APPELLATE CIVIL.

Before M. C. Ghose J.

SALADUR JAMAN CHAUDHURI

v.

OAJADDIN.*

1936

Jan. 7, 8.

Custom—Right of pasturage by long user, if legally enforceable.

A custom by which a right of pasturage by long user is claimed by villagers to lands in a neighbouring village and belonging to a different landlord, which would result in precluding the land for ever from being brought under cultivation, is unreasonable and is not legally enforceable.

Bhola Nath Nundi v. *Midnapore Zemindary Co.* (1) and *Secretary of State for India* v. *Mathurábhái* (2) distinguished.

SECOND APPEAL by the defendants.

The facts of the case are sufficiently stated in the judgment.

Chandra Shekhar Sen for the appellants. The lower appellate Court has found that the plaintiffs had been grazing their cattle on the suit lands for about 40 years. This is not sufficient to establish immemorial user. The alleged custom will have the effect of completely depriving the owners of their right to the suit lands and is therefore unreasonable and not valid. I rely on *Sayed Ali* v. *Sarjan Ali* (3).

Hemendra Kumar Das and *Sudheer Kumar Acharjya* for the respondent. A right of pasturage acquired as an easement by custom and immemorial user has been recognised in a number of cases, *e.g.*, *Secretary of State for India* v. *Mathurábhái* (2) and *Bhola Nath Nundi* v. *Midnapore Zemindary Co.* (1).

*Appeal from Appellate Decree, No. 34 of 1934, against the decree of Bagala Prasanna Basu, Third Subordinate Judge of Tippera, dated Aug. 25, 1933, affirming the decree of Nripendra Kumar Ghosh, Second Munsif of Brahmanbaria, dated May 12, 1932.

(1) (1904) I. L. R. 31 Cal. 503; L. R. 31 I. A. 75.

(2) (1889) I. L. R. 14 Bom. 213.

(3) (1913) 18 C. W. N. 735.

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M. C. GHOSE J. This is an appeal by the defendants in a suit by the villagers of Satgaon for declaration of their right of pasturage based upon custom in seven plots of land specified in the plaint. The area of the seven plots according to the record-of-rights is about 38 acres. In the record-of-rights, which was finally published in 1919, six of the plots were recorded as cattle pasture and one of the plots was recorded as a *khâl*. The trial Court found that the plot was recorded wrongly as a *khâl* in the record-of-rights; it was really a piece of land. The defendants resisted the suit on various grounds. The trial Court decreed the suit and that decree has been affirmed in appeal.

The Courts below have held that the right of the plaintiffs to pasture their cattle on the defendants' land is a right which can be acquired as an easement. This view was held in 1889 in the case of the *Secretary of State for India* v. *Mathurábhái* (1) where certain tenants of Government claimed a right of pasturing their cattle in certain waste lands of Government. The suit was resisted. The Advocate-General argued that profits *a prendre* cannot be claimed as an easement by the inhabitants of a village or town either by custom or by prescription. The Court held that that was entirely true in English law but that objection could not be taken to a right of grazing by a village in the Bombay Presidency as against the Government and that the right of free pasturage had always been recognised by Government as a right belonging to certain villages and must have been acquired by custom or prescription. In 1903, in the case of *Bhola Nath Nundi* v. *Midnapore Zemindary Co.* (2) it was held that the plaintiffs as cultivators by occupation claimed against their landlord a right of pasturage over the waste lands of the villages to which they belonged, that the enjoyment of right was from time immemorial and that

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there was no difficulty in the way of the legal origin of the right claimed. Their Lordships found that the right of pasturage had been enjoyed by the plaintiffs and their predecessors from time immemorial, from the time of the Hindu *râjâs* long before the present landlords had anything to do with the property. As to the objection that right of pasturage was a right in gross it was held that the defendants landlords should not be precluded from improving the property; the plaintiffs would get a decree but the decree was not to prevent the defendants landlords or their successors-in-title from cultivating or executing improvements upon the waste lands in question so long as sufficient pasturage was left for the plaintiffs and the other persons entitled to the right of pasturage claimed.

It is to be observed that in both the reported cases the plaintiffs were the tenants of the defendants landlords and claimed pasturage over the waste lands of the village belonging to their landlords. In the present case the plaintiffs did not make a case that they claimed free pasturage as tenants of the defendants landlords. Their case was that this was waste land adjacent to the village and that from time immemorial they had been pasturing their cattle thereon and the whole of the land was necessary for their pasturage, but the defendants had cultivated part of the land and were threatening to turn the whole into arable land.

A custom to be valid in law must be of immemorial existence and it must be reasonable. In this case the trial Court found that the plaintiffs had been grazing their cattle in the suit lands for about 32 or 33 years, but had been prevented for about five years before the suit. The Court of appeal held that the plaintiffs had been grazing their cattle on the suit lands for about 40 years. It is urged by the learned advocate for the appellants that the findings of the Courts below are not sufficient to establish immemorial usage. In my opinion, there is force in the argument. These are waste lands of

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the defendants. They are swampy lands and so long as they remained unfit for cultivation the inhabitants of the adjacent villages grazed their cattle, and the defendants did not object. But a few years ago when part of the lands became fit for cultivation the defendants landlords let out the lands to the defendants tenants who proceeded to grow *boro* paddy on the lands upon which the present suit was instituted. In my opinion the Courts below committed an error of law in holding that the plaintiffs had been enjoying the custom of pasturing their cattle from time immemorial.

Further, it appears that the decree of the Court of appeal below in effect completely deprives the landlords of their right to the lands in suit. This cannot be considered to be a reasonable position. Even though by custom the plaintiffs obtained a right of pasturing their cattle in the suit lands they can only enforce it in law if the custom be reasonable. It cannot be considered a reasonable custom if the owners of the lands be thereby deprived completely of their rights. By the decree the plaintiffs' right of pasturage is declared, and it is ordered that they do recover possession of the lands. The defendants are permanently restrained in effect from ever bringing the land under cultivation. This cannot be considered fair and equitable. The landlords have to pay revenue to Government. It is not right that they should be deprived of the power of making any profitable use of the lands. The custom claimed by the plaintiffs is not reasonable.

The appeal is allowed and the suit is dismissed. Having regard to all the circumstances, each party will bear its own costs throughout.

Leave to appeal is rejected.

Appeal allowed: suit dismissed.

A. A.