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Tekaba AO v. Sakomeren AO, 2004

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Case Note: Case concerning dispute over land and source of water between two clans of two villages in Nagaland with the governing law being customary law. The court in view of the customary nature of the substantive and procedural law involved decided not to pursue an adversarial mode of dispute settlement but instead opted for a solution in the 'spirit of accommodation and adjustment' so as to mutually benefit the two parties. The court went on to observe that so far as natural resources such as land and water were concerned disputes over ownership were not that relevant as the state was the 'sovereign dominant owner'. The court declared the source of water to be a common water source.

AIR2004SC3674, 2004(5)SCALE297, (2004)5SCC672

IN THE SUPREME COURT OF INDIA

Decided On: 29.04.2004

Tekaba AO and Anr.

v.

Sakumeren AO and Anr.

Hon'ble Judges:

Shivaraj V.Patil and D.M. Dharmadhikari, JJ.

JUDGMENT

D.M. Dharmadhikari, J.

1. This appeal arises from a dispute between two clans of two villages in the Hill District of Mokokchung in North-Eastern State of Nagaland. The dispute between the two clans of the two villages is concerning the access to the source of water and the ownership of the suit land which is described as 'Jakoktsuba' by the appellants and 'Mezenteraba' by the respondents. Without going into greater details, it is sufficient to state that the appellants herein represent Sai (Soya) clan of Longkhum village and the respondents represent the Pongen clan of Mangmetong village.

2. The dispute to the water source and the land arose sometime in the year 1985 as the boundary pillars of the two villages were alleged to have been disturbed by some villagers.

3. At the outset, it may be stated that the civil rights to the water source and the land in the Hill District of Nagaland comprising the two villages mentioned above are not governed by any codified law contained in Code of Civil Procedure and the Evidence Act. The parties are governed by customary law applicable to the tribal and the rural population of Hill District of Nagaland. The customary law has been recognised by framing - Rules for Administration of Justice and Police in Nagaland 1937 (hereinafter referred to as the 'Rules') by Governor of Assam in exercise of powers under Section 6 of the Scheduled District Act 1874. The aforesaid Rules were amended in the years 1984

and 1989. The civil justice system provides for hierarchy of courts. The lowest original village court is called 'Dobhasis', which can try and decide civil cases referred to it by the Deputy Commissioner or Additional Deputy Commissioner or Assistant to the Deputy Commissioner, as the case may be. Dobhasis Court comprises of village authorities like Mauzadars Gaonbura, Chiefs and Headman of Khels with other village elders. The procedure in Dobhasis or village court is less formal. The proceedings are viva voce. Efforts are required to be made under the Rules to abide by the decision of their Panchayats. An appeal is provided to District Customary Court and a further appeal can be filed to the High Court under Rule 29. Rule 62(2) provides the procedure of these Village Courts and Customary Court, as under:

"Rule 62(2). The District Customary Court and the Subordinate District Customary Court in deciding civil suits shall follow the customs and usages applicable to such suits and cases and shall adjudicate all such suits and cases according to justice, equity, good conscience and the customs and usages applicable."

4. Sub-rule (3) of the said Rule reads as under:-

"Rule 62(3). The District Customary Court and the Subordinate District Customary Court shall follow in matters of procedure the spirit of the Code of Civil Procedure in matters not covered by customs and usages followed in the district."

5. The aforesaid mentioned 1937 Rules recognizing customary law and providing forums of subordinate customary court and district court for resolving disputes among the tribals and villagers came to be amended on 14.3.1989 by incorporating Rule 24(1) providing filing of pleadings by parties in dispute of civil nature.

6. The brief background of the dispute is as under:-

The village boundaries of two villages concerned are said to have been demarcated by erecting pillars in the year 1942. The disputes with regard to the land measuring about 2 acres and the water source available therein is alleged to have arisen in the year 1985 when according to the appellants, they saw that the members of the clan in village represented by respondents removed the pillars and encroached on the disputed land for use of the water source. The appellants filed a complaint on 3.5.1985 before the Additional Deputy Commissioner who endorsed the dispute for decision to the Village Customary Court viz., Dobhasis Court.

7. The Dobhasis Court after examining the witnesses and conducting spot verification came to the conclusion that the disputed land in which the water source is situated belongs to the Sai clan of Longkhum village represented by the appellants.

8. The villagers represented by the respondents went in appeal to Addl. Deputy Commissioner (Judicial) on 12.12.1985. They also prayed for a *denovo* trial by the Addl. Deputy Commissioner.

9. As has been mentioned earlier, at the time when complaint was filed raising dispute, there was no law strictly governing the pleadings. The provision requiring filing of pleadings was introduced by amendment to the Rules made in the year 1989. Before the Addl. Deputy Commissioner, the appellants had submitted a written statement to the appeal filed by the respondent. The Addl. Deputy Commissioner framed eight issues on the disputes raised by the villagers but no issue regarding the ownership of the land in which the water source exists was framed for trial.

10. The Additional Deputy Commissioner after trying the issues with regard to the dispute to the water source, allowed the appeal of the respondents and declared their title both to the water source as also the land in dispute.

11. Aggrieved by the decision of the Addl. Deputy Commissioner, the appellants preferred an appeal to the Kohima Bench of Gauhati High Court. The learned single Judge of the High Court accepted the contention of the appellants that without framing issue on the ownership of the land, the dispute regarding land could not have been decided by the Addl. Deputy Commissioner. The High Court, therefore, passed an order on 20.6.1996 remitting an additional issue on the ownership of land to the Addl. Deputy Commissioner for recording evidence on that issue and submitting the record of evidence to the High Court for deciding the appeal. The additional issue framed reads as under:-

"Whether the plaintiff or the defendant is owner of disputed land and possess the disputed land measuring about 2 acres of land lying between Mangmetong and (sic)ongkhum villages."

12. The Additional Deputy Commissioner, thereafter, recorded additional evidence of the parties on the additional issue and submitted the record of the evidence to the High Court.

13. The learned single Judge of the High Court on the basis of additional evidence recorded on the additional issue decided the appeal against the present appellants. As the additional evidence was recorded by the Addl. Deputy Commissioner and submitted to the High Court, in deciding the issue of ownership of land the High Court acted as, the original court. The learned single Judge in the impugned judgment held *inter alia* that the ownership to the disputed land claimed by the respondents was not specifically denied by the present appellants in the written statement which they had submitted in the appeal before the Addl. Deputy Commissioner. The learned single Judge also referred to the evidence of other witnesses in which it was stated that the land was forest land. The learned single Judge, however, gave much importance to the fact that the respondents had been exercising rights of ownership on the land by collecting forest produce without any objection from the villagers represented by the appellants. It also made a reference to the version of witnesses that as per the custom prevailing amongst the clans, as and when, the members of the clan represented by the appellants used the water source, a tea party was thrown to the members of the clan of the respondents indicating recognition of the title to the water source of the other clan. It is on the above grounds and appreciation of the oral evidence of the parties, the High Court came to the conclusion that the ownership of the disputed land is with the respondents.

14. In the present appeal, for want of necessary instructions, the learned counsel engaged by the appellants has not been able to assist the Court in the decision of this appeal. The learned Senior Counsel Shri S.B. Sanyal appearing for the respondents very fairly placed the case of both the parties and invited our attention to the order passed by this Court on 2.9.1998. At a stage when only notice was issued to the opposite party on the special leave petition, this Court on 2.9.1998 recorded in its order the statement made on behalf of the appellants thus:-

'Learned senior counsel for the petitioners states on instructions that the petitioners will have no objection to the contesting respondents drawing any quantity of water from this disputed water course at any time for any number of years subject to only one rider that the respondents may formally accept the ownership of the said water course as belonging to the petitioners. On this statement learned counsel for the contesting respondents seeks eight weeks' time to take instructions. Adjourned for eight weeks.'

15. The case, thereafter, went on being adjourned awaiting instructions in response to proposals made on behalf of the appellants. It appears that no instructions on the proposal made on behalf of the appellants were received by the counsel appearing for the respondents and therefore, after granting leave, this appeal was directed to be listed for hearing by order made on 6.4.1999.

16. Even at the time of hearing of the matter finally by us, the learned senior counsel appearing for the respondents has stated that on the proposal made by the appellants, no instructions have been received. We have already mentioned above that the learned counsel appearing for the appellants also was unable to assist this Court for want of instructions. The plight of tribals and villagers living in remote corner of North-East States of Nagaland can well be realised as access to this Court is extremely difficult for them. We, therefore, proceed to decide the case on the basis of evidence and material on record.

17. After perusing the record of the Rules which constitute special for a and recognize customary law applicable to the residents of the Hill Districts of the State of Nagaland, we find that there are flaws in the order of learned single judge both in procedure and merit.

18. We have mentioned above the nature of the Rules containing substantive and procedural law applicable to the villages of the Hill districts of Nagaland. Neither the Civil Procedure Code nor the Evidence Act is applicable in adjudicating the disputes of people living in the Hill districts. Akin to their Traditional fora village Dobbasis Court and District Courts have been constituted to decide disputes on the basis of customs of the villages. The procedure indicated is not at all formal. At the time when the dispute with regard to the water source was raised, the Rules did not contain any requirements of strict adherence to law of pleading as contained in the Code of Civil Procedure. It is only in 1989 that the rules were amended to provide some law of pleadings although not as rigid and strict as is contained in the Code of Civil Procedure.

19. In view of the peculiar substantive and procedural law as contained in the Rules applicable to Hill Districts of Nagaland, the village disputes, particularly with regard to the source of water and the land in which it is situated, was required to be decided not as an adversarial litigation but as a subject matter requiring solution in a spirit of accommodation and adjustment of conflicting rights of the members of two contesting clans. In the village courts customary law is required to be applied and the adjudicatory process requires the adjudicating *fora* to make all possible efforts to resolve the dispute by mutual agreement and achieve a consensus. The disputes in villages like the one involved in the present case regarding access to the source of water and right and title to the land in which the source exists, needed a resolution so as to best serve the demands of all members of the two village communities who had raised the dispute. Villagers in disputes arising inter se between them concerning exercise of community rights to natural resources like land and water can never feel satisfied by a mere formal decision of such disputes in favour of one or the other party. Instead of decision they need a satisfactory solution of such disputes for their mutual benefits.

20. In adopting a course of remitting the issue of ownership of land in which the water source exists, the High Court has deprived the village court as the primary court to make an effort to resolve the dispute between the two clans of the two villages amicably and on consensus. It is to be noted that under the Rule 55, against decision of village court, appeal is provided to the District Customary Court. It is after the appellate authority decides the dispute that the matter can be brought to the High Court by way of an appeal by the aggrieved party.

21. The learned single judge of the High Court by remitting the issue of ownership to the district customary court for recording evidence on the additional issue and deciding the case on such evidence has virtually acted as the original court. As the dispute is first required to be handled in the spirit of co-operation with all efforts to arrive at a consensus in the village court, the procedure adopted by the High Court in deciding the issue of ownership of the land as the original court was not in accordance with the Rules which provide a less formal procedure and application of customary law. The issue about the ownership of land in which the water source exists, if at all, was found to be important, should have been allowed to be raised in the primary court i.e. the village court and then, if necessary agitated before the District Court through an appeal. Undertaking exercise of deciding the said dispute of ownership of the land by the High Court for the first time in appeal was not in accordance with the letter and spirit of the Rules.

22. The other flaw that we find in the impugned judgment of the High Court is that at the time when it remitted the matter to the district village court for recording evidence on the additional issue of ownership, the Rules stood amended providing for filing of pleadings by the parties. In the order remitting the additional issues for recording evidence, the learned judge of the High Court did not allow the parties to file fresh pleadings in relation to the additional issue remitted. This resulted in serious prejudice to the case of the appellants because one of the grounds on which the issue of ownership has been decided against them is that they have not controverted the claim of ownership of the respondents

in their written statements filed in response to the appeal preferred by the opposite party before the District Village Court.

23. For the aforesaid reason, in our opinion, the decision of the High Court on the additional issue of ownership of the land in dispute deserves to be set aside.

24. As we have noted above, during the pendency of this appeal, the counsel of the appellants have expressed no objection to the respondents representing the other village for drawing water from the source situate in the disputed land on the condition that the respondents representing the other village should acknowledge the ownership of the said water course of the appellants. On such a statement made and recorded in the order of this Court, learned counsel appearing for the respondents, despite being granted repeated time gave no response. Eventually, therefore this court granted leave and entertained this appeal. For want of easy means of communication from the clients we can well realize the helplessness of the counsel representing tribal and village population residing in such remote corners of the country. As we have stated above, the disputes of village community particularly relating to access to land having water source is not a traditional civil litigation as is handled by ordinary civil courts under the Code of Civil Procedure. These are dispute to be dealt with and handled only on the basis of customs of the village communities and through a very informal procedure contained in the Rules. So far as natural resources like land and water are concerned dispute of ownership is not very relevant because undoubtedly the state is the sovereign dominant owner.

25. In the aforesaid circumstances and in view of the peculiar nature of the subject matter of dispute which needed decision on customary law applicable to the parties, we do not think it necessary to again allow the parties to litigate the issue of ownership of the land. In the situation obtaining before us, where the learned counsel did not have latest information and instructions on the subject matter of the dispute and keeping in view long passage of time, in our considered opinion this appeal can be disposed of by declaring that the village communities in two clans of two villages would have a joint and equal right to the water source in the disputed land. None of the members of the two contesting clans or communities in the two villages shall restrict access to any one of the two village communities to the common water source. After setting aside the order of the High Court and its decision on dispute of ownership of the land measuring two acres, we leave the dispute of ownership open for being raised by any of the contesting parties, if a cause of action for the same arises in future, in the competent village court for its resolution in accordance with the provisions of the Rules. We, however, hope that such conflict or cause of action would never arise and without raising the dispute of ownership of the land, the two village communities will peacefully and in orderly manner regulate their tights of drawing water from the source for their common benefit.

26. In the result the appeal partly succeeds. The impugned order of the High Court is set aside by substituting the directions made above. Keeping in view the status of the parties and the nature of the dispute, we make no order as to costs in this appeal.