot conceive it, and I must hold that here also he went wrong.

15. His fourth point was that Section 18, Easements Act proved the right of grazing cattle as a right acquired by custom. This section merely says:

> "An easement may be acquired in virtue of a local custom. Such easements are called customary easements."

No one for the appellant has said anything to the contrary. Of course, an easement may be acquired in virtue of a local custom. The point was whether a custom in this particular locality lending support to the right claimed by the plain, tiffs had, in fact been proved. If it had been, of course the plaintiffs would be deemed to have acquired a right of easement: if not, it would not be so. This just puts us back into the same position where we are in quest for evidence proving the custom alleged. To talk of a right of easement based on custom, without saying whether the custom itself was or was not proved is obviously to beg the question. Unless the foundation of a custom had been established, the right claimed could not be conceived at all to have grown.

16. After mentioning the above four points, every one of which has been found by me either a misconception or a wrong assumption, the learned Civil Judge wound up the judgment by using the words I have already above quoted, namely, that "its long use clearly goes to show that the villagers have acquired a customary easement over the land in suit."

I need not repeat my reactions to this remark again. As if to lend some sort of a final strength to his judgment the learned Judge repeated, a few lines before the end of the order, his reasoning that the Court of Wards had 'admitted' the plaintiffs' claim. I have already shown that this 'admission' existed only in the Judge's imagination and is not traceable to any materials on the record.

17. A judgment based on such faulty reasoning and wholly innocent of any reference to the evidence on the record cannot possibly be upheld. In a case where the question of a custom was involved, it was essential that the evidence should have been tackled with due regard to the legal requirements of the proof of custom. Besides where the documentary evidence was altogether wanting, a satisfactory quantum of the oral evidence should have been insisted upon. Only for a group of three individuals to depose that they had seen this thing or the other on this land since they had been conscious of events in their live was certainly not to prove the custom in the manner required by law.

18. In Kuar Sen v. Mamman, 17 ALL. 87, Edge C.J. and Banerji J. laid down the law in these words:

> "Where a local custom excluding or limiting the general rules of law is set up a Court should not decide that it exists unless such Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right wag not by leave granted, or by stealth, or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it. concerned."

19. The dictum was followed in a later case of our Court in Mohammad Yusuf v. Suraj Bali Singh, A. I. R. (17) 1930 ALL. 333.

20. In Lakshmi Kumara v. Chinna Narayanappa, A. I. R. (15) 1928 Mad. 799, it was remarked:

> "A customary right of pasture on landlord's land cars be established by proper evidence if it is made out that from time immemorial the tenants have enjoyed it as of right, and if from the circumstances it could be gathered, that the right was enjoyed by them customarily or might be due to a lost grant."

21. Their Lordships of the Privy Council in Baba Narayan v. Saboosa, A. I. R. (30) 1943 P. C. 111 affirmed :

> "The burden lies upon one who sets up a custom in derogation of the ordinary rights of another as the owner of immovable property to give clear and positive proof of the

user relied upon to substantiate the custom."

and "It is by no means conclusive against a claim to customary right that the practice should have begun by permission or agreement, but it must be shown to have continued in 'such circumstances and for such length of time that it has come to be exercised as of right. The peaceful immersion of tazias in the Padmatirtha tank at the time of Muharram between the years 1910--25 is an insufficient basis for a finding of customary right."

The last sentence in the above quotation is highly significant in its application to the present case. The mere fact, assuming it to be a fact, that portions of the land had been used by the villagers in different ways, not in defiance of any declared prohibition by the owner, nor in denial of his rights or assertion of a hostile claim, would not give rise to such incidents as would entail an extinction of the rights of the latter or a creation o f a right for the former. A zamindar, for the mere reason that he does not for the time being require a particular area within his zamindari, may not take notice of such stray and fugitive acts as the non-proprietary residents in the village may have been carrying on, but this, again, would not be the origin of the creation of a right in favour of the villagers and to the prejudice of the zamindar.

Indeed, in an agricultural village, as the village now in dispute admittedly is, such miscellaneous liberties, as the grazing of cattle on one part of the land today and on another tomorrow, and passing over a portion of the land on one side today and on another tomorrow, or taking mud from some outlying strip of land for the erection of a house in the abadi, may just be only some of the normal features of village activity. All this may be within the knowledge of the zamindar and yet without a protest from him. But none of such acts shall, in law, be the origin of an accrual of right by custom or prescription. Any other view would almost revolutionise the mutual relations of landlords and tenants in our villages and not unoften lead to a chaos.

22. In the judgment of the lower appellate Court there is no indication whatsoever of the ingrediente of proof of a right of custom as laid down in the rulings aforesaid. As I have said perhaps more than onse, there is no indication even of the evidence relating to custom. The words "long use" in the sentence twice quoted above do not indicate a finding sufficient to cover the requirements of law for a finding in favour of custom. They may imply anything except time immemorial or time beyond human memory. The words may be well used even to convey a period not longer than eleven years and, Surely, no one can suggest that user only for such a period may constitute proof of a custom.

23. Learned counsel for the plaintiffs respondents referred me to a large number of cases which merely emphasised that a customary right could be acquired for keeping khalyana, grazing cattle, or tying cattle. This is not denied by learned counsel for the appellants. The whole question was whether the judgment under appeal could be justified by the evidence on the record in the light of the necessary ingredients of proof of a custom such as claimed by the plaintiffs. I have shown that in every senss it was not, and I find it impossible to uphold it except on a particular point now to be mentioned.

24. Suraj Bali, defendants' witness No. 3, as I have pointed out admitted that there was a Deoasthan on a portion of the land. The learned Munsif, no doubt, had remarked that the pots placed there might have been put only recently and for purposes of this case. The lower appellate Court, again, unfortunately did not address itself to this aspect of the case, and, accepting the plaintiffs' case wrongly, gave a judgment in their favour. A suggestion being made during the arguments that the defendants-appellants might not tamper with the Deoasthan referred to in the evidence of Suraj Bali, defendants' own witness, their learned counsel readily accepted it, and undertook on behalf of his clients not to do so. This was a very graceful attitude and I must acknowledge my appreciation of it.

25. For these reasons I allow this appeal, set aside the decree of the lower appellate Court and restore that of the trial Court, except with regard to the Deoasthan mentioned by the latter Court as under a neem tree, for which the plaintiffs' claim shall stand decreed. In the circumstances, the plaintiffs, while bearing their own costs, shall pay only three-fourths of the defendants' costs.

26. Leave to appeal to a Bench is refused.