(1913) 05 CAL CK 0030

Calcutta High Court

Case No: Appeal from Appellate Decree No. 3085 of 1911

Syed Ali and others		APPELLANT
	Vs	
Sarjan Ali and others		RESPONDENT

Date of Decision: May 23, 1913

Final Decision: Allowed

Judgement

1. This Appeal arises out of a suit by certain cultivating tenants for a declaration that they have a right of pasturage over the land in suit and for consequential relief. The lower Appellate Court has decreed the suit and the Defendants appeal. The first point taken is that of limitation but in the view that we take of the case, no question of limitation really arises.

2. The learned Subordinate Judge says: "The land has been lying unoccupied from time immemorial and the villagers have been grazing their cattle here for more than 30 years. Their user was open and peaceful without interruption and should be in the circumstances of this case presumed to be as of right also." In our opinion these findings are hardly sufficient to dispose of the suit. We believe that throughout Bengal, where land is left waste or jungle, the cattle of the villagers graze over it and probably in most cases have done so from time immemorial. No one is interested in stopping them and the user is therefore open, peaceful and uninterrupted. But it would be impossible to hold that therefore no landlord is entitled to bring any waste or jungle land under the plough. A right of pasturage arising from immemorial user of this kind resembles a right based upon custom. This has been laid down in Madras and Bombay, sec. 18, Easement Act, 1882, and Secretary of State v. Mathurabahi ILR 14 Cal. 213 (1889) and the view is in accordance with common sense. Now a custom must be reasonable and it would be wholly unreasonable that no land over which cattle had hitherto grazed should ever be brought under the plough. We may refer in this connection to the case of Leechmutput Singh v. Sadaulla I.L.R 9 Cal. 698 (1882). Nor is this view inconsistent with the decision in Bholanath v. Midnapur Zemindary Co. ILR 31 Cal. 503 (1904). Their Lordships''

judgment clearly proceeded on the supposition that the landlords were entitled to plough waste land if only sufficient pasturage were left, and the judgment certainly does not go so far as to lay down that immemorial grazing without more makes waste land inviolable. Their Lordships observe :--" It was certainly not the intention of the Subordinate Judge or the Munsif, that the decrees should prevent the Defendants improving their property. And, indeed, the Munsif expressly states that the Plaintiffs admitted the right of the Defendants to improve their property, provided sufficient pasturage were left." And they thought it advisable to add a specific provision to that effect to the decree. We think, therefore, that the lower Appellate Court must find more than that the village cattle have always grazed on this land before he can decree the suit. It may be the case, for instance, that the land in suit has been reserved in some particular manner for pasturage, or that the circumstances of the locality mark it out as suitable for pasture. It may be an island of waste amid a great expanse of cultivated land so that if it is cultivated the cattle of the villagers may have to be driven to an unreasonable distance in order to obtain pasture. Or it may be that the amount of waste remaining in the village is only sufficient for the needs of the cattle. In any of these cases the lower Appellate Court might be justified in holding that the custom underlying the right was reasonable in decreeing the suit. But if there is nothing to show that the land in suit differs in any respect from other waste and if there is plenty of pasturage left in the village the Plaintiffs are not entitled to relief. The Appeal is accordingly allowed and the case will go back to the Court below for rehearing with reference to these observations. It will be open to that Court to allow fresh evidence to be taken either by himself or by the first Court. Costs will abide the result.