(1955) 10 MAD CK 0003

In the Madras High Court

Case No : Petition No. 286 of 1955

Ananda behera and another APPELLANT

Vs

The State of Orissa and Another RESPONDENT

Date of Decision : 27-10-1955

Acts Referred:

Constitution of India, 1950 — Article 19(1)(f), 32

Citation : (1955) 10 MAD CK 0003

Hon'ble Judges : S. R. Das, Acting C.J.;Vivian Bose, J;Syed Jafer Imam, J;Jagannadhadas, J;Chandrasekhara Aiyar, J

Bench : Full Bench

Advocate : H. Mohapatra and G. C. Mathur, for the Appellant; C. K. Daphtary, Solicitor-General for India, Messrs. P. G. Porus A. Mehta and G. Gokhale, Advocate with him for Respt, No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Delivered by Bose J.

1. This judgment will also govern Petition Nos. 277, 288, 289 and 304 of 1955. We will set out the fact in Petition No. 286 of 1955. The others

follow the same pattern. The dispute is about fishery rights in the Chilka lake which is situate in what was once the estate of the Raja of Parikud.

This estate vested in the State of Orissa under the Orissa Estates Abolition Act, 1951 (Orissa Act I of 1952) on 24th September, 1953 and has

now ceased to exist in its original form. The Act came into force on 9th February, 1952.

2. The further facts are set out in paragraphs 2 and 3 of the petition in the following terms:

That the petitioners carry on the business of catching and selling fish particularly from fisheries within the said lake.

That long before the vesting of the estate the petitioners had entered into contracts with the ex-proprietor and had obtained from the latter, on

payment of heavy sums, licences for catching and appropriating all the fish from the fisheries detailed in the schedule given in the accompanying

affidavit and had obtained receipts on payment in accordance with the prevailing practice.

3. The lake is divided into sections and this petition is concerned with four of them. The licences relating to them were purchased as follows :

1. On 30-7-50 for rights in Gerasar Prawn for 1955-56

2. On 2-8-50 for rights in Jayamal Prawn for 1955-56

3. On 81-9-51 for rights in Solakudi Prawn for 1955-56

4. On 6-5-52 for rights in Jayamal Chungudi for (1956-57, 1957-58, 1958-59.)

4. It will be seen that though the licenced were acquired before the estate vested in the State of Orissa they were for future years, all after the date

of vesting.

5. The State of Orissa refused to recognise these licences and were about to re-auction the rights when the petitioners filed the present petition

seeking writs under Art. 32on Vol. 69-116 the ground that their fundamental rights under Arts. 19 (1)(f) and 31(1) were, or were about to be,

infringed.

6. The first question that we have to determine is whether the petitioners acquired any rights or interest in ""property"" by their several ""purchases,

as Arts. (1)(f) and 31(1) are dependent on that.

7. In their petition the petitioners claim that the transactions were sales of future goods, namely of the fish in these sections of the lake, and that as

fish is moveable property Orissa Act I of 1952 is not attracted as that Act is confined to immoveable property. We agree with the learned

Solicitor-General that if this is the basis of their right, then their petition under Art. 32is misconceived because until any fish is actually caught the

petitioners would not acquire any property in it.

8. There can be no doubt that the lake is immoveable property and that it formed part of the Raja''s estate. As such it vested in the State of Orissa

when the notification was issued under the Act and with it vested the right that all owners of land have, to bar access to their land and the right to regulate, control and sell the fisheries on it. If the petitioners'' rights are no more than the right to obtain future goods under the Sale of Goods Act,

then that is a purely personal right arising out of a contract to which the State of Orissa is not a party and in any event a refusal to perform the

contract that gives rise to that right may amount to a breach of contract but cannot be regarded as a breach of any fundamental right. But though

that is how the matter is put in the petition, we do not think that is a proper approach to this case.

9. The facts disclosed in paragraph 3 of the petition make it clear that what was sold was the right to catch and carry away fish in specific sections

of the lake over a specified future period. That amounts to a licence to enter on the land coupled with a grant to catch and carry away the fish, that

is to say, it is a profit a prendre : see 11 Halsbury''s Laws of England (Hailsham Edition) pp. 382 and 383. In England this is regarded as an

interest in land (11 Halsbury''s Laws of England, page 387) because it is a right to take some profit of the soil for the use of the owner of the right

(page 328). In India it is regarded as a benefit that arises out of the land and as such is immoveable property.

S. 3(26) of the General Clauses Act defines ""immoveable property "" as including benefits that arise out of the land. The Transfer of Property Act

does not define the term except to say that immovable property does not include standing timber, growing crops or grass. As fish do not come

under that category the definition in the General Clauses Act applies and as a Profit a prendre is regarded as a benefit arising out of land it follows

that it is immoveable property within the meaning of the Transfer of Property Act.

10. Now a ""sale"" is defined as a transfer of ownership in exchange for a price paid or promised. As a profit a prendre is immoveable property and

as in this case it was purchased for a price that was paid it requires writing and registration because of S. 54 of the Transfer of Property Act. If a

profit a prendre is regarded as tangible immoveable property, then the ""property "" in this case was over Rs. 100 in value. If it is intangible, then a

registered instrument would be necessary whatever the value. The ""sales"" in this case were oral; there was neither writing nor registration. That

being the case, the transactions passed no title or interest and accordingly the petitioners have no fundamental right that they can enforce.

11. It is necessary to advert to Firm Chhotabhai Jethabai Patel and Co, v. The State of Madhya Pradesh (1953) S.C.J. 96; (1953) S.C.R. 476.

and explain it because it was held there that a right to ""pluck, collect and carry away"" tendu leaves does not give the owner of the right any

proprietary interest in the land and so that sort of right was not an ""encumbrance"" within the meaning of the Madhya Pradesh Abolition of

Proprietary Rights Act. But the contract there was to"" pluck, collect and carry away'' the leaves. The only kind of leaves that can be ""plucked"" are

those that are growing on trees and it is evident that there must be a fresh crop of leaves at periodic intervals. That would make it a growing crop

and a growing crop is expressly exempted from the definition of ""immoveable property in the Transfer of Property Act. That case is distinguishable

and does not apply here.

12. It was then argued that a contract is ""property"" within the meaning of Arts. 19(1) (f) and 31(1). Again, we need not decide this because even if

it be assumed that it is that kind of property the State of Orissa has not taken the petitioners'' contract away from them or prevented them from

acquiring, holding or disposing"" of it. They are free to sue on it or to assign it if they want. The State merely says, as any other person might say:

I was not a party to that contract. Neither its rights nor its liabilities have devolved on me and I refuse to recognise it or to assume the obligation of

either contracting party,

13. If the State is wrong in its attitude that may give rise to a suit against it for damages for breach of contract or possibly, (though we do not say it

would), to a right to sue for specific performance; but no question under Arts. 19(1)(f) and 31(1) can arise because the State has not confiscated

or acquired or taken possession of the contract as such. If it had it would have claimed the benefits under it. It would have taken the money that

the petitioners paid to the Raja from the Raja or demanded it over again from the petitioners. But it is not doing that. It simply refuses to recognise

the existence of the contract. The petition fails and is dismissed with costs.