

CASE NO.:  
Appeal (civil) 1610 of 1988

PETITIONER:  
Ramchandra Wahiwatdar Substituted by Moreshwar

RESPONDENT:  
Vs.  
Narayan & Others

DATE OF JUDGMENT: 26/08/2003

BENCH:  
M.B. SHAH & Dr. AR. LAKSHMANAN.

JUDGMENT:  
J U D G M E N T

Shah, J.

Aggrieved by the judgment and decree dated 8.10.1987 passed by the High Court of Bombay in Second Appeal No.112/80, the plaintiff â\200\223 appellant has filed this appeal.

At the time of hearing of this matter, despite service, none appeared for the respondents.

At the outset, learned senior counsel Mr. Bobde submitted that dealing with similar facts and contentions, this Court in *Tulsi Ram and others v. Mathurasagar Pan Tatha Krishi* and another [(2003) 1 SCC 478] held that there cannot be any customary right of getting lease or licence of profits-a-prendre of catching fish from a tank owned by the appellant.

For appreciating the said contention, we would refer to the facts and findings recorded by the Courts below: -

Plaintiff â\200\223 appellant filed Regular Civil Suit No.60 of 1998 before the Civil Judge (Jr. Divn.) at Ramtek for a declaration of title to the tank and for permanent injunction restraining defendants from interfering with the plaintiff's rights to that tank either by fishing or otherwise and also for recovery of Rs.2000/- as damages. In that suit, after recording the evidence, the trial Court arrived at the conclusion: "that the proprietors used to give a right to catch and carry away fish from the suit tank under the lease /leases that used to be granted by them annually. Some of those documents are (i) Waji-bularz for 1894-95 vide Ex.138 (ii) Wazi-bulurz for 1912-13 vide Ex.139 and (iii) Wazi-bulurz for 1942-43, vide Ex.140. There is however nothing in these documents to show that the theka or lease used to be given only to the Dhimars of Parshioni. But, in view of plaint allegations, it may be taken for granted such theka used to be given to the said Dhimars. What is, however, important to note in this connection is that the said documents go to indicate that the act of catching fish in the suit tank was only permissive and not on account of any independent right as such as in the Dhimars." The Court also observed that the dhimars had no right independently of the theka agreements with the proprietors and it was held that the dhimars (defendants) had been catching fish in the suit tank not in their own right of profits-a-prendre but only as licensees or lessees of the plaintiffs. Finally, the Court held that plaintiffs are absolute owners of the suit tank and the defendants were restrained from interfering with the plaintiffs' right over the suit tank either by fishing or

otherwise in future.

Against that judgment and decree, defendants preferred Regular Civil Appeal No.162 of 1975. The Court after considering various documentary evidence including the lease deed held that if this document is given its plain meaning, it would show that dhimars had got the fishing right under the lease and it was a permissive one. The Court also held that from the evidence on record and the admission of one of the defendants, it was clear that rights of the parties were governed by the contract entered into between them. The Court thereafter arrived at the conclusion that custom has grown in the village and it can be taken to be local custom followed by the lambardar since time immemorial that the lease should be in favour of the dhimars. The court also held that dhimars have failed to prove that they have an absolute right to fish and they have been exercising the right independently in their own paramount right. The Court partly allowed the appeal and held that the plaintiffs are absolute owners of the suit tank. However, it was further declared that the defendants have a customary right to obtain lease or licence to catch and carry away the fish from the plaintiffs' tank and they have a right to catch and carry away the fish from the tank by executing Thekapatra. The Court further directed that if the plaintiffs fail to give the lease or licence, the defendants can move the Court for a suitable relief by way of separate proceeding and that right of the dhimars is conditioned by the fact that they have to pay Theka amount mutually to be agreed between them and the plaintiffs.

That judgment and order was challenged by the plaintiffs by filing Second Appeal before the High Court. In that appeal, the Court arrived at the conclusion that except the fishing rights, the defendants have no other right or interest in the tank and that the custom of fishing by the dhimars was in existence prior to 1861 and continued thereafter, which shows that it is acquired by long user which was recognised by the community and also by the administration. The Court thereafter observed thus:â\200\224

"â\200| In the year 1920 Central Provinces Land Revenue Code came into force which describes the Wajib-u-urj as the village administration paper under Section 79 of the said Act. In view of the above statutory provisions it became a settlement record and statutory presumption and correctness is attached to it. It is pertinent to note that while it is clear that the landlords who own agricultural lands were declared as Lambardars of the said tank for the reason that they were getting water for irrigation from the said tank while the claim of the dhimars â\200\223 fisherman as a customary right to fish from the tank was not recorded subsequently because of their low status and illiteracy. In fact, their fishing right should have been recorded in clear terms, but because of their illiteracy they could not agitate their cases before the authorities who had prepared the administrative records of the said area during that period. Agreement Exh. 165 gave rise some explanation about the facts which culminated in the agreement. This agreement shows the custom in favour of the dependants..."

Finally, the Court held that "the entire evidence, therefore, goes to show that from the long usage followed between the parties the practice of giving the fishing rights in respect of the suit tank has grown since time immemorial to the dhimars only and that they have got a customary right to obtain lease." The Court observed that the dhimars â\200\223 fishermen are having a customary right to catch and carry fish from the suit tank for which the plaintiffs are bound to grant lease or licence. Hence, appeal was dismissed.

That order is challenged by filing this appeal.

From the record, it is apparent that there was no justifiable reason for the High Court to observe that the claim of the dhimars fishermen as a customary right to fish from the tank was not recorded because of their low status and illiteracy.

Further, at the time of admission of this appeal on 21.4.1988, this Court passed following interim order:

"Till the disposal of the appeal there will be stay. The rights of the parties during the current year shall be as determined by the award rendered by the District Deputy Registrar, Co-operative Societies, Nagpur subject to the right of the parties to challenge the quantum of the profits so determined. However, from the ensuing fishery year and for every succeeding year, i.e. the seeding season fishery right for each year would be put to auction by the Sub-Divisional Officer, Ramtek and the right would be given to the highest bidder. The auction price so recovered shall be deposited in the High Court. The High Court will permit the appellants to withdraw half of the amount on furnishing of Bank Guarantee to the satisfaction of the trial court. The High Court shall deposit the remaining amount in a fixed deposit with the State Bank of India."

As no proper bidder came forward because of short period of one year for fishery rights, an application was moved seeking modification of the above order. After calling the report of Sub-Divisional Officer, this Court vide order dated 11.5.2001 modified the aforesaid order dated 21st April, 1988 and passed the following order:

"Our attention has been drawn to the Government Circular dated 5th July, 1995, which has categorised the ponds one having the area of 200 hectares and another more than 201 hectares. According to this, it recommends five years to be the period for giving of lease to the Society concerned. This also reveals that it takes about three years for getting fishing production. Looking to the aforesaid facts and the report filed by S.D.O., we feel it appropriate and accordingly direct by modifying our order dated 21st April, 1988 by increasing the period from one year to three years. Rest of the conditions may remain the same."

At the time of hearing of this matter, learned senior counsel Mr. Bobde contended that once it is established on record that the respondents were exercising right to fish on the basis of lease or licence, the High Court manifestly erred in arriving at the conclusion that the respondents had acquired a customary right to obtain lease. It is his contention that once there is a lease, the rights of the parties are governed by the lease-deed. He also contended that if licence was granted for fishing from tank, licence can be cancelled at any point of time. He relied upon the decision rendered by this Court in Tulsi Ram's case (supra), wherein the Court dealt with similar dispute from the same area and finally negatived the contention raised by dhimars of Ramtek. The Court held that as a matter of fact, only a licence to fish was granted and for grant of such licence, consideration was paid by the fishermen which was used for the maintenance of tanks for the sake of owners and not for the sake of fishermen. The tanks were utilized for cultivating betel leaves which was and is their occupation. The tanks which were the sole source of water for cultivation for the betel leaves were maintained by the owners namely a body of barais.

The learned counsel further submitted that order in terms of the said matter be also passed as the question involved in this matter is the same.

In that case, the Court has directed that fishing rights be auctioned and the rights thereof be conferred on dhimars.

In our view, there is no reason to take any other view than what is held by this Court in Tulsi Ram's case (supra). On this aspect, the trial court has rightly relied on the documents produced on record which indicates that the proprietors used to give a right to catch and carry away fish from the suit tank under the lease/leases that used to be granted by them annually. Some of the documents referred to by the trial court are (i) Waji-bularz for 1894-95 vide Ex.138 (ii) Wazi-bulurz for 1912-13 vide Ex.139 and (iii) Wazi-bulurz for 1942-43 vide Ex.140. From these documents and the averments made in the plaint, the Court arrived at the conclusion that the dhimars were having permissive right to catch fish from the tank. Once there is a permissive right under the lease or licence, it would be difficult to arrive at the conclusion that the respondents have acquired customary right to get lease or licence and that is settled by this Court in Raja Braja Sundar Deb v. Moni Behara and others [1951 SCR 431] wherein the Court after considering similar contentions held as under:â\200\224

"It is again not possible to hold that the fishermen residing in these villages are a corporate body and that being fishermen by profession it has the effect of incorporating them. We find ourselves unable to subscribe to the view of the High Court that the defendants constitute some kind of a unit simply because they are a body having a common interest to fish in this fishery; unless the defendants-fishermen form a corporate body, or it is found that a trust was created for their benefit, such a body of persons could acquire no right by the doctrine of lost grant. A right to fish from the fishery based on mere inhabitancy is capable of an increase almost indefinite and if the right exists in a body which might increase in number it would necessarily lead to the destruction of the subject matter of grant. Moreover, there could not be a valid grant to a body so incapable of succession in any reasonable sense of the word, so as to confer a right upon each succeeding inhabitant.

For the reasons given above, the defendants' right to remain in possession of the fishery on the basis of a lost grant or on the basis of prescription or adverse possession stands negatived. All that appears from the evidence is that a number of fishermen from time to time have been exercising the right of fishing with the leave and licence of some of the owners. This is not sufficient for the acquisition of the right either by adverse possession or by prescription. Further, no finding can be given in their favour as the evidence does not establish that they have been paying uniformly the same amount of rent."

The aforesaid judgment is followed by this Court in Tulsi Ram's case (supra).

In this view of the matter, the appeal is partly allowed. The judgment and decree passed by the High Court is modified. The judgment and decree passed by the trial Court is confirmed with a modification that right to fish in the suit tank would be granted by a public auction to the dhimars of that area. There shall be no order as

to costs.

JUDIS