CASE NO.:
Appeal (civil) 1170 of 1980
Appeal (civil) 645 of 1981

PETITIONER:
Tulsi Ram & Ors., The Proprietors of Mathura Sagar Bareja & ors.

RESPONDENT:
Mathura Sagar Pan Tatha Krishi & Anr., Tulsiram & Ors.

DATE OF JUDGMENT: 12/11/2002

BENCH:
Umesh C. Banerjee & Y.K. Sabharwal.

JUDGMENT:
JUDGMENT

Banerjee, J.

Since the decision of this Court in Braja Sundar (Raja Braja Sundar Deb v. Moni Behara & Ors. : 1951 SCR 431), the legal phenomena pertaining to the doctrine of 'lost grant' seems to be well settled. This Court in Braja Sundar (supra) upon reliance on the observations of Lord Radcliffe in Laxmidhar Misra v. Rangalal (AIR (37) 1950 PC 56) stated as below :

".. This doctrine has no application to the case of inhabitants of particular localities seeking to establish rights of user to some piece of land or water. the doctrine of lost grant originated as a technical device to enable title to be made by prescription despite the impossibility of proving immemorial user and that 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, and that 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 being no admissible grantees."

This Court further in Braja Sundar (supra) upon reference to a Bench decision of the Calcutta High Court in Asrabulla v. Kiamatulla (AIR 1937 Cal. 245) was pleased to observe that no 'lost grant' can be presumed in favour of a fluctuating and unascertained body of persons.

It would be convenient at this stage, however, to note in slightly more greater detail the observations of Lord Radcliffe in Laxmidhar Misra (supra) as below :

"6. 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."

Turning attention on to the fact situation of the matter in issue be it noted that the present litigation has been between the Barai community being the proprietors of certain tanks in the village known as Mathurasagar and the fishing community called the Dhimars of Ramtek, which happen to be represented by Tulsi Ram & Ors., being the appellants herein. It is not in dispute that there was a group of five tanks in this village, water from which was drawn for the purpose of irrigation by the Barais who had betel leaves plantations. These tanks at one time presumably were also a good fishing ground and fish used to be caught and collected by the fishermen community in the neighbourhood. The tanks are artificial and as the record goes to show and suggest, were privately owned. As both the communities were interested in the maintenance of the tanks and water therein for their benefit, some arrangements seem to have been arrived at and the same came to be recorded and noted in a document popularly described as Wajib-ul-arz having statutory recognition under the C.P. Land Revenue Act. Significantly, both parties to the litigation presently under consideration admit that arrangement which prevailed between them since a long time, first made its appearance in the Wajib-ul-arz in the year 1862 at the time of settlement of the year 1862-63. This continued in the next settlement of the year 1892-93. Then again in the third settlement year 1914-15 and subsequently also in 1942-43.

On the factual score it further appears that in the year 1951, the Madhya Pradesh Abolition of Proprietary Rights Act came into force and the rights of Malguzars-proprietors in these lands were extinguished. In some cases, however, as provided under the Act certain rights were conferred upon the Malguzars and it is not in dispute that so far as the present tanks and lands are concerned, the tanks were treated as of the ownership of Barais.

In the year 1954, the present plaintiffs commenced a suit being Civil Suit No.10A/54 praying for an injunction to restrain the defendants being the Appellants herein from catching fish in the said tanks and also for damages. When that suit reached the stage of second appeal in the High Court being Second Appeal No.398 of 1959, it was allowed to be withdrawn with liberty to file a fresh suit. The present suit is a sequel to the suit which was withdrawn and was filed on 9.8.1963. Leave under Order 1 Rule 8 Civil Procedure Code was obtained and the suit thereafter was proceeded with and contested in a representative capacity - the plaintiffs being the Barais and the defendants, the Dhimars or fishermen of Ramtek.

On a perusal of the pleadings it appears that the defendants (presently the appellants herein) have been rather candid with their defence to the effect that question of there being any permission for the catch and collection of fish or its removal, would not arise

since such activities were within their own rights by reason of the grant. It is on this score, the High Court in the second appeal commented to the effect : "It is significant to note that the written statement does not show or claim that the right to catch fish was claimed only on behalf of some Dhimars or some Dhimar family only and not on behalf of all Dhimars of Ramtek." The suit however, came to be decided in favour of the defendants upholding the right in terms of the grant.

Aggrieved by the decision, the plaintiffs came in appeal before the District Judge, Nagpur in Civil Appeal No.308/65 and the learned District Judge, however, also was pleased to dismiss the appeal and affirmed the judgment and decree passed by the learned trial Judge. The first appellate Court held that the right to catch and carry away fish from the tanks was "profit-a-prendre" and that "defendants and their ancestors have been enjoying the right to catch fish in the suit tanks uninterruptedly." In fine, the first appellate Court stated : "The right of fishing in the suit tanks is being enjoyed by the Dhimars uninterruptedly for over 100 years and in view of long uninterrupted user, it could be presumed that the origin of the right of the Defendant was in a grant which cannot now be traced." In other words, according to the learned Appellate Judge, the nature of the right was the right to share in the profit-a-prendre which was in an immovable property and was a permanent grant made in favour of Dhimars. There was, therefore, no question of any licence being granted by the plaintiffs and the suit, therefore, in his opinion was rightly dismissed. Accordingly, the appeal was dismissed and the judgment and decree passed by the learned trial Judge was confirmed.

The matter, however, did not rest there and the plaintiffs moved the High Court in second appeal, wherein the rights of the defendants stand expressly negatived and hence the appeal before this Court under Article 136 of the Constitution upon the grant of leave.

Before proceeding with the matter further the conclusion as recorded by the High Court in paragraph 64 of the impugned judgment ought to be noticed.

"The result, therefore, is that the defendants Dhimars of Ramtek cannot claim this right to fish in the Mathurasagar tank either by way of a lost grant or by way of custom. A lost grant of this kind cannot be presumed as existing or could have been made in favour of an indefinite and indeterminate body of persons being inhabitants of a particular place capable of increase and decrease. The right cannot also be considered and recognised, for such a right would be unreasonable, being destructive of the subject matter itself if exercised, and if could be exercised as permitted and to that extent. If an indefinite body of person, and if a large number of persons were authorised to exercise such a right and if there was no restriction of whatever kind, then a customary right which could produce such a result must be deemed to be unreasonable, and therefore, unenforceable in a court of law. There has been no claim of this right to fish either as a lease or as an easement. The observation above and a reference to the aforesaid authorities would clearly also go to show that such a right cannot be claimed either by way of easement or as a tenancy right much less by an indeterminate body of persons belonging to a certain community or from a certain area. Consequently, the Second Appeal must succeed. The decision of the Courts below is set aside and the

plaintiffs suit decreed with costs."

Mr. Uday Umesh Lalit, Advocate, appearing in support of the appeal have been rather vocal as regards the factum of Wajib-ul-arz, which in fact recognises the right of the defendant (Appellants herein) not as a licensee but as a definite and ascertained body of persons having irrevocable hereditary right from generation to generations absolutely and upon reference thereon contended that the effect of such documentary evidence cannot be wiped out or be rendered a nullity without a declaration to that effect by the Civil Court. It has been his definite contention that Wajib-ul-arz cannot but be termed to be a record of rights. Alternatively, it is Mr. Lalit's further submission that at least the appellants cannot be decried of their right as Haqdars and in the second alternative Mr. Lalit contended that it is a right based on custom from time immemorial as such question of interference by the High Court in second appeal would not arise. Lastly, Mr. Lalit contended that it is not an unascertained body but a class determinate.

We shall deal with the submissions presently, but before so doing, the observations of the Judicial Committee of Privy Council in Bholanath Nundi & Ors. v. Midnapore Zemindary Company Ltd. & Ors. (LR (31) Indian Appeals 75) on which very strong reliance has been placed by Mr. Lalit, ought to be noticed. Lord Macnaghten, speaking for the Bench stated :

"The case, as presented by the plaintiffs, on the face of it and in substance, seems simple enough. 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, both in the Moonsiff's Court and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured, by copious reference to English authorities, and by the application of principles of doctrines, more or less refined, founded on legal conceptions not altogether in harmony with Eastern notions. The result is that, although the decree appear to be justified by the main facts, which both the lower Courts held to be established, it is impossible to say that the judgments delivered are entirely satisfactory."

It is on this judgment, Mr. Lalit appearing in support of the appeal, has been rather emphatic on to his submission that the right did not exist in an unascertained family of Dhimars but among certain families of which the appellants are the representatives and since it was given to a certain number of persons, question of there being any infraction of any law does not arise and the same ought to be treated as in the nature of lost grant. The existence of such a right for such a long period of time for over a century was enjoyed by the group of Dhimars continuously and uninterruptedly and the Barais also did obtain the benefit of cash payment in lieu of half the catch and this cash benefit used to be spent for the development and maintenance of tanks rather than individual enjoyment therefrom. Mr. Lalit further contended that a Khasra record available with the State depict this long and uninterrupted user of the tanks to the exclusion of all others and question of dispossession from the same would not arise : the revenue record is a record of right capable of being enforced and enjoyed by a specified group of people though unascertained. By reason of the uninterrupted user of the tank, a right stands conferred on to the appellants herein as a customary right and thus enforceable.

In the judgment impugned the issue pertaining to the Dhimars of Ramtek and the particular connotation to be attributed

thereon has been dealt with in the manner set out hereinbelow. The High Court in the judgment impugned upon consideration of the submissions as recorded in the plaint as well as the written submissions stated as below :

"In the face of the aforesaid statement in the written statement understood in the context of the plaint laid, which refers to the defendants as All Dhimars of Ramtek", I do not think it possible for Mr. Padhye to contend that the right was claimed by the named defendants only, and not by all Dhimars of Ramtek or by these defendants and not as representing all the Dhimars of Ramtek. As I pointed out, the defendants did not dispute in their written statement that they cannot be representing all the Dhimars of Ramtek as their interest do not coincide. It is also not contended that some Dhimars from Ramtek are excluded."

The High Court thereafter, however, went on to observe that in the very nature of things such a right would be a matter of contract and would not be classified. As a customary right, the same can never be claimed since it is a right in respect of a contract between the Barais and Dhimars relating to certain property, entered into between the parties at that point of time and it is on this score further the High Court negated the submission that the right existed or was granted to only some of the Dhimars from the village. The High Court further observed :

".. That this was continued and was to run from the period of one settlement to the other. Such a concept necessarily presupposes a contract being renewed from time to time and the rights of the contracting parties in accordance with the terms of the contract itself and lapsing after the period of contract. No such suggestion appears at any time anywhere in the entire conduct and trial of this suit. One must, therefore, proceed on the footing, as was done in the Courts below that the dispute between the parties was in respect of rights which were claimed by one community against the proprietors of the tanks represented by some members of other community. It was in that sense a representative suit against the Dhimars brought by one of the numerous holders of interest in the tanks of the Barais in a representative capacity. That disposes of the first contention which was raised by Mr. Padhye."

Incidentally, be it noted that the first appellate court came to a conclusion that even if a right cannot be accepted as can be acquired by custom in a fluctuating body of persons, it cannot be said that the villagers of a particular community in a village can be regarded as a fluctuating body of persons. The High Court negated that submission and we do feel it expedient to record our concurrence therewith since there seems to be ample justification therefor. The decision of the Calcutta High Court in Asrabulla (supra), which stands subsequently approved by this Court in Braja Sundar (supra), the law seems to be well settled that if a right cannot be conferred, no grant can be presumed in favour of an indefinite body of persons and members of a particular community though of a village in such a body of persons.

This Court in Bihar v. S.G. Bose (1968 (1) SCR 313) stated:

"A claim in the nature of a profit-a-prendre operating in favour of an indeterminate class of persons and arising out of a local custom may be held enforceable only if it satisfies the tests of a valid

custom. A custom is a usage by virtue of which a class of persons belonging to a defined section in a locality are entitled to exercise specific rights against certain other persons or property in the same locality. To the extent to which it is inconsistent with the general law, undoubtedly the custom prevails. But to be valid, a custom must be ancient, certain and reasonable, and being in derogation of the general rules of law must be construed strictly. A right in the nature of a profit-a-prendre in the exercise of which the residents of locality are entitled to excavate stones for trade purposes would ex facie be unreasonable because the exercise of such a right ordinarily tends to the complete destruction of the subject-matter of the profit. It is said in Halsbury's Laws of England, 3rd Edn. Vol.11, Art. 324 at p. 173 :

"If a right in alieno solo amounts to a profit-a-prendre it cannot be claimed under an alleged custom; for no profit-a-prendre and therefore no right of common can be claimed by custom except in certain mining localities; nor can there be a right to a profit-a-prendre in an undefined and fluctuating body of persons."

The view as appears stands supported by a considerable body of authority in a long catena of cases. In Lord Rivers v. Adams (L.R. 3 Ex. Div. 361) it was held that the right claimed by inhabitants of a parish to cut and carry away for use as fuel in their own houses faggots or haskets of the under-wood growing upon a common belonging to the lord of the manor is a right to a profit-a-prendre in the soil of another : such a right cannot exist by custom prescription, or grant, unless it be a Crown grant which incorporates the inhabitants. The House of Lords in Harris and Another v. Earl of Chesterfield and Another (1911 A.C. 623) held that a prescription in a que estate for a profit-a-prendre in alieno solo without stint and for commercial purposes is unknown to the law. In the case of Harris and Another (1911 A.C. 623) the freeholders in parishes adjoining the river Wye were in the habit of fishing a non-tidal portion of the river for centuries, openly, continuously, as of right and without interruption, not merely for sport or pleasure, but commercially in order to sell the fish and make a living by it. The riparian proprietors claiming to be owners of the bed of the river brought an action of trespass against the freeholders for fishing. It was held by a majority of the House of Lords that the legal origin for the right claimed by the freeholders could not be presumed and that the action by the plaintiffs was maintainable.

Mr. Bobde, however, contradicted the basic submission of Mr. Lalit and contended :

A body of persons, which is indeterminate and fluctuating by reason of births and deaths, influxes and effluxes, can neither be the recipients of a grant nor claim a customary right to enter upon and take away profit-a-prendere in alieno solo (Latin for on another's land and in French the equivalent term is 'en autre soile').

Mr. Bobde further made a sharp distinction between a customary right to profit-a-prendere for commercial purposes from that of home use or sport, and the same is unknown to law.

In India, Mr. Bobde contended further that under the Easement Act, 1882, prescription of easements is permissible under Section

15. An easement may include profit-a-prendre, but not profit-a-prendre in gross i.e. where there is no dominant heritage for which there is corresponding servient heritage. The profit-a-prendre in gross in English law flows from the English common law and the Prescriptions Act, 1832. As the customary rights to other profit-a-prendre or other easements in India, it will be necessary to prove a legal and valid local custom and to be a legal and valid custom in relation to profit-a-prendre, a custom alleged must above all, be reasonable. Whether the exercise of a right claimed is by a body of persons which can grow or change indefinitely and which is not capable of having a succession in any reasonable sense of the term, or where the exercise of the right tends to destroy the subject matter of the right, the alleged custom is ex-facie unreasonable and cannot be sustained in law. It is in this context that Mr. Bobde has taken recourse to Section 47 of the Abolition Act and Section 225 of the Land Revenue Code and stated that the same are the legal filters through which an alleged practice/contract must pass to be even claimed as a custom. Once a claim is made, scrutinised and rejected by the competent authority and no suit is filed by the aggrieved party, it is not open to that party to allege and prove the custom in a Court of Law as a defence to a suit.

It was next contended that the vast and vital difference between a suit and a defence, in the context of Section 225 of the Land Revenue Code, is that a suit by an aggrieved party can reopen the question closed by the order under the statute. Once limitation for suit expires, the extinguishment of remedy extinguishes the right ubi jus ibi remedium and the other party is entitled to act on the basis of the order as a final and conclusive decision on the existence or otherwise of the alleged custom. When the successful party goes to Court to injunct or evict a trespasser, it is not open to the Defendants then to reagitate the question whether there was a customary right.

The public policy reflected in the post-independence laws cannot be allowed to be defeated, the policy being that 'rights in or over land' which is a State subject in Entry 18, List VII, fall within the exclusive domain of the State and once the State authorities have determined the existence or absence of those rights, finality must attach to such determination in the public interest and the interests of justice, submitted Mr. Bobde. The object of the policy also is to prevent long litigation spanning decades or generations on a subject that is made the exclusive and final domain of statutes, unless of course the aggrieved party goes to Court in accordance with Section 225. It is trite law that when a law says that a thing is to be done in a certain way, it must be done in that way alone and no other. The Courts' sole function-indeed its "sworn duty and trust" (De Grey CJ in the Duchess of Kingston's case (1775-1802) All E.R. Rep. 623 at 628 C) is to uphold and administer the law and do justice in accordance therewith.

Mr. Bobde further contended that the alleged grant was never in favour of individuals. No such plea was ever raised in the lower Courts which decided the suit and first appeal. The Courts proceeded on the footing that it was a representative action. If the Wazib-ul-arz of 1942-43 is construed as showing a grant having been in favour of the individuals mentioned in Ex.117 (viii), it is plain that it was not in favour of their families, heirs or descendants in perpetuity, and must therefore expire with the expiry of individuals mentioned therein. If it is construed as a grant in favour of, or custom enuring to the benefit of families, heirs, descendants and all manner of successors or assigns, the body of persons again becomes fluctuating and thus renders the same incapable of legal recognition of the grant or claiming a customary right. The exercise of right destroys the subject matter is clear from the Written Statement. itself wherein, at p. 142, the

Defendants state that they put in seeds of fishes. Obviously, the fish are caught and consumed or sold for gain. The fishery gets exhausted. Then it is replenished with fresh seeds to have a new lot of fishes. It is as though some people claimed the right to come upon another's land, sow and reap crops repeatedly for eternity. It would leave the owner with merely the husk of ownership while it would really virtually vest in those who claim such an absurd right, not as permissive user or activity but as of right, and in the bargaining process, even have the Barais maintain the tanks for the Dhimars. As a matter of fact only a licence to fish was granted and the same stands corroborated by the fact that there was even consideration therefor viz. the amount that was to be paid by the fishermen. It was used for the maintenance of the tanks not for the sake of the fishermen but for the purposes of the owners; for utilizing the tanks for cultivating betel leaves which was and is their occupation. This was particularly so because the body of Barais was large in fact, larger than that of Dhimars and it was in their common interest that the tanks which were the sole source of water for cultivation for the betel leaves were maintained. For that reason alone, fishing was allowed for a price.

On the wake of the above discussion, we do not feel it inclined to interfere with the order of the High Court. The appeal, therefore, fails and is dismissed. No costs.

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Admittedly, the appellants herein do not deal in fish: whereas the Dhimars do deal with the same!! Strict enforcement of individual rights will create a situation not only of further stiffening of attitude of each of the parties towards the other but this may lead to economic instability which the Dhimars may suffer: It is on this score Mr. Bobde in his usual fairness suggested that some such orders should be passed so as to allow the parties to co-exist and avoid economic deprivation. We place on record our appreciation therefore and thus direct that the fishing rights be auctioned and the rights thereof be conferred on to the highest bidder.

It is further ordered that till the auction as directed above, takes place, mesne profits as determined by this Court shall continue to be paid.

The appeal thus stand disposed of as above. No costs.