

(2002) 08 MAD CK 0161
In the Madras High Court
Case No : S.A. No. 1900 of 1989

Alagar Iyengar, Mani Iyengar, Ramachandra Rao, Ramanatha
Vadhyar, Achalu Iyengar, Krishnamoorthy Iyer, Raghavendran
Venkataraman, Ramaswami Iyengar, Chandramouliswaran
Iyer, Krishnan Iyengar, Sankara Iyer, Ranganatha Iyer and
Srinivasan Rao

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 23-08-2002

Acts Referred:

Tamil Nadu Panchayats Act, 1958 — Section 2, 72, 83, 85, 85(1)
Tamil Nadu Panchayats Rules, 1995 — Rule 2

Citation : (2002) 4 LW 498

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : T.R. Mani, for T.M. Hariharan, for the Appellant; Chinnasamy, Special Government Pleader for Respondent 1, S. Gopalaratnam and R. Nandakumar, for N. Baskaran, for Respondent 2, for the Respondent

Final Decision : Allowed

Judgement

K. Sampath, J.

"Whether the second respondent can claim the fishery right u/s 83 of the Tamil Nadu Panchayats Act, on the foot of Ex.B-11, G.O. and the reversal of the decree of the trial Court on this basis is legal and proper?"

1. The above is the substantial question of law raised at the time of admission of the second appeal arising under the following circumstances:

The appellants filed the suit O.s.No.16/86 before the Subordinate Judge's Court, Srivilliputtur, for declaration that they were the owners of the fishery in the suit tanks and channels and for consequential injunction to protect their alleged long possession and enjoyment of the fishery rights sought to be interfered with by the second respondent Panchayat Union. Their case was as follows:

The suit fisheries were owned, managed and enjoyed by the Karaiswans of 43 Karais and the income derived was utilised as per custom and usage for common good. Fishery pattas for the suit properties were granted to the Karaiswans as far back as 1912. The kist relating to the fishery rights was throughout being paid to the Government regularly. A Scheme was framed for the proper administration of the common properties including the suit fishery rights in O.S.Nos.97 to 100 of 1924 on the file of the District Munsif, Srivilliputtur, on 30-4-1926 and it provided for payment towards the maintenance of the local Hindu High School and for annual lease of the fishery rights by public auction. In 1941, the Tahsildar, Srivilliputtur, attempted to sell the fishery rights, compelling suit notice to be issued by the Karaiswans. The Collector, Ramanathapuram, by order dated 16-3-1942 in R.D.S. No.1635/41 notified that the Government would not interfere with the fishery patta. This was affirmed by G.O. No.552 on 28.2.1942.

All the Karaiswans were members of the Hindu High School and Chatram Committee, a registered society managing the Hindu High School at Watrap. The Secretary of the Chatram Committee was the Secretary of the Finance committee of the plaintiffs as well. On 23-5-1954 the Karaiswans settled the fishery rights in the suit tanks for the plaintiffs Committee and ever since the plaintiffs Committee was enjoying the fishery rights by annual lease auctions and by paying the kist due to the Government as owners of the fishery rights. The only right the respondents/defendants had, was to collect the kist for the fishery. While so, the second respondent Panchayat Union/second defendant issued a notice on 31-12-1985 for the sale of the suit fishery rights in January, 1986, necessitating the filing of the suit.

2. The respondents/defendants resisted the suit contending inter alia that as per the provisions of the Panchayats Act and the Rules framed thereunder, the fishery rights in all the irrigation tanks were vested with the Panchayat Union and by this statutory vesting the second respondent Panchayat Union became absolutely entitled to the fishery in the suit kanmois and the plaintiffs were entitled to have no better title and that the tanks, their bunds and their supply channels were maintained by the Government at Government expense.

3. On the above pleadings, the learned Subordinate Judge, Srivilliputtur, framed the necessary issues and on the oral and the documentary evidence, accepted the case of the plaintiffs and held that they had title to the suit fishery on the basis of A Registers, Settlement Registers and Ex.A-4 G.O. and the continuous and exclusive enjoyment of the fishery rights by them and their predecessors" right from 1912 and in the absence of any declaration by the Government that the kanmois or the fishery rights vested in the Panchayat and any order of Government transferring the maintenance of the irrigation work to the Panchayat Union produced by them and on the categorical admission of the Commissioner of the second respondent Union, that there was no such declaration or order, the second respondent could not claim any right u/s 83 or Section 85 of the Tamil

Nadu Panchayats Act, 1958 (hereinafter referred to as the Act). By judgment and decree dated 29-4-1988 the learned Subordinate Judge decreed the suit as prayed for.

4. The respondents filed appeal in A.S.No.209/88 before the Principal District Court, Ramnad at Madurai. The learned Principal District Judge agreed with the trial Court, upholding the title of the plaintiffs, however taking a view that by reason of the statutory rules framed under Ex.B-11 G.O., the second respondent/second defendant could avail the benefits of Section 83 of the Act and allowed the appeal by judgment and decree dated 31-10-1989 holding that after the Panchayats Act and the Rules, the plaintiffs could not claim the suit fishery rights.

5. It is as against this, the present second appeal has been filed. The substantial question of law has already been extracted.

6. Mr. T.R. Mani, learned Senior Counsel appearing for the appellants, made the following submissions:

The lower Appellate Court relied on a document Ex.B-10 dated 16-1-1988, which was long subsequent to the suit, which was clearly erroneous. Even otherwise, Ex.B-11 rules were framed only to regulate the procedure for the lease and licensing of fishery rights in Panchayat and Panchayat Union tanks in general and did not contemplate or operate to create any vestiture of rights or property. The lower Appellate Court overlooked that the said rules related only to the Panchayat and Panchayat Union tanks specified in the annexure thereto and the annexure in specific items covered only irrigation courses entrusted to Panchayat Union Councils u/s 85(1) of the Act and maintained by them or by Panchayats and other public water sources vested with Panchayats. There was no vestiture made or created by the said rules and this circumstance was lost sight of by the lower Appellate Court. Ex.B-11 relied on by the lower Appellate Court did not enlarge the scope of Sections 84 and 85 and if it attempted to do so, it would be invalid and void for repugnancy. Even otherwise, the lower Appellate Court failed to see that Section 83 did not apply to Panchayat Union, which was the contesting respondent and that the Panchayat was not a party.

7. Per contra, Mr. R. Nandakumar and Mr. S. Gopalaratnam, learned Counsel for the Panchayat Union, submitted that u/s 83 of the Act, there was automatic vesting and the plaintiffs could not claim any fishery rights. The learned Counsel submitted that there was no separate notification or declaration required to claim the right to auction by the second respondent.

8. Mr. Chinnasamy, learned Special Government Pleader appearing for the first respondent, submitted that vesting was automatic, that no specific declaration was necessary, that the status of the plaintiffs had not been accepted at any time, that what was given to the plaintiffs' predecessors in interest was only a licence and that the Government had a right to revoke the licence. The learned Counsel also relied on a number of decisions, which I will refer to in due course.

9. The only ground on which the lower Appellate Court reversed the decision of the trial Court finding title and interest in favour of the appellants, is that by virtue of Ex.B-11 there was automatic vesting and therefore the second respondent could avail the benefit of Section 83 of the Act.

10. Section 83 of the Act runs as follows:

"Vesting of communal property or income in Panchayat:

Any property or income including any fishery right which by custom belongs to, or has been administered for the common benefit of the inhabitants of the village or town, or of the holders in common of village land generally or of the holders of lands of a particular description or of the holders of lands under a particular source of irrigation shall, if so declared by the Government, vest in the Panchayat and be administered by it for the benefit of the inhabitants or holders aforesaid."

Section 83 clearly contemplates a declaration by the Government. Mr. Gopalaratnam submitted that the declaration contemplated u/s 83 relates only to the last clause preceding, viz. "of the holders of lands under a particular source of irrigation". This, in my view, is not at all correct. If we remove the word "shall" for the earlier clauses, the very section will become meaningless. The contention in this regard urged on behalf of the second respondent is, therefore, untenable. We can therefore rest assured that there has to be a declaration by the Government for vesting of communal property or income in Panchayat.

11. If we go to Section 72 of the Act, it says that,

"All unreserved forests in the village at the commencement of this Act shall vest in the Panchayat and be administered by it for the benefit of such village"

When the legislature intended that there should be automatic vesting, the expression by the legislature is different from a case wherever vesting is not automatic.

12. In MELKUPPAM VILLAGE PANCHAYAT BOARD VS. SATYANARAYANAN AND OTHERS (2000) 2 MLJ 571) VENKATACHALAMOORTHY, J. considered the scope of Sections 2, 72 and 84 of the Act in a suit filed by the Panchayat for a declaration that the suit lands were communal lands and for recovery of possession. In that case, the suit lands were previously governed by the provisions of Estates Land Act. The government took over the suit lands vesting with the Panchayat for the common benefit of the community under the Estates Abolition Act. The defendant in that suit committed act of trespass contending that the suit lands were unreserved forest and dry lands and the suit was bad for non-joinder of government as a party. The trial court decreed the suit. However, on appeal, it was reversed and in the second appeal, the learned Judge held that the G.O made it clear that unassessed waste forest land vested with the Panchayat and the Panchayat was entitled to a decree. The learned Judge pointed out that,

"the Government Order made a fine distinction between the properties vested in

the Panchayat under the Madras Panchayats Act, 1958 and the properties, which the Panchayat could regulate with the permission of the State Government delegated to the Collectors. While all unassessed waste vest in the Panchayat, assessed waste did not and the Collector should permit the Panchayat in the case of the assessed waste. Neither the Collector nor the State government need to grant any permission to the Panchayat in respect of its vested properties."

13. If we have a look at the G.O marked as Ex.B-11, in Rule 2 this is what is stated:

"Prohibition of Fishing without lease or licence in Water sources under the control of Village Panchayat or Panchayat Union Council:

No person shall take any fish from the Water sources specified in Appendix I of these rules except under a lease or licence granted by the Village Panchayat or the Panchayat Union Council, as the case may be, or by such authority as may be authorised by them with such condition as may be specified in the lease or licence, as the case may be, which may be suitably modified or amended from time to time as required."

The heading clearly says "under the control of Panchayat or Panchayat Union Council" and the annexure referred to in Rule 2 runs as follows:

"(1) Irrigation sources which are entrusted to Panchayat Union Council u/s 85(1) of the Tamil Nadu Panchayats Act and maintained by them.

(2) Irrigation sources which are entrusted to Panchayat Union Council u/s 85(1) of the Tamil Nadu Panchayats Act, but maintained by Panchayats.

(3) All public water sources vested with Panchayats."

14. Section 83, as already pointed out, contemplates a declaration and unless there is a declaration, there can be no vesting. As opposed to Section 83 where a declaration is contemplated, u/s 84 there is automatic vesting of water works in Panchayat. Section 85(3) provides that,

"where the maintenance of any irrigation work is transferred under this section, the fishery rights of Government in such work shall be transferred to and be vested in the Panchayat or the Panchayat Union Council, as the case may be, subject to such terms and conditions including terms and conditions regarding the utilisation of the income, as may be specified by the Government."

Section 85(1) provides that,

"Subject to such conditions and control as may be prescribed, the Government may transfer to any Panchayat or to any Panchayat Union Council the protection and maintenance of any irrigation work, the management of turns of irrigation, or the regulation of distribution of water from any irrigation work to the fields depending on them."

15. If there is a declaration by the Government u/s 83, then there would be

vesting of communal property or income in Panchayat and only where the maintenance of any work is transferred u/s 85 of the Act to any Panchayat Union, the fishery rights of Government will be transferred to and vested in it and in the instant case, there was no transfer of any irrigation work and the fishery rights cannot therefore belong to the Panchayat. If as contended in the written statement that tanks and channels are maintained by the Government at its expense, then it goes against the case of the second respondent u/s 85 of the Act.

16. In my considered view, Ex.B-11 does not enlarge the scope of Sections 83 and 85 at all. The annexure already referred to in specific terms governs only irrigation sources entrusted to Panchayat Union Council u/s 85(1) of the Act and maintained by them or by Panchayats and other public water sources vested with the Panchayat. The rules cannot amount to a declaration contemplated u/s 83 of the Act. In the present case, it is only the Panchayat Union, which had issued a notice of auction and not any Panchayat.

17. We may incidentally note that in the 1994 Panchayats Act, Section 132 is identical with Section 83 of 1952 Act. We may also note that no Section or Notification is referred to in the written statement.

18. Let us now refer to some of the decisions cited by Counsel.

19. In AIR 1946 92 (Privy Council) it has been held as follows:

"There is nothing to prevent the Crown, when making settlements of land, from severing fishery rights in waters from the right to the subjacent soil or from granting the fishing rights to one private individual and the subjacent soil to another private individual."

I fail to see how this decision is of any assistance to the case of the respondents.

20. In THE STATE OF MADRAS VS. M. DORAIPANDIAN @ SUBBA NAICKEN AND OTHERS ILR (1969) Mad 623, the plaintiffs' predecessors in title who were already ryots, had been granted fishery rights as early as the years 1870 and 1872 in some tanks on payment of certain sums to the landholder. The question for consideration was to what extent the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) affected those fishery rights. In that case it was held that,

"Section 3(b) of the Act did certainly effect a transfer to the Government of the tanks and fisheries as well. Section 3(c) also puts an end to any rights and interests created in and over the estate by the principal or any other landholder before the notified date. In either of these cases, Section 3(e) steps in and makes it clear that any person whose rights are transferred by operation of clause (b) or cease and determine under clause (c) shall be entitled only to such rights as are conferred or recognised to by the other provisions of the Act. Clause (g) which refers to rights and privileges which may have accrued to any person before the notified date, which also cease and determine on the notified date, is

to a similar effect, namely, that any such person shall be entitled only to such rights and privileges as are recognised and conferred by or under the Act. Notwithstanding the transfer of the fishery right or the cessation of any right or interest created by the landholder before the notified date, a person claiming to have been in enjoyment of such a right prior to the notified date can invoke the appropriate provisions of the Act and ask that such rights and privileges as are claimed by him should be recognised in terms of the provisions of the Act.

The right to fish on payment of certain rentals was created in favour of the plaintiffs' predecessors in title by agreements entered into before the 1st day of July, 1945. Under clauses (e) and (g) of Section 3, the Act contemplates the recognition of such rights by or under the other provisions of the Act, notwithstanding the transfer of the estate or the determination of rights created in the estate under clauses (b) and (c). Section 20 was clearly intended to provide for the manner in which these transferred or determined rights are to be recognised and if so, to what extent. Where the landholder has conferred the right of fishery in a tank situated in his estate in the distant past, certainly before the 1st day of July, 1945, and the creation of such a right is not void or illegal under any law in force, that right cannot be determined except as provided for by Section 20 of the Act, and the section clearly postulates that the Government if they think, it is in the public interest to do so, could terminate this right by taking proceedings under this section and not otherwise. Indeed, sub clause (c) of sub section (2) Section 20 lays down that if the right created by the 1st day of July, 1945, is not terminated in the manner set out under this section, such right should be deemed to be valid and all rights and obligations arising thereunder shall be enforceable against the Government. It is not open to the government to claim that this right has been put an end to merely by pointing to Section 3(b) or (c) of the Abolition Act. The saving of these rights is contemplated by Section 3(g) itself and the manner in which such a right can be put an end to is provided for by Section 20 of the Act. So long as the Government have not taken the steps indicated in Section 20 of the Act, this right shall by virtue of that provision be deemed to be valid and be enforceable against the Government as well."

21. This decision, in fact, supports the case of the plaintiffs. Unless there is a declaration, there can be no vesting.

22. The next decision is *Hajee S.V.M. Mohamed Jamaludeen Bros. and Co. Vs. Govt. of T.N.*, . That arose under the Government Grants Act, 1895. In that case, pursuant to acceptance of the offer made by the appellant, being the highest bidder, agreements were executed between the Government of Tamil Nadu and the appellant as per which right to collect "chank shells" from coastal sites was granted to the appellant for three years. Clause 7 of the agreement read: "The lease shall also be liable to be terminated at any time by the lessor or any officer of the Department acting for and on his behalf without assigning any reasons therefore." The appellant commenced fishing operations in February, 1971, but in June, 1971 the Government terminated the "lease" as per clause 7. The

appellant filed a suit claiming damages for the said action of the government. A single Judge of the High Court found that the transaction was only a licence coupled with interest and hence it was irrevocable and that clause 7 of the agreement was unenforceable and found that the appellant was entitled to the entire damages claimed by him. The suit was hence decreed in terms of the plaint. But the Division Bench of the High Court set aside the said decree and dismissed the suit holding that clause 7 of the agreement was valid and enforceable in view of the provisions in the Grants Act and hence the appellant was not entitled to claim damages for the action resorted to by the Government. Dismissing the appeal, the Supreme Court held as follows:

"The combined effect of Sections 2 and 3 of the Government Grants Act is that terms of any grant or terms of any transfer of land made by a Government would stand insulated from the tentacles of any statutory law. Section 3 places the terms of such grant beyond the reach of any restrictive provision contained in any enacted law or even the equitable principles of justice, equity and good conscience adumbrated by common law if such principles are inconsistent with such terms. The two provisions are so framed as to confer unfettered discretion on the Government to enforce any condition or limitation or restriction in all types of grants made by the Government to any person. In other words, the rights, privileges and obligations of any grantee of the Government would be completely regulated by the terms of the grant, even if such terms are inconsistent with the provisions of any other law."

This decision also has no application to the facts of the present case.

23. In view of the discussion above, I have no hesitation in holding that the lower Appellate court was in error in holding that Ex.B-11 would be sufficient to clothe the Panchayat Union Council with rights to put up fishery rights in auction. The lower Appellate Court was also in error in relying on Ex.B-10 dated 14-1-1988, which appears to be a copy of the letter from D.W.1 to the Tahsildar, Srivilliputtur, which is admittedly after the suit. It ought not to have been relied upon by the lower Appellate Court. The lower Appellate Court clearly lost sight of the full implications of Ex.A-4 recognising the plaintiffs' rights and reserving the right in the Government to revise the kist alone. It is also to be noted that the suit kanmois had not been handed over to the second defendant Panchayat Union.

24. The conclusion is therefore inevitable that the lower Appellate Court clearly erred in reversing the judgment of the trial Court. The substantial question of law is answered in favour of the appellants. The second appeal succeeds. The judgment and the decree of the lower Appellate Court are set aside and those of the trial Court restored. However, there will be no order as to costs.