1964

April 15

SANT RAM AND ORS.

v.

LABH SINGH AND ORS.

[P. B. GAJENDRAGADKAR, C. J., K. N. WANCHOO, M. HIDAYATULLAH, K. C. DAS GUPTA AND N. RAJAGOPALA AYYANGAR, JJ.]

Pre-emption—Based on custom—Whether infringes Constitution of India—"Laws in force"—Whether includes custom and usage—Constitution of India, Arts. 13, 19.

In a suit filed by the respondent, the Munsif though holding that there was a general custom of pre-emption in the locality and that the respondent had a right to pre-empt, under that custom, dismissed the suit because the sale did not include a strip of land 3 feet 6 inches wide between the respondent's house and the property sold. The respondent's appeal was allowed by the District Judge. The appellants appealed to the High Court which was unsuccessful because of the answer of the Division Bench to which the question was referred. The Division Bench held that the law relating to pre-emption on the ground of vicinage was saved by Art. 19(5) and was not void under Art. 13 of the Constitution. The appellant relied on the decision of this Court in *Bhau Ram* v. *Baijnath* and claimed that pre-emption on the ground of vicinage could not be claimed. The respondents in reply contended (a) that *Bhau Ram's* case was concerned with a legislative measure whereas the present case arose from custom and was thus distinguishable and (b) that Art. 13(1) dealt with "all laws in force" and custom was not included in the definition of the phrase "laws in force" in cl. (3)(b) of Art. 13.

Held: (i) In so far as statute law is concerned *Bhau Ram's* case decides that a law of pre-emption based on vicinage is void. The reasons given by this Court to hold statute law void apply equally to a custom.

Bhau Ram v. *B. Baijnath Singh*, [1962] Supp. 3 S.C.R. 724, followed.

Digambar Singh v. *Ahmad Said Khan*, L.R. 42 I.A. 10, referred to.

(ii) Custom and usage having in the territory of India the force of law are included in the expression "all laws in force".

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 299 of 1964. Appeal from the judgment and order dated September 26, 1961 of the Allahabad High Court in Second Appeal No. 620 of 1957.

J. P. Goyal, for the appellants.

B. C. Misra, for the respondent No. 1.

April 15, 1964. The judgment of the Court was delivered by

Hidayatullah, J.

HIDAYATULLAH, J.—In this appeal by certificate from the High Court of Judicature at Allahabad the appellants are the four original defendants in a suit for pre-emption filed by the first respondent. Kaiseri Begam (respondent No. 2) sold a plot and two houses in mohalla Gher Abdul Rahman Khan,

Qasba Milak, Tehsil Milak, District Rampur, to the appellants on December 4, 1953. The first respondent Labh Singh owned the adjacent house and he claimed pre-emption on the ground of vicinage after making the usual demands. The suit was filed by Labh Singh in the court of Munsif, Rampur who by his judgment dated September 25, 1955 held that there was a general custom of pre-emption in the town of Milak. He also held that Labh Singh was entitled to pre-empt and had performed the Talabs. He, however, dismissed the suit because the sale did not include a strip of land 3 feet 6 inches wide between Labh Singh's house and the property sold. He made no order about costs. There was an appeal by Labh Singh and the present appellants objected. The District Judge, Rampur allowed the appeal and dismissed the cross-objections. The appellants then filed a second appeal in the High Court of Allahabad. Mr. Justice V. D. Bhargava, who heard the appeal, referred the following question to a Division Bench:—

> "Whether after coming into operation of the Constitution, the right of pre-emption is contrary to the provisions of Art. 19(1)(f) read with Art. 13 of the Constitution, or is it saved by clause (5) of Art. 19?"

The Divisional Bench held that the law relating to pre-emption on the ground of vicinage was saved by clause (5) of Art. 19 and was not void under Art. 13 of the Constitution. In view of this answer, the second appeal was dismissed. The High Court, however, certified the case and the present appeal has been filed.

The question which was posed by Mr. Justice V. D. Bhargava was considered by this Court in connection with s. 10 of the Rewa State Pre-emption Act, 1946 in *Bhau Ram* v. *B. Baijnath Singh* (1). This Court held by majority that the law of pre-emption on the ground of vicinage imposed unreasonable restrictions on the right to acquire, hold and to dispose of property guaranteed by Art. 19(i)(f) of the Constitution and was void. It was pointed out that it placed restrictions both on the vendor and on the vendee and there was no advantage to the general public and that the only reason given in support of it, that it prevented persons belonging to different religions, races or castes from acquiring property in any area peopled by persons of other religions, races or castes, could not be considered reasonable in view of Art. 15 of the Constitution.

If this ruling applies the present appeal must succeed. Mr. B. C. Misra, who appears for Labh Singh attempts to distinguish *Bhau Ram's case*(1). He contends that the earlier case was concerned with a legislative measure whereas the

(1) [1962] Supp. 3 S.C.R. 724.

1964

Sant Ram and Others
v.
Labh Singh and Others

Hidayatullah, J.

present case of pre-emption arises from custom. He refers to the decision in *Digambar Singh* v. *Ahmad Said Khan*(1) where the Judicial Committee of the Privy Council has given the early history of the law of pre-emption in village communities in India and points out that the law of pre-emption had its origin in the Mohammedan Law and was the result, some times, of a contract between the sharers in a village. Mr. Misra contends that Arts. 14 and 15 are addressed to the State as defined in Art. 12 and are not applicable to custom or contract as neither, according to him, amounts to law within the definition given in Art. 13(3)(b) of the Constitution. He submits that the ruling of this Court does not cover the present case and that it is necessary to consider the question of the validity of the customary law of pre-emption based on vicinage.

It is hardly necessary to go into ancient law to discover the sources of the law of pre-emption whether customary or the result of contract or statute. In so far as statute law is concerned *Bhau Ram's case*(2) decides that a law of pre-emption based on vicinage is void. The reasons given by this Court to hold statute law void apply equally to a custom. The only question thus is whether custom as such is affected by Part III dealing with fundamental rights and particularly Art. 19(i)(f). Mr. Misra ingeniously points out in this connection that Art. 13(1) deals with "all laws in force" and custom is not included in the definition of the phrase "laws in force" in clause (3)(b) of Art. 13. It is convenient to read Art. 13 at this stage:

> "13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
>
> (3) In this article, unless the context otherwise requires,—
>
> (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
>
> (b) "law in force" includes laws passed or made by a Legislative or other competent authority in the territory of India before the commencement of this Constitution and not previously

(1) L.R. 42 I.A. 10, 18. (2) [1962] Supp. 3 S.C.R. 724.

repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

The argument of Mr. Misra is that the definition of "law" in Art. 13(3)(a) cannot be used for purposes of the first clause, because it is intended to define the word "law" in the second clause. According to him, the phrase "laws in force" which is used in clause (1) is defined in (3)(b) and that definition alone governs the first clause, and as that definition takes no account of customs or usage, the law of pre-emption based on custom is unaffected by Art. 19(i)(f). In our judgment, the definition of the term "law" must be read with the first clause. If the definition of the phrase "laws in force" had not been given, it is quite clear that the definition of the word "law" would have been read with the first clause. The question is whether by defining the composite phrase "laws in force" the intention is to exclude the first definition. The definition of the phrase "laws in force" is an inclusive definition and is intended to include laws passed or made by a Legislature or other competent authority before the commencement of the Constitution irrespective of the fact that the law or any part thereof was not in operation in particular areas or at all. In other words, laws, which were not in operation, though on the statute book, were included in the phrase "laws in force". But the second definition does not in any way restrict the ambit of the word "law" in the first clause as extended by the definition of that word. It merely seeks to amplify it by including something which, but for the second definition, would not be included by the first definition. There are two compelling reasons why custom and usage having in the territory of India the force of the law must be held to be contemplated by the expression "all laws in force". Firstly, to hold otherwise, would restrict the operation of the first clause in such ways that none of the things mentioned in the first definition would be affected by the fundamental rights. Secondly, it is to be seen that the second clause speaks of "laws" *made by the State* and custom or usage is not made by the State. If the first definition governs only cl. (2) then the words "custom or usage", would apply neither to cl. (1) nor to cl. (2) and this could hardly have been intended. It is obvious that both the definitions control the meaning of the first clause of the Article. The argument cannot, therefore, be accepted. It follows that respondent No. 1 cannot now sustain the decree in view of the prescriptions of the Constitution and the determination of this Court in *Bhau Ram's case*(1). The appeal will be allowed but in the circumstances of the case parties will bear their costs throughout.

Appeal allowed.

(1) [1962] Supp. 3 S.C.R. 724.