

(1977) 08 CAL CK 0047

Calcutta High Court

Case No: Second Appeal No. 633 of 1965

Satis Chandra Naskar

APPELLANT

Vs

Upendra Nath Biswas

RESPONDENT

Date of Decision: Aug. 17, 1977**Acts Referred:**

- Bengal Tenancy Act, 1885 - Section 159, 161, 162, 163, 166
- West Bengal Estates Acquisition Act, 1953 - Section 2, 3, 4, 5, 5(1)
- West Bengal Estates Acquisition Rules, 1954 - Rule 4(3)

Citation: (1977) 2 ILR (Cal) 264**Hon'ble Judges:** Chittatosh Mookerjee, J**Bench:** Single Bench**Advocate:** S.C. Mitter and Joy Gopal Ghosh, for the Appellant; Biswajit Ghosh and Ramapati Roy, for the Respondent**Final Decision:** Dismissed

Judgement

Chittatosh Mookerjee, J.

Six plots comprised in khatian No. 1, mouza Ganga Jawara, P.S. Sonarpore, dist. 24-Parganas, are subject-matters of the present appeal. Previously, two groups of Roychowdhury landlords were in khas possession of these plots. In the C.S. records these plots were described as with further remarks On Chaitra 1, 1353 B.S., corresponding to March 15, 1947, two brothers Palan Naskar, the father of the Plaintiffs and Kartick Naskar, by executing two kabuliats had taken settlement of these plots from the said two groups of Roychowdhury landlords. On Falgun 9, 1358 B.S., Kartick sold his interests to said Palan Naskar. Subsequently, one group of landlords headed by Sailendra Kumar Roychowdhury had sued Kartick Naskar and Palan Naskar for arrears of rent and had obtained a decree. The decree-holder had put the said decree into execution. On June 10, 1954, one Panchanan Ghosh had auction purchased the suit property. On Bhadra 22, 1361 B.S. corresponding; to

September 8, 1954, the Plaintiffs purchased the suit property from the said Panchanan Ghosh.

2. The Plaintiffs brought a suit, inter alia, for declaration of title and for further declaration that the entries in the record of rights in respect of the disputed plots were erroneous, for confirmation of possession and for permanent injunction. The Defendants contested the suit, inter alia, claiming that the villagers had been using the disputed plots for grazing their cattle as of right from time immemorial and that they acquired a customary right of pasturage over the suit property. The learned Munsif, First Additional Court, Alipore, dismissed the suit, inter alia, holding that the presumption of the correctness of the record of rights stood unrebutted and even assuming that the predecessors of the Plaintiffs had taken settlement, they had taken the same subject to the customary right of the members of the public. The Plaintiffs being aggrieved by the said decision preferred an appeal. The learned Additional District Judge, Fourth Court, Alipore, allowed the said Appeal in part. He ordered that the suit be decreed in part and the Plaintiffs' title to the disputed lands be declared and their possession be confirmed subject to the "easement right of pasturage" of the villagers of Ganga Tawara from the months of Ashar to Mash every year. The Defendants were ordered to be restrained from interfering with such possession of the lands by the Plaintiffs. The Plaintiffs have preferred this Second Appeal, inter alia, contending that the lower appellate Court had erred in law in passing the above qualified decree.

3. Both the trial Court and the lower appellate Court have concurrently found that the villagers of Ganga Jawara had a right of pasturage by immemorial custom over the suit property. The Defendants witnesses Nos. 1 and 2 admitted that their cattle grazed on the suit lands from transplantation to harvesting time and these witnesses did not even claim such right of pasturage throughout the year. The Plaintiffs as owners were entitled to exercise their tenancy rights subject to the customary right of pasturage of the villagers of Ganga Jawara enjoyed from Ashar to Magh each year. The decree passed by the lower appellate Court fully satisfies the principles of law relating to customary right to pasturage enunciated by G.N. Das and Lahiri JJ. in [Nani Gopal Dutta and Others Vs. Kshitish Chandra Banerjee and Another](#), which was placed by Mr. Mitter, the learned Advocate for the Appellants. The Division Bench held that the villagers of a particular village can claim right of pasturage over the banks of a tank as a customary right. But such right of pasturage based on custom has to be strictly construed and all the essentials of a valid custom must be fulfilled. The exercise of the right of pasturage by the villagers over the banks of a tank does not entirely deprive the owner of the right to use his servient heritage. Such custom would be reasonable.

4. The only point in this appeal is whether or not the said customary right of pasturage now stands annulled by reason of publication of the notification u/s 4 of the West Bengal Estates Acquisition Act read with Section 5 of the said Act. The

Plaintiffs were the raiyats in respect of the suit plots. Upon publication of the notification u/s 4, with effect from Baisakh 1, 1361 B.S., the estates and rights of Roychowdhurys, who were the landlords, vested in the State. But in terms of Section 5(1)(c) of the West Bengal Estates Acquisition Act until the provisions of chap. VI were given effect to, the Plaintiffs as raiyats began to hold the suit lands directly under the State "as if the State had been the intermediary and on the same terms and conditions as immediately before the date of vesting". It has been concurrently found by the two Courts of fact that in 1353 B.S., the Plaintiffs were granted settlement of the suit plots subject to the aforesaid customary right of pasturage of the residents of village Ganga Jawara. Until chap. VI of the West Bengal Acquisition Act came into force, the Plaintiffs who were raiyats in view of the express provisions of Section 5(1)(c) continued to hold the suit lands on identical terms and conditions.

5. With effect from April 10, 1956, chap. VI of the West Bengal Estates Acquisition Act came into force in all the districts of West Bengal. On the issue of the notification u/s 49 of the West Bengal Estates Acquisition Act, chaps. II, III, V and VII subject to such modifications as might be necessary applied *mutatis mutandis* to raiyats and under-raiyats as if they were intermediaries and the land held by them were estates and persons holding under raiyats or under-raiyats were raiyats for the purpose of Clause (c) and (d) of Section 5(1).

6. In this case, the Plaintiffs claim that they had continued as raiyats under the State. In other words, the Plaintiffs' case is that they were entitled to retain and in fact, they had retained the suit lands u/s 6 of the West Bengal Estates Acquisition Act. Therefore, they are not entitled to contend that their retained lands had been freed of the customary right of pasturage hitherto enjoyed by the residents of village Ganga Jawara. Section 5(1) of the Act lays down the effect of a notification u/s 4 vesting estates and the rights of intermediaries in the estates. Not only all the rights owned by intermediaries in the estates are extinguished but the vested estates are freed from all encumbrances. But Section 5(1) does not operate to release retained properties of the encumbrances, if any. Venkatarama Ayyar J. speaking for the Court in *Collector of Bombay v. Nusserwanji Rattanji Mistri and Ors.* AIR 1955 S.C. 296 : 1955 S.C.A. 692 (701), with reference to the scope of Section VIII of the Land Acquisition Act, 1857, had observed:

When the Government acquires lands under the provisions of the Land Acquisition Act, it must be for a public purpose and with a view to put them to that purpose, the Government acquires the sum total of all private interest subsisting in them.

Their Lordships, however, hold that if the Government has itself an interest in the land, it has only to acquire the other interest outstanding therein so that it might be in a position to pass it on absolutely for public use. These observations may be made with reference to vesting under the West Bengal Estates Acquisition Act. The same results in State acquisition of estates of rights of intermediaries therein and of certain rights of raiyats and under-raiyats and of the right of certain other persons

in lands comprised in estates. When an intermediary is allowed to retain, no question of freeing the retained land of incumbrances upon the said retained land could arise.

7. Section 6(1) starts with the expression "notwithstanding anything contained in Sections 4 and 5" and then states that an intermediary except in cases mentioned in proviso to Sub-section (2) shall be entitled to retain different categories of lands specified in Clause (a) to (1) of Sub-section (1). Further, in terms of Section 6(2) of the Act read with Rule 4(3) of the West Bengal Estates Acquisition Rules, the Plaintiffs have been holding the suit lands on the terms and conditions mentioned in Sections 23, 23A, Clause (a) of Section 25, Sections 26, 26B, 26C, 26G, 52 to 55, Sub-sections (1) and (2) of Section 56, Sections 65 and 67, Sub-section (1) of Section 58, Sections 73, 86A, Sub-sections (1), (2) and (3) of Section 87, so much of Section 159 as does not relate to protected interests, Sections 161, 162, 163, 166, Sub-sections (1), (2) and (3) of Section 167, Section 168, Sections 169 to 171 and Sections 173 to 177 of the Bengal Tenancy Act, 1885.

8. Thus, the right of the Plaintiffs in the suit lands did not vest. Section 5(1)(a) of the West Bengal Estates Acquisition Act cannot operate to automatically annul the customary right of pasturage upon such retained land. It may be pointed out that such customary right of pasturage will not be covered by Section 161(a) of the Bengal Tenancy Act because such right was not created either by the landlords or by the Plaintiffs as tenants. The West Bengal Estates Acquisition Act neither expressly nor by necessary implication provides for freeing or annulling such customary rights of pasturage over the retained lands of the raiyats. The definition of the expression "incumbrance" in Section 2(h) is as follows:

"incumbrance" in relation to estates and rights of intermediaries therein does not include the rights of a raiyat or of an under-raiyat or of a non-agricultural tenant, but shall, except in the case of land allowed to be retained by an intermediary under the provisions of Section 6, include all rights or interests of whatever nature, belonging to intermediaries or other persons, which relate to lands comprised in estates or to the produce thereof.

This definition of "incumbrance" in Section 2(h) thus by necessary implication provides that in case of land allowed to be retained by intermediary under provisions of Section 6, rights and interests of whatever nature belonging to intermediaries or other persons which relate to retained lands or to the products thereof are not incumbrance. Therefore, in case any intermediary and raiyat are allowed to retain u/s 6 any land, such land will continue to subject to the customary right of pasturage.

9. The decision of Khanna and Krishna Iyer JJ. in [State of West Bengal Vs. Sudhir Chandra Ghose and Others](#), is distinguishable from the present case. In the said case, an estate in village Vadurerpati Madhabpore in the district of Hooghly had

vested in the State upon publication of a notification u/s 4 of the West Bengal Estates Acquisition Act. The Supreme Court in *State of West Bengal v. Sudhir Chandra Ghose and Ors.* held that after such vesting the customary right of pasturage of the villagers being an incumbrance within the meaning of Section 2(h) of the West Bengal Estates Acquisition Act had been terminated by the impact of Section 3. The Supreme Court reversed the decision of Chatterjee J. in *Sudhir Chandra Ghose v. Balai Santra* ILR 1967 Cal. 386. It would be pertinent to point out that in the above case the Supreme Court held that by reason of Section 5(1) read with Section 2(h), the said customary right of pasturage could not be exercised in respect of vested lands. The Supreme Court, however, had no occasion to consider whether or not such customary right even after vesting would subsist in respect of the retained lands of the intermediaries. I have already pointed out that Section 2(h) expressly makes exception in case of retained lands of intermediaries. Further, the statute does not expressly or by necessary implication provide for extinguishment of customary right of pasturage over the retained lands. The decision of the Supreme Court in [State of West Bengal Vs. Sudhir Chandra Ghose and Others](#), is an authority for the proposition that in relation to vested lands of intermediaries, the right of pasturage is an incumbrance and persons enjoying such rights are "other persons" within the meaning of Section 2(h). Therefore, the said customary right in respect of vested lands have been extinguished.

10. In the result, I conclude that the suit properties are retained lands of the Plaintiffs and the same had not been freed of the customary right of pasturage during the cultivation season enjoyed by the villagers of village Ganga Jawara.

11. The lower appellate Court has inaccurately described the Defendants' right of pasturage both as an easement and as a customary right. G.N. Das and Lahiri JJ. in *Nani Gopal Datta and Ors. v. Kshitish Chandra Banerjee* Supra correctly pointed out that an easement right is a privilege annexed to some property to be enjoyed over some other property. A right of pasturage claimed by the villagers is claimed by them as residents of a defined locality; there is no dominant tenements in such a case to which the right can attach. A prescriptive right of easement is wholly untenable where the villagers claim a right of pasturage. Such right of pasturage is based on custom.

12. Accordingly, I dismiss the appeal and affirm the decree of the lower appellate Court, subject to the modification that the Plaintiffs' title to the disputed lands shall be declared subject to the customary right of pasturage of the villagers of Ganga Jawara therein from the transplantation to harvesting season, that is from the month of Ashar to Magh, every year, the Defendants would be also restrained in the manner ordered by the lower appellate Court.

13. There will be no Order as to costs.