

Lakshmidhar Misra and Others - - - - - *Appellants*

v.

Rangalal and Others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 20TH OCTOBER, 1949**

Present at the Hearing :

LORD SIMONDS

LORD RADCLIFFE

SIR MALCOLM MACNAGHTEN

[*Delivered by LORD RADCLIFFE*]

This appeal is concerned with the legal status of two parcels of land comprising 3.90 acres in all in the village of Byree, Killa Darpan, district Cuttack, Orissa. These two parcels, which may conveniently be referred to as "the disputed area", are themselves part of a plot No. 1990-2401 in the same village, the plot lying to the west of the Bengal—Nagpur railway line which intersects the village. The documents in this case, not excluding the judgments, do not make it always an easy task to determine whether the whole plot No. 1990-2401 is not more properly the subject of dispute than that portion of it which is described as the disputed area. In fact all the relevant evidence bears as much upon the status of the larger as of the smaller area. However that may be, the appellants' case is that the disputed area must be recognised in law as a cremation ground of the village and that, it being so, no part of the site can be made available for the purposes of private industry. The respondents Rangalal, Lachminarayan and Balu Ram, on the other hand, maintain that the disputed area has been validly granted to them or some of them by the Zamindar of the Killa Darpan estate and that they are entitled to occupy the site for the purposes of a rice mill which at the date of the institution of the suit they were proceeding to erect upon it.

In the first Court, the Court of the Munsiff of Jajpur, questions were raised as to the form of the suit and as to whether the necessary parties were before the Court. Issues were framed with regard to these points. The learned Munsiff decided these issues in favour of the appellants, who were plaintiffs in the suit. Neither of the intervening Courts expressed any disagreement with his holding on these issues, and no point with regard to them was pressed in argument before their Lordships. It may be taken therefore that the appellants, of whom the third is in fact the owner of an existing rice mill in the same village, are entitled to maintain the suit in a representative capacity on behalf of the villagers and that the suit is not defective in form by reason of the nonjoinder of the Zamindar or of the Collector.

The important issue for the purposes of the appeal therefore is that which was No. 5 of the issues framed by the trial Judge. It was expressed as follows:—"Is the disputed land a Sarbasadharan cremation ground?" This question, which can hardly be regarded as other than a mixed question of law and fact, received a diversity of answers in the Courts below. The appellants, as they were entitled to, confined their Pleint to the allegation of fact that "the said plot has been reserved from time immemorial and the people of the locality are using it for the said purpose from generation to generation," without pleading any special legal conclusion from these facts. At the trial their advocate disclaimed any intention of basing his case on an easement or prescriptive right, and the Munsiff, treating the claim as one of an alleged customary right, held that the evidence was insufficient to establish the existence of such a right. He further held that a claim based on a presumption of lost grant must necessarily fail, since no such presumption could be made in favour of villagers "who constitute a fluctuating and unascertained body of persons." The additional Subordinate Judge before whom the case went on first appeal, while noting that the appellants did not depend on any right of easement, held that on the evidence there had been a "dedication" of the land for use as cremation or burial ground. He rejected the view that the appellants' case was based upon "any customary right of user" and expressed his final conclusion on a review of the evidence with the words "In my opinion the reservation of the lands . . . amounts to dedication or a regrant by the landlord." On second appeal in the High Court of Patna the Judge, Mr. Justice Shearer, held that it was impossible to say that anything amounting to a dedication of the land had occurred in this case and, so holding, reversed the judgment of the additional Subordinate Judge on first appeal and dismissed the appellants' suit. It will be seen that in the course of these various hearings the original basis of the claim, that of customary right, appears to have become obscured by other and more complicated legal conceptions. The words of Lord Macnaghten, when delivering the judgment of this Board in *Bholanath Nundi v. Midnapore Zemindary Co. Ltd.*, L.R. 31 I.A. 75 are singularly apposite to the present case. "It appears to their Lordships that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately however (in the lower Courts) the question was overlaid, and in some measure obscured, by copious references to English authorities and by the application of principles or doctrines, more or less refined, founded on legal conceptions not altogether in harmony with Eastern notions."

It is necessary at this stage to notice the primary submission that was made to their Lordships on behalf of the appellants. This was founded on the well known S. 100 of the Civil Procedure Code which prohibits a second appeal on questions of fact. The Subordinate Judge on first appeal had found that there had been a dedication or lost grant of the disputed area for the purposes claimed and this, it was said, was a finding of fact that could not be disturbed on second appeal. Therefore the judgment of the Subordinate Judge had been wrongly reversed and ought now to be restored. Their Lordships regard it as impossible to treat this appeal in this way. There is more than one objection to doing so. Issue No. 5 is essentially a mixed question of law and fact. There are findings of fact by the Subordinate Judge which must indeed be accepted as binding in any consideration of this matter on further appeal: but his actual conclusion that there had been a **dedication or lost grant**, is more properly regarded as a proposition of law derived from those facts than as a finding of fact itself. There is an abundance of reported authority on the application of S. 100 of the Code of Civil Procedure, though it would be too much to say that there are not some decisions that are difficult to reconcile with the main line of authority. It is unnecessary to review them for the purposes of this appeal. It is enough to quote two passages from past decisions of this Board. "The facts found need not be questioned. It is the soundness of the conclusions from them that is in question and this is a matter of law" (see *Ram Gopal v. Shamskhaton*, L.R. 19 I.A.

228 at 232). "The proper legal effect of a proved fact is necessarily a question of law" (see *Najar Chandra Pal v. Shukur*, L.R. 45 I.A. 183).

But, apart from this, the conclusion at which the learned Subordinate Judge arrived with his finding that there had been dedication or lost grant is on the face of it defective in law. These are words of art in English law and the learned Judge does not explain how they can be invoked to determine rights in India and yet released from their essential terms. He may have been right in the result in thinking that the respondents were in the wrong. That must be considered later. But if the legal doctrines of English law, on which dedication and lost grant depend, are to be resorted to for the purpose of settling the disputes of this Indian village then the learned judge was wrong in decreeing the appellants' suit. It is essentially a suit to establish the rights of the villagers in the disputed area. No one claimed or spoke of the land as subject to the rights of the general public nor indeed would it be easy to give a meaning to such a conception as applied to a cremation ground in a particular village. But dedication is only known to English law as something equivalent to an irrevocable licence granted by the owner of soil to the use of the public. Dedication of a piece of land to a limited section of the public, such as the inhabitants of a village, is a claim unknown in law, and evidence limited to such special user would not justify a finding of dedication (see *Poole v. Huskinson*, 11 M. & W. 827, *Hildreth v. Adamson*, 8 C.B. (N.S.) 587, *Bermondsey v. Brown*, L.R. 1, Eq. 204). Much the same result might well be achieved by the creation of a charitable trust binding the land, but that is not dedication nor is it in question here. At no stage of the hearing is there any record of a claim that the village community constitutes a corporation administering a trust for some classes of its inhabitants, nor was any such argument advanced before their Lordships.

The doctrine of lost grant gives no firmer basis for the appellants' case. This doctrine originated as a technical device to enable title to be made by prescription despite the impossibility of proving "immemorial user." By English common law prescription had to run from time immemorial which by convention began in the year 1189. If it was possible to demonstrate that the user in question, though ancient, originated since 1189 the proof of title by the prescription of immemorial user failed. To get round this difficulty Judges allowed or even encouraged juries to find that the right in question, though less ancient than 1189, originated in a lost grant since that date. Thus the right acquired the necessary legal origin. But such a right, just as much as an easement, had to be attached to and to descend with an estate: moreover, since it originated in grant, its owners, whether original or by devolution, had to be such persons as were capable of being the recipients of a grant under English law. A right exercisable by the inhabitants of a village from time to time is neither attached to any estate in land nor is it such a right as is capable of being made the subject of a grant. There are no admissible grantees. In fact the doctrine of lost grant has no application to such rights as those of the inhabitants of a particular locality to continue an ancient and established user of some piece of land.

In their Lordships' view the true legal basis of such rights lies in custom. This is as much the case in India as it would be in England. Indeed this is the view which is fully set out in the judgment of Mr. Justice B. K. Mukherjea in *Asrabulla v. Kiamatulla* A.I.R. 1937 Cal. 245. A customary right can exist only in relation to the inhabitants of a district and it cannot be claimed in respect of the public at large (*Fitch v. Rawling*, 2 H.Bl. 393). The custom, if established, makes the local law of the district and it creates a right in each of the inhabitants irrespective of his estate or interest in any particular property. The Courts of England have upheld many customs in different parts of the countryside which have had the effect of binding some piece of land to the perpetual service of the village or district. The claims so upheld are not different in any essential respect from the claim to the cremation ground in the village of Byree which is in question here. A custom for the inhabitants to dance

upon a piece of ground for their recreation (*Abbot v. Weekly* 1 Levinz 176): a custom to use a close for exercise and play at all kinds of lawful games, sports and pastimes (*Fitch v. Rawling* supra): a custom to enter upon certain land, erect a maypole thereon and dance round and about it (*Hall v. Nottingham* 1 Ex.D. 1). What the Courts have required of a custom, if the law is to uphold it as a right, is that it should be immemorial in origin, certain and reasonable in nature and continuous in use. It is by these tests that the appellants' claim in this case must be tried.

The evidence adduced at the trial was in some respects conflicting. But any appeal in a Court above the first appellate Court must necessarily proceed on the basis of such relevant findings of fact as were made by the additional Subordinate Judge in his review of the evidence. These findings may be summarised in three points. Firstly, he was satisfied that "the suit lands are used for generations as cremation or burial ground." Secondly, he held that their appropriation for this purpose did not originate with the Provincial Settlement of 1901, at which date the Plot 1990-2401 was entered in the published record as Smasan ground, with the added note "These numbers are kept in reserve for cremation of dead bodies by the Sarbasadharan (public)." His finding was that, while this entry supported the villagers' claim to rights in the land, it was absurd to suggest that it was only at that time that the user of it as a cremation ground began. The villagers, he said, have been there from time immemorial: no settlement papers had been produced to show that other plots were previously in use as cremation grounds: and the necessity for cremation ground could hardly have been felt for the first time at the date of the settlement. Thirdly, he did not accept the view that the user had been abandoned.

From these findings it would seem reasonable to infer the existence of a village custom to which the law could attach legal sanction. It seems beyond dispute that it is a question of law whether such a custom is to be recognised or not, although the facts upon which the question is to be decided cannot be a matter of appeal beyond the first appellate Court (see *Ram Bilas v. Lal Bahadur*, I.L.R. 30 All. 311. *Tajammul Husain v. Banwari Lal*, I.L.R. 48 All 77. *Kumarappa Reddi v. Manavala Goundan*, I.L.R. 41 Mad. 374. *Kailash Chandra Datta v. Padmakisore Roy*, I.L.R. 45 Cal. 285). At this point it is necessary to notice the reasons which led the Munsiff in the first Court and Mr. Justice Shearer on second appeal to regard the appellants' claim as unmaintainable. They have been referred to already. The Munsiff, who did treat the claim as one based primarily on customary right, dismissed the suit because he thought that the evidence was insufficient to establish such a right. But his view of the effect of the evidence as a whole was materially different from that which was adopted by the additional Subordinate Judge on first appeal, and it is the latter which must govern the consideration of the question before this Board. In particular he seems to have found that the disputed area had fallen into disuse as cremation ground and that the villagers had given up the use of it for this purpose within living memory. This finding was clearly not adopted on first appeal. Mr. Justice Shearer, on the other hand, concentrated his consideration of the appeal before him upon two issues, firstly whether the Court below had misdirected itself, as he held that it had, in deciding the present case by reference to reported decisions relating to Muslim graveyards, and secondly whether the evidence, in particular the entries in the Record-of-rights at the time of the 1901 Settlement, ought to be treated as amounting to a legal dedication of the land for this purpose. No doubt he was led to take this course by the form of the judgment in the Court appealed from, but the result was unfortunate, since no consideration was given to what was the original and what is in their Lordships' view the natural basis of the appellants' claim—customary right. The learned Judge was very definitely of the opinion that it would be to misunderstand the position to hold that any entry made in the Record-of-rights at the time of the settlement operations ought to be construed as evidence of a contemporaneous dedication. That may be so: though even on this point the Judge's observations seem to

apply more to settlement operations in general than to what is recorded as having taken place in connection with this particular Killa Darpan estate, which was a permanently settled one. It must be remembered that contemporaneously with the entries in the Record of rights the officer who carried out the settlement of this estate stated in his published report with regard to the settlement "Areas reserved for public use. These have been reserved after careful enquiry and with the agreement of both landlords and tenants, (1) for pasturage and cremation, and (2) for public uses. The proprietor took care to exclude culturable areas from these." But, however this may be, the question whether there was a dedication in connection with the 1901 settlement is not really the question at issue. Despite some inconsistency of statement the Subordinate Judge had clearly held that what he called the dedication had taken place at a date long anterior to the settlement operations and that what was recorded at that time, though important confirmatory evidence, as indeed it is, was merely part of the evidence that established the "dedication." As a consequence of this the judgment which is now under appeal before their Lordships' Board can hardly be regarded as a fully satisfactory treatment of the issues involved in the present case.

Their Lordships consider that the appellants have made out their case that the disputed area is bound by custom to be reserved as the village cremation ground. The respondents did not maintain that such a right could not legally exist in India. They stressed—and there is, of course, force in the distinction—that a piece of land covering several acres used for Hindu cremation is something very different from a Christian or Muslim burial ground. And there are substantial differences between it and the burning ghat which came under consideration in the *Howrah Municipality* case (4 Cal. L.J. 343). But these differences bear upon the probability of any defined area of land being permanently reserved for cremation in a village; they do not destroy the legal possibility of such a reservation if the evidence supports it. The respondents' main argument turned on the proposition that the obligations of the proprietor of the estate towards the villagers was limited to providing them with a satisfactory area for cremation purposes. So long as at any given time adequate land was made available for the purpose no particular piece of his land was bound to be reserved by him. Their Lordships have found it impossible to accept this view of the legal relationship between the proprietor and the villagers. It must be founded either on law or fact or a combination of the two. If on fact, there seems no satisfactory evidence in the case to support it and the argument really amounts to no more than saying that the findings of fact which were made on first appeal misconceived the position. If on law, no authority was cited to suggest that the legal relationship of proprietor and villagers, even if it be such as the respondents contend, is so unalterable that it cannot be modified by such immemorial user as is spoken to in this case.

The appeal therefore must be allowed, the Decree of 24th September, 1943, of the Patna High Court set aside and the Decree dated 12th September, 1939, of the additional Subordinate Judge at Cuttack restored with one modification. It contained an order upon defendants 2 and 3 in the suit to remove their mills, buildings, machinery and other structures from the land within one month, so as to restore the land to its original condition and render it useful as cremation or burial ground. The respondents have pointed out there was no issue in this case as to a burial ground and that the Judge ought not therefore to have allowed any right in respect of it. Their Lordships agree with this, and the words "or burial ground" should be struck out of the Order accordingly. Any sums which the appellants have paid to the respondents under orders of the Courts below must be repaid to them, and the respondent Rangalal must pay to the appellants their costs of the appeal in the High Court. Their Lordships will humbly advise His Majesty to this effect. The respondents Rangalal, Lachminarayan and Balu Ram must pay the appellants' costs of the appeal before this Board.

In the Privy Council

LAKSHMIDHAR MISRA AND OTHERS

v.

RANGALAL AND OTHERS

[DELIVERED BY LORD RADCLIFFE]

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